NO. 12-1155

IN THE SUPREME COURT OF THE UNITED STATES

ROGER CHARLES DAY, JR.,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A grand jury indicted Petitioner and he was arrested in Mexico, which allowed extradition on some counts of the indictment, but denied it for others. Aiding and Abetting under 18 U.S.C. § 2 (a) was not alleged in the indictment, provided to Mexico in extradition proceedings, or mentioned at trial prior to the charge conference. The District Court instructed the jury on the elements of Aiding and Abetting, after which Petitioner was convicted on all counts, and sentenced to 105 years in prison. The questions presented are:

I. Whether a jury instruction on Aiding and Abetting, under the original understanding of accessory liability, violates the Fifth Amendment right to a Grand Jury where the indictment does not charge 18 U.S.C. § 2 (a).

II. Whether Mexico must decide that Aiding and Abetting is a willful act and otherwise extraditable under the U.S.-Mexico Extradition Treaty before a District Court may instruct a jury on the elements of 18 U.S.C. § 2 (a).

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The published opinion of the United States Court of Appeals for the Fourth Circuit, filed by the court on November 29, 2012 at *United States v. Day*, 700 F.3d 713 (4th Cir. 2012), is reprinted at Appendix 1a through 40a.[1] The memorandum opinion of the United States District Court for the Eastern District of Virginia, electronically reported at *United States v. Day*, 2011 U.S. Dist. Lexis 130291 (E.D. Va., Nov. 10, 2011), is reprinted at Appendix 41a through 54a. The Fourth Circuit's final Order entered on December 27, 2012, denying Day's Petition for Panel Rehearing and En Banc Review, is reprinted at Appendix 55a.

JURISDICTION

The Fourth Circuit affirmed the District Court's judgment of sentence by the published opinion filed on November 29, 2012. Thereafter, the lower court denied Day's timely Petition for Rehearing and En Banc Review by Order entered on December 27, 2012. *See* App. 55a. Day now invokes the jurisdiction of this Court, within 90 days after the lower court's final order, pursuant to 28 U.S.C. § 1254 (1).

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[1] Petitioner cites the joint appendix filed with the Fourth Circuit as (J.A. _____).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *Fifth Amendment*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V, cl. 1.

B. *Aiding and Abetting*

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal." Principals, 18 U.S.C. § 2 (a) (2012).

C. *U.S-Mexico Extradition Treaty*

"Extradition shall also be granted for willful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year." Extradition Treaty, U.S.-Mex., art. 2 (3), May 4, 1978, 31 U.S.T. 5059 (hereinafter, "Treaty").

"The request for extradition shall contain the description of the offense for which extradition is requested, and shall be accompanied by [. . .] the text of the legal provisions describing the essential elements of the offense." *Id.*, art. 10 (2)(b).

"A person extradited under the present Treaty shall not be detained, tried or punished in the

territory of the Requesting Party for an offense other than that for which extradition has been granted." *Id.*, art. 17 (1).

STATEMENT OF THE CASE

A. *Day and his associates sold off-spec hardware to the Government.*

Day was convicted and sentenced to 105 years in federal custody for the sale of deficient spare parts to the Defense Logistics Agency (the "DLA"). The Fourth Superseding Indictment alleged that Day was the ringleader of a conspiracy to sell the parts through use of a software application, invented by Day, which tracked DLA pricing patterns to maximize bid amounts, and made it possible to submit multiple bids simultaneously. *See* App. at 2a ("Using Day's custom-designed software program, the companies would then bid *en masse* on low-dollar value DLA contracts."). Due to considerations of cost and efficiency, the DLA did not individually inspect each delivered part for quality assurance prior to paying out many of its contracts with Day. *See id.* at 3a-4a. During the three years when Day led the conspiracy, he secured 987 DLA contracts with a gross value of approximately $8,670,380.78. *See id.* at 3a.

Three of Day's helpers – Nathan Carroll, Susan Crotty Neufeld and Glenn Teal – were based in New Jersey, where parts were obtained from suppliers, repackaged, and sent on to DLA, with a fourth assistant, Gregory Stewart, traveling between Ontario and Mexico. Carroll, Teal and Stewart

brought gold to Day in Mexico, concealing it in vehicles modified for the purpose. *See id.* at 5a ("Once the gold was hidden, Carroll picked up Stewart and drove across the U.S.-Mexico border where they met up with Day.").

The Government alleged that Day directed all material aspects of the operation from Mexico, where he was arrested in July 2008. *See id.* at 4a-5a. Protracted extradition proceedings followed in Mexican courts. *See id.* at 6a. After Mexico refused extradition on aggravated identity theft and obstruction of justice charges (and specified the exact charges where extradition would be allowed), the Government brought Day to Richmond, Virginia, for trial. *See id.*

B. *Day was the kingpin, until he became an aider and abettor at the charge conference.*

None of the indictments charged Day with Aiding and Abetting (J.A. 27), and in opening statements, the Government said that its case was "about the one person with the full knowledge of the scheme, the one person who controlled every aspect of what happened, and the one person who ended up with nearly all the money. That person is the defendant, Roger Charles Day, Jr." (J.A. 765). The Government's theory against Day was not that he facilitated the co-defendants' actions, but that he was at all times the "kingpin" (J.A. 1814), with complete control over the what, when and how of the spare parts which the co-defendants sold to DLA.

Carroll, testifying as a cooperating Government witness, explained that Day directed him "not to talk to anybody about money or anything, not even to any other associate as far as Stewart was concerned or Susan." (J.A. 1617). Stewart, likewise hoping for leniency at sentencing, testified that "I am not sure that I made any decisions. I was more of a time saver." (J.A. 1107). Describing correspondence with DLA, Crotty testified that "most of the time he would respond posing as me, because I wouldn't know, you know, how to respond to most of the questions."). (J.A. 1395).[2]

After eight days of testimony, the Government made a brisk about-face at the charge conference. Perhaps concerned by the sufficiency of the Government's evidence against Day as the absentee mastermind, ringleader and kingpin of the conspiracy, the Government at that point first raised Aiding and Abetting liability, to which the District Court responded as follows:

> Aiding and abetting. What does aiding and abetting have to do with this case? How did Mr. Day aid and abet somebody else? I don't get that one. This is -- he is either a principal or he is nothing in this case, isn't he? (J.A. 2895).

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[2] Day's sentence was subject to a four-level Role in the Offense Adjustment as "mastermind" of the conspiracy. (J.A. 3699).

Day's trial counsel did not follow through on the District Judge's skepticism, and without objection, the Court later instructed the jury on the elements of Aiding and Abetting as follows:

> In order to be found guilty of aiding and abetting the commission of the crime of wire fraud, charged in count two through four of the indictment, the government must prove beyond a reasonable doubt that the defendant knew that the crime charged was to be committed, or was being committed; two, knowingly did some act for the purpose of aiding, commanding, encouraging the commission of the crime; three, acted with the intention of causing the crime to be committed. Those are the three elements that have to be proved to find somebody guilty of aiding and abetting. (J.A. 3054-55) (emphasis supplied).

C. *As principal and accessory combined, Day received a consecutive maximum sentence for each felony conviction.*

On August 25, 2011, the jury unanimously found Day guilty on all counts. *See* App. at 8a. After an evidentiary hearing held on December 15, 2011, the District Court sentenced Day to consecutive maximum sentences for his felony convictions, resulting in an aggregate sentence of 1,260 months' (105 years) confinement. *See id.* at 8a-9a. The District Court also ordered restitution of

$6,256,710.44 (J.A. 3268), fines totaling $3,000,000 (J.A. 3430), and forfeitures involving 3,496 ounces of gold, two motor vehicles, and a $2,128,549.50 money judgment (J.A. 3429); App. at 34a.

D. *The Fourth Circuit held that Aiding and Abetting need not be alleged in an Indictment, and does not require approval by Mexico during the extradition process.*

In an Opinion by Circuit Judge Wilkinson, the Fourth Circuit rejected each argument raised by Day on appeal. In response to Day's core points – that the jury charge on Aiding and Abetting was a constructive amendment and that the Extradition Treaty required the Government to present the Aiding and Abetting charge to Mexico for consideration during extradition proceedings – the Fourth Circuit decided that Aiding and Abetting under 18 U.S.C. § 2 (a) was not an offense, but instead "simply describes the way in which a defendant's conduct resulted in the violation of a particular law." *See* App. at 11a, quoting *United States v. Ashley*, 606 F.3d 135, 143 (4th Cir. 2010). As a result, the Court held that Aiding and Abetting was properly omitted from Day's Indictment, and that there was no need for Mexico to consider if Aiding and Abetting satisfied the requirements of the Treaty. *See id.* at 15a-16a.

REASONS FOR GRANTING THE PETITION

I. A JURY INSTRUCTION ON AIDING AND ABETTING, UNDER THE ORIGINAL UNDERSTANDING OF ACCESSORY LIABILITY, VIOLATES THE FIFTH AMENDMENT RIGHT TO A GRAND JURY WHERE THE INDICTMENT DID NOT CHARGE 18 U.S.C. § 2 (a).

A. *The consequences of instructing a jury on an unindicted count of Aiding and Abetting present an unsettled question of federal law.*

In *Southern Union Co. v. United States*, ___ U.S. ___, 132 S. Ct. 2344 (2012), this Court looked to "longstanding common law practice" to determine the Framer's original understanding on whether the facts supporting a substantial fine must be tried to a jury. *See id.* at 2350. In this case, the common law distinctions between principal and accessory liability (which persisted after the enactment of legislation punishing accessories as principals) demonstrate that the Fifth Amendment requires an indictment to allege Aiding and Abetting before a jury may be instructed on the elements of 18 U.S.C. § 2 (a).[3]

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[3] *See Regina v. Fallon* (Ct. Crim. App. 1862), 9 Edward W. Cox, *Record of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland* (hereinafter, "Cox") 242 (1865) (vacating defendant's conviction as an accessory after the fact, following indictment as a principal only).

Contrary to the common law practice of specifically alleging accessory liability in an indictment, the lower court and other federal circuits hold that 18 U.S.C. § 2 (a) never needs to be indicted by a grand jury before a defendant is tried for violating it.[4] In a more fact-dependent approach, the Second Circuit holds that "a trial judge may properly give an aiding and abetting instruction even if the indictment does not expressly charge a violation of 18 U.S.C. § 2 as long as the government has indicated to the defendant that it intends to prosecute on such a theory." *Graziano v. United States*, No. 12-CV-738 (JFB), 2013 U.S. Dist. Lexis 10332, * 24 (E.D.N.Y., Jan. 25, 2013) (emphasis supplied), citing *United States v. Mayo*, 14 F.3d 128, 132-33 (2d Cir. 1994).

Within the Seventh Circuit, a District Court has followed the common law rule applied by the English Court of Criminal Appeals in *Fallon*, holding that where "[t]he indictment carries no citation to 18 U.S.C. § 2, the aiding and abetting statute; submission of such a theory to the jury would appear to amount to a constructive amendment of the indictment." *United States v. Norris*, 833 F. Supp.

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[4] *See Ashley*, 606 F.3d at 143; *United States v. Alexander*, 447 F.3d 1290, 1298 (10th Cir. 2006) ("Aiding and abetting, therefore, need not be alleged in the indictment."); *United States v. Wasserson*, 418 F.3d 225, 232-233 (3d Cir. 2005) ("[T]he indictment need not specifically charge aiding and abetting in order to support a conviction for aiding and abetting"); *United States v. Armstrong*, 909 F.2d 1238, 1241 (9th Cir. 1990) (approving jury instruction on aiding and abetting first mentioned four days before trial in a Government brief).

1392, 1402 (N.D. Ind. 1993). The above decisions confirm the absence of a uniform rule on this issue.

The lower court's view that aiding and abetting "does not set forth an essential element of an offense with which the defendant is charged or itself create a separate offense," App. 11a, citing *Ashley* at 143, is contradicted by Day's jury instruction, which confirms that aiding and abetting has its own distinct elements. (J.A. 3054-55).[5] Moreover, *Ashley* fails to recognize that the earliest United States precursor to 18 U.S.C. § 2 (a) (punishing accessories as principals is not new to the federal crimes code), was enacted in 1790, when the common law required an indictment to specify principal and accessory liability. While later English legislation made accessories punishable as principals, the Courts of that country maintained the requirement that an indictment specifically plead accessory liability.[6]

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[5] A suggested jury instruction on Aiding and Abetting begins by explaining that "the indictment charges the defendant with aiding and abetting [describe principal offense]." 1 Hon. Leonard B. Sand, et al., *Modern Federal Jury Instructions* (Criminal) (2012) ¶ 11.01, Inst. 11-1 (Aiding and abetting, 18 U.S.C. § 2 (a). The same treatise also advises the jury, as part of introductory instructions, to "consider only the charges" which the indictment alleges against the defendant. *Id.* at ¶ 3.01, Inst. 3-3.

[6] *See Fallon*, 9 Cox at 243 ("The prisoner ought to have been indicted for the substantive felony of being an accessory after the fact, of which offense he was found guilty.").

Exempting aiding and abetting from the Fifth Amendment Grand Jury requirement will allow the Government to bolster a criminal case at the eleventh hour, when it is too late for a defendant, previously characterized as a principal, to refute a newly alleged form of liability. This Court should resolve this unsettled question of federal law, where the original understanding of the Framers provides correction for the rule applied by the lower court. *See* Sup. Ct. R. 10 (c).

B. *The grand jury has plenary authority to specify the offenses on which a defendant will stand trial.*

"Throughout U.S. history, the grand jury has served the dual function of the sword, providing the government with a means of investigating possible crimes, and the shield, providing its citizens with protection against unwarranted prosecution." 1 Susan W. Brenner & Lori E. Shaw, *Federal Grand Jury – A Guide to Law and Practice* § 2:3 (2d ed. 2006).[7] During the 18th century, the English grand jury gained popular renown as a bulwark of individual liberty, withstanding Crown pressure to

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[7] The history of the grand jury spans nearly 1,000 years, starting with efforts by Henry II in 1166 to divest English barons of local authority to commence criminal proceedings. Under the Assize of Clarendon, that power was transferred to 12 "good and lawful" men from each hundred (or four such men from each village), who were to "disclose under oath the names of those in the community believed guilty of criminal offenses." R.D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, 1 (1963); 3 Wayne R. LaFave, et al., *Criminal Procedure* § 8.2 (a) (3d ed. 2007).

issue indictments in high-profile cases involving religion and politics. *See Younger* at 2 (noting that "[t]he refusal, in 1681, of a grand jury to indict Lord Shaftesbury on charges of treason, in spite of the insistence of Charles II, led Englishmen to look upon the grand jury system with increased respect."). This reputation carried over to the American Colonies, where "the infamous prosecution of John Peter Zenger for seditious libel was brought by prosecutor's information because colonial grand juries twice refused to issue requested criminal indictments." *LaFave* at 13.

At the Constitutional Convention, the Massachusetts delegation in February 1788 proposed an express guarantee of the right to grand jury indictment in criminal cases, with one of its members warning the Convention that "an officer of the proposed new government would be able to file informations and bring any man to jeopardy of his life without indictment by a grand jury." *Younger* at 45.[8] The New York and New Hampshire delegations soon proposed similar grand jury provisions. *Id.*[9] A

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[8] The Massachusetts proposal stated in relevant part that "no person Shall be tried for any Crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury [. . .]." Neil H. Cogan, ed., *The Complete Bill of Rights* 278 (1997).

[9] With the exception of older spelling conventions ("no Person shall be Tryed…), New Hampshire's proposal was identical to the Massachusetts text. *Id.* New York's proposal, however, provided in more definite terms that "a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States [. . .]. *Id.*

hybrid of these proposals was part of the 12 constitutional amendments submitted by the first Congress, and became the Fifth Amendment after ratification of the Bill of Rights. *Id.*

Unlike an investigating officer, "the grand jury can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *United States v. Williams*, 504 U.S. 36, 48 (1992). In addition, the grand jury "need not identify the offender it suspects, or even the precise nature of the offense it is investigating." *Id.* Finally, "the grand jury requires no authorization from its constituting court to initiate an investigation," which "generally operates without the interference of a presiding judge," and "deliberates in total secrecy." *Id.*

Consistent with its far-reaching power, only the grand jury has power to issue or amend an indictment, and it is established that an indictment must contain every essential element of an offense, fairly informing a defendant of the charges against which he must defend, and enabling a defendant "to plead an acquittal or conviction in bar of future prosecutions for the same offense." *See United States v. Carll*, 105 U.S. 611, 612-13 (1882) (noting "the necessity of alleging in the indictment all the facts necessary to bring the case within [the legislative] intent" of the underlying criminal statute); *Hamling v. United States*, 418 U.S. 87, 117 (1974).

C. *When the Fifth Amendment was adopted, principal and accessory liability were separate crimes.*

"It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex Parte Bain*, 112 U.S. 1, 12 (1887) (concluding that the original understanding of the Fifth Amendment barred any amendment of a grand jury indictment during trial). Aiding and abetting has long been part of federal criminal law, dating back to enactment of the first federal crimes code in 1790. *See* Act of Apr. 30, 1790, 1 Stat. 114 (1790).[10] At that time, the lawyers among the framers of the Fifth Amendment would have been familiar with the common law distinctions between criminal liability as principal and as an accessory.

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[10] Section 10 of the 1790 federal crimes code (annotated as "Accessories therein, how punished") mandated identical, capital punishment for Piracy, whether committed as a principal or accessory:

> [E]very person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel or advise any person or persons, to do or commit any murder or robbery, [. . .] shall be, and they are hereby declared, deemed and adjudged to be accessory to such piracies before the fact, and every such person being thereof convicted shall suffer death.

1 Stat. 114, § 10 (1790) (emphasis supplied).

Blackstone devoted an entire chapter of his Commentaries (titled *Of Principals and Accessories*) to the topic, organizing principals into two degrees and accessories into two types – those acting before and after the fact. *See* 4 W. Blackstone, *Commentaries on the Laws of England* 34-40 (1769). Blackstone explained that a principal in the first degree "is the actor, or absolute perpetrator of the crime," while a principal in the second degree is "he who is present, aiding and abetting the act to be done." *Id.* at 34. The "presence" requirement for a second degree principal was not understood to be "an actual immediate standing by, within sight or hearing of the fact; but there may also be a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance." *Id.*[11]

Blackstone went on to define an accessory as "he who is not the chief actor in the offence, nor present at its performance, but is in some way concerned therein, either before or after the fact committed." *Id.* at 35. Citing Pleas of the Crown, a leading 18th century work on British substantive criminal law, Blackstone explains that an accessory before the fact is "one, who being absent at the time

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[11] This Court has considered Blackstone and contemporary legal scholars as reliable indicators of the common law at the time the Constitution was adopted. *See Southern Union*, 132 S. Ct. at 2353 (citing Blackstone and treatises on criminal procedure by Starkie (1814) and Hawkins (1739)); *Crawford v. Washington*, 541 U.S. 40, 43 (2004) (citing Blackstone for the proposition that "the common law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.").

of the crime committed, doth yet procure, counsel, or command another to commit a crime." *Id.* at 36.[12] In contrast, "an accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon." *Id.* at 37.

Finally, Blackstone arrives at his last point of inquiry: "how accessories are to be treated, considered distinct from principals," and his answer is simple: "accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable: as by the laws of Athens, delinquents and their abettors were to receive the same punishment." *Id.* at 39. In response to the stark conclusion of his research, Blackstone asks a fundamental question, and answers it as follows:

> Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons: 1. **To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted**; the commission of an actual robbery being quite a different accusation from that of harboring the robber.

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[12] As an example, Blackstone provides that "If A then advises B to kill another, and B does it in the absence of A, now B is the principal, and A is accessory in the murder." *Id.* at 37.

Id. (emphasis supplied).

For Blackstone, it was a given that Aiding and Abetting, as characterized by the lower court in this case, "simply describes a way in which the defendant's conduct resulted in a violation of a particular law." *Ashley* at 143. This did not mean, however, under the common law when the Fifth Amendment was enacted, that accessory liability did not need to be charged in the Indictment. To the contrary, Blackstone leaves no doubt that accessory liability was specifically pleaded in a common law indictment – so "that the accused may know how to defend himself when indicted." Blackstone at 877.[13]

D. *Statutory revision of the common law rule did not allow conviction for accessory liability where the indictment failed to allege it.*

A negative consequence of the strict common law distinction between principal and accessory liability was that an accessory could not be brought to trial until the principal was convicted or subjected to attainder.[14] *See* John H. Tate, *Distinctions Between Accessory Before the Fact and Principal*, 19

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[13] The *Fallon* case, decided a century after Blackstone in 1862, illustrates the consequences of a conviction for accessory liability which was not indicted -- the appeals court vacated Fallon's conviction. 9 Cox at 243.

[14] Although attainder most commonly arose from conviction of a capital offense, it also attached when "the person accused made his escape and was outlawed." Black's Law Dictionary 127 (6th ed. 1991).

Wash. & Lee L. Rev. 96 (1962); 1 William O. Russell, et al., *A Treatise on Crimes and Misdemeanors* 47 (9th Amer. ed. 1877) (noting "a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed.").

The British legislative response was the Accessories and Abettors Act, which provided in relevant part that "Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."[15] The resemblances between 18 U.S.C. § 2 (a) and Section 1 of the Accessories and Abettors Act are evident.[16] However, contemporary British legal scholars did not view the Accessories and Abettors Act as dispensing with the need for an indictment to specifically allege accessory liability. Instead, the 1877 Russell treatise advised that:

> In every case where there may be a doubt whether a person be a principal or accessory before the fact, it may be advisable to prefer the indictment under this section, as such an indictment will be

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[15] Accessories and Abettors Act, 24 & 25 Vict., c. 94 sec. 1 (1861).

[16] Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal." 18 U.S.C. § 2 (a)(2).

> sufficient, whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other, but it is uncertain which he was.

Russell at 67; *see also Regina v. Richards* (Ct. Crim. App. 1877), 13 Cox 611 (holding that defendants indicted as accessories after the fact to murder could be convicted as accessories to the lesser included offense of manslaughter committed by the principal). The view in the United States – that accessory liability was indicted and not just argued or instructed upon -- was similar.[17]

E. *The constructive amendment implemented through the jury charge was error per se.*

A constructive amendment occurs when the potential bases for conviction are broadened at trial beyond those alleged by the indictment, and as a

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[17] "In an indictment for soliciting or inciting to the commission of a crime, or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance [. . .] it seems that general words are sufficient, because the endeavor, attempt, or solicitation is in general made up of a number of petty circumstances, which cannot be set out on the record." 1 Francis F. Heard, *The Principles of Criminal Pleading* 93, 108 (1879).

result, the defendant is convicted of an offense not considered and expressly approved by the Grand Jury. *See Stirone v. United States*, 361 U.S. 212, 217-19 (1960) (noting that "a Court cannot permit a defendant to be tried on charges that are not made in the indictment against him."); 10 John H. Merrill, *The American and English Encyclopedia of Law* 534 (1889) ("The general powers which courts have over pleadings does not extend to indictments, which cannot be amended without the concurrence of the grand jury by which they were found."). "Constructive amendment of an Indictment is error per se and is an independent ground for reversal on appeal even when not preserved by objection." *United States v. Roe*, 606 F.3d 180, 189-90, citing *United States v. Floresca*, 38 F.3d 706, 714 (4th Cir. 1994).[18]

"It is elementary that procedural due process requires that a person be tried and convicted only for the specific offenses with which he is charged." *United States v. Maselli*, 534 F.2d 1197, 1201 (6th Cir. 1976).[19] In the last hours of Day's trial, the jury

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[18] A constructive amendment, even when not objected to, is reviewable as plain error. *See* Fed. R. Crim. P. 52 (b).

[19] When a grand jury indictment has the specificity required by law, a defendant is able, if later reindicted for the same criminal episode, "to plead an acquittal or conviction in bar of future prosecutions for the same offense." *See Hamling*, 418 U.S. at 117. If Day was reindicted for Aiding and Abetting any of the offenses for which he was convicted, Day would be unable to plead the District Court's prior judgment, because the Indictment on which he stood trial lacked an Aiding and Abetting charge. This anomaly further confirms that 18 U.S.C.

was instructed on Aiding and Abetting, despite the absence of that allegation from the Fourth Superseding Indictment and each of its predecessors. Accessory liability was required to be specifically alleged at the time the Fifth Amendment was enacted, and this requirement continued after the enactment of legislation that allowed an aider and abettor to be convicted as a principal. The lower court's abrogation of the need for an indictment to allege Aiding and Abetting was constitutional error.

II. MEXICO MUST DECIDE THAT AIDING AND ABETTING IS A WILLFUL ACT AND OTHERWISE EXTRADITABLE UNDER THE TREATY BEFORE A DISTRICT COURT MAY INSTRUCT A JURY ON THE ELEMENTS OF 18 U.S.C. § 2 (a).

A. *A breach of the Treaty presents an important question of federal law.*

Mexico is the United States' third largest trading partner in goods and services. In 2011, total trade in goods and services between the two nations totaled about $500 billion, with U.S. exports to Mexico making up nearly half ($224 billion) of the total.[20] United States direct foreign investment in Mexico rose to $91.4 billion in 2011, an 8.4% increase from 2010.[21] The number of foreign

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§ 2 (a) should have been specifically alleged against Day in the Fourth Superseding Indictment.

[20] *See* www.ustr.gov/countries-regions/Americas/mexico.

[21] *Id.*

travelers to Mexico in 2011 reached 22.7 million, the largest number since the Bank of Mexico began keeping records in 1980.[22] Extradition proceedings between Mexico and the United States have kept pace with these expanded contacts, with Mexico extraditing a record-setting 107 defendants to the United States in 2009, followed by 94 in 2010, and 93 in 2011.[23]

Where trade, travel and a shared economic future connect the United States and Mexico, each nation should remain empowered to decide those issues, which are exclusively reserved to it under the Treaty. As the lower court correctly noted: "If the United States wishes to protect its own citizens from bait-and-switch prosecutions when they are extradited for trial in a foreign nation, so too must it honor the same limitation in the reciprocal situation." App. at 14a-15a, citing *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994).

The Government, with the lower court's approval, removed from Mexico's consideration an issue solely within its purview under the Treaty: Whether all the conduct for which the United States sought to try Day, including Aiding and Abetting, was based on willful acts, punishable by not less

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[22] *See* www.latimesblogs.latimes.com/world-now/2012/02/mexico.

[23] *See* Clare R. Seelke, *U.S.-Mexico Security Cooperation: The Mérida Initiative and Beyond*, 27 (Cong. Res. Svce., Jan. 14, 2013).

than one year's incarceration, which were also illegal under Mexican law. Before the Fourth Circuit decided that Aiding and Abetting was not an offense, Mexico needed to decide if its own law even recognized this type of liability.[24]

B. *The Treaty binds U.S. Courts.*

The Constitution, federal law and treaties are "the Supreme Law of the Land," and a self-executing Treaty – one that operates without the need for implementing legislation – is equivalent to an Act of Congress. *See* U.S. Const. art. VI, cl. 2; *United States v. Riviere*, 924 F.2d 1289, 1297 (3d Cir. 1991) ("[I]n the United States under the Constitution, a treaty is the law of the land equivalent to an act of the legislature, as distinguished from other countries in which a treaty is merely a contract between nations."). Extradition treaties "are deemed self-executing," and "in the case of a conflict between a treaty provision and a legislative norm, the former should prevail." M. Cherif Bassiouni, *International Extradition* 69 (4th ed. 2002).[25] In summary, "the duty to extradite internationally arises solely as a matter of treaty," and the "decision to extradite is

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[24] The lower court's removal of Aiding and Abetting from Mexican consideration under the Treaty is an important question of federal law that has not been, but should be, resolved by this Court. *See* Sup. Ct. R. 10 (c).

[25] The Proclamation that precedes the text of the Treaty explains that "the instruments of ratification of the Treaty were exchanged at Washington on January 25, 1980; and accordingly the Treaty entered into force on that date." *Treaty* at 1.

ultimately an executive function" of the asylum nation. *See Haxiaj v. Hackman*, 528 F.3d 282, 290 (4th Cir. 2008), citing *United States v. Alvarez-Machain*, 504 U.S. 655, 664 (1992) and *Martin v. Warden, Atlanta Penitentiary*, 993 F.2d 824, 828 (11th Cir. 1993).

C. *The Treaty requires Mexico to consider "willful acts" in violation of codified United States and Mexican law, which are punishable by at least twelve months' incarceration.*

Article 2 of the Treaty, titled Extraditable Offenses, states that "[e]xtradition shall take place, subject to this Treaty, for willful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year." *Treaty*, art. 2 (1) (emphasis supplied). The Treaty goes on to state that "[e]xtradition shall also be granted for willful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contacting Parties, by a deprivation of liberty the maximum of which shall not be less than one year." *Id.*, art. 2 (3) (emphasis supplied).[26]

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[26] Review of the Treaty Appendix confirms that Aiding and Abetting is not among the thirty-one types of "willful acts" listed therein. *See id.* at pages 18-20. However, for each violation of United States law alleged in the Fourth Superseding Indictment where Day faced Aiding and Abetting liability, his potential "deprivation of liberty," as required by

Referring to Article 2 of the Treaty, the Extradition Order issued by Mexico to govern the scope of Day's extradition confirmed that it was conduct, and not a label such as "crime," "felony" or "theory of liability," which was central to Mexico's identification of the charges where it would extradite Day:

> From the above article we can infer that it is the conduct engaged in that will result in granting the extradition [. . .]. The acts must be examined in order to determine whether they are deemed illicit and punishable in the requesting State, regardless of the name given to the offense in either legislation as long as there exists conduct or facts classified as offenses abroad, as well as within the United Mexican States [. . .]. (J.A. 521, emphasis supplied).

The Extradition Order also discusses the Treaty requirement that a "willful act" be in breach of a codified provision of both the requesting and asylum nation's law:

> We only examine conduct which conforms to the different texts of criminal codes and identify conduct which fits within some offense

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the Treaty, was not less than one year. *See id.*, art. 2 (3); J.A. 548 (portion of Extradition Order listing charges where Mexico allowed extradition).

> classified in Mexican legislation and in the legislation of the requesting State, which in the current case, is the United States of America, since finding the defendant's alleged conduct described as an offense in both countries is sufficient to fulfill the requirement and the name it has been given does not matter. (J.A. 527).

The Extradition Order demonstrates that Mexico would agree that the Aiding and Abetting statute "describes the way in which a defendant's conduct resulted in the violation of a particular law." *Ashley*, 606 F.3d at 143. However, an assessment of Day's alleged conduct was the start of the Treaty analysis which Mexico was required to preform for Aiding and Abetting, and not, as held by the lower court, a reason to bypass the Treaty entirely.

D. *Aiding and abetting is a "willful act."*

For conduct to qualify as an "extraditable offense" under the Treaty, it must as a threshold matter be a "willful act." See Treaty, art. 2 (1). Caselaw confirms that the lower court's characterization of Aiding and Abetting as a "theory of liability" does not preclude it from being a "willful act" under the Treaty.

"To be liable for aiding and abetting, a defendant must: (1) willfully associate himself with the criminal venture; and (2) seek to make the venture succeed through some action of his own."

United States v. Bowen, 527 F.3d 1065, 1078 (10th Cir. 2008) (emphasis supplied). Aiding and Abetting is a "willful act," because "in order to establish the offense of criminal aiding and abetting, it must be shown that: (1) the substantive offense has been committed; (2) the defendant knew the offense was being committed; and (3) the defendant acted with the intent to facilitate it." *Doe v. Liberatore*, 478 F. Supp. 2d 742, 756 (M.D. Pa. 2007) (emphasis supplied), citing *United States v. Cartwright*, 359 F.3d 281, 287 (3d Cir. 2004). In 2012, the Sixth Circuit confirmed that "aiding and abetting requires a defendant's participation in a crime to be 'willful,' which means 'voluntarily and intentionally and with the specific intent to do something which the law forbids." *Glen v. Holder*, 690 F.3d 417, 422-23 (6th Cir. 2012) (emphasis supplied), quoting *United States v. Brown*, 151 F.3d 476, 486 (6th Cir. 1998).[27] Consistent with these authorities, the District Court's instruction on Aiding and Abetting confirmed the Government's burden to prove that Day's conduct was willful before the jury could find a violation of 18 U.S.C. § 2 (a). *See* page 6, *supra*, quoting J.A. 3054-55.

In summary, Aiding and Abetting was a "willful act" under Article 2 of the Treaty, in breach of codified United States law, and was therefore required to be assessed by Mexico during extradition

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[27] The Second Circuit has observed that "international law recognizes Aiding and Abetting only for purposeful conduct." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

proceedings, to determine if it otherwise qualified as an "extraditable offense" under the Treaty.

E. *The lower court foreclosed the dual criminality inquiry entrusted to Mexico.*

The final step of Mexico's inquiry into Aiding and Abetting would have been the determination of dual criminality – whether the willful acts "are punishable, in accordance with the federal laws of both Contracting Parties…". *See* Treaty, art. 2 (3). Looking to the detailed analyses of the Extradition Order, there is every reason to believe that had Mexico been presented (as required by Article 10 of the Treaty) with a charge of Aiding and Abetting, by name, statutory citation, and a statement of supporting facts, Mexico would have performed the conscientious analysis which it did for every other charge on which Day's extradition was sought.

For example, Mexico immediately confirmed that Count I of the Fourth Superseding Indictment, alleging Wire Fraud Conspiracy, "is specified in Article 164 of the Federal Criminal Code of Mexico," and therefore satisfied the dual criminality requirement of the Treaty. (J.A. 242). Proceeding to substantive Wire Fraud, Mexico noted that it "is also a crime in Mexican law," citing Article 386 of the Federal Criminal Code, which "states that fraud is committed when one misleads another and takes advantage of the mistake or position in order to commit an unlawful act for monetary gain." (J.A. 243). Reviewing the charge for Conspiracy to Smuggle Gold at Count Nine, Mexico noted that

"this behavior is defined in Mexican criminal law, Federal Criminal Code, Article 164, where conspiracy is defined and punishable." (J.A. 244).

For the charges where it refused to extradite, Mexico conducted an even more detailed analysis. Mexico rejected extradition on charges of Aggravated Identity Theft at Counts 5, 6 and 7, on grounds that the offense was not criminal under Mexican law, and further that the proof submitted by the United States, consisting of "e-mail, a medium which anyone may access using any name or company name," was weak. (J.A. 249) (further observing that "said counts are for the offense of Aggravated Identity Theft and there are insufficient elements present to deem the alleged acts attributed to that person as a violation of Mexican law").

The Obstruction of Justice Charge at Count 10 was based largely on a report to a Government investigator, that Day had offered "a lot of money" to Mexican officers for his release. Although the Grand Jury indicted on this charge, Mexico denied extradition:

> [T]hat sole accusation, brought by one American agent, who was not party to the facts that were specified as criminal, but who learned of them through a third party, by no means would justify the issuance of a warrant

> of arrest or prosecution of an accused person for its commission. (J.A. 257).[28]

At the end of the process, Mexico specified its limited grant of extradition, and observed in correspondence to the prison holding Day that his extradition had been allowed "solely" (unicamente) for the offenses Mexico found sufficient under the Treaty.[29]

Under the Rule of Specialty, a foundation of international extradition recognized by this Court more than 120 years ago, "a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition." *United States v. Rauscher*, 119 U.S. 407, 430 (1886). The Specialty provision of the Treaty states in unqualified terms that "a person extradited under the present Treaty shall not be detained, tried or punished in the territory of the Requesting Party for an offense other than that for which extradition has been granted." *Treaty*, art. 17. The District Court

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[28] Mexico also noted, with reference to the extraterritorial application of United States law, that "if the offense is committed in the United Mexican States, the extradition of the person sought should be refused." (J.A. 256).

[29] The Government of Colombia conducted a similarly detailed analysis in response to a United States Indictment alleging Aiding and Abetting, and denied extradition on that charge because Colombian law (like Mexican) does not recognize this theory of liability. *See United States v. Gallo-Chamorro*, 48 F. 3d 502, 503 (11th Cir. 1995).

lacked jurisdiction to try Day for Aiding and Abetting – a form of willful conduct, which was not determined by Mexico to be an extraditable offense under the Treaty.

CONCLUSION

The Court should grant Day's petition, because the constructive amendment of his indictment violated the Fifth Amendment and the Treaty.

Respectfully submitted,

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