

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. [REDACTED]

UNITED STATES OF AMERICA :
 :
 v. : MEMORANDUM OF LAW IN SUPPORT
 : OF MOTION TO ELECT OR MOTION
 [REDACTED] : FOR A BILL OF PARTICULARS
 :
 :

NOW COMES the Defendant, having moved this Honorable Court for an order requiring the government to elect in each count of the indictment filed against him which offense it intends to pursue as to him, or in the alternative, an order requiring the government to file a Bill of Particulars precisely describing the Defendant's alleged involvement in the charged offenses, and shows unto the Court his basis for requesting such relief.

STATEMENT OF THE CASE

The Defendant, [REDACTED], stands charged in three counts of a four count Bill of Indictment. Count one charges the Defendant and his identical twin brother, [REDACTED] [REDACTED], with manufacturing counterfeit money in violation of 18 U.S.C. § 471. Count two charges the Defendant and his brother with possessing counterfeit money in violation of 18 U.S.C. § 472. Count four charges the Defendant and his brother with selling counterfeit money in violation of 18 U.S.C. § 474. Although no assertions, elements, or facts are alleged in any of these three counts that the [REDACTED] brothers aided or abetted each other, or if so, in what manner, at the end of each count 18 U.S.C. § 2 is referenced.

FACTUAL BACKGROUND

According to the government's file, a confidential informant ("CI") notified the Secret Service in late December of 2000 that counterfeiting may be taking place at a residence in [REDACTED]. The CI told the Secret Service that a person known to the CI as [REDACTED] had witnessed the manufacture of counterfeit money and had purchased counterfeit money from the residence located at [REDACTED] [REDACTED] [REDACTED]. According to the CI, he and [REDACTED] went to the apartment but only purchased marijuana and not counterfeit money from some of the persons there at the time.

On [REDACTED], the [REDACTED] Police department conducted a search pursuant to a state warrant at [REDACTED] in an effort to obtain evidence with regard to an alleged rape. In the process of their search, officers discovered and seized counterfeit money from the apartment. The officers observed and photographed a counterfeit money printer during the search. The lessee of the apartment, [REDACTED] [REDACTED], was arrested at the apartment with one counterfeit \$100 bill in his pocket and the reverse side of a counterfeit \$50 bill as well. The Defendant was arrested also but no incriminating evidence was found on his person.

When searching the apartment, the [REDACTED] police were interested only in any evidence relating to a possible rape and did not seize the counterfeit printer nor notify the Secret Service

about the counterfeit money. The Secret Service learned of the police department's search and seizures when one of its agents read about the raid in the local paper on [REDACTED].

On [REDACTED], the Secret Service obtained from the [REDACTED] police the counterfeit money and obtained from the court a federal search warrant for [REDACTED]. Seized from the residence that day was \$5970 in counterfeit money and other paraphernalia associated with the production of counterfeit money. Missing from the apartment was the printer.

On [REDACTED], the Secret Service interviewed [REDACTED]. [REDACTED] stated that he had no involvement in the production of counterfeit money. He did state that the "machine" was taken from the apartment by "friends" and moved to an unknown location in [REDACTED].

On [REDACTED], the CI told the Secret Service that [REDACTED] had passed two counterfeit notes at a Chic-Fil-A restaurant in [REDACTED] a day or two prior. The CI also said that [REDACTED] was scared and was looking for a way to get rid of the "machine." [REDACTED] police confirmed that counterfeit money was passed at the Chic-Fil-A on [REDACTED] [REDACTED] [REDACTED], and delivered the fake money to the Secret Service.

As a part of the investigation, the Secret Service interviewed merchants in [REDACTED] where counterfeit money had been passed. These merchants identified an individual, [REDACTED], as the

person passing the notes. The Secret Service attempted to interview ██████████ but, upon learning that he was a minor, ended the interview.

Thirty (30) latent fingerprints, eighteen (18) latent palm prints and three (3) latent impressions (fingerprints or palm prints) were developed on the seized counterfeit money. One (1) fingerprint of the Defendant's was identified on a sheet of paper bearing front and back images of counterfeit \$100 bills.

DISCUSSION

The Defendant contends that he has been charged with a duplicitous indictment. See, e.g., United States v. Burns, 990 F.2d 1426, 1438 (4th Cir.), cert. denied sub. nom, Laforney v. United States, 508 U.S. 967 (1993) (Fourth Circuit discussion concerning the difference between "multiplicity" and "duplicity"). In other words, he asserts that the indictment is charging him with more than one offense in a single count. Count one charges the Defendant with manufacturing counterfeit money, and, arguably, aiding and abetting the manufacture of counterfeit money. In count two, the Defendant has been charged with possessing counterfeit money and, arguably, with aiding and abetting the possession of counterfeit money. Count four charges the Defendant with selling counterfeit money, and, arguably, aiding and abetting the sale of counterfeit money. As can be seen, the Grand Jury has charged the

Defendant with two offenses in each count; a substantive offense and an aiding and abetting offense.

Because the discovery available to the Defendant thus far, as recited above, does not indicate that the Defendant either actually manufactured, possessed, or sold counterfeit money, or that he actually aided and abetted the manufacture, possession, or sale of the same, he is incapable of mounting a defense until the government clarifies how it intends to proceed against him.

The Defendant anticipates that the government will respond by stating that aiding and abetting is not an offense but a theory of criminal liability implicit in every indictment and, therefore, each count against the Defendant contains only one charged crime. If advanced, the government's response is technically correct. However, it is no longer a sound position. Aiding and abetting is its own offense, and as such, according to the Federal Rules of Criminal Procedure and recent Supreme Court precedent, the alleged facts supporting each of its elements must be pleaded in a separate count of an indictment.

The government's present day position with regard to aiding and abetting can be traced back in virtually every circuit¹ to the 5-4 Supreme Court decision in Nye & Nissen v. United States, 336

¹In the Fourth Circuit, one such case is United States v. Pigford, 518 F.2d 831, 834 (4th Cir. 1975) ("An indictment or information need not specifically charge aiding and abetting in order to support a conviction on that charge.")

U.S. 613 (1949). In this case, the defendants were charged with conspiring to defraud the government, and substantive offenses of fraud, in their supplying dairy and poultry products to the Army and Navy from 1938 to 1944. Although not charged with aiding and abetting, the jury was given such a charge. Defendants were convicted on all counts and their convictions affirmed on appeal. Defendants sought the Supreme Court's review, in part, alleging that the evidence was insufficient to convict them on the substantive counts as there was no direct evidence linking them to the fraud. The Supreme Court agreed but affirmed nonetheless. Writing for the five member majority, Justice Douglas stated that:

The difficulty with that argument is that the case was submitted to the jury on an equally valid theory. The trial court charged that one "who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly." That theory is well engrained in the law. . . . In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

336 U.S. at 618-19 (footnote and citations omitted).

In dissent, Justice Frankfurter predicted what has come to pass today as the Court's apparent "fabricat[ion of] a rule of law." 336 U.S. at 625 (Frankfurter, J., dissenting).

The Court itself seems to draw the inference that the defendant, because of his position and connection with the conspiracy, must inevitably have been associated as an aider and abettor in the commission of the substantive crimes. For an appellate court to draw such an inference

is to make it a rule of law that the same inference must be drawn in every similar case.

Id. And the rest is history.

But the question remains, is aiding and abetting an offense or is it some amorphous theory of responsibility? As far as the Fourth Circuit is concerned, it is an offense. In this circuit, a defendant can be charged with a single count of aiding and abetting another in the commission of some other federal offense. For example, in United States v. Blackwell, 515 F.2d 125, 126 (4th Cir. 1975), the defendant was indicted specifically for aiding and abetting the principal, one Gwendolyn Hernandez, in her embezzlement of bank funds in the amount of \$2300. When Hernandez pleaded guilty to the lesser included offense of embezzlement of less than \$100, Blackwell moved to dismiss his indictment on the ground that Hernandez had been implicitly acquitted of the greater embezzlement charge for which he was alleged to have aided and abetted. The district court denied the motion and ordered that Blackwell be tried on the lesser included offense of aiding and abetting embezzlement of less than \$100. The Fourth Circuit affirmed. In so ruling, the appellate court recognized that aiding and abetting, itself, is an offense.

Further support for the proposition that aiding and abetting, itself, is an offense, comes from the Fourth Circuit's en banc decision in United States v. Burgos, 94 F.3d 849, 873 (4th Cir. 1996), where the court set forth the elements of the offense.

A defendant is guilty of aiding and abetting if he has "knowingly associated himself with and participated in the criminal venture." In order to prove association, the Government must establish that the defendant participated in the principal's criminal intent, which requires that a defendant be cognizant of the principal's criminal intent and the lawlessness of his activity. . . . As we explained in United States v. Arrington, 719 F.2d 701 (4th Cir.1983), cert. denied, 465 U.S. 1028, 104 S.Ct. 1289, 79 L.Ed.2d 691 (1984), "[t]o be convicted of aiding and abetting, '[p]articipation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result.'"

Burgos, 94 F.3d at 873 (citations omitted) (emphasis added).

Finally, comparing the aiding and abetting statute to a similar legislative act that establishes a criminal offense demonstrates why 18 U.S.C. § 2 must be held to be an offense. No one today would dispute the fact that 21 U.S.C. § 846² defines the two offenses of attempt and conspiracy as they relate to the drug trafficking laws. Like 18 U.S.C. § 2³, the offenses set forth in 21 U.S.C. § 846 have definite elements which must be pleaded. And, although both 21 U.S.C. § 846 and 18 U.S.C. § 2 are written in language that primarily connotes punishment, there exists no doubt

²"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

³"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2.

that a single count alleging both a substantive drug offense under Title 21 and a drug conspiracy under 21 U.S.C. § 846 would be found duplicitous. The same, therefore, must hold true for an indictment which alleges in a single count an offense under Title 18 and aiding and abetting under 18 U.S.C. § 2.

Now that it is clear that aiding and abetting an offense is an offense itself, to understand why the government's position regarding that offense is no longer valid, one must understand the "pedigree of the pleading requirement at issue." Apprendi v. New Jersey, 120 S. Ct. 2348, 2362 n.15 (2000).

Nye & Nissen was decided under the law as it existed before the Federal Rules of Criminal Procedure became effective on March 21, 1946. Since then, Rule 8(a) has required that two or more offenses, if contained in the same indictment, be charged "in a separate count for each offense." The duplicity in this matter of joining the substantive counterfeiting and aiding and abetting charges is the joining of two or more separate offenses in the same count in contravention of that Rule. United States v. Starks, 515 F.2d 112, 116 (3d Cir. 1975). The prohibition against duplicity has constitutional underpinnings in the Sixth Amendment's guarantee that an accused be adequately "informed of the nature and cause of the accusation" and the Fifth Amendment's interdiction against double jeopardy. United States v. Zeidman, 540 F.2d 314, 316 (7th Cir. 1976). The possibility that a less than unanimous verdict

will be returned by the jury is an additional danger sought to be obviated by the Rule. United States v. Zeidman, supra.

In addition to Nye & Nissen being decided before the Federal Rules of Criminal Procedure, it was decided before the Court's fundamental Constitutional pronouncements delineating the contours of the Fifth and Sixth Amendments, one of which being In re Winship, 397 U.S. 358 (1970). "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364 (emphasis added).

Recently, the Court has been writing about the role factual allegations play in the settings of conviction or sentencing. And although the continuing vitality of one recent decision may be in doubt⁴ and the question of what constitutes a sentencing factor has not been fully defined by the Court, see generally Harris v. United States, 536 U.S. ----, No. 10666 (June 24, 2002), one thing is certain: "An indictment must set forth each element of the crime

⁴"Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset." Apprendi, 120 S. Ct. at 2362.

that it charges." Almendarez-Torres v. United States, 532 U.S. 224, 228 (1998).

Clearly, in this matter, the indictment does not set forth each element of the crime of aiding and abetting nor does it state against whom the Grand Jury has alleged this offense. Further, the discovery reviewed in this case does not disclose who the alleged principal was that manufactured, possessed, or sold the counterfeit money. "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,--it must descend to particulars....An indictment not framed to apprize the defendant with reasonable certainty, of the nature of the accusation against him * * * is defective, although it may follow the language of the statute." Russell v. United States, 369 U.S. 749, 765 (1962) (citations omitted).

Unless the defects inherent in the duplicitous counts charging the Defendant can be obviated by the contents of a Bill of Particulars, the appropriate remedy for a duplicitous count is to require the government to elect one of the multiple offenses embraced therein on which to proceed. United States v. Henry, 504 F.2d 1335, 1338 (10th Cir. 1974). It is manifest that an indictment may not be amended without resubmission to the Grand

Jury. Ex parte Bain, 121 U.S. 1 (1887). However, charges may be withdrawn from a petite jury so long as nothing is thereby added to the indictment; this withdrawal is not tantamount to an amendment and thereby raises no Fifth Amendment problem. United States v. Hall, 536 F.2d 313 (10th Cir. 1976); Overstreet v. United States, 321 F.2d 459 (5th Cir. 1963), cert. denied, 376 U.S. 919 (1964). Requiring the government to elect merely narrows the charges and withdraws certain of them from the jury's consideration. As such, it presents no Fifth Amendment difficulty.

Therefore, the Defendant respectfully requests the Court enter an order requiring the government to elect in each count of the indictment filed against him which offense it intends to pursue as to him, or in the alternative, require the government to more particularly describe the Defendant's alleged involvement in the charged offenses by way of a Bill of Particulars.

Respectfully submitted this ____ day of March, 2011.

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing upon _____, Assistant United States Attorney for the

Middle District of North Carolina, Post Office Box 1858,
Greensboro, North Carolina, 27401, by hand-delivering, by faxing,
or by mailing a copy of the same.

This the ____ day of March, 2011.



