

to the Honorable Eduardo C. Robreno. In the complaint, Constand contended that she was defamed by Castor and that he invaded her privacy and cast her in a false light when he made certain comments regarding Constand's allegations of sexual assault against former actor and comedian William "Bill" Cosby, Jr. Cosby was later convicted of sexual assault in the Court of Common Pleas of Montgomery County, Pennsylvania.

On January 3, 2016, Troiani received three emails from an individual identifying himself as "Tre Anthony" using the email address devoutplayerhater@yahoo.com. These emails asserted that Constand had made "false and fraudulent" allegations against Cosby and threatened the release of certain personal information of Constand, including her address and telephone number. Attached to one of the emails was an Internal Revenue Service ("IRS") "Information Referral" Form 3949A, which is used to report to the IRS suspected tax law violations. The form included a "comments" section wherein the author accused Constand of failing to report income resulting from "baseless lawsuits" premised on "a decade old campaign of filing multiple lawsuits against multiple people throughout the United States based on false allegations ranging from rape to defamation."

On February 1, 2016, sometime between noon and 4:30 p.m., an unknown individual hand-delivered to the Clerk's Office in the United States Courthouse in Philadelphia in the Eastern

District of Pennsylvania an envelope containing copies of the same IRS Form 3494A regarding Constand and a printout of addresses for Constand and her family, both of which had been attached to the January 3 emails. These documents were accompanied by a praecipe to attach the documents as Exhibit A to Constand's complaint and a certificate of service which appeared to be signed by Troiani.

Once the documents were electronically filed, Troiani received an email notification confirming the docket submission. She immediately notified the court that she had neither submitted nor authorized the filing of the documents in question. Her signatures were determined to have been photocopies of signatures she previously submitted on earlier docket filings. Judge Robreno struck the submission from the record in the Constand action the following day as "fraudulent and . . . not filed by the attorney whose purported signature appears on the document."

Pursuant to a grand jury subpoena, Yahoo! provided to the Government subscriber records for the "devoutplayerhater" email account, which included the Internet Protocol ("IP") address used to establish the account. The Government also obtained records from Verizon, the Internet Service Provider ("ISP") for the IP address. Verizon identified devoutplayerhater's subscriber user name as

"jjohnson531@dslextreme.com." Officials from Verizon advised that during the relevant time frame, the subscriber account had been maintained by a third-party ISP, IKANO d/b/a DSL Extreme.

DSL Extreme provided to the Government records associated with its registered customer "jjohnson531," who was identified as Joe Johnson, with an alternate email address jjohnson531@gmail.com, a residential address of 2600 Brinkley Road, Fort Washington, Maryland, and a mailing address of P.O. Box 441572, Fort Washington, Maryland.

Thereafter, the Government obtained documents from the United States Postal Service showing that a "Joe Johnson" opened the P.O. Box in April 2013. The Postal records show that individual provided a residential address of 2600 Brinkley Road, # 611, Fort Washington, Maryland, a Maryland's driver license and voter registration card, a Google email address, and a telephone number. Maryland Department of Motor Vehicles ("DMV") records identify Joe Johnson of 2600 Brinkley Road, # 611, Fort Washington, Maryland, with a date of birth of May 31, 1970. The photograph on the DMV records for Joe Johnson depicts defendant Johnson.

The Government further conducted internet research to find posts and other comments by devoutplayerhater. The Government identified comments related to Cosby as well as many anti-law enforcement comments about high-profile incidents

involving Treyvon Martin, Eric Garner, and Michael Brown. The Government also obtained records from the United States Courts' electronic document filing system, Public Access to Court Electronic Records ("PACER"), for a registered user named Joseph Johnson, Jr. with a username of "jjohnson531," who had accessed the Constand docket at issue.

The Government also identified another IP address used by the "jjohnson531" PACER account to access the Constand docket as belonging to a corporation, Alion Science and Technology ("Alion"), where defendant Johnson was employed. Alion confirmed that the IP address was registered to it and connected Johnson's employee profile at Alion with the PACER access. Alion also provided Johnson's internet history. For the time period January 1, 2016 through March 31, 2016, Johnson had searched or entered the word "Cosby" 9,322 times and the word "Constand" 933 times.

The original envelope received by the Clerk's Office on February 1, 2016 and its contents were sent by the Federal Bureau of Investigation ("FBI") to its laboratory for fingerprinting. The FBI's analysis revealed the presence of at least six fingerprints belonging to "Joseph Johnson Jr." on the envelope and on the adhesive side of the tape used to affix the address label to the envelope.

The Government reports that on June 28, 2019, Johnson traveled to Philadelphia to turn himself into federal authorities on the charges here. While in Philadelphia, Johnson was processed by the FBI. During processing Johnson was fingerprinted, provided his May 31, 1970 birthdate, and also his social security number. The FBI provided Johnson's information to its Criminal Justice Information Service ("CJIS"). The CJIS compared the fingerprints taken on June 28, 2019 with other fingerprints on file. Johnson's fingerprints matched the fingerprints of "Joseph R. Johnson, Jr.," who had previously been incarcerated at a federal prison. They also matched the fingerprints recovered from the envelope and adhesive tape recovered in this investigation. The May 31, 1970 birthdate provided by Johnson matches devoutplayerhater's subscriber user name and email address, that is, respectively jjohnson531@dslextreme.com and jjohnson531@gmail.com. The social security number provided by Johnson during his June 28, 2019 processing also matches the social security number of Joseph R. Johnson, Jr. who was previously incarcerated federally.

II

The first issue raised by Johnson calls to mind the familiar question, "What's in a name?" asked by Juliet in

Shakespeare's Romeo and Juliet.¹ Johnson argues that the indictment should be dismissed because it identifies the defendant as Joseph R. Johnson, Jr. According to Johnson, he is Joe Johnson and has never been known by the name Joseph R. Johnson, Jr. He reports that he has a valid Maryland's driver's license and social security card in the name of Joe Johnson. He disputes that he is the person named in the indictment and does not consent to amendment of the indictment without approval by a grand jury.

Under Rule 7(c)(1) of the Federal Rules of Criminal Procedure, an indictment must be "a plain, concise, and definite written statement of the essential facts constituting the offense charged." There are two constitutional requirements for an indictment. First, it must contain the elements of the offense charged and fairly inform a defendant of the charge against him. United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007) (citing Hamling v. United States, 418 U.S. 87, 117 (1974)). Second, it must enable the defendant "to plead an acquittal or conviction in bar of future prosecutions for the same offense." Id. (quoting Hamling, 418 U.S. at 117). A court may not dismiss an indictment based on minor and technical deficiencies which do not prejudice the accused. See Bank of

1. Juliet says, "What's in a name? [T]hat which we call a rose [b]y any other name would smell as sweet." William Shakespeare, Romeo and Juliet act 2, sc. 2.

Nova Scotia v. United States, 487 U.S. 250, 254 (1988); United States v. Jackson, 344 F.2d 158, 159 (3d Cir. 1965). This includes minor errors or discrepancies as to a defendant's name. As stated by our Court of Appeals in United States v. Fawcett:

An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. An indictment, then, is an accusation of a person of crime. It is an accusation against a person, and not against a name. A name is not of the substance of an indictment. And a person may be well indicted, without the mention of any name, and designating him as a person whose name is to the grand jurors unknown.

115 F.2d 764, 767 (3d Cir. 1940) (internal quotations and citations omitted).

Here, the record shows that defendant has used various names, including Joe Johnson, Joe Johnson, Jr., Joseph Johnson, Jr. and Joseph R. Johnson, Jr. The evidence presented to the grand jury referred to the defendant using various names, including both Joe Johnson and Joseph Johnson, Jr. It further suggested that the person responsible for the theft of Troiani's identity and the false filing is the same individual who emailed the IRS Form 3494A to Troiani on January 3 from an email account of devoutplayerhater@yahoo.com. Records for that email account trace back to jjohnson531@dslextreme.com with a residential address of 2600 Brinkley Road, Fort Washington, Maryland. The Government has reported, and the defendant has not disputed,

that FBI agents interviewed him at his apartment at this very address. Moreover, records produced by defendant's employer Alion and Alion's ISP connect defendant with the PACER account used to access the Constand docket as well as multiple internet searches related to Constand and Cosby. Defendant's fingerprints taken at the time he was processed on the charges here match the fingerprints recovered from the envelope containing the filing at issue and also match the fingerprints of a "Joseph R. Johnson, Jr.," who was previously incarcerated at a federal prison.

Simply put, the correct defendant has been indicted, and he has subsequently appeared to face the charges. He has not established that he lacked notice of the charges against him. Nor has he presented any evidence to suggest that the wrong person was indicted. Thus, the fact that the indictment may not have used defendant's preferred name or listed every iteration of his name did not violate any right under the United States Constitution or the Federal Rules of Criminal Procedure and did not result in prejudice to Johnson. The law, like Shakespeare's Juliet, will not elevate a name over the person behind the name at least under the present circumstances.

Accordingly, we decline to dismiss the indictment on this ground.²

III

We next consider Johnson's motion to dismiss the indictment as to Count I. That count charges that, in violation of 18 U.S.C. §§ 1001 and 2, Johnson:

knowingly and willfully made, and aided and abetted the knowing and willful making of, materially false, fictitious, and fraudulent statements and representations, in that defendant JOSEPH R. JOHNSON, JR., in a fraudulent filing in a civil case pending before the United States District Court for the Eastern District of Pennsylvania, falsely represented and aided and abetted the false representation that the fraudulent filing had been made by the plaintiff's counsel [Troiani], when, as the defendant then knew, [Troiani] had not made the fraudulent filing, but rather the fraudulent filing was made by and at the direction of the defendant.

Section 1001 provides:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative,

2. Although the Federal Rules of Criminal Procedure do not explicitly provide for it, a court may order amendments of a charging document that relate merely to matters of form. See Russell v. United States, 369 U.S. 749, 770 (1962). Such amendments have included misnomers or typographical errors related to a defendant's name. See United States v. Perez, 776 F.2d 797, 799 (9th Cir. 1985); United States v. Denny, 165 F.2d 668, 668-70 (7th Cir. 1948); United States v. Owens, 334 F. Supp. 1030, 1031 (D. Minn. 1971); United States v. Campbell, 235 F. Supp. 94, 95 (E.D. Tenn. 1964). Because we find the indictment sufficient as written, amendment is not necessary here.

or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. . . .

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

To establish a violation of § 1001, the government must prove:

(1) that the defendant made a statement or representation;

(2) that the statement or representation was false; (3) that the false statement was made knowingly and willfully; (4) that the statement or representation was material; and (5) that the statement or representation was made in a matter within the jurisdiction of the federal government. United States v. Castro, 704 F.3d 125, 139 (3d Cir. 2013) (citing United States v. Moyer, 674 F.3d 192, 213 (3d Cir. 2012)).

Johnson asserts that the Government cannot prove the fifth element of its case, that is, that the statement was made "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." He reasons that the Constand action was a civil action between private parties and did not involve the United States or any other government agency. In support, he cites United States v. London for the proposition that § 1001 "is not intended to apply to false statements made in civil actions in the United States Courts where the government is not a party to the lawsuit; instead the statute was intended to proscribe only those false statements meant to deceive the government or its agencies." 714 F.2d 1558, 1561 (11th Cir. 1983) (citing United States v. D'Amato, 507 F.2d 26 (2d Cir. 1974)).

London dealt with a situation where an attorney attempted to defraud his clients into paying a fictitious damages award by forging a court order. 714 F.2d at 1560. The attorney never presented the order to the court nor made any false representation to the court. Id. Thus, it is factually distinguishable from the matter presented here which involves the filing of a fraudulent document with the court. More importantly, London and the other authority cited by Johnson were decided under a prior version of § 1001 which prohibited false statements "in any matter within the jurisdiction of any

department or agency of the United States.” Id. at 1560-61. The jurisdictional element of the statute has since been broadened to apply to “any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” See 28 U.S.C. § 1001 (emphasis added). The statement at issue here was made in a filing in this court and thus there can be no doubt that it involves a “matter within the jurisdiction of the . . . judicial branch of the Government of the United States” as required under the statute. See id.

Johnson also maintains that he cannot be convicted on this charge because there is no evidence that the filing at issue was not made by a party to the Constand action or his or her counsel. As stated above, § 1001(b) contains an exemption for statements made by a party to the proceeding or counsel to a party. This subsection is commonly known as the “judicial function” exception and is designed to avoid the chilling effect on advocacy that the threat of criminal prosecution could produce. See United States v. Manning, 526 F.3d 611, 616-17 (10th Cir. 2008). Johnson reasons that the Government cannot rule out the possibility that a party to the proceeding or counsel made the filing or caused it to be made and thus cannot establish that the “judicial function” exception in subsection (b) does not apply.

Johnson's argument at this stage is unavailing. The indictment charges that Johnson, who was not a party to the Constand action or counsel, is responsible for the filing at issue. Thus, it adequately charges a violation of § 1001 that does not fall within the exception set forth in § 1001(b).

To issue an indictment, a grand jury merely must find probable cause that a crime has been committed. United States v. Calandra, 414 U.S. 338, 343 (1974). Indictments generally are not subject to attack based on the inadequacy of evidence:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.

Costello v. United States, 350 U.S. 359, 363 (1956).

In issuing the indictment, the grand jury found probable cause to believe that Johnson made or caused to be made the false filing at issue. As discussed above, the grand jury had before it ample circumstantial evidence implicating Johnson, including the fact that the documents contained in the envelope were identical to documents Johnson appeared to have emailed to Troiani on an earlier date and the fact that Johnson's fingerprints were found on the envelope and on tape adhered to

the envelope label. The ultimate issue of who caused the filing to be made is an issue of fact for the jury to resolve. It is not grounds to dismiss the indictment.

Johnson further contends that he cannot be convicted under an aiding and abetting theory because there is no evidence that Johnson "knowingly and willfully" aided and abetted a false statement or representation. 18 U.S.C. § 2 provides:

(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.

With respect to an aiding and abetting theory of liability under 18 U.S.C. § 2, the Government must prove:

"(1) that another committed a substantive offense; and (2) the one charged with aiding and abetting knew of the commission of the substantive offense and acted to facilitate it." United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010).

Additionally, the defendant must have the specific intent to facilitate the crime. Id. "One can aid or abet another through use of words or actions to promote the success of the illegal venture." Id. Indeed, only "some affirmative participation which at least encourages" the offense is required. United

States v. Frorup, 963 F.2d 41, 43 (3d Cir. 1992) (quoting United States v. Raper, 676 F.2d 841, 850 (D.C. Cir. 1982)).

Section 2 specifically provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense is liable as a principal. See 18 U.S.C. § 2(a). Through the enactment of this statute, Congress abolished the distinction between principals and accessories as it existed under the common law. See United States v. Standefer, 610 F.2d 1076, 1082 (3d Cir. 1979). A defendant therefore may be convicted as a principal under § 2 for aiding and abetting the commission of a crime even where the individual who actually carried out the criminal act lacked the requisite criminal intent, provided that the act constituting the crime has itself been completed. Id. at 1087; see also United States v. Bryan, 483 F.2d 88, 92 (3d Cir. 1973). Thus, it is well-established that a defendant may be convicted for a crime performed through an "innocent dupe." See Bryan, 483 F.2d at 92. A defendant can also be convicted under an aiding and abetting theory where the individual who actually carried out the criminal act is unidentified or has been acquitted of the charge. See id.

Considering this standard, it is of no import that the Government did not present evidence to the grand jury that Johnson actually dropped off the envelope or directly provided any instruction to the Clerk's Office. As discussed above, the

grand jury had before it ample circumstantial evidence connecting Johnson to the envelope at issue, including prior emails sent by Johnson and his fingerprints. Thus, it had probable cause to believe that Johnson knew of the fraudulent filing and acted to facilitate it, even if he was not the individual who actually delivered or filed it.

It is also irrelevant that a Clerk's Office employee is the individual who actually filed the documents at issue. As stated above, Johnson may be prosecuted under § 2 even where the individual who filed the false documents is innocent or unidentified. See Bryan, 483 F.2d at 92. Contrary to Johnson's assertion that no "written or oral directions or instructions" were provided to the Clerk's Office, the evidence presented to the grand jury suggested that Johnson caused the delivery of an envelope to the Clerk's Office containing a praecipe to attach certain documents contained therein to the Constand complaint and that the praecipe to attach bore the forged or fabricated signature of Troiani. As stated above, to issue the indictment the grand jury need only have found probable cause to believe that Johnson aided and abetted the filing in controversy. The question of whether there is evidence beyond a reasonable doubt to conclude that Johnson did so is ultimately a question of fact for the jury to decide.

Accordingly, the motion to dismiss the indictment will be denied as to Count I.

IV

We now turn to Johnson's motion to dismiss Count II of the indictment. That count charges that Johnson "knowingly and without lawful authority used a means of identification of another person, and aided and abetted the use of a means of identification of another person, that is, [Troiani's] name" during and in relation to the false statements charged in Count I, in violation of 18 U.S.C. §§ 1028A(a)(1), (c)(4) and (c)2. Section 1028A(a)(1) provides that "[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." The statute further defines "felony violation enumerated in subsection (c)" to include any violation of the United States Code Title 18, Chapter 47, "Fraud and False Statements," which includes a violation of 18 U.S.C. § 1001 as charged in Count I of the indictment.

Johnson asserts that Count II of the indictment must be dismissed because the Government did not present sufficient evidence to establish a violation of 18 U.S.C. § 1001 as charged

in Count I and thus cannot establish that he unlawfully transferred, possessed, or used the identity of Troiani "during and in relation to any felony violation enumerated in subsection (c)" of the statute. See 18 U.S.C. §§ 1028A(a)(1), (c)(4). As stated above, we are denying Johnson's motion to dismiss as it relates to Count I. For those reasons, his challenge to Count II also fails.

Accordingly, the motion to dismiss the indictment as to Count II will be denied.³

V

Finally, Johnson moves for the recusal of all judges of the Eastern District of Pennsylvania under 28 U.S.C. § 455(a). In support of his motion, Johnson asserts that potential witnesses in this action may include employees of the Clerk's Office as well as Judge Robreno and his staff. He reasons that this court's impartiality "is called into question because of the relationship between the Court and the Clerk of Court" and because the court itself is a victim of the alleged criminal activity.

Section 455(a) provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself

3. To the extent Johnson's motion can be interpreted to assert that he cannot be convicted under an aiding and abetting theory of liability with respect to Count II, that argument fails for the reasons discussed in section III, supra.

in any proceeding in which his impartiality might reasonably be questioned." In considering recusal under this statute we must determine whether an objective, reasonable person might question the judge's impartiality. See, e.g., Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1043 (3d Cir. 1997). Recusal is generally not warranted simply because a witness in the proceedings may be an acquaintance or colleague of the judge. See United States v. DePaoli, 41 F. App'x 543, 550 (3d Cir. 2002); U.S. ex rel. Perry v. Cuyler, 584 F.2d 644, 647 (3d Cir. 1978); Jordan v. Fox, Rothschild, O'Brien & Frankel, No. 91-2600, 1995 WL 141465, at *2 (E.D. Pa. Mar. 30, 1995).

Considering the motion from a reasonable and objective viewpoint, we see no valid reason to question the impartiality of the judges of this court. The Clerk's Office generally performs administrative functions, and it is unlikely that its handling of the filing at issue will be a matter of genuine controversy. Similarly, any testimony by Judge Robreno would be limited in nature and would be provided as a disinterested third-party witness offering factual testimony about the filing and the striking of that filing. Whether to credit the testimony of any Clerk's Office employee or any other witness called to testify in this action ultimately will be for the jury, not the court, to resolve.

Accordingly, the motion for recusal will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JOSEPH R. JOHNSON, JR.	:	NO. 19-367

ORDER

AND NOW, this 16th day of October, 2019, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant to dismiss the indictment and for recusal (Doc. # 10) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.