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COMMENTS

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*United States v. Standefer**

I. Introduction

In *United States v. Standefer*[1] the Court of Appeals for the Third Circuit undertook the first in-depth determination by a federal court of whether the acquittal of one charged as a sole principal in a criminal act should preclude conviction of an aider and abettor. This question involved the interpretation of a federal statute, 18 U.S.C. section 2, which provides that one charged as an aider and abettor in the violation of a federal statute shall be charged as a principal. Although this question has previously arisen in the federal courts, it has resulted in conflicting interpretations among the circuits.

In an attempt to formulate a decisive answer, the *Standefer* court considered Congress' intent in drafting an aider and abettor statute of general application, precedents bearing on the question, and relevant policy considerations. The Third Circuit ultimately held that acquittal of the sole principal does not preclude conviction of one charged as an aider and abettor.[2] A close look at the decision, however, indicates a need for further clarification, either by the Congress or the Supreme Court. This comment therefore serves two purposes: first, to examine the holding of the Third Circuit in *Standefer,* and secondly, to analyze and evaluate the issue presented in *Standefer* and its possible ramifications of federal aider and abettor law.

II. Statement of Facts

United States v. Standefer arose out of a series of gifts made by the Gulf Oil Corporation to an agent of the Internal Revenue Service who was charged with auditing Gulf's federal income tax returns. From May, 1971, to June, 1974, Gulf Oil Corporation, through two of its employees, Fred W. Standefer and Joseph Fitzgerald, supplied a number of gifts to I.R.S. agent Cyril J. Niederberger and his family. Five of these gifts were in the form of paid vacations.[3]

Indictments were returned against Gulf Oil Corporation, Standefer, Fitzgerald and Niederberger. Gulf Oil elected to plead guilty as to certain counts of the indictment against it, while Fitzgerald entered a plea of *nolo con-*

* 610 F.2d 1076 (3d Cir. 1979) (en banc), *cert. granted,* 48 U.S.L.W. 3426 (U.S. Jan. 8, 1980) (No. 79-383).

1 610 F.2d 1076 (3d Cir. 1979) (en banc), *cert. granted,* 48 U.S.L.W. 3426 (U.S. Jan. 8, 1980) (No. 79-383).

2 610 F.2d at 1078.

3 *Id.*

tendere. Niederberger and Standefer each pleaded not guilty to the charges and elected to have separate jury trials.[4]

The trial of Niederberger, the principal in the case, was held first. Niederberger was charged with five counts of violating 26 U.S.C. section 7214(a)(2),[5] one count for each of the trips in question.[6] This statute prohibits an Internal Revenue Service agent from receiving gratuities which in any way relate to the performance of an official duty. Niederberger was convicted on two of the five section 7214(a)(2) counts. These convictions were affirmed on appeal. As to the other three counts of section 7214(a)(2), the jury returned a verdict of not guilty.[7]

The trial of the appellant, Standefer, followed Niederberger's conviction. Standefer was also charged with five counts of violating section 7214(a)(2), under the theory that he had aided and abetted Niederberger in accepting the paid vacations.[8] Although on its face section 7214(a)(2) applies only to misconduct of government employees, it was possible to charge Standefer with violation of this federal law as a result of 18 U.S.C. section 2.[9] The jury convicted Standefer on all five counts.[10]

On appeal to the Third Circuit, Standefer urged that three of the section 7214(a)(2) counts should have been dismissed because of Niederberger's acquittal on identical charges. Specifically, Standefer argued that as a matter of law he could not be convicted of aiding and abetting a principal when that principal had been acquitted of committing the charged offense.[11] A divided panel rejected the argument, relying on past decisions of the Third Circuit that permitted the conviction of an aider and abettor even when the principal had been acquitted.[12] The *Standefer* court thereafter ordered rehearing *en banc* to reconsider its position in prior cases and to reexamine the state of the federal law

4 *Id.*

5 26 U.S.C. § 7214(a)(2) imposes a criminal sanction against: Any officer or employee of the United States acting in connection with any revenue law of the United States—

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty.

6 Niederberger was also charged with five counts of violating 18 U.S.C. § 201(g)(1977), which provides:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or because of any official act performed or to be performed by him;
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> . . . .
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> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Niederberger was convicted on four of the five § 201(g) counts. The convictions were affirmed on appeal. 610 F.2d at 1079.

7 United States v. Niederberger, 580 F.2d 63 (3d Cir. 1978), *cert. denied,* 439 U.S. 980 (1979).

8 Standefer was also charged with four counts of violating 18 U.S.C. § 201(f)(1977), a companion provision to § 201(g), which provides:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official:
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> . . . .
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> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Standefer was convicted on all four § 201(f) counts. The convictions were affirmed on appeal. 610 F.2d at 1078.

9 18 U.S.C. § 2 (1977).

10 610 F.2d at 1078.

11 *Id.* at 1081.

12 *See* United States v. Bryan, 483 F.2d (3d Cir. 1973) (en banc); United States v. Provenzano, 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964); United States v. Klass, 166 F.2d 373 (3d Cir. 1948).

respecting aiders and abettors. The court concluded that the outcome of Niederberger's prosecution had no effect on Standefer's conviction, and it accordingly affirmed the conviction on all counts.[13]

III. The Congressional Intent in Drafting 18 U.S.C. Section 2

Under federal law, an individual assisting in the commission of a crime can be charged under 18 U.S.C. Section 2 as if he were a principal. This statute 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.[14]

A. *The* Standefer *Interpretation*

A critical question raised in the course of the court's *en banc* consideration of the case was whether Congress had intended 18 U.S.C. section 2(a) to permit the conviction of an aider and abettor after the principal had been acquitted.[15] In making this determination, the *Standefer* court initially sought guidance from analysis of the statute's history. The court first noted that up until 1909 an accessory to a felony could not be tried at all under federal law absent an express statutory authorization[16] making the aiding and abetting of the particular felony a crime in and of itself.[17] A federal prosecution for aiding

13 610 F.2d at 1078.

14 18 U.S.C. § 2 (1977).

15 The court also addressed the question of whether 18 U.S.C. § 2 may be used to convict one who could not be charged as a principal under the substantive criminal statute. The statute under which Standefer was indicted, 26 U.S.C. § 7214(a)(2), is limited in its coverage to officers and employees of the United States. Standefer, a private citizen, argued that the government could not use 18 U.S.C. § 2(a) to prosecute him as an aider and abettor when he could not have been indicted as a principal for the substantive crime.

18 U.S.C. § 2(a) formerly provided that: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." In 1951, the section was amended by Section 17B of the Act of October 31, 1951. The phrase "is a principal" was replaced by "is punishable as a principal." The legislative history discloses that the amendment was "intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted." S. Rep. No. 1020, 82nd Cong., 1st Sess. (reprinted in 1951) U.S. Code Cong. & Admin. Serv. 2578, at 2583. Given as examples were those criminal statutes that "are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks." *Id.*

In light of this expression by the Senate that 18 U.S.C. § 2(a) may be used to convict one who could not be charged under the substantive statute, Standefer's contention was given limited attention by the Court of Appeals. 610 F.2d at 1085.

16 It is well established that under federal law there are no common law crimes. United States v. Britton, 108 U.S. 199, 206 (1883); Jones v. United States, 137 U.S. 202, 211 (1890). The federal courts have jurisdiction only over actions specifically proscribed by Congress. United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812).

17 *See, e.g.,* United States v. Crane, 25 F.Cas. 691 (C.C.D. Ohio 1847) (No. 14,888).

The rule differed as to misdemeanors. No specific statutory authorization was necessary to prosecute an accomplice, and aiders and abettors were chargeable as principals. *See* United States v. Mills, 32 U.S. (7 Pet.) 138, 141 (1883); United States v. Snyder, 14 F. 554, 556 (C.C.D. Minn. 1882).

and abetting required a specific provision, and several such provisions were included among the criminal statutes of the period.[18]

By the Act of March 4, 1909, Congress enacted a general provision which made it a crime to aid or abet the commission of any federal offense.[19] The court in *Standefer* relied on the congressional history of the Act of March 4, 1909, to interpret its successor, 18 U.S.C. section 2(a).[20]

In the Senate Report on the Act of March 4, 1909 the Senate committee stated its purpose in enacting a general accomplice provision:

> The committee has deemed it wise to make those who are accessories before the fact at common law principal offenders, thereby permitting their indictment and conviction for a substantive offense.
> At common law an accessory cannot be tried without his consent before the conviction or outlawry of the principal except where the principal and the accessory are tried together; if the principal could not be found or if he had been indicted and refused to plead, had been pardoned or died before conviction, the accessory could not be tried at all. This change of the existing law renders these obstacles to justice impossible.[21]

The Senate, in this somewhat limited explanation of its intent, indicated that the statute would allow for the conviction of an accomplice even though the principal could not be found, had failed to plead, was pardoned, or had died. The situation in which the principal is acquitted was not specifically mentioned. An important question which therefore arose was whether Congress intended to reach only these specific "obstacles to justice" which are set out in the committee's notes; or whether Congress intended that the statute reach other unanticipated or unexpressed "obstacles to justice" such as that presented in *Standefer.*

The *Standefer* court concluded that although the Senate Report provided for the elimination of certain "obstacles to justice" by the proposed statute, there was no indication that the list was intended to be all-inclusive.[22] The fact that the committee did not affirmatively set down, in a particular report, its intention to reach the particular class of cases in which a principal is acquitted was not thought to be determinative of their intent to exclude that class. The court felt that congressional committees should be expected neither to anticipate every possible application of a general rule, nor to express their desire to bring about all the applications that are foreseen, since to insist upon an affirmative expression of legislative intent would require a "clairvoyant legislative report"[23] and bring many general provisions under unnecessary scrutiny. Such a requirement, in the majority's view, would have the effect of

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18 *See, e.g.,* Act of March 3, 1825, ch. 64, § 45, 4 Stat. 114 (buying stolen mail); R.S. § 5323 (1878) (piracy); R.S. § 5427 (1878) (naturalization offenses); R.S. § 5466 (1878) (destroying mail).

19 The Act provided that:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." Act of March 4, 1909, ch. 321, 35 Stat. 1152.

20 The Act of March, 4, 1909, became § 332 of the penal code, and is presently codified, without substantive modification, at 18 U.S.C. § 2(a) (1977).

21 S. Rep. No. 10, pt. 1, 60th Cong., 1st Sess. 26 (1908).

22 610 F.2d at 1084.

23 *Id.*

undermining congressional authority rather than respecting congressional intent.[24]

The court also pointed out that at no time had Congress sought to alter the seventy-year-old statute in order to create an exception for cases involving the acquittal of a principal. Since several cases decided in the federal courts during this period held that the aider and abettor could be convicted notwithstanding acquittal of the principal, the congressional inaction was interpreted as a statement in support of this position.[25]

Considering all these factors, the majority determined that in drafting this provision Congress intended to draft an aider and abettor statute of general application. Congress by its enactment, said the court, sought to remove certain "obstacles to justice" which existed at common law, including, although not expressly mentioned, the rule that precluded conviction of an aider and abettor in cases where the principal was acquitted.

B. *Analysis: Congressional Intent*

As previously indicated, the majority in *Standefer* felt that the rule that precluded conviction of an aider and abettor in cases where the principal was acquitted was among the "obstacles to justice" that Congress intended to eliminate in 18 U.S.C. section 2. Although this particular "obstacle" was not expressly mentioned in the Senate Report accompanying the legislation, the court concluded that the list had not been intended to be all-inclusive, therefore justifying its liberal interpretation of the statute itself. A close scrutiny of the statute and relevant legislative history, however, reveals that the *Standefer* majority, in an effort to justify its decision, read more into the statute's history than was legitimately there.

Judge Aldisert made this point in an opinion, joined in part by Chief Judge Seitz, in which he concurred in part and dissented in part. Aldisert argued that the Senate expressed a clear intention to remove only *certain* impediments to justice. The change in the existing law provided by the statute, he argued, would render those "obstacles to justice" expressed in the Committee Report impossible.[26] In essence, Judge Aldisert argued that since the report contained no mention of the situation in which the principal had been acquitted, a doubt arises whether it was intended that the statute apply to such cases. Thus, the law should be construed strictly, and any ambiguity resolved in favor of the defendant, since, in Judge Aldisert's opinion, the power of punishment is vested in the legislative, not the judicial department.[27]

Whether the statute and accompanying legislative history resolve the issue depends largely on the interpretation technique used. If one construes the statute and other reports strictly, with the understanding that the statute was intended to cover only those situations expressly enumerated the conclusion would clearly be that the statute does not cover the situation at issue. Converse-

24 *Id.*
25 *Id.* at 1084-85.
26 *Id.* at 1104 (Aldisert, J., concurring and dissenting).
27 *Id.*

ly, if one gives a broad interpretation to the statute and other reports, with the understanding that the statute was intended to cover those other situations reasonably foreseeable, it is possible to conclude that the statute was intended to allow the conviction of an aider and abettor notwithstanding the acquittal of the principal.

The Third Circuit reached too far in an attempt to justify its position. The specific language of the Senate Report indicated that the statute was intended to remove "these obstacles to justice." The Senate's use of the word "these" should not have been so readily disregarded. Furthermore, the maxim of statutory interpretation *"expressio unius est exclusio alterius"* would preclude such an expansive interpretation.[28] Thus where a statute enumerates the subjects on which it is intended to operate, it is to be construed as excluding from its operation all those subjects not expressly mentioned.[29] The Senate Report clearly indicated that it was to remedy the situations where the principal cannot be found, has failed to plead, was pardoned, or died.[30] Since no mention was made of the situation where the principal was acquitted, the statute should not be interpreted to cover that situation.

Given the sketchy existence of legislative history and its questionable interpretation one may only speculate as to whether Congress intended to address the situation in which the substantive principal is acquitted. Congress has not yet provided a clear indication of how the issue should be resolved, and in the absence of Congressional guidance, interpretation of the statute has become largely subjective. The effect of this subjective interpretation is reflected in the divergent positions of the federal court on this issue.

IV. Existing Precedents

Since the situation in *Standefer* is not easily resolved by reference to either the text or legislative history of the federal statute, a case law analysis is mandated. The question of whether an aider and abettor can be convicted notwithstanding the acquittal of the sole principal has arisen in numerous situations. A split among the circuits exists however, which the *Standefer* majority chose to ignore.

A. *Authority Relied on by the Third Circuit*

The Third Circuit panel that initially heard *Standefer* concluded that the aider and abettor could be convicted even though the principal was acquitted of committing the charged offense. In reaching this result, the divided panel relied on a line of Third Circuit precedents that dated back more than thirty years.[31] In *United States v. Klass,*[32] decided in 1948, the Third Circuit had ruled that it was immaterial that the actual principal had been acquitted in determin-

28 This maxim, which is generally applied to the interpretation of statutory language, can be of assistance in interpreting other Congressional statements.
29 Williams v. Wohlgemuth, 540 F.2d 163 (3d Cir. 1976).
30 *Supra* note 21.
31 610 F.2d at 1081.
32 166 F.2d 373 (3d Cir. 1948).

ing whether the aider and abettor could still be charged with the substantive offense. The court reasoned in *Klass* that "each participant must stand on his own two feet"[33] therefore denying the defendant the benefit of any prior acquittal. This same rationale was applied in *United States v. Provenzano*[34] to affirm the conviction of an aider and abettor despite acquittal of the principal.

In *United States v. Bryan.*[35] a relatively recent decision, the court refused to acquit an aider and abettor, proven to be a participant in a crime, when there was insufficient evidence to convict the principal. The crime charged in *Bryan* was the theft of whiskey, a charge which required a showing of criminal intent to steal. The trier of fact found that the principal, referred to as an "innocent dupe," had committed the act in question, but lacked the requisite intent. Without this necessary element, the principal was acquitted. The same court found, however, that the aider and abettor had possessed the necessary criminal intent, and therefore convicted him. The fact that the evidence was insufficient to convict the principal did not absolve the aider and abettor of guilt for his participation in the crime.[36]

Although the *Standefer* panel had ample Third Circuit precedents to support its holding, it felt that the issue deserved more consideration. The Third Circuit therefore ordered rehearing *en banc* in order to reconsider its holdings in these cases.

As previously indicated, the *en banc* majority held that Congress intended for 18 U.S.C. section 2 to allow conviction of the aider and abettor notwithstanding acquittal of the principal. In order to lend support to their decision, the *Standefer* court cited the decisions of other circuits on the same issue. The majority characterized its decision as adherence to "the clear majority position."[37] In support of its assertion, the court cited cases from eight circuits, which it claimed stand for the proposition that acquittal of the sole principal does not preclude conviction of an aider and abettor.[38] In addition, the majority noted that its view is also in accord with that of the Model Penal Code[39] and that favored by most commentators.[40]

According to the court's interpretation, most of the cases reaching conclusions contrary to its own stood simply for the proposition that the government must prove every element of a crime in order to sustain a conviction. The distinguishing feature of those cases, reasoned the court, was that the government failed to come forth with adequate proof of the fact that the substantive

33 *Id.* at 380.
34 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964).
35 483 F.2d 88 (3d Cir. 1973).
36 *Id.* at 94.
37 610 F.2d at 1086.
38 *See* United States v. Deutsch, 451 F.2d 98, 118-19 (2d Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972); United States v. Bryan, 483 F.2d 88 (3d Cir. 1973) (en banc); United States v. Musgrave, 483 F.2d 327, 331-32 (5th Cir. 1973); United States v. Kelley, 258 F. 392, 402 (6th Cir.), *cert. denied,* 249 U.S. 616 (1919); Pigman v. United States, 407 F.2d 237 (8th Cir. 1969); United States v. Azadian, 436 F.2d 81 (9th Cir. 1971); United States v. Coppola, 526 F.2d 764, 776 (10th Cir. 1975); Gray v. United States, 260 F.2d 483 (D.C. Cir. 1958).
39 "An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has immunity to prosecution or conviction or has been acquitted." Model Penal Code § 2.06(7).
40 *See, e.g.,* PERKINS, CRIMINAL LAW, ch. 6, § 8 (1969); 1 WHARTON'S CRIMINAL LAW AND PROCEDURE, § 116 (1957); 21 AM. JUR. 2d *Crim. Law,* § 128 (1965).

criminal act had been committed.[41] Apparently, the *Standefer* majority reasoned that if the government had been able to prove the corpus delicti of the offenses, conviction of the aider and abettor may have resulted notwithstanding acquittal of the principal.

B. *Analysis: Case Authority*

The decision in *Standefer* is in accord with the position of a majority of the circuits that have addressed this issue, although there is no clear consensus among the circuits as a whole.[42] Many of the cases cited by the majority in support of its position were decided in different factual contexts, and therefore do not support the specific holding of *Standefer*.[43]

The *Standefer* decision, however, is clearly the rule in at least four circuits. As previously indicated, the *Standefer* court followed a line of precedent initiated more than thirty years earlier[44] which established that regardless of the fact that the actual principal had been acquitted, the aider and abettor could still be charged with the substantive offense.[45]

In *United States v. Musgrave,*[46] the Fifth Circuit adopted the same position when it unequivocally held that acquittal of the only possible principal does not preclude the conviction of an aider and abettor. The court indicated that a verdict of "not guilty" did not necessarily mean that the particular principal or specific act was innocent, but rather, only that insufficient evidence was developed at the first trial to establish the principal's guilt beyond a reasonable doubt. Thus, the conviction of an aider and abettor would not necessarily produce an inconsistency.[47]

In *Pigman v. United States,*[48] the Eighth Circuit ruled that in order to sustain a conviction of one charged as an aider and abettor it was necessary that there be evidence showing an offense to have been committed by a principal, and

41 610 F.2d at 1087.

42 The Supreme Court has not directly addressed the issue. The Court, however, has dealt with aiders and abettors in a related context. In Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963), two Negro ministers were tried and convicted of aiding and abetting a violation of a criminal trespass ordinance for their part in the organization of a sit-down strike. The convictions of the principals were held constitutionally invalid. Nevertheless, the defendants were still charged as aiders and abettors. The Supreme Court held that there could be no conviction for aiding and abetting someone to do an innocent act. *Id.* at 265.

43 Two of the cases that the *Standefer* Court cited in support of its position, United States v. Coppola, 526 F.2d 764 (10th Cir. 1975), and United States v. Deutsch, 451 F.2d 98 (2d Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972), involved plea bargains by the principal. In those cases the principals pleaded guilty to lesser included offenses or to other counts of the indictments. In such contexts, the courts approved convictions of aiders and abettors. 526 F.2d at 776; *Deutsch,* 451 F.2d at 118-19. The fact that plea bargains were made as a result of compromise, and not necessarily with respect to the guilt or innocence of the principal in regard to a particular charge, however, removes such cases from the context involved herein.

Another case cited by the majority, United States v. Azadian, 436 F.2d 81 (9th Cir. 1971), should be also distinguished. In *Azadian,* the sole reason for the principal's acquittal was that she was entrapped by a government agent. The principal's acquittal was thus predicated not on her innocence, but rather on the fact that there was overreaching on the part of a government agent. The rule in the Ninth Circuit requires a defendant to admit the criminal act before he can successfully assert a defense of entrapment. Thus, the defense merely grants immunity from prosecution for criminal acts concededly committed. It does not establish innocence per se. *Id.* at 83. For this reason, the case should not have been cited by the *Standefer* court in support of its holding.

44 United States v. Klass, 166 F.2d 373 (3d Cir. 1948).

45 *Id.* at 380.

46 483 F.2d 327 (5th Cir.), *cert. denied,* 414 U.S. 1023 (1973).

47 483 F.2d at 331.

48 407 F.2d 237 (8th Cir. 1969).

also that the principal was aided and abetted by the accused. If the aider and abettor was proven to have assisted in the crime, the court would not be compelled to acquit him merely because of insufficient evidence against the principal at the first trial.[49]

Finally, in *Van Patzoll v. United States,*[50] the Tenth Circuit recognized that conviction of the principal was not a prerequisite to conviction of the aider and abettor. The court stated that the acquittal of the principal presented no impediment to the trial and conviction of a person charged with aiding and abetting the commission of the crime. So long as the proof established that a crime was committed, and that the person charged with aiding and abetting assisted in its commission, his conviction could be upheld.[51]

These precedents clearly held that acquittal of the sole principal does not preclude conviction of an aider and abettor. The decisions rely on the fact that different trials may produce different results. In a separate trial context, the defendant is required to support himself, not rely on the outcome of the trial of another defendant. The four circuits followed this common reasoning in holding that the principal's acquittal was immaterial with respect to the decision concerning the aider and abettor.

On the other hand, at least two circuits have indicated that acquittal of the principal will preclude conviction of an aider and abettor. In *Girogasian v. United States,*[52] the First Circuit held that where the evidence was insufficient to convict the principal, a bank's branch manager, of willful misapplication of bank funds in an earlier trial, the defendant could not be found guilty of aiding and abetting the manager. According to the First Circuit, in order to convict one of aiding and abetting it was necessary that the prosecution first prove that the principal himself was guilty of the substantive offense.[53]

The Fourth Circuit is also clearly in conflict with the rule set down in *Standefer.* In two cases, *United States v. Shuford*[54] and *United States v. Prince,*[55] the court held that where the only potential principal had been acquitted, the acquittal established that no crime has been committed, and therefore the conviction of an aider and abettor must be set aside.[56]

Several other circuits have indicated that where the two parties are tried together, the aider and abettor cannot be convicted without the conviction of the principal. In *United States v. Bernstein,*[57] the Second Circuit stated that since "it is the law that a person cannot be found guilty of aiding and abetting unless a principal whom he has aided and abetted committed the criminal act,"[58] it was not error for the judge to instruct the jury that the aider and abettor could not be convicted unless the principal was also convicted. The Seventh Circuit in *United States v. Stevison*[59] affirmed a similar jury instruction under the ra-

49 *Id.* at 239.
50 163 F.2d 216 (10th Cir.), *cert. denied,* 332 U.S. 809 (1947).
51 163 F.2d at 219.
52 349 F.2d 166 (1st Cir. 1965).
53 *Id.* at 167.
54 454 F.2d 772 (4th Cir. 1971).
55 450 F.2d 1324 (4th Cir. 1970).
56 454 F.2d at 779; *Prince,* 430 F.2d at 1325.
57 533 F.2d 775 (2d Cir.), *cert. denied,* 429 U.S. 998 (1976).
58 533 F.2d at 799.
59 471 F.2d 143 (7th Cir. 1972), *cert. denied,* 414 U.S. 819 (1973).

tionale that it was "invalid" to presuppose that an aider and abettor could be convicted absent conviction of the principal.[60]

Although no consensus has been reached among the circuits a disturbing feature common to most of these cases is that the courts have not discussed the reasoning behind their holdings. In the usual situation, the court will merely set forth a principle of law and cite supporting authority. The cases are decided on the basis of other decisions, not statutory interpretation or policy considerations. Thus, the Third Circuit's analysis in *Standefer* stands as the only in-depth discussion of the reasoning for denial of acquittal of an aider and abettor when the principal is found not guilty.

V. Policy Considerations

A. *General Policy Factors*

When the legislative intent of an act is not easily ascertainable and precedents are divergent, policy considerations become very important. In *Standefer*, therefore, the Third Circuit identified and discussed the various effects that the two possible interpretations of 18 U.S.C. section 2 would have on the federal system of criminal justice.

The court first recognized that if 18 U.S.C. section 2 were interpreted to allow conviction of an aider and abettor despite acquittal of the principal, the law would tolerate, if not promote, the existence of inconsistent verdicts.[61] Such logical inconsistency, the court noted, might lead to public distrust in, or disrespect for, the federal judicial system.[62]

In deciding to adopt the interpretation which would allow potential inconsistency, however, the majority argued that a rule that would allow inconsistent results in separate trials pertaining to the same transaction does not necessarily defy logic.[63] The cornerstone of their argument was that no two trials are alike in all respects. In many cases the proof available and actually used by the prosecution will vary, depending upon who is being prosecuted and when the prosecution is brought.[64] Different defense strategies, for instance, may result in the use of different witnesses or a different emphasis in testimony.[65] Evidence that was inadmissible against the principal may be admissible against an aider and abettor.[66] If there is a substantial time difference between the trials of the defendants, a key witness may be unavailable for the second trial.[67] The possibility also exists that new evidence may be obtained against an aider and abettor that was either unknown or unavailable to the prosecution at the time of the principal's trial.[68] The *Standefer* majority argued

60 471 F.2d at 147-48.
61 610 F.2d at 1088-89.
62 *Id.* at 1093.
63 *Id.* at 1089.
64 *Id.*
65 *Id.*
66 For example, a defendant normally has standing to raise violations of his own constitutional rights, but no standing to raise those of others. Alderman v. United States, 394 U.S. 165, 171-72 (1969); Brown v. United States, 411 U.S. 223 (1973).
67 610 F.2d at 1089.
68 *See* United States v. Musgrave, 483 F.2d 327 (5th Cir.), *cert. denied,* 414 U.S. 1023 (1973).

that the realities of criminal trials should not require that two juries, presented with essentially different fact situations, reach the same conclusion.[69]

The court further explained that a verdict of "not guilty" is not necessarily the equivalent of a finding of innocence.[70] A verdict of "not guilty" may, in some instances, indicate only that insufficient evidence was developed at the first trial to establish the principal's guilt beyond a reasonable doubt. It does not necessarily mean that the particular principal was innocent or that the specific act was not committed.[71]

The principal argument advanced for precluding conviction of an aider and abettor where the principal has been acquitted is that a contrary holding would impair "the appearance of evenhandedness in the administration of justice."[72] The cornerstone of this argument is that the public will neither understand nor accept a situation in which the courts rule that the substantive crime was not committed although the defendant aided and abetted in its commission.[73] Thus, public confidence in the judicial system may be diminished by those cases in which the principal escapes punishment while the aider and abettor is convicted and sentenced, because the result seems logically inconsistent.[74]

The majority acknowledged that confidence in the fairness and integrity of the judicial system is, to some extent, diminished in those cases where the principal escapes punishment while the aider and abettor is convicted and sentenced.[75] Their position, however, was that the perception of evenhandedness, except in the unusual case, is not an overriding concern.[76] Turning the "loss of confidence" argument around, the majority argued that the public would be disillusioned in those cases in which the guilt of the aider and abettor is confessed or conclusively proven at his own trial and yet his conviction is precluded due to the acquittal of the principal. In such cases, the public would be more appalled by the *failure* to prosecute than by the "logical inconsistency" of doing so.[77] In either situation the public will be confused. In one case, the government is apparently prosecuting someone for assisting in a crime that was never committed. In the other, the government apparently allows a guilty defendant to go free. The only realistic way of dealing with the problem of public perception is therefore to provide better information about the realities of our criminal justice system. Since the Third Circuit rule is not in fact logically inconsistent, it should not be changed merely because it may appear at first glance to be so.

In *Standefer,* the court was justifiably concerned with the possibility that guilty defendants would be allowed to go free by a rule that acquittal of the principal precludes conviction of an aider and abettor. The majority argued that the public interest would not be served by a rule that allows aiders and

69 610 F.2d at 1089.
70 *Id.* at 1095.
71 *See* United States v. Musgrave, 483 F.2d 327 (5th Cir.), *cert. denied,* 414 U.S. 1073 (1973).
72 610 F.2d at 1104 (Aldisert, J., concurring and dissenting).
73 *Id.* at 1105 (Aldisert, J., concurring and dissenting).
74 *Id.* (Aldisert, J., concurring and dissenting).
75 *Id.* at 1093.
76 *Id.*
77 *Id.;* Gardner v. State, 396 A.2d 303, 311 (Md. Ct. Spec. App. 1979).

abettors to escape responsibility for their criminal activity merely because the respective principals have escaped punishment.[78]

In some situations, the prosecution of a defendant will be hampered by rules requiring the exclusion of evidence. Judicial adoption of the "exclusionary rule" is premised on the notion that it serves to deter unlawful police practices as well as enhance the security of all citizens although, in some contexts, it may allow the guilty defendant to go unpunished. Unlike the situation in which the "exclusionary rule" is invoked in order to preserve the rights and liberties of all people, however, a rule requiring acquittal of the aider and abettor would not protect the rights of others. Since the issue does not implicate the rights of others, the *Standefer* court did not feel compelled to alter their rule.

The majority also argued that a rule precluding the conviction of an aider and abettor where the principal was acquitted would unjustly give the aider and abettor "two bites at the apple."[79] The argument was premised on the notion that the aider and abettor is given the opportunity to prevail in either of two trials; the principal's or his own.[80] The aspect found most objectionable by the majority was the possibility that the aider and abettor could prevail vicariously, no matter how strong the evidence was against him at his own trial, due to some unforeseen development at the principal's trial.[81] When viewed in context with the fact that separate trials can logically produce inconsistent results, and that a verdict of not guilty is not the equivalent of a finding of innocence, the argument is well-taken.

Interestingly, the "two bites at the apple" argument can also be used to attack the *Standefer* interpretation. Judge Gibbons, in an opinion in *Standefer* in which he concurred in part and dissented in part, argued that where the government has had a full and fair opportunity to prove its case against the principal, any fact which was determined against it in that trial should be applied in the aider and abettor's favor in a subsequent trial.[82] This concept, known as nonmutual collateral estoppel, is premised at least in part on the theory that the government, having lost once, should not be given a second opportunity to litigate the same factual issues in a subsequent trial.[83] The question of applicability of this concept in the aider and abettor context therefore became an important element in the court's evaluation of public policy concerns in *Standefer*.

B. *Applicability of Nonmutual Collateral Estoppel*

At the outset, nonmutual collateral estoppel should be distinguished from collateral estoppel. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit."[84] In the criminal context the double jeopardy clause of the fifth

78 610 F.2d at 1090.
79 *Id.* at 1089.
80 *Id.* at 1090.
81 *Id.*
82 *Id.* at 1108 (Gibbons, J., concurring in part and dissenting in part).
83 *Id.* at 1110 (Gibbons, J., concurring in part and dissenting in part).
84 Ashe v. Swenson, 397 U.S. 436, 443 (1970).

amendment prohibits the government from trying a defendant twice for the same crime.[85] The double-jeopardy provision has also been applied to prohibit the government from relitigating, at a subsequent trial on different charges, issues of fact decided in a defendant's favor at a prior trial.[86] The government is therefore collaterally estopped from challenging the prior findings. Absent mutuality of parties, however, the application of collateral estoppel in a criminal context is not constitutionally mandated.[87]

Judicial adoption of a principle of nonmutual collateral estoppel would forbid the relitigation of facts already decided against the government at a prior trial even though the current defendant was not a party at the earlier trial.[88] The "nonmutual" party, the new defendant, would thus receive the benefit of the findings in a prior trial, while he would not be subject to any negative holdings.

The *Standefer* majority provided several reasons for their refusal to adopt nonmutual collateral estoppel in the aider and abettor situation. First, the court argued that the use of nonmutual collateral estoppel would create a reluctance on the part of prosecutors to try co-defendants separately. Prosecutors would be more reluctant to grant an aider and abettor's right to a separate trial if everything decided adversely to the prosecution in the trial of the principal is denied consideration in a subsequent trial of the aider and abettor.[89]

Secondly, the majority argued that application of nonmutual collateral estoppel could result in the refusal by the government to prosecute some co-defendants at all for fear of jeopardizing other cases yet to be tried.[90] In order to avoid the application of the doctrine, the government would either try the co-defendants together or attempt to try the strongest cases first.[91] In either case, the strategy of the prosecution can affect the rights of the defendants.

Finally, the application of nonmutual collateral estoppel in a criminal prosecution would entail procedural burdens. The court involved in the trial of the aider and abettor will have to carefully scrutinize the record of the prior trial involving the principal in order to determine precisely what issues of fact were determined.[92] In jury cases, verdicts may be internally inconsistent, and can be the result of confusion, doubt, or compromise.[93] Although Judge Gibbons points out that application of the doctrine imposes no greater burden than that which is involved in mutual collateral estoppel cases,[94] one might question whether the added burden is justified in light of the other policy considerations.

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85 U.S. Const. amend. V.
86 397 U.S. at 436.
87 Hubbard v. Hatrak, 588 F.2d 414 (3d Cir. 1978).
88 610 F.2d at 1091.
89 *Id.* at 1094; *Hubbard,* 588 F.2d at 418.
90 610 F.2d at 1094.
91 Judge Gibbons would not give nonmutual collateral estoppel retroactive effect. Thus, the doctrine would have no effect on convictions already obtained. However, application of the doctrine in such a way seems to weaken the strongest argument for nonmutual collateral estoppel, concern for "the appearance of evenhandedness." The perceived injustice of inconsistent results is not lessened by the order in which such results are obtained. *Id.* at 1094.
92 *Id.* at 1095.
93 *Id.*
94 *Id.* at 1110-11 (Gibbons, J., concurring in part and dissenting in part).

Since the use of nonmutual collateral estoppel would entail additional burdens and the possible infringement of rights, application of the doctrine to federal criminal cases is improbable. The insistence on separate determinations of all factual issues is conducive to maintaining individual rights and will therefore be preserved in federal criminal law.

VI. Conclusion

The Third Circuit's decision in *Standefer* provides the first comprehensive look at the question of whether the acquittal of one charged as a sole principal should preclude conviction of an aider and abettor. The decision provides an excellent overview of the relevant policy considerations.

A close reading of *Standefer* reveals that Congress did not address the issue with their enactment of 18 U.S.C. section 2. Furthermore, there is a split in the circuits that have dealt with the issue specifically. Confronted with a situation where the intent of Congress is not easily ascertainable and the applicable precedents divergent, resolution of the issue becomes dependent upon policy considerations.

The *Standefer* majority had argued convincingly that separate trials may justify a situation where the principal is acquitted and the aider and abettor convicted. Since a verdict of not guilty is not the equivalent of a finding of innocence, differing verdicts do not necessarily entail consistencies. The realities of criminal trials should not require that two juries, presented with essentially different fact situations, reach the same conclusion.

The issue, however, is still largely unresolved in federal criminal law. The conflicting views among the circuits will ultimately demand final resolution. Congress or the Supreme Court should therefore resolve this important question of federal law.