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Case Note

THE SCOPE OF ACCOMPLICE LIABILITY UNDER 18 U.S.C. § 2(b)

United States v. Ruffin, 613 F.2d 408 (2d Cir. 1979)

The United States Court of Appeals for the Second Circuit recently interpreted section 2(b) of title 18 of the United States Code in a way which enlarged the scope of accomplice liability. In United States v. Ruffin, a defendant who lacked the capacity to violate a substantive federal statute was convicted for willfully causing the commission of the criminal act by an innocent person who did, however, possess the statutorily required capacity to violate the statute. This Note examines the majority and minority opinions in Ruffin and the legislative history of section 2(b) to determine whether the court's decision was consistent with congressional intent. The Note also discusses trial court procedural irregularities which could have provided the grounds for reversal based on violations of the defendant's fifth and sixth amendment rights.

INTRODUCTION

Accomplice liability is the general principle of criminal law which provides for the conviction of a person who procures or assists another to commit a crime.¹ Under the early common law, it was impossible to convict an accomplice without first convicting the principal.² Subsequent developments in criminal law, however, have made it unnecessary to obtain the principal's conviction as a prerequisite to convicting the accomplice.³ Today, a defendant may be punished as a principal even for causing an innocent agent to commit a criminal act.⁴

Section 2(b) of title 18 of the United States Code prohibits one from willfully causing another to commit an act which if directly performed by the defendant or another would violate a federal

1. See W. LAFAVE & A. SCOTT, CRIMINAL LAW 495-98, 502 (1972).

2. See Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 695 (1930).

3. W. LAFAVE & A. SCOTT, *supra* note 1, at 499.

4. See notes 76-111 *infra* and accompanying text.

criminal statute.⁵ Recently, the United States Court of Appeals for the Second Circuit enlarged the scope of 18 U.S.C. § 2(b) in *United States v. Ruffin*.⁶ In *Ruffin*, a defendant who lacked the capacity to violate a substantive statute was held criminally liable as a principal for willfully causing another to commit criminal acts for which the other person, though acquitted, possessed the requisite capacity.⁷

This Note will analyze the reasoning of the majority and dissenting opinions in *Ruffin* to determine whether the court exceeded the limits set by Congress in 18 U.S.C. § 2.⁸ Particular attention will be given to the language and the legislative history of the statute to determine congressional intent regarding the criminal liability of one who does not directly commit the actual criminal offense. In addition to these substantive issues raised by *Ruffin*, this Note will discuss procedural irregularities at the trial which could arguably have justified a remand on appeal.⁹ Finally, this Note will examine the potential ramifications of the *Ruffin* decision upon federal criminal law.¹⁰

I. THE DEVELOPMENT OF ACCOMPLICE LIABILITY FROM ITS COMMON LAW ORIGINS

The participants in the commission of a crime are distinctly classified according to whether they actually perpetrate the offense or whether they aid the perpetrator before, during, or after its commission.¹¹ The common law generally classified these parties as either principals or accessories.¹² The sole exception was that all parties to misdemeanors were held as principals, and consequently, the guilt or innocence of each defendant was independent of that of the other participants.¹³ The parties to a felony, however, were classified more precisely because of the seriousness of the offenses and punishments involved.¹⁴ The actual perpetrator

5. 18 U.S.C. § 2(b) (1976); see note 28 *infra*.

6. 613 F.2d 408 (2d Cir. 1979).

7. See notes 95-111 *infra* and accompanying text.

8. See notes 95-140 *infra* and accompanying text.

9. See notes 141-77 *infra* and accompanying text.

10. See part IV *infra*.

11. W. LAFAVE & A. SCOTT, *supra* note 1, at 495-98.

12. See W. LAFAVE & A. SCOTT, *supra* note 1, at 495-98; 1 C. TORCIA, WHARTON'S CRIMINAL LAW 157-75 (14th ed. 1978).

13. W. LAFAVE & A. SCOTT, *supra* note 1, at 495-98; 1 C. TORCIA, *supra* note 12, at 157-75. See, e.g., *R. v. Burton*, 32 L.T.R. (n.s.) 539, 541 (1875); *State v. Hunter* 79 S.C. 73, 60 S.E. 240 (1908).

14. W. LAFAVE & A. SCOTT, *supra* note 1, at 499. Under the common law, a principal

of the offense was classified as a principal in the first degree,¹⁵ while an aider or abettor was classified as a principal in the second degree or accessory before the fact, the former requiring presence at the commission of the crime.¹⁶

Since all principals and accessories could be convicted and punished for the commission of the crime, procedural distinctions arose to protect accessories not present at the commission of the crime from receiving the same punishment given to those actually present.¹⁷ The most significant of these procedural distinctions was the requirement that the principal offender be convicted to obtain the conviction of an accessory to a crime.¹⁸ If the principal had been acquitted, fled, died, or for any other reason escaped conviction, prosecution of the accessory was barred. During the eighteenth and early nineteenth centuries, this procedural requirement became less rigid as punishment for felonies became less harsh.¹⁹

In 1848 it became possible in England for an accessory before the fact to be "indicted, tried, convicted, and punished in all respects as if he were a principal felon."²⁰ Thus, an accessory could be convicted despite the principal's acquittal.²¹ The conviction of

in the first degree either committed the felony personally or did so through an innocent or irresponsible agent; a principal in the second degree, present at the commission of the felony, aided and abetted in its commission; an accessory before the fact aided and abetted the felon but was not present at the commission of the felony; and an accessory after the fact, not present at the commission of the felony, aided the felon in avoiding punishment. These distinctions have been largely abrogated by statute, so that a principal and accessory are interchangeably referred to as "principal," "accomplice," or "party." See generally *id.* at 495-98; 1 C. TORCIA, *supra* note 12, at 157-75.

Although the common law distinctions between principals and accessories have been largely eliminated by modern statutes, it has been suggested that the term "principal" should be discarded. The American Law Institute, in drafting the Model Penal Code, noted that it "seems unnecessary . . . in framing an entire system to declare that the offender is a 'principal,' language that has meaning only because of the special background of the common law." MODEL PENAL CODE § 2.04, Comment at 14 (Tent. Draft No. 1, 1953).

15. W. LAFAYE & A. SCOTT, *supra* note 1, at 499.

16. See note 14 *supra*.

17. W. LAFAYE & A. SCOTT, *supra* note 1, at 499.

18. 1 M. HALE, PLEAS OF THE CROWN 623-24 (1847), cited in *Standeford v. United States*, 447 U.S. 10, 15 (1980).

19. See, e.g., An Act for Punishing of Accessories to Felonies and the Receivers of Stolen Goods and to prevent the wilful burning and destroying of ships, 1 Anne. c.9 (1702); An Act for Improving the Administration of Criminal Justice in England, 7 Geo. 4, c.64, § 9 (1826). See also 2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW 235 (1883); Sayre, *supra* note 2, at 695 nn.24-26 (1930).

20. An Act for the Removal of Defects in the Administration of Criminal Justice, 11 & 12 Vict., c.46, § 1 (1848).

21. *R. v. Hughes*, 1 L.T.R. (n.s.) 450, 452 (1860).

an accessory, however, still required proof that the crime had been committed, even if the perpetrator's identity was unknown.²² In proving the commission of a crime, the State needed to prove only that the perpetrator, known or unknown, committed the actus reus of the crime; the perpetrator's mens rea was immaterial.²³ This flexibility allowed the prosecution to proceed against an accessory where the mens rea of the principal could not be proven because of his or her unavailability,²⁴ but where the actus reus could be proven beyond a reasonable doubt. A rule which barred the conviction of the accessory in these situations would have contravened the developing policy of determining an accessory's liability independently of the principal's liability, "in all respects as if he were a principal felon."²⁵

Beginning in 1850, most state legislatures in the United States enacted provisions similar to those in England which allowed the conviction of an accessory despite the principal's acquittal.²⁶ Today only four states have clearly retained the early common law requirement that the principal's conviction is a prerequisite to the conviction of an accessory.²⁷ Similarly, this early common law requirement has been abolished with respect to federal crimes. Title 18, section 2 of the United States Code provides for the conviction of an accomplice to a crime,²⁸ even though the actual perpetrator has not been convicted.²⁹ Recently, the United States Court of Appeals for the Second Circuit extended the scope of

22. *R. v. Gregory*, L.R., 1 Cr. Cas. Res. 77 (1869).

23. See Note, *Proof of Principal Offences and Liability of Secondary Party*, 90 L.Q. REV. 314, 315 (1974).

24. *Id.*

25. 11 & 12 Vict., c.46, § 1 (1848).

26. See, e.g., Cal. Stat. Ch. 99, §§ 11-12 (1850), which has been interpreted as abolishing the common law distinctions between principals and accessories. *People v. Bears*, 10 Cal. 68, 70 (1858).

27. The states which require conviction of a principal in order to convict an accessory are Maryland (MD. CRIM. LAW CODE ANN. art. 27 (1957)), North Carolina (N.C. GEN. STAT. § 14-5 (1969)), Rhode Island (R.I. GEN., LAWS § 11-1-3 (1969)), and Tennessee (TENN. CODE ANN. §§ 39-107 to 110 (1975)).

28. 18 U.S.C. § 2 provides in full:

- (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 (1976).

29. See notes 56-60 & 76-94 *infra* and accompanying text.

accomplice liability. In *United States v. Ruffin*,³⁰ an accomplice without the capacity to violate the substantive statute was held criminally liable as a principal for willfully causing another to commit criminal acts for which the other person, though acquitted, had the requisite capacity.³¹

II. THE FACTS IN RUFFIN

Olga Defreitas, the executive director of an agency, which received federal funds under the Economic Opportunity Act of 1964,³² was a close personal friend of William Ruffin. In 1969 Ruffin purchased a condemned, uninhabitable building in Brooklyn, New York.³³ Knowing that Defreitas' agency needed additional space for its program, he persuaded her to obtain approval from the agency's board of directors to lease the building from him.³⁴ The agency entered into an agreement to lease the building "as is" from Ruffin, and Ruffin agreed to pay one-half of the renovation costs up to \$35,000.³⁵ Subsequently, the agency procured a private contractor to undertake the renovation. The contractor, however, breached the renovation contract.³⁶ Once again unusable, the building was slated for demolition by the New York City Department of Buildings.³⁷ Although Ruffin applied for and received extensions of the demolition order, he did not attempt to renovate the building.³⁸ Ruffin also induced Defreitas to obtain approval from the agency's board of directors to continue leasing the building for four more years.³⁹ During this time, Ruffin re-

30. 613 F.2d 408 (2d Cir. 1979).

31. *Id.* at 417.

32. Ms. Defreitas directed the Young Mothers Training Program (YMP), a delegate agency which received federal funding through the Bedford-Stuyvesant Youth Youth-in-Action Community Corporation (BSYIA) under the Economic Opportunity Act of 1964, 42 U.S.C. § 2701 (1976). 613 F.2d at 410.

33. 613 F.2d at 410.

34. *Id.*

35. Brief for Appellee at 9. *United States v. Ruffin*, Docket No. 78-1361 (2d Cir. Jan. 15, 1979).

36. The contractor, Lima Construction Co., was subsequently sued by the BSYIA, which obtained a judgment against Lima for breach of contract. Brief for Appellee at 9.

37. Superseding Indictment, Synopsis of Evidence at 1, *United States v. Ruffin*, No. 77-Cr-182(S) (E.D.N.Y. Apr. 7, 1978).

38. *Id.*

39. After an internal investigation, the BSYIA discontinued its payments to Ruffin. Shortly thereafter, however, YMP became a fiscally independent delegate agency, whose board of directors were induced by Defreitas to lease the condemned building. Brief for Appellee at 9-10 (citing Trial Transcript at 152 and Defendant's Exhibits KK-NN); 613 F.2d at 410.

ceived a total of \$115,000 in rental payments from which he made concurrent payments of approximately \$30,000 to Defreitas.⁴⁰

Shortly before the fourth lease was to expire, officials of the New York City Human Resources Administration (responsible for disbursing funds through the Economic Opportunity Act) inadvertently discovered that Defreitas' agency had been paying rent to Ruffin for his unusable building.⁴¹ Following investigation, the United States Attorney for the Eastern District of New York charged Defreitas with fraudulently and willfully misapplying federal funds in violation of 42 U.S.C. § 2703.⁴² The District Court for the Eastern District of New York, however, acquitted Defreitas upon a finding of not guilty by the jury.⁴³

Ruffin was charged and convicted pursuant to 18 U.S.C. § 2⁴⁴ for willfully causing the commission of a crime by an innocent agent.⁴⁵ Since Ruffin was not an employee, officer, or connected in any capacity with Defreitas' agency, he could not be charged with a substantive violation of 42 U.S.C. § 2703. Despite his incapacity to commit the substantive offense involved, however, Ruffin was convicted as an accomplice to that offense under 18 U.S.C. § 2.⁴⁶

III. THE DEVELOPMENT AND SCOPE OF ACCOMPLICE LIABILITY UNDER 18 U.S.C. § 2

Prior to 1909, no federal statute specifically permitted the prosecution of one who aided and abetted another in the commission of a crime.⁴⁷ Rather, various criminal statutes themselves defined accessory liability with regard to the crimes they proscribed.⁴⁸

40. Ruffin deposited the money in his and Defreitas' personal accounts. 613 F.2d at 410.

41. Brief for Appellee at 15.

42. *Id.* 42 U.S.C. § 2703 (1970) (repealed 1975) provided in pertinent part: Whoever, being an officer, director, agent, or employee of, or connected with, any agency receiving financial assistance under this chapter embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to this chapter, shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

43. 613 F.2d at 409, 412.

44. 18 U.S.C. § 2 (1976). *See* note 28 *supra*.

45. 613 F.2d at 412. Defreitas and Ruffin were also charged with and acquitted of conspiracy to obtain funds by fraud, in violation of 18 U.S.C. § 371 (1976). *Id.* at 409.

46. 613 F.2d at 412.

47. 613 F.2d at 421.

48. *See, e.g., Coffin v. United States*, 162 U.S. 664, 669-70 (1896) (where a federal banking statute, Rev. Stat. § 5207 (1874), allowed the conviction of an accessory for aiding

The original version of 18 U.S.C. § 2, the Act of March 4, 1909,⁴⁹ grouped these accessory liability provisions into a single federal statutory provision. Under its terms, any individual who aided, abetted, or procured the commission of any federal criminal offense could be prosecuted as a principal.⁵⁰ The legislative history of the Act indicates that Congress intended to abrogate the common law distinctions between principals and accessories to felonies, rendering all aiders and abettors subject to punishment as principals.⁵¹ This legislation, therefore, provided the first general federal codification of the common law provision which allowed the conviction of an accomplice notwithstanding the absence of the principal's conviction.⁵²

Congress revised and clarified the federal criminal code in 1948.⁵³ The terms of the Act of 1909, however, remained essentially the same,⁵⁴ indicating that Congress saw no need to revise the aiding and abetting provision. Such congressional acquiescence may be construed as affirming judicial interpretations which did not require the conviction of the actual perpetrator of the crime to convict the aider and abettor.⁵⁵

and abetting a guilty principal, even though he lacked the requisite capacity to violate the statute directly).

49. Ch. 321, § 332, 35 Stat. 1152 (current version at 18 U.S.C. § 2 (1976)). See note 28 *supra*.

50. The 1909 Act provided in pertinent part: "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." The Act of March 4, 1909, Ch. 321, § 332, 35 Stat. 1152.

51. H.R. REP. NO. 2, 60th Cong., 1st Sess., 13 (1908); S. REP. NO. 10, 60th Cong., 1st Sess., pt. 1, at 13 (1908); COMM'N TO REVISE AND CODIFY THE LAWS OF THE UNITED STATES, FINAL REPORT 118-19 (1906). The Chairman of the Joint Committee on the Revision of the Laws, Representative Moon, stated, "[We] have abolished the existing arbitrary distinctions between felonies and misdemeanors." 42 CONG. REC. 585 (1908). *Accord*, *Hammer v. United States*, 271 U.S. 620, 628 (1926) (the statute "abolish[ed] the distinction between principals and accessories and [made] them all principals").

52. *Cf.*, *Beauchamp v. United States*, 154 F.2d 413, 416 (6th Cir. 1946) (it is "not necessary that the principal be first convicted before bringing to trial one charged with aiding and abetting"); *Kelly v. United States*, 258 F. 392, 402 (6th Cir. 1919) ("where persons were formerly chargeable as aiders and abettors, they may be indicted and prosecuted as principals, whether the principal offender has been indicted and acquitted . . . , or has not been indicted at all").

53. Act of June 25, 1948, ch. 645, 62 Stat. 684 (codified at 18 U.S.C. §§ 1-5037 (1976)).

54. Compare the relevant text of the Act of 1909, *supra* note 50, with § 2(a) as revised: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." Act of June 25, 1948, ch. 645 § 2(a), 62 Stat. 684 (amended 1951) (current version at 18 U.S.C. § 2) (1976); see note 28 *supra*.

55. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Despite this apparent congressional intent, federal courts continued to disagree as to the criminality of an aider and abettor whose principal had not been convicted.⁵⁶ Recently, the United States Supreme Court resolved this conflict by sustaining the conviction of an aider and abettor under 18 U.S.C. § 2(a), notwithstanding the acquittal of the only possible principal offender. In *Standefer v. United States*,⁵⁷ the defendant was convicted of aiding and abetting the bribery of an Internal Revenue Service agent.⁵⁸ The Court reasoned that all participants in federal offenses are independently "punishable for their criminal conduct," since 18 U.S.C. § 2 defines them equally as "principals".⁵⁹ This reasoning allowed the Court to conclude that the fate of other participants in the substantive crime is irrelevant under the statute.⁶⁰ Thus, the Supreme Court clearly established that the acquittal of the actual perpetrator of a crime does not bar the conviction of an aider and abettor under section 2(a).⁶¹

The addition of section 2(b) to title 18 extended the scope of accomplice liability by expanding the "procurement" element of section 2(a). The new section prohibited one from "caus[ing] an act to be done, which if directly performed by [the causer] would be an offense against the United States."⁶² Congress intended this section to punish one who caused an innocent intermediary or agent to commit a crime.⁶³ Although it seems paradoxical to find that an innocent agent has committed a crime,⁶⁴ the justification

56. See, e.g., *United States v. Harper*, 579 F.2d 1235, 1239 (10th Cir. 1978) (proving beyond a reasonable doubt that a specific person is a principal is not necessary for conviction of the aider and abettor; it is necessary only to prove that the offense was committed by some principal); *United States v. Prince*, 430 F.2d 1324, 1325 (4th Cir. 1970) (per curiam) (conviction of aider and abettor barred by acquittal of only possible principal, despite proof of actus reus), citing *Meredith v. United States*, 238 F.2d 535, 542 (4th Cir. 1956) ("conviction of the principal actor is not a prerequisite to conviction of the aider and abettor").

57. 447 U.S. 10 (1980).

58. *Id.* at 13.

59. *Id.* at 20.

60. *Id.*

61. Act of June 25, 1948, ch. 645 § 2(b) 62 Stat. 684, as amended by Act of Oct. 31, 1951, ch. 655, § 17(b), 65 Stat. 717 (codified at 18 U.S.C. 2(b) (1976)).

62. *Id.*

63. A House report explained that this section

removes all doubt that one who puts in motion or assists in the illegal enterprise [or] causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

H.R. REP. NO. 304, 80th Cong., 1st Sess. A5. See also note 67 *infra*.

64. See, e.g., *United States v. Prince*, 430 F.2d 1324, 1325 (4th Cir. 1970) (per curiam)

for this proposition lies in the mens rea-actus reus dichotomy of criminal law.

Criminal law defines every crime in terms of the mens rea and actus reus of the offender. Thus, criminal acts have two elements: the intent and the act.⁶⁵ Although some crimes impose objective intent (without regard to the actor's actual state of mind), a proscribed act is criminal only when accompanied by criminal intent.⁶⁶ If a criminal act is performed by an innocent agent, that agent is not guilty of the crime because he or she lacks criminal intent. The one who willfully causes the innocent agent to perpetrate the offense, however, harbors the requisite criminal intent. Since the "causer" intends the commission of the crime, and manipulates the innocent agent to perform the act, he or she is held responsible for the crime.⁶⁷ If the rules were otherwise, the person actually responsible for the crime's commission would not be punished. Although Congress intended to ensure the punishment, as a principal, of one who "causes the commission of an indispensable element of the offense by an innocent agent,"⁶⁸ federal courts differed as to whether the "causer" needed to have the capacity to commit the substantive offense.⁶⁹ A literal reading of the language, "if directly performed by him would be an offense," appears to limit criminal liability only to those causers who could directly commit the defined crime.⁷⁰ Many courts, however, resisted this interpretation and held that although a defendant was personally incapable of committing the crime,⁷¹ section 2(b) allowed his or her conviction for procuring innocent agents to com-

(where the court stated that there could be no crime since the only possible principal was acquitted).

65. See generally W. LAFAVE & A. SCOTT, *supra* note 1, at 496.

66. *Id.*

67. *United States v. Lester*, 363 F.2d 68, 73 (6th Cir. 1966). While section 2(b) of title 18 is used ordinarily to convict an accomplice if the perpetrator is acquitted, it is apparently not limited to situations involving an innocent agent. If the agent is "guilty", however, it is unclear whether the "causer" may adopt the agent's mens rea. This may be important in the determination of whether the conduct "if directly performed by him" would have been criminal. See Model Penal Code § 2.04(2)(a), Comment (Tent Draft No. 1, 1953); see, e.g., *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947).

68. See note 63 *supra*.

69. See, e.g., *United States v. Chiarella*, 184 F.2d 903 (2d Cir. 1950).

70. 613 F.2d at 425 (Wyatt, J., dissenting).

71. See, e.g., *United States v. Selph*, 82 F. Supp. 56, 60 (S.D. Cal. 1949) (even though the defendant lacked the capacity to violate directly the Serviceman's Readjustment Act, an indictment under that Act charging the defendant with causing a bank mistakenly to certify certain claims was sufficient).

mit the crime.⁷² Other courts doubted whether Congress had intended section 2(b) to enlarge the scope of accomplice liability in this manner. According to Judge Learned Hand, "[I]n spite of the cogency of the verbal argument that can be made to the contrary, we cannot bring ourselves to be sure that such baffling language was intended to have so revolutionary a consequence."⁷³ Rather, it "appear[s] in general not to contemplate more than a restatement of already existing law."⁷⁴

In response to the concern that "[c]riminal statutes should be definite and certain,"⁷⁵ Congress amended 18 U.S.C. § 2(b) in 1951.⁷⁶ The 1951 amendment provided for the conviction of one who caused an act to be done which "if directly performed by him or another"⁷⁷ would violate a substantive criminal statute.⁷⁸ Although Congress intended to eliminate the existing confusion in the lower federal courts,⁷⁹ the 1951 amendment failed to resolve the problem.⁸⁰

A basic tenet of statutory construction is that every word, clause, or phrase of a statute is given full effect so that it is neither inoperative nor superfluous.⁸¹ It is therefore assumed that Con-

72. See, e.g., *Boushea v. United States*, 173 F.2d 131 (8th Cir. 1949) (defendants were convicted for causing an innocent agent to submit a false claim under the Agricultural Adjustment Act, although they lacked the capacity to violate the Act directly). Even before the enactment of the 1951 amendment, it had been held that although a "defendant was incompetent to commit the offense as principal by reason of not being of a particular age, sex, condition, or class, he may, nevertheless, be punished as a procurer (causer) or abettor." *United States v. Snyder*, 14 F. 554, 556 (C.C.D. Minn. 1882).

73. *United States v. Chiarella*, 184 F.2d 903, 910 (2d Cir. 1950).

74. *Id.* Judge Hand's opinion is supported by a House report which states that the provision was "added to permit the deletion from many sections throughout the revision of such phrases as 'causes or procures' "—terms which had generally been used synonymously. H.R. REP. NO. 304, *supra* note 63, at A5.

75. S. REP. NO. 1020, 82d Cong., 1st Sess. 8, *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS 2578, 2583.

76. Act of Oct. 31, 1951, ch. 655, § 17(b), 65 Stat. 717.

77. *Id.* (emphasis added).

78. The amendment provided in part: "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 as principal." *Id.*

79. See S. REP. NO. 1020, *supra* note 75, at 7, *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS at 2583.

80. E.g., compare *United States v. Giordano*, 489 F.2d 327 (2d Cir. 1973) (an accessory cannot be convicted unless the principal is found guilty) with *United States v. Inciso*, 292 F.2d 374 (7th Cir. 1961) (defendant could be convicted of causing an innocent principal to violate federal statute), and *United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle*, 250 F. Supp. 410 (N.D. Tex. 1966) (one who commits an offense may be regarded as an agent whose conviction is unnecessary to convict the accessory who causes the offense to be committed).

81. 2 A. SUTHERLAND, STATUTORY CONSTRUCTION 63 (1973). See also *United States*

gress does not include language in a statute which is irrelevant.⁸² Thus, the language added to the statute seems meaningless unless it is interpreted to relieve the causer of the capacity requirement.⁸³ Accordingly, it would have been unnecessary to amend the statute if it did not intend to broaden the scope of accomplice liability.⁸⁴ It appears, therefore, that Congress intended to ensure the conviction of causers regardless of their capacity to commit the substantive offense.⁸⁵

Many federal courts, following the lead of the Sixth Circuit Court of Appeals in *United States v. Lester*,⁸⁶ have adopted this "plain meaning" interpretation of section 2(b).⁸⁷ Although the defendants in *Lester* were legally incapable of committing the substantive offense involved, the court upheld their convictions under a conspiracy statute for causing innocent intermediaries to commit the offense.⁸⁸ The court's reliance on the words "or another," added to section 2(b) of title 18 of the U.S.C. in 1951, allowed it to conclude that it was "beyond controversy" that the defendants could adopt the capacity of one within the reach of the substantive offense.⁸⁹

Although *Lester* involved a conspiracy prosecution, its holding has not been limited to that type of prosecution. In *United States v. Wiseman*,⁹⁰ the Second Circuit Court of Appeals held that the defendants, who lacked the capacity to commit a substantive of-

v. Moore, 423 U.S. 122, 145 (1975) ("The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose.").

82. See 2 A. SUTHERLAND, *supra* note 81, at 57.

83. See text accompanying notes 98-102 *infra*.

84. *Id.*

85. The Senate report which accompanied the amendment stated that the amended section 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, *supra* note 75, at 7 *reprinted in* [1951] U.S. CODE CONG. & AD. NEWS at 2583.

86. 363 F.2d 68 (6th Cir. 1966).

87. See note 80 *supra*.

88. 363 F.2d at 72. The defendants caused police officers to arrest and imprison the victim, knowing him to be innocent, in contravention of the federal criminal code. See 18 U.S.C. §§ 242, 371 (1976).

89. 363 F.2d at 73. The court held:

It has been beyond controversy, then, at least since the 1951 amendment to 18 U.S.C. § 2(b), that the accused may be convicted as causer, even though not legally capable of personally committing the act forbidden by a Federal statute, and even though the agent willfully caused to do the criminal act is himself guiltless of any crime.

Id.

90. 445 F.2d 792 (2d Cir. 1971).

fense, were nonetheless punishable as principals for causing innocent intermediaries to commit the offense.⁹¹ The appellants in *Wiseman* had been convicted pursuant to 18 U.S.C. § 2(b) for willfully causing a court clerk to enter default judgments against persons who had never received notice of the pending actions.⁹² The appellants argued that they could not be convicted under 18 U.S.C. § 2(b) because they lacked the capacity to violate 18 U.S.C. § 242.⁹³ The *Wiseman* court, however, followed *Lester* and held that the appellants had adopted the capacity of "another" (in this case, the clerk) who could violate section 242.⁹⁴ It then determined the appellants' culpability by what would have been the culpability of the clerk if he had actually had the same intent and knowledge as the appellants. Thus, the court in *Wiseman* held that persons causing an innocent intermediary to commit a substantive offense were punishable as principals, despite their incapacity to commit the offense directly.

IV. THE EXTENSION OF ACCOMPLICE LIABILITY IN *RUFFIN*

The courts in *Wiseman* and *Lester* utilized the "plain meaning" of 18 U.S.C. § 2 to justify an extension of section 2(b) to a defendant who lacked the capacity to commit the relevant substantive offense. The majority and dissenting opinions in *Ruffin*, however, relied heavily on the legislative history of the Act to ascertain the congressional intent expressed in the statute. Consequently, the *Ruffin* opinions provide a more comprehensive foundation for the expression of section 2(b) than do those of *Wiseman* and *Lester*.

A. *The Majority Opinion*

The majority in *Ruffin* extended criminal liability to a behind-the-scenes manipulator who caused an innocent agent to commit the actus reus of a crime.⁹⁵ To reach its conclusion, the majority

91. *Id.* at 794-95.

92. *Id.* at 794. This action violated 18 U.S.C. § 242 (1976).

93. Section 242 of title 18 extends only to those acting "under color of any law" 18 U.S.C. § 242 (1976).

94. 445 F.2d at 795. The court held:

The phrase 'or another' includes the Clerk of the Civil Court. Thus if defendants 'willfully caused' the Clerk to enter such judgments, defendants would be culpable to the same extent as the Clerk would be assuming the Clerk had the same knowledge as was possessed by defendants as to the falsity of the papers.

Id.

95. 613 F.2d at 413.

assumed that a criminal act could be caused (by an accomplice) despite acquittal of the principal for the substantive offense. Thus, even though Defreitas was not convicted under 42 U.S.C. § 2703, the evidence could still show that Ruffin had committed a crime. The record indicated that the jury acquitted Defreitas because it found that she lacked the necessary criminal intent, not because of the absence of a criminal act.⁹⁶ Since the jury also decided that Ruffin had the requisite criminal intent,⁹⁷ the majority sustained his conviction.⁹⁸

Not only did the majority combine the principal's actus reus with the accomplice's criminal intent in extending criminal liability to the causer, but the majority also allowed Ruffin to adopt his innocent agent's legal capacity to violate 42 U.S.C. § 2703. Ruffin was not within the class contemplated by 42 U.S.C. § 2703, and therefore he was incapable of violating that statute by himself.⁹⁹ Nevertheless, the majority held that Ruffin could adopt Defreitas' capacity to violate section 2703 despite her acquittal.¹⁰⁰ This transference of the innocent agent's capacity led the majority to conclude that a causer, who lacks the capacity to commit a proscribed crime directly, can commit it indirectly through the acts of another.¹⁰¹

The majority derived support for its extension of criminal liability to Ruffin from the legislative history of 18 U.S.C. § 2. Prior to the 1951 amendment, it would have been unclear whether Ruffin could have been convicted, since the act "if directly performed by him" would not have been "an offense against the United States."¹⁰² The majority reasoned, however, that the addition of the words "or another" to the phrase "if directly performed by him" permitted Ruffin's conviction,¹⁰³ since the act, if performed by Defreitas ("another"), would have been criminal if she had had Ruffin's criminal intent.¹⁰⁴ The majority also noted that if Ruffin were required to possess the capacity to commit the substantive

96. *Id.*

97. *Id.* at 412. The jury found that Ruffin had willfully caused the commission of the crime through an innocent intermediary.

98. The majority stated that "the record in this case would permit an inference that Ruffin caused Defreitas . . . to engage in the alleged criminal conduct." *Id.* at 413.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 414-15.

103. *Id.*

104. The majority stated: "As amended, . . . the phrase 'which if directly performed . . . by another . . . ' (emphasis added) covers the present case since the criminal act, if

offense directly, the addition of "or another" would have been "meaningless surplusage."¹⁰⁵ Furthermore, the majority concluded that "absent this sensible interpretation of § 2(b) . . . we do not find any logical reason, nor has one been offered by appellant, for the addition of the words 'or another' to that section in 1951."¹⁰⁶

The majority drew additional support for its conclusion from the interpretation given to section 2(b) in *Lester* and in *Wiseman*.¹⁰⁷ In these cases, as in *Ruffin*, the courts upheld the causers' convictions despite the causers' incapacity to commit the substantive offense and despite the acquittal of the principal who possessed the requisite capacity.¹⁰⁸ In all three cases, the evidence showed that the accomplice had caused an innocent agent to commit an unlawful act.¹⁰⁹ In *Lester* and *Wiseman*, the courts had held that the 1951 amendment to section 2(b) imputed the capacity of the innocent agent to the causer.¹¹⁰ In analyzing a similar fact pattern in *Ruffin*, the majority noted, "[t]his reasoning applies with equal force to the present case."¹¹¹ *Ruffin*, like the defendants in *Lester* and *Wiseman*, caused the commission of a criminal act; the majority opinion sustaining his conviction is therefore consistent with those decisions.

B. *The Dissenting Opinion*

In contrast to the majority, the dissenting judge asserted that the acquittal of the only person capable of committing the charged substantive offense implied that no crime had in fact occurred; where there was no crime, there could be no accomplice.¹¹² Noting that an indictment under 18 U.S.C. § 2 must be joined with an indictment for a substantive offense,¹¹³ the dissenter claimed that there could be no substantive offense without the existence of a guilty principal.¹¹⁴ Where the perpetrator of the crime is an inno-

committed by 'another' (i.e., Defreitas), would be such an offense, even though the other lacked the intent to commit the crime." *Id.*

105. *Id.* at 415-16.

106. *Id.* at 415.

107. *Id.*

108. See notes 86-94 *supra* and accompanying text.

109. See notes 32-46 & 86-94 *supra* and accompanying text.

110. See notes 86-94 *supra* and accompanying text.

111. 613 F.2d at 415.

112. *Id.* at 426. *Cf.* *Shuttlesworth v. Birmingham*, 373 U.S. 262, 265 (1963) ("there can be no conviction for aiding and abetting someone to do an innocent act").

113. *Id.* *Cf.* *United States v. Campbell*, 426 F.2d 547, 553 (2d Cir. 1970).

114. 613 F.2d at 425.

cent agent, the causer is the only possible guilty principal.¹¹⁵ If, however, the causer lacks the capacity to commit the substantive offense, he or she cannot be convicted as a principal and thus, there can be no crime.¹¹⁶

Despite the dissenting judge's concession that the evidence was "more than sufficient" to justify Ruffin's punishment,¹¹⁷ he reasoned that the 1951 amendment to section 2(b) did not authorize the transfer of the capacity to commit the substantive offense from the innocent intermediary to the causer.¹¹⁸ He further contended that the majority's literal interpretation of section 2(b) "stick[s] too closely to the letter" and fails to reach the 1951 amendment "in light of the mischief to be corrected" by that amendment.¹¹⁹ That "mischief," according to the dissent, was the disagreement then prevalent as to whether an aider and abettor could be prosecuted under section 2(a), absent that person's capacity to commit the relevant substantive offense.¹²⁰ The dissenter asserted that Congress intended the amendment to ensure that no one would infer, on the basis of section 2(b), that section 2(a) required the aider and abettor to have the requisite capacity.¹²¹

The Senate report accompanying the 1951 amendment appears to support the dissenting interpretation of congressional intent. In referring to section 2(b), it states:

Section 2(b) of title 18 is limited by the phrase, "which if directly performed by him would be an offense against the United States," to persons capable of committing the specific offense. Section 2(a) of such title, while not containing that language, is open to the inference that it also is limited in application to persons who could commit the substantive offense.¹²²

Moreover, the report acknowledges that the purpose of the

115. *Id.* Cf. *United States v. Bryan*, 483 F.2d 88, 95 (3d Cir. 1973).

116. 613 F.2d at 417. The dissenting opinion stressed the following point several times: "The causer cannot be a principal because of lack of capacity. The intermediary cannot be a principal because, though possessing capacity, he or she is innocent. Without a principal there can be no violation of the substantive statute." *Id.* at 426.

117. *Id.* at 417.

118. He also indicated that "there is other disagreement to be noted, but it is less important." *Id.*

119. *Id.* at 425-26 (quoting *Warner v. Goltra*, 293 U.S. 155, 158-59 (1934)).

120. *Id.* at 426.

121. The dissenter recognized that "[t]here were some changes in 1951 to Section 2(b) as well as to Section 2(a) . . . however, the changes made to 2(b) . . . were solely to avoid in the interpretation of Section 2(a) any inference from the wording of 2(b)." *Id.* at 425.

122. S. REP. NO. 1020, *supra* note 75, at 7, reprinted in [1951] U.S. CODE CONG. & AD. NEWS at 2583.

amendment is "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."¹²³ The dissenting judge therefore concluded that Congress did not intend to remove the capacity limitation on section 2(b); rather, it intended to avoid any inference that section 2(a) was limited in that way.¹²⁴ To support his conclusion, the dissenter emphasized that an accomplice convicted under section 2(a) does not need the capacity to commit the substantive offense because that section also requires the conviction of the actual perpetrator (the guilty principal).¹²⁵ On the other hand, because the actual perpetrator under section 2(b) may be innocent, the dissenter reasoned that Congress must have intended to distinguish this section by requiring a causer to have the capacity to commit the substantive offense as if he or she were a principal.¹²⁶

In addition to the legislative history of 18 U.S.C. § 2, the dissenter also drew support for his conclusions from the Third Circuit opinion in *United States v. Standefer*,¹²⁷ which stated that "18 U.S.C. § 2 has not altered the rule that in order to convict an aider and abettor, the government must first demonstrate that a crime has been committed."¹²⁸ The dissenting judge interpreted this statement in *Standefer* as allowing the conviction of an aider and abettor, who lacked the capacity to commit the substantive offense, under section 2(a) only if the commission of the offense by a principal who possessed the requisite capacity had been proven.¹²⁹ Without this proof, there could be no crime and no accomplice.¹³⁰ Accordingly, the dissenter maintained that the acquittal of Defreitas indicated that no crime had been committed.¹³¹

Notwithstanding the apparent validity of the dissenter's rea-

123. *Id.*

124. 613 F.2d at 425. The dissenter further stated: "This is not so 'incongruous' as the majority thinks. On the contrary, it is the reasonable and logical consequence of settled rules of criminal law, deriving from the classification at common law of parties to crimes and the reasons for that classification." *Id.* at 426.

125. *Id.* See notes 112-16 *supra* and accompanying text.

126. 613 F.2d at 426.

127. 610 F.2d 1076 (3d Cir. 1979), *aff'd*, 447 U.S. 10 (1980); see notes 57-60 *supra* and accompanying text. The dissenting judge relied, as well, on other judicial precedent. See, e.g., *United States v. Giordano*, 489 F.2d 327 (2d Cir. 1973) (an accessory cannot be convicted unless the principal is himself guilty); *Girogosian v. United States*, 349 F.2d 166 (1st Cir. 1965) (an aider and abettor cannot be guilty unless the principal is found guilty).

128. 610 F.2d at 1087.

129. 613 F.2d at 424-25.

130. *Id.*

131. *Id.* at 426-27. The record, however, showed that the jury found that the criminal

soning, it is flawed in two respects. First, the dissenting judge criticized the majority's literal interpretation of the statute and the accompanying Senate report as overlooking the "mischief" sought to be corrected by the 1951 amendment.¹³² That mischief, the dissenter maintained, was the possible inference from section 2(b) that section 2(a) required the aider and abettor to have the capacity to commit the substantive crime involved.¹³³ The dissent, however, offered no suggestion as to why Congress would follow the indirect route of adding "or another" to section 2(b) in order to avoid confusion regarding section 2(a).¹³⁴ It seems more plausible, as the majority contended, that Congress amended section 2(b) to affect that section directly, in addition to causing any indirect effect on section 2(a).¹³⁵ In other words, the "mischief" sought to be avoided by Congress was that "causers", such as Ruffin, would not be able to escape punishment because they lacked the legal capacity to commit the substantive offense.¹³⁶

Second, although the dissenter correctly quoted the Third Circuit Court of Appeals in *United States v. Standefer*¹³⁷ as stating that conviction of an aider and abettor requires proof "that a crime has been committed,"¹³⁸ it failed to note that the *Standefer*

act had occurred and that it acquitted Defreitas simply because she lacked the requisite criminal intent. See note 96 *supra* and accompanying text.

132. 613 F.2d at 425-26; see notes 119-20 *supra* and accompanying text.

133. 613 F.2d at 425-26; see notes 119-20 *supra* and accompanying text.

134. Indeed, he stated: "That Congress added the words 'or another' to Section 2(b) is, in light of the legislative history, baffling in the extreme, but I cannot accept that Congress meant thereby to make such a far-reaching and radical alteration as is found by the majority." 613 F.2d at 425.

135. The majority noted:

Judge Wyatt [dissenting] suggests that the words 'or another' were added to § 2(b) in order to make it clear that § 2(a) does not require that the aider and abettor have the capacity to commit the crime as principal. We find it difficult to believe that Congress would take such a circuitous route to achieve that goal. Rather, we read the legislative history to indicate that Congress meant to make it clear that neither 2(a) nor 2(b) included a capacity requirement as to the 'aider and abettor' or 'causer'.

Id. at 416 n.3.

136. While the dissenter asserted that Congress intended the amendment to ensure the punishment of aiders and abettors regardless of their incapacity to violate the substantive statute directly, see note 123 *supra* and accompanying text, the dissenting opinion also noted: "There has been much confusion in judicial opinions and elsewhere because of the indiscriminate application of the term 'aider and abettor' to one against whom either Section 2(a) or Section 2(b) is invoked." 613 F.2d at 417-18. In light of the legislative history of the 1951 amendment, the language of the report appears to be another example of such indiscriminate usage.

137. 610 F.2d 1076 (3d Cir. 1979), *aff'd*, 447 U.S. 10 (1980); see notes 57-60 & 127-30 *supra* and accompanying text.

138. 613 F.2d at 425.

court further explained that where a crime has been proven, Congress intended section 2(a) to abrogate the common law requirement that conviction of an aider and abettor depended upon conviction of the principal.¹³⁹ Thus, *Standefer* does not support the dissenter's premise that conviction of an accessory depends upon proof of a crime and conviction of the principal.¹⁴⁰

V. PROCEDURAL IRREGULARITIES

Although the dissenter's attempt to exclude Ruffin from the scope of 18 U.S.C. § 2(b) failed, he did indicate certain procedural irregularities in the trial which provide constitutional grounds for questioning Ruffin's conviction as a "causer." The indictment against Ruffin and Defreitas did not specify whether Ruffin was charged pursuant to section 2(a) or 2(b); rather, it referred merely to "Title 42, United States Code, Section 2703; and Title 18, United States Code Section 2."¹⁴¹ Moreover, the trial judge read both subsections of 18 U.S.C. § 2 as part of the initial jury charge.¹⁴²

The Government based its prosecution upon the joint conspiracy of the defendants, pursuant to 18 U.S.C. § 2(a); it intended to show that Defreitas was guilty and that Ruffin had aided and abetted her. Indeed, the indictment charged that both defendants "did knowingly and wilfully misapply and obtain by fraud" federal funds.¹⁴³ The United States Attorney requested the judge to charge the jury with specific reference to a determination that Ruffin aided and abetted Defreitas, further demonstrating that the prosecution based its case on section 2(a).¹⁴⁴ During the trial, the

139. 610 F.2d at 1086.

140. The Supreme Court affirmed the Third Circuit's decision in *Standefer*, holding that "(w)ith the enactment of that section, all participants in conduct violating a federal criminal statute are 'principals'. As such, they are punishable for their criminal conduct; the fate of other participants is irrelevant." *Standefer v. United States*, 447 U.S. 10 (1980), *aff'g*, 610 F.2d 1076 (3d Cir. 1979); see notes 57-60 *supra* and accompanying text.

141. Superseding Indictment at 5, *United States v. Ruffin*, No. 77-CR-182(S) (E.D.N.Y. April 7, 1978).

142. 613 F.2d at 411.

143. Superseding Indictment, *supra* note 141, at 5.

144. Specifically, the Government requested the judge to charge, in relevant part, as follows:

The law provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find the defendant William Ruffin guilty . . . if you find beyond a reasonable doubt that the defendant Olga Defreitas committed the offenses with which they were charged in those counts and that the defendant William Ruffin aided and abetted her.

Government never advanced the theory that Ruffin merely caused Defreitas, an innocent agent, to commit the proscribed acts; that is, there was no indication during the trial that Ruffin could be convicted under section 2(b). The Government, instead, maintained that a "corrupt agreement [existed] between the parties"¹⁴⁵ and, in its summation at trial, pointed out that "Mr. Ruffin was the outside man . . . [and] Miss Defreitas was the inside woman."¹⁴⁶

The trial judge instructed the jury: "[Y]ou may find the defendant William Ruffin guilty . . . if you find beyond a reasonable doubt that the defendant Olga Defreitas committed the offenses with which they were charged . . . and that the defendant William Ruffin aided and abetted her. Otherwise, you must acquit."¹⁴⁷ Neither the Government nor Ruffin's counsel objected to this charge.¹⁴⁸ The jury, apparently confused by the charge, deliberated briefly and sent the judge a note inquiring as to whether it was possible to find one defendant guilty and the other not guilty.¹⁴⁹ The Government then abandoned its initial position that Ruffin aided and abetted a guilty principal under section 2(a).¹⁵⁰ It argued that the jury could acquit Defreitas as an innocent intermediary and convict Ruffin as a "causer" under section 2(b). It further argued that the 1951 amendment to section 2(b) allowed Ruffin's conviction despite his lack of capacity to violate 42 U.S.C. § 2703.¹⁵¹ Ruffin's counsel objected to the Government's alteration of its theory of the prosecution.¹⁵² At first, the trial judge agreed with the objection and indicated that he would reply to the jury that it was necessary to convict Defreitas in order to convict Ruffin.¹⁵³ When the Prosecuting Attorney protested that such an instruction was incorrect, the trial judge admonished: "You gave it to me. I included your charge."¹⁵⁴ Inexplicably, the trial judge then deciding that his earlier charge had been too limited, reinstructed the jury that it could find only one of the defend-

613 F.2d at 418.

145. Defendant-Appellant's Petition for Rehearing at 4 (citing Trial Transcript at 22).

146. *Id.* at 3 (citing Trial Transcript at 1396).

147. 613 F.2d at 419 (quoting Trial Transcript at 1362-64).

148. *Id.*

149. *Id.*

150. *Id.* at 411.

151. *Id.*

152. *Id.* at 420.

153. *Id.*

154. *Id.*

ants guilty.¹⁵⁵

Ruffin's conviction should not stand if the jury misapplied the law because of these contradictory instructions.¹⁵⁶ Since the jury requested reinstruction regarding the conviction of one defendant despite the acquittal of the other,¹⁵⁷ it appears that the jury was confused. The fact that the jury did convict Ruffin despite Defreitas' acquittal, however, indicates that the jury (upon reinstruction) understood that it was not bound to convict him solely under section 2(a). As the trial and appellate courts agreed, the jury's inclination, if still confused, would have been to acquit Ruffin (presumably for aiding and abetting) upon acquitting Defreitas.¹⁵⁸ Thus, while a more detailed jury instruction initially could have avoided jury confusion,¹⁵⁹ the inconsistent jury instructions were doubtful grounds for reversal since they did not appear prejudicial to Ruffin.¹⁶⁰

The variance between the theory of prosecution and the theory of conviction might also have provided constitutional grounds for reversal. The fifth and sixth amendments to the Constitution guarantee a criminal defendant the right to be apprised of the pending charges and to have adequate opportunity to defend against them.¹⁶¹ The relevant portion of the fifth amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law. . . ."¹⁶² The fifth amendment safeguards a criminal defendant's right to be prosecuted only in strict accordance with those charges handed down by a Grand Jury¹⁶³ and is

155. *Id.*

156. According to the trial court, because the contradictory jury instructions were potentially more harmful to the prosecution than to the defendants, they would probably not constitute prejudicial error on appeal. *Id.* at 411-12; see note 160 *infra*.

157. See notes 147-49 *supra* and accompanying text.

158. 613 F.2d at 412, 416.

159. See, e.g., 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §§ 11.08, 12.04 (3d ed. 1977).

160. See *Pittman v. United States*, 368 F.2d 560 (9th cir. 1966), cert. denied, 386 U.S. 995 (1967) (imprecise jury instruction not reversible error since jury was not misled); *Michaud v. United States*, 350 F.2d 131 (10th Cir. 1965) (incorrect jury instruction favorable to defendant not grounds for reversal). See generally FED. R. CRIM. P. 30.

161. See notes 162-73 *infra* and accompanying text.

162. U.S. CONST. amend. V.

163. See, e.g., *Stirone v. United States*, 361 U.S. 212, 217 (1960) (criminal defendant held to have a "substantial right to be tried only on charges presented in an indictment returned by a grand jury").

applied beyond cases of capital or "infamous" crimes.¹⁶⁴ Consequently, Ruffin could not be tried except on those charges returned by a Grand Jury indictment against him. Although the indictment cited 18 U.S.C. § 2,¹⁶⁵ it specifically charged that Ruffin had aided and abetted Defreitas in the commission of the crime.¹⁶⁶ Ruffin's conviction, however, was based on the prosecution's revised theory that Ruffin caused Defreitas, an innocent intermediary, to commit the proscribed act.¹⁶⁷ Therefore, it appears that the court convicted Ruffin for a different offense than that for which he was indicted, in apparent contravention of his fifth amendment rights.

The sixth amendment affords criminal defendants additional rights, including the right "to be informed of the nature and cause of the accusation" and the right to be confronted during the trial with any adverse evidence.¹⁶⁸ The sixth amendment requires that an indictment must set forth the offense charged in terms sufficient to allow the defendant the opportunity to prepare an adequate defense.¹⁶⁹ Ruffin, however, could not prepare an adequate defense to the section 2(b) "causing" charge, since the revised theory of the prosecution did not arise until *after* the case had been submitted to the jury.¹⁷⁰ Consequently, as the dissenting judge pointed out on appeal, "Ruffin was never able to determine his strategy with knowledge of the government's present position."¹⁷¹ It is possible that Ruffin might have been able to secure vindicating testimony from Defreitas (who elected not to testify) if the Government had not indicted her since, as an innocent intermediary under section 2(b), her testimony could not have harmed her.¹⁷² Similarly, Ruffin might have been able to present evidence that Defreitas' innocence showed that the substantive offense was never committed. Ruffin's defense, however, responded only to the offenses charged by the indictment against him and

164. See, e.g., *Ex parte Wilson*, 114 U.S. 417, 426 (1885) (the fifth amendment prevented abuse of legislative as well as prosecutorial power without specific congressional declaration that a crime is "infamous").

165. See note 141 *supra* and accompanying text.

166. See notes 143-46 *supra* and accompanying text.

167. See notes 149-51 *supra* and accompanying text.

168. U.S. CONST. amend. VI; see, e.g., *United States v. Sorrentino*, 175 F.2d 721 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949).

169. *Davis v. United States*, 357 F.2d 438 (5th Cir.), *cert. denied*, 385 U.S. 927 (1966).

170. See notes 143-60 *supra* and accompanying text.

171. 613 F.2d at 428 (Wyatt, J., dissenting).

172. *Id.*

Defreitas.¹⁷³

In sum, although Ruffin probably was guilty of that crime for which he was ultimately convicted, it appears the dissenter was correct in urging that "there was a violation of [his] constitutional rights."¹⁷⁴ As the dissenting opinion emphasized, Ruffin's conviction was based on a theory which was not contained in the indictment, which was not specifically presented at trial, and of which Ruffin was neither given notice nor the opportunity to defend against, either before or during the trial.¹⁷⁵ The majority of the court, however, opposed reversal, apparently because it did not believe that the procedural irregularities were prejudicial or serious, especially in light of the sufficiency of the substantive evidence supporting Ruffin's conviction.¹⁷⁶ Without specifically addressing the constitutional questions raised by the dissenter, the majority sustained Ruffin's conviction since the "jury was armed with a correct statement of the applicable legal principals [sic]" and there was no "inconsistency" in the resulting conviction.¹⁷⁷

VI. CONCLUSION

The dissenting judge in *Ruffin* feared that the court's holding reflected a major change in the application of 18 U.S.C. § 2(b) to federal criminal defendants. Yet, in light of both judicial precedent and congressional intent, allowing a causer to adopt the capacity of an innocent intermediary seems no more radical than allowing an aider and abettor under section 2(a) to adopt the capacity of the acquitted principal. Indeed, public policy requires conviction of one who assists in the commission of a criminal act, even if the actual perpetrator is not convicted. It seems well within the same bounds of public policy to allow conviction of one who causes the commission of a criminal act by an innocent perpetrator, regardless of the causer's capacity to commit the offense directly. In both situations, the crime has been proven; whether one causes or assists in that crime, the same interest in deterrence applies.

Notably, the scope of accomplice liability under *Ruffin* remains limited to those situations where a criminal act has been proven. Extension of the majority's reasoning to situations where

173. *Id.* See Reply Brief for Defendant-Appellant.

174. 613 F.2d at 428.

175. *Id.*

176. *Id.* at 416-17.

177. *Id.* at 416.

the only possible perpetrator has been acquitted because of lack of evidence of a crime or legal incapacity would seem contrary to the public policy of protecting persons from conviction where proof of the crime has not been established beyond a reasonable doubt. In cases, however, where one who lacks criminal intent is dominated and manipulated by another who purposely perpetrates a crime through that intermediary, it would seem equally against the public interest to allow the causer's acquittal merely because he or she lacks the capacity to commit the crime directly. Congress has provided for a conviction under these circumstances by enacting 18 U.S.C. § 2(b); *United States v. Ruffin* provides a well-reasoned enunciation of this mandate.

ANDREW WHITE