

# No. 99-11211

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ELI TREVINO MUNGIA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe oral argument is necessary. In our view, the Court needs to resolve only one issue in order to decide this appeal: whether the certification issued by the Associate Attorney General in this case met each of the requirements imposed by the plain language of 18 U.S.C. 245(a)(1). This is a straightforward question. The relevant facts about the certification are undisputed, and the Court can resolve the issue by simply comparing those facts with the plain language of § 245(a)(1). Because the certification fully complied with the statutory language, the Court need not decide whether § 245(a)(1)'s certification requirements are jurisdictional in nature.



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BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 2255 to decide Appellant's motion to vacate his sentence. The court entered an amended judgment on September 24, 1999, denying relief under § 2255 (R5-1213).<sup>1/</sup> Appellant timely filed a notice of appeal on October 25, 1999 (R5-1214). This Court issued a certificate of appealability and has jurisdiction under 28 U.S.C. 2253 and 2255.

STATEMENT OF ISSUES

This Court issued a certificate of appealability limited to two issues:<sup>2/</sup>

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<sup>1/</sup> References to "R\_\_ - \_\_ - \_\_" are to the volume number and page number or page range of the record on appeal.

<sup>2/</sup> Mungia improperly tries to raise a third issue in his brief: whether the indictment was defective because it failed to  
(continued...)

1. Whether the government complied with the certification requirements of 18 U.S.C. 245(a)(1) prior to prosecuting Eli Mungia under that statute.

2. Whether the certification requirements of 18 U.S.C. 245(a)(1) are jurisdictional.

STATEMENT OF THE CASE

This Court previously affirmed Mungia's conviction on direct appeal (R4-999-1000). United States v. Mungia, 114 F.3d 1181 (5th Cir.) (table), cert. denied, 522 U.S. 876 (1997). Mungia later filed a motion under 28 U.S.C. 2255 to vacate his sentence. The present appeal is from the denial of Mungia's § 2255 motion.

In March 1995, a grand jury indicted Mungia and two other defendants for various federal offenses as a result of their participation in the racially motivated shootings of three African-American men in Lubbock, Texas (R1-2-12). The indictment charged Mungia and each of his co-defendants with three counts of violating 18 U.S.C. 245(b)(2)(B) by using force and threat of force to willfully injure, intimidate, and interfere with three black individuals because of their race and because they were enjoying facilities provided and administered by a subdivision of the State of Texas (R1-5, 7, 9). In addition, the indictment charged Mungia and each of his co-defendants with one count of conspiracy under 18 U.S.C. 371, with three counts of violating 18

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<sup>2/</sup>(...continued)  
allege that the government had satisfied the certification requirements of 18 U.S.C. 245(a)(1). This issue is not properly before the Court. See p. 11, infra.

U.S.C. 924(c) by using a short-barreled shotgun during and in relation to a federal crime of violence, and with one count of violating 26 U.S.C. 5841, 5861(d), and 5871 by knowingly receiving and possessing a sawed-off shotgun that was not registered as required by federal law (R1-2-12). The evidence at trial showed that, on the night of October 16, 1994, Mungia and his two co-defendants drove around Lubbock, and in three separate incidents, lured three black men over to the car and shot them at close range with a sawed-off shotgun. The shotgun blasts killed one of the victims and seriously injured the other two (R6-244-276; R7-299-338, 389-422, 451-455). A jury found Mungia and his co-defendants guilty on all counts (R4-898), and the court sentenced each defendant to a term of life imprisonment plus 50 years (R4-988-993).

Mungia appealed his conviction (R5-994). One of his contentions on direct appeal was that the district court lacked jurisdiction to try him under 18 U.S.C. 245 (R4-999). He argued that jurisdiction was lacking because (he asserted) the victims were not engaged in federally protected activities at the time of the shootings (R4-999). This Court affirmed Mungia's conviction. In its opinion, the Court held that "[t]he district court had jurisdiction to try the defendants under the federal criminal statute under 18 U.S.C. § 3231" (R4-999-1000).

Mungia subsequently filed a motion in the district court to reverse his conviction (R5-1002-1010). The court construed the motion as a request to vacate his sentence under 28 U.S.C. 2255

(R5-1016). Mungia alleged, inter alia, that the United States failed to comply with the certification requirements of 18 U.S.C. 245(a)(1), and thus the sentencing court had no subject-matter jurisdiction (R5-1086-1092). After an evidentiary hearing, the district court denied Mungia's § 2255 motion (R5-1180-1185). The court concluded that the United States complied with the certification requirements of § 245(a)(1). Specifically, the court found that the Associate Attorney General issued the necessary certification in writing prior to Mungia's indictment (R5-1182, 1209). The court rejected Mungia's argument that § 245(a)(1) requires the government to file the certification with the court (R5-1184, 1211).

#### STATEMENT OF FACTS

On February 2, 1995, the Associate Attorney General of the United States issued a written certification stating:

I, John R. Schmidt, hereby certify that in my judgment a prosecution by the United States of Eli Mungia for violating Title 18, United States Code, Section 245, is in the public interest and necessary to secure substantial justice. This certification is made pursuant to Title 18, United States Code, Section 245.

R5-1028, 1182. Mr. Schmidt made that certification more than a month before Mungia's indictment on March 7, 1995 (R1-2; R5-1182). Neither Mungia's attorneys nor the district court requested a copy of the certification prior to Mungia's conviction (R5-1183). The United States did not file the certification with the district court prior to Mungia's conviction (R5-1183). Nonetheless, on May 9, 1995 - six months prior to the start of trial - the United States filed a response

to Mungia's motion to dismiss the indictment, and in that document advised Mungia and the district court that "Associate Attorney General John R. Schmidt has certified in this matter that the prosecution of all three defendants for violation of Section 245 is in the public interest and necessary to secure substantial justice" (R1-120).

#### SUMMARY OF ARGUMENT

The district court properly denied Mungia's motion to vacate his sentence under 28 U.S.C. 2255.

1. The United States fully complied with the certification requirements of 18 U.S.C. 245(a)(1). More than a month prior to Mungia's indictment, the Associate Attorney General issued a written certification stating that "in [his] judgment," a federal prosecution of Mungia under 18 U.S.C. 245 was "in the public interest and necessary to secure substantial justice." That certification strictly complied with the language of § 245(a)(1): it was made before the prosecution of Mungia began, it was in writing, it was issued by the appropriate official, and it contained the assertions required by the statute.

Section 245(a)(1) does not require the government to file the certification with the district court. The statutory language does not mention a filing requirement, and the contrast between the wording of § 245(a)(1) and other statutes illustrates that when Congress intends to require the filing of a certification, it knows how to say so explicitly. If, prior to conviction, the defendant or the district judge demands proof of

compliance with the certification requirements, the government has the burden of establishing that a proper certification was made. But where, as here, neither the defendant nor the judge questions the certification prior to conviction, the government is under no obligation to file the document.

Mungia argues that the indictment was defective for failure to allege compliance with the § 245(a)(1) certification requirements. This Court did not grant a certificate of appealability on this issue and thus Mungia cannot raise it on appeal. In any event, Mungia's argument is meritless because the certification requirements are not elements of a § 245 offense.

2. Because no violation of § 245(a)(1) occurred, the Court need not decide whether the certification requirements are "jurisdictional." But if the Court addresses the issue, it should hold that failure to comply with the certification requirements does not deprive a court of jurisdiction to try a defendant for a § 245 violation. This Court's previous ruling on direct appeal that the sentencing court had jurisdiction pursuant to 18 U.S.C. 3231 is law-of-the-case binding in the present appeal. In any event, that ruling is correct. Section 3231 gives district courts jurisdiction over federal criminal offenses committed by adults. Nothing in 18 U.S.C. 245(a)(1) suggests that Congress intended to impose jurisdictional requirements beyond those found in § 3231.

But even if the explicit requirements of § 245(a)(1) were jurisdictional, any filing requirement that this Court might

impose would be non-jurisdictional because it does not appear on the face of the statute. At most, the failure to file a certification would be no more than a technical defect that does not implicate subject-matter jurisdiction.

ARGUMENT

I

THE UNITED STATES FULLY COMPLIED WITH THE  
CERTIFICATION REQUIREMENTS OF 18 U.S.C. 245(a)(1)

Section 245's certification provision states:

No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

18 U.S.C. 245(a)(1). The district court found (and Mungia does not dispute on appeal) that more than a month before Mungia's indictment, the Associate Attorney General issued a written certification stating that, in his judgment, the federal prosecution of Mungia was "in the public interest and necessary to secure substantial justice." That certification strictly complied with the language of § 245(a)(1): it occurred before the prosecution of Mungia began, it was in writing, it was issued by the appropriate official, and it contained the necessary statement about the "public interest" and "substantial justice." In light of the certification's compliance with the statutory

language, this appeal should be at an end. No violation of § 245(a)(1) occurred, and Mungia thus lacks any plausible claim to relief under 28 U.S.C. 2255.

A. Section 245(a)(1) Does Not Require The Government To File The Certification With The District Court

Mungia argues (Br. 14-18) that the United States failed to comply with § 245(a)(1) because it did not file the certification with the district court prior to arraignment. But the statutory language neither states nor implies that the government must file the certification. And Mungia concedes (Br. 16) that the legislative history does not mention a filing requirement. Mungia is thus asking this Court to read into the statute a requirement that Congress chose not to impose when it drafted the language of § 245.

Mungia contends, however, that the certification requirement is meaningless unless the government is obligated to file the document with the court (Br. 15-18). He asserts that without a filing requirement, the district judge and the defendant could never be certain that certification had occurred. That contention is meritless. If, prior to conviction, the defendant or the court demands proof of compliance with the certification requirements, the government has the burden of showing that the proper certification was made.

If Mungia or the judge had any doubts about the compliance with the certification requirement, they could have asked the



United States to produce a copy of the certification and the government would have provided the document promptly. Mungia had ample opportunity to obtain a copy of the certification before trial. Six months before his trial began, the United States filed a pleading with the district court stating that "Associate Attorney General John R. Schmidt has certified in this matter that the prosecution of all three defendants for violation of Section 245 is in the public interest and necessary to secure substantial justice" (R1-120). Yet Mungia never asked to see the written certification until after he had exhausted his direct appeal to this Court.

Mungia argues that this Court should read an implied filing requirement into § 245(a)(1) because a different statute – 18 U.S.C. 5032 – mandates the filing of a certification with the court. The language of § 5032 actually undermines Mungia's argument. That statute provides, in relevant part, that "[a] juvenile alleged to have committed an act of juvenile delinquency \* \* \* shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that [certain factors exist]." 18 U.S.C. 5032 (emphasis added).<sup>3/</sup> Section 245(a)(1), by contrast, requires certification

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<sup>3/</sup> A number of other statutes contain similar language requiring certification "to the \* \* \* court." See 18 U.S.C. 3731; 20 U.S.C. 1710; 42 U.S.C. 1997c(b).

but does not mandate certification "to the appropriate district court." The contrast between the wording of § 245(a)(1) and § 5032 illustrates that when Congress intends to require the filing of a certification with the court, it knows how to say so explicitly.

In an analogous context, this Court has appropriately refused to impose a filing requirement that did not appear on the face of the statute. See Belt v. United States, 73 F.2d 888, 888-889 (5th Cir. 1934), cert. denied, 294 U.S. 713 (1935). In Belt, defendants argued that an attorney lacked authority to appear before a grand jury because although he had obtained written authorization from the Attorney General to conduct grand jury proceedings as required by 5 U.S.C. 310, he had failed to file that authorization with the court prior to his grand jury appearance. 73 F.2d at 888. Section 310 did not expressly require filing of the Attorney General's authorization. See 5 U.S.C. 310 (1934), now codified at 28 U.S.C. 515(a). This Court rejected defendants' argument, concluding that the attorney "was acting under a valid appointment in writing" from the Attorney General which "was not rendered invalid by the failure to file or record it." Belt, 73 F.2d at 889; accord Shushan v. United States, 117 F.2d 110, 114 (5th Cir.) (authorization under 5 U.S.C. 310 "does not have to be filed in court"), cert. denied, 313 U.S. 574 (1941). More recent decisions have relied on Belt in refusing to impose a filing requirement for Attorney General

authorizations under 28 U.S.C. 515(a), the recodified version of 5 U.S.C. 310. In re Grand Jury Subpoena of Persico, 522 F.2d 41, 62 (2d Cir. 1975); United States v. Giacalone, 408 F. Supp. 251, 253 (E.D. Mich. 1975) ("It is the authorization and not the filing which authorizes the government attorney to act."). Consistent with Belt, this Court should refuse to read an implied filing requirement into § 245(a)(1).

B. Mungia's Challenge To The Sufficiency Of The Indictment Is Not Properly Before The Court And, At Any Rate, Is Meritless

Mungia argues (Br. 19-25) that the indictment was defective because it did not allege that the government had satisfied the § 245(a)(1) certification requirements. He asserts (Br. 20, 25) that those requirements are elements of a § 245 offense.

This challenge to the sufficiency of the indictment is not properly before the Court. Mungia concedes (Br. 2 n.1) that this issue was "not specifically raised with the district court or presented in the arguments to this Court" in his application for a certificate of appealability (COA). This Court limited the COA to two issues, neither of which pertains to the sufficiency of the indictment. In an appeal from the denial of a § 2255 motion, review is limited to those questions specified in the COA, and the appellant is not free to raise other issues. Lackey v.

Johnson, 116 F.3d 149, 151 (5th Cir. 1997); 28 U.S.C. 2253(c)(3).<sup>4/</sup>

At any rate, Mungia has not established that the indictment was defective in any way.<sup>5/</sup> The certification requirements of § 245(a)(1) are not elements of the § 245 offenses for which Mungia was convicted. All the criminal conduct that § 245 proscribes is defined in § 245(b), which states that "[w]hoever, whether or not acting under color of law, by force or threat of force willfully [commits certain prohibited acts] \* \* \* shall be [subject to criminal penalties]." 18 U.S.C. 245(b). Because § 245(b) says nothing about certification, it cannot be considered an element of the offense.<sup>6/</sup>

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<sup>4/</sup> This rule would apply even if the alleged deficiency in the indictment were a "jurisdictional" defect (Br. 19). See Fountain v. United States, 211 F.3d 429, 432-433 (7th Cir. 2000) (declining to address question whether sentencing court "lacked subject matter jurisdiction" because that issue was not included in the COA).

<sup>5/</sup> Even if the sufficiency of the indictment were properly before the Court, Mungia could obtain relief only in "exceptional circumstances" because he failed to raise the issue prior to his § 2255 appeal. See United States v. Dyer, 136 F.3d 417, 425 (5th Cir. 1998). No such "exceptional circumstances" exist here.

<sup>6/</sup> Contrary to Mungia's argument, the United States need not prove to the jury that his federal prosecution was "in the public interest and necessary to secure substantial justice." 18 U.S.C. 245(a)(1). The plain language of the statute commits this determination to the "judgment" of the certifying official, ibid., and it is well-established that analogous determinations by Department of Justice officials are unreviewable by judges or juries. See Ullmann v. United States, 350 U.S. 422, 423-424, 432-433 (1956) ("public interest"); United States v. Juvenile Male No. 1, 118 F.3d 298, 307 (5th Cir.) ("substantial federal

(continued...)

II

THE CERTIFICATION REQUIREMENTS OF  
18 U.S.C. 245 ARE NOT "JURISDICTIONAL"  
FOR PURPOSES OF AN APPEAL UNDER 28 U.S.C. 2255

Mungia argues (Br. 12-16) that the certification requirements of 18 U.S.C. 245 are "jurisdictional" and that failure to file a certification deprived the sentencing court of "subject matter jurisdiction" (Br. 16, 18). As we have explained, the United States fully complied with § 245's certification requirements. Therefore, this Court need not decide whether those requirements are jurisdictional. Nevertheless, if the Court decides to reach that issue, it should hold that the certification requirement is not jurisdictional and thus is not properly raised in this § 2255 appeal.

A. For Purposes Of A § 2255 Appeal, An Alleged Statutory Violation Does Not Rise To The Level Of A "Jurisdictional" Defect If, As Here, The District Court Had Both Subject-Matter And Personal Jurisdiction

The word "jurisdiction" has different meanings in different contexts. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) ("jurisdiction" is "'a word of many, too many, meanings'") (citation omitted). Thus, for example, the Supreme Court has held that the term "lack of jurisdiction" in Fed. R. Civ. P. 41(b) is not to be equated with "the fundamental

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<sup>6/</sup> (...continued)  
interest"), cert. denied, 522 U.S. 976 (1997); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 122, 125 n.14 (5th Cir.) ("general public importance"), cert. denied, 414 U.S. 826 (1973).

jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter." Costello v. United States, 365 U.S. 265, 285 (1961). Similarly, this Court has held that the interstate commerce element under 18 U.S.C. 844(i), although sometimes called "jurisdictional," is "not a prerequisite to subject matter jurisdiction." United States v. Johnson, 194 F.3d 657, 659 (5th Cir. 1999) (citation and quotation marks omitted), vacated on other grounds and remanded, 120 S. Ct. 2193 (2000). And in United States v. Robinson, 119 F.3d 1205 (5th Cir. 1997), cert. denied, 522 U.S. 1139 (1998), this Court emphasized that although judges often refer to the commercial nexus element of the Hobbs Act as "jurisdictional," it "is not 'jurisdictional' in the sense that a failure of proof would divest the federal courts of adjudicatory power over the case." Id. at 1212 n.4.

The only "jurisdictional" errors that will justify relief in a § 2255 appeal are those that are "fundamental" in nature. See Costello, 365 U.S. at 285. A petitioner may seek collateral relief in the district court by showing, among other things, that the sentencing court "was without jurisdiction to impose [the] sentence." 28 U.S.C. 2255. Courts have typically construed "jurisdiction" in this context to refer only to subject-matter and personal jurisdiction. See, e.g., Bowen v. Johnston, 306 U.S. 19, 23 (1939) (collateral attack unavailable "[w]here the District Court has jurisdiction of the person and the subject

matter in a criminal prosecution"). The definition of "jurisdiction" should be at least as restrictive in the context of a § 2255 appeal. Not all errors that might justify relief under § 2255 in the district court are cognizable on appeal. Rather, the alleged defect must rise to the level of a "denial of a constitutional right." 28 U.S.C. 2253(c)(2). Consequently, Mungia is entitled to relief in this appeal only if the alleged violation of 18 U.S.C. 245(a)(1) is of constitutional dimensions. Only the most fundamental "jurisdictional" defects can plausibly be considered constitutional in nature. For these reasons, a so-called "jurisdictional" error that might justify reversal on direct appeal will not necessarily qualify as a "jurisdictional" defect for purposes of a § 2255 appeal. See Prou v. United States, 199 F.3d 37, 44-45 (1st Cir. 1999).

Therefore, in the context of a § 2255 appeal, a statutory violation cannot be considered a "jurisdictional" defect unless, at a minimum, it deprived the district court of either subject-matter or personal jurisdiction. Mungia does not challenge the court's jurisdiction over his person, nor could he in light of his appearance before the district judge. See United States v. Vicars, 467 F.2d 452, 455-456 (5th Cir. 1972), cert. denied, 410 U.S. 967 (1973). And as we explain below, the district court had subject-matter jurisdiction to convict and sentence him for the § 245 violations.

B. A Failure To Comply With § 245's Certification Requirements Would Not Deprive The District Court Of Subject-Matter Jurisdiction

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On direct appeal, this Court held that "[t]he district court had jurisdiction to try [Mungia] under the federal criminal statute under 18 U.S.C. § 3231" (R4-999-1000).<sup>7/</sup> That holding is law-of-the-case and thus forecloses Mungia's attempt to attack the sentencing court's subject-matter jurisdiction.<sup>8/</sup>

In any event, a failure to comply with § 245's certification requirements would not deprive the district court of subject-matter jurisdiction. Because Mungia's indictment charged a federal offense, the district court had subject-matter

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<sup>7/</sup> In seeking review of his conviction in the Supreme Court, Mungia conceded that the district court "had jurisdiction pursuant to Title 18, United States Code, § 3231." Petition for Writ of Certiorari in No. 97-5104, at 3 (excerpts in addendum).

<sup>8/</sup> A ruling on direct appeal is law-of-the-case in a subsequent § 2255 proceeding. See United States v. Scrivner, 189 F.3d 825, 827-828 (9th Cir. 1999); Daniels v. United States, 26 F.3d 706, 711-712 (7th Cir. 1994); United States v. Serpa, 930 F.2d 639, 640 (8th Cir. 1991). Moreover, the law-of-the-case doctrine applies to jurisdictional rulings. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816-817 (1988); Free v. Abbott Labs., Inc., 164 F.3d 270, 272 (5th Cir. 1999); LaShawn A. v. Barry, 87 F.3d 1389, 1394 (D.C. Cir. 1996) (en banc). It does not matter that Mungia failed to raise the precise jurisdictional argument before the previous panel that he is making here. See United States v. Duchi, 944 F.2d 391, 392-393 (8th Cir. 1991); Munoz v. County of Imperial, 667 F.2d 811, 817 (9th Cir.), cert. denied, 459 U.S. 825 (1982). If alternative grounds for attacking the district court's jurisdiction existed, Mungia should have presented those theories on direct appeal. "It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." Fogel v. Chestnutt, 668 F.2d 100, 108-109 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982).



jurisdiction by virtue of 18 U.S.C. 3231, which provides that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." See United States v. Williams, 341 U.S. 58, 65-66 (1951) (because defendant was charged with violating 18 U.S.C. 241, the district court had subject-matter jurisdiction under 18 U.S.C. 3231); United States v. Sardelli, 813 F.2d 654, 656 (5th Cir. 1987) (district court had subject-matter jurisdiction because defendant was charged with violating a federal criminal statute). "Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231 \* \* \*. That's the beginning and the end of the 'jurisdictional' inquiry." Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999).

Nothing in § 245(a)(1) suggests that Congress intended to impose jurisdictional requirements beyond those found in 18 U.S.C. 3231. The portion of § 245(a)(1) creating the certification requirement does not "refer in any way to the jurisdiction of the district courts." Zipes v. TWA, Inc., 455 U.S. 385, 394 (1982) (statutorily-imposed time limit is not jurisdictional); accord Davis v. Johnson, 158 F.3d 806, 810-811 (5th Cir. 1998) (same), cert. denied, 526 U.S. 1074 (1999). Although § 245(a)(1) speaks in mandatory terms about the certification, the language is no more mandatory than other statutory provisions that this Court has found to be non-

jurisdictional. See, e.g., Wendell v. Asher, 162 F.3d 887, 890 (5th Cir. 1998) (42 U.S.C. 1997e); Sierra Club v. Yeutter, 926 F.2d 429, 434-437 (5th Cir. 1991) (16 U.S.C. 1540(g)(2)(A)(i)). Nor are we aware of any statements in the legislative history indicating an intent to deprive district courts of subject-matter jurisdiction if the government fails to comply with § 245's certification requirements.

Mungia, however, urges this Court to construe § 245's certification requirement as jurisdictional because the Ninth Circuit has held that the certification provision of a different statute – 18 U.S.C. 5032 – is "jurisdictional" (see Br. 12, 14, 16). Although not cited in Mungia's brief, three decisions of this Court also have stated that § 5032's certification requirement is "jurisdictional." United States v. Male Juvenile, 148 F.3d 468, 469 (5th Cir. 1998); United States v. Wilson, 116 F.3d 1066, 1093 (1997), overturned in part on other grounds, 161 F.3d 256, 257 n.1 (5th Cir. 1998); United States v. Tolliver, 61 F.3d 1189, 1199 (5th Cir. 1995), vacated and remanded, 516 U.S. 1105 (1996).

This § 5032 caselaw is inapposite. First, Mungia's reliance on § 5032 ignores a critical distinction between offenses committed by juveniles and those committed by adults. In finding § 5032's certification requirement jurisdictional, courts have concluded that, although 18 U.S.C. 3231 provides subject-matter jurisdiction over federal criminal offenses committed by adults,

Congress intended the Federal Juvenile Delinquency Act (of which § 5032 is a part) to revoke the § 3231 jurisdiction that federal courts previously had exercised over juvenile offenses. See In re Sealed Case, 131 F.3d 208, 210-211 (D.C. Cir. 1997); United States v. Chambers, 944 F.2d 1253, 1258-1259 (6th Cir. 1991), cert. denied, 502 U.S. 1112 (1992). Thus, a federal court "loses jurisdiction [over juvenile offenses] under § 3231 and does not regain it unless it is conferred pursuant to § 5032." Sealed Case, 131 F.3d at 211 n.2. Based on this reasoning, courts have concluded that § 5032 "must be a jurisdictional requirement." Id. at 211; accord Chambers, 944 F.2d at 1258-1259. By contrast, nothing in the language or legislative history of § 245 suggests that Congress intended that statute to revoke or limit the subject-matter jurisdiction conferred by 18 U.S.C. 3231 over offenses committed by adults.

Second, Mungia's argument overlooks critical distinctions between the language of § 5032 and § 245(a)(1). Section 5032 imposes a certification requirement and then states that "[i]f the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State." 18 U.S.C. 5032. By contrast, § 245 does not specify the consequences of a failure to comply with the certification requirements. Such silence is a strong indicator that Congress did not intend § 245's certification requirement to be jurisdictional. Cf. Roadway Express, Inc. v. Dole, 929 F.2d

1060, 1066 (5th Cir. 1991) ("an agency does not lose jurisdiction for failing to comply with statutory time limits unless the statute both expressly requires the agency to act within a specified period and states a consequence for failing to comply") (emphasis added).

Another distinction is that § 5032's language expressly purports to limit the power of the federal courts. Section 5032 specifies that, absent certification, the juvenile "shall not be proceeded against in any court of the United States." This limits not only the prosecutor's authority to bring a case, but also the power of the federal court itself to "proceed[] against" a juvenile. 18 U.S.C. 5032. By explicitly imposing limits on the authority of the courts, Congress sent a strong message that it intended the § 5032 certification requirement to be jurisdictional. See Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) ("jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties'") (citation omitted). Section 245(a)(1), by contrast, contains no comparable language expressly directed at the power of the federal courts.<sup>2/</sup>

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<sup>2/</sup> Apart from § 5032, this Circuit and other courts have generally interpreted certification (or similar authorization) requirements as non-jurisdictional. See United States v. Smith, 135 F.3d 963, 967-968 (5th Cir. 1998) (18 U.S.C. 3731); United States v. Hendrickson, 22 F.3d 170, 172 n.1 (7th Cir.) (18 U.S.C. 3742(b)), cert. denied, 513 U.S. 878 (1994).

But even if § 245(a)(1)'s explicit certification mandates were jurisdictional, any implicit filing requirement would be non-jurisdictional. This Court's decision in Taylor v. United States Treasury Dep't, 127 F.3d 470 (5th Cir. 1997), illustrates the principle that courts should not construe as jurisdictional those judicially-imposed procedural requirements that do not appear on the face of a statute. In Taylor, this Court noted that when Congress explicitly mandates that a claimant exhaust administrative remedies, the exhaustion requirement is often considered jurisdictional. Id. at 475. Although courts sometimes require exhaustion as a prudential matter even in the absence of an explicit congressional mandate, such a judicially-created exhaustion requirement is not jurisdictional. Id. at 475-476. Similarly, if this Court were to impose a filing requirement that Congress did not explicitly mandate, such a judicially-created procedure would be non-jurisdictional.

Finally, no jurisdictional bar exists here because any failure to comply with an implicit filing requirement would be, at most, a technical defect. In construing 18 U.S.C. 5032, this Circuit and other courts have emphasized that a "'technical failure in filing is not fatal to jurisdiction.'" United States v. Doe, 871 F.2d 1248, 1257 (5th Cir.) (citation omitted), cert. denied, 493 U.S. 917 (1989); accord United States v. White, 139 F.3d 998, 1001 (4th Cir.), cert. denied, 525 U.S. 933 (1998); United States v. Wellington, 102 F.3d 499, 504 (11th Cir. 1996).

The same result should apply here. As we have explained, although the United States did not file the certification itself, it did file a pleading six months prior to trial that notified the court and Mungia that certification had occurred and set forth the substance of the certification in language virtually identical to that of § 245(a)(1). Under such circumstances, a technical failure to file the certification would not deprive the district court of subject-matter jurisdiction.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2000, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE and a disk containing the body of that brief were served by first-class mail, postage prepaid, on:

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I further certify that on July 26, 2000, copies of the same brief and a disk containing the body of the brief were sent to the Fifth Circuit clerk's office by first-class mail, postage prepaid.

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