No. _____

In the Supreme Court of the United States

OCTOBER TERM, 2023

JOSE SALOMON MADRID-PAZ, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Friesell Westerlage, PLLC

By: /s/ John Riley Friesell
John Riley Friesell
Attorney at Law
Texas Bar No. 90001413
One City Centre
1021 Main Street, Suite 1250
Telephone: (713) 236-9177
Fax: (888) 749-3831

Counsel for Petitioner

QUESTION PRESENTED

1. Whether aiding and abetting is a means of committing a Hobbs Act violation under the categorical approach.

2. Whether conspiracy and attempt are means of committing a Hobbs Act violation under the categorical approach.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED CASES

1. *United States of America v. Jose Salomon Madrid-Paz*, Southern District of Texas, USDC No. 4:17-CR-00345-001.

2. *United States of America v. Jose Salomon Madrid-Paz*, United States Court of a Appeals for the Fifth Circuit, Fifth Circuit Case No. 22-20397.

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No._____

In the Supreme Court of the United States

OCTOBER TERM, 2023

JOSE SALOMON MADRID-PAZ, PETITIONER

versus.

UNITED STATES OF AMERICA, RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Friesell Westerlage, PLLC

By: /s/ John Riley Friesell
John Riley Friesell
FRIESELL WESTERLAGE, PLLC
Texas Bar No. 90001413
One City Centre
1021 Main Street, Suite 1250
Houston, Texas 77002
Telephone: (713) 236-9177
Fax: (888) 749-3831

Counsel for Petitioner

PRAYER

Petitioner respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *United States v. Jose Salomon Madrid-Paz*, 5th Cir. Case No. 22-20397.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Petitioner's judgment of conviction and sentence in an unpublished opinion on October 24, 2023. The court's opinion is attached at Appendix A. Petitioner's petition for rehearing was denied on December 5, 2023. The court's denial of the petition for rehearing is attached as Appendix B.

STATUTES INVOLVED

This case involves the following statutes:

18 U.S.C. § 2. Principals

> **(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. § 924. Penalties

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law,

any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

> **(3)** The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
>
> **(c)** This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

JURISDICTION

This case was brought as a federal criminal prosecution under 18 U.S.C. §§ 2, 924(c)(1)(A), and 1951. The district court therefore had jurisdiction under 18 U.S.C. § 3231.

The court of appeals entered judgment on December 5, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course of Proceedings.

Petitioner entered a guilty plea to two counts of aiding and abetting Hobbs Act robbery in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2 and two counts of aiding and abetting using and carrying a firearm in furtherance of Hobbs Act robbery, a crime of violence, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. §2. ROA.214-219.

Petitioner appealed his convictions and consecutive sentences under 18 U.S.C. § 924(c) arguing that Hobbs Act robbery was not a qualifying crime of violence under

18 U.S.C. § 924(c)(3)(A) as a matter of law because conspiracy and attempt were means of committing a Hobbs Act robbery. The court of appeals affirmed Petitioner's convictions in an unpublished opinion on October 24, 2023, and denied Petitioner's petition for rehearing on December 5, 2023.

B. Statement of Relevant Facts.

A second superseding indictment charged Petitioner with offenses which included: four counts of aiding and abetting Hobbs Act robbery (Counts 2, 4, 6, 8); one count of aiding and abetting an attempt to commit Hobbs Act robbery (Count 15); and five counts of aiding and abetting using and carrying a firearm in furtherance of a crime of violence, Hobbs Act robbery, as alleged in counts 2, 4, 6, 8, and 15 (Counts 3, 5, 7, 9, and 16). ROA.56-75, 496-535. ROA.56-75. Petitioner filed a motion to dismiss the charges of aiding and abetting the use and carrying of a firearm in furtherance of a crime of violence (Counts 3, 5, 7, 9) and attempting to do so (Count 16) arguing that substantive Hobbs Act robbery and attempted Hobbs Act robbery were not crimes of violence under 18 U.S.C. § 924(c) under the modified categorical approach as a matter of law because conspiracy was a means of committing the Hobbs Act robbery offense. ROA.111-118. The district court denied Petitioner's motion to dismiss. ROA.150-151.

Petitioner entered a guilty plea to Counts 5, 7, 8, and 9 of the second superseding indictment and was subsequently sentenced to 144 months as to Counts 6SS and 8SS, to run concurrently, followed by a consecutive term of 84 months as to Count 7SS and a consecutive term of 84 months to Count 9SS to be served

consecutively to each other as well as to Counts 6SS and 8SS for a total term of 312 months. ROA.214, 216, 313-314.

Petitioner appealed and argued that Hobbs Act robbery was not a crime of violence under 18 U.S.C. § 924(c)(3)(A) as a matter of law because conspiracy and attempt were means of committing a Hobbs Act robbery. On October 24, 2023, the Fifth Circuit rejected Petitioner's arguments and affirmed his convictions in an unpublished opinion holding Petitioner's interpretation of 18 U.S.C. § 1951(a) as creating a single offense rather than three separate offenses was foreclosed by Fifth Circuit precedent and that aiding and abetting Hobbs Act robbery is a predicate crime of violence under 18 U.S.C. § 924(c) since "the substantive equivalence of aiding and abetting liability with principal liability means that aiding and abetting Hobbs Act robbery is, like Hobbs Act robbery itself, a crime of violence." Appendix A, at p. 4 quoting *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023) citing *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *United States v. Bowens*, 907 F.3d 347, 353-54 & nn. 10-11 (5th Cir. 2018).

REASONS FOR GRANTING THE WRIT

I. This Court should grant the petition to resolve whether aiding and abetting is a means of committing a Hobbs Act violation under the categorical approach.

This case involves application of the modified categorical approach the Hobbs Act to resolve whether Hobbs Act robbery qualifies as crime of violence under § 924(c)(3)(A). Title 18 U.S.C. § 924(c)(1)(A) prohibits the use of a firearm "during and

in relation to any crime of violence....". 18 U.S.C. § 924(c)(1)(A). Section 924(c)(3) defines "crime of violence" as a felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Hobbs Act robbery must satisfy the elements clause under 18 U.S.C. § 924(c)(3)(A) to serve as a predicate offense for conviction under 18 U.S.C. § 924(c)(1)(A). *United States v. Taylor*, 142 S.Ct. 2015, 2020 (2022).

Applying the categorical approach to the elements clause of § 924(c)(3)(A) requires that the purported predicate offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" without considering the facts underlying the conviction or the defendant's actual conduct. *United States v. Taylor*, 142 S.Ct. 2015, 2020 (2022). In *Taylor*, this Court therefore held that attempt to interfere with interstate commerce by robbery did not qualify as a crime of violence under the elements clause of Section 924(c)(3)(A) because it did not require proof of the use, attempted use, or threatened use of physical force as an element of the offense. *United States v. Taylor*, 142 S.Ct. 2015, 2020 (2022).

In this case, Petitioner was charged with aiding and abetting Hobbs Act robbery. The aiding and abetting statute "'comprehends all assistance rendered by

words, acts, encouragement, support, or presence,' even if that aid relates to only one (or some) of a crime's phases or elements." *Rosemond v. United States*, 572 U.S. 65, 73 (2014) quoting *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993). Conviction of aiding and abetting an offense therefore does *not* require that the defendant commit *each* element of the offense aided and abetted. *Rosemond v. United States*, 572 U.S. 65, 73 (2014).

Aiding and abetting is not a separate offense, but an alternate theory of liability. *United States v. Neal*, 951 F.2d 630, 633 (5th Cir. 1992); *United States v. Botello*, 991 F.2d 189, 192 (5th Cir. 1993). Because the jury need not unanimously agree as to which of the alternative means by which the defendant committed an essential element, an alternative means of committing an essential element of an offense are "not necessary to support a conviction." *Mathis v. United States*, 579 U.S. 500, 515 (2016). And aiding and abetting is not a separate offense, but an alternate theory of liability. *United States v. Neal*, 951 F.2d 630, 633 (5th Cir. 1992); *United States v. Botello*, 991 F.2d 189, 192 (5th Cir. 1993). Aiding and abetting is therefore not an element of the Hobbs Act offense, but a means of committing a Hobbs Act offense. As an alternate means of committing a Hobbs Act offense, a defendant's conviction of aiding and abetting does not require proof that he participated in each element of the Hobbs Act robbery aided and abetted. Conviction of aiding and abetting Hobbs Act robbery therefore does not require as a necessary element of the offense, the defendant's "use, attempted use, or threatened use of physical force

against the person or property of another." And because the categorical approach prohibits consideration of the defendant's actual conduct, aiding and abetting a Hobbs Act robbery is not a crime of violence as a matter of law.

II. The Court should grant the petition to resolve whether conspiracy and attempt are means of committing a Hobbs Act offense under the categorical approach.

When applying the categorical approach, courts must determine whether a statute lists essential elements or alternate means of committing the offense because "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Mathis v. United States*, 579 U.S. 500, 506 (2016) quoting *Schad v. Arizona*, 501 U.S. 624, 636 (1991). Because the jury need not unanimously agree as to which of the alternative means by which the defendant committed an essential element, alternative means of committing an essential element of an offense are "*not* necessary to support a conviction." *Mathis*, 579 U.S. 500, 515 (2016). To determine whether a statute lists alternative means of committing a single offense or essential elements of separate offenses courts may consider the statute's text. *Mathis v. United States*, 579 U.S. 500, 517-518 (2016). The meaning of "the statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, (1997).

The purpose of the Hobbs Act is to protect interstate commerce and therefore "to punish interference with interstate commerce by extortion, robbery or physical violence[.]" *United States v. Culbert*, 435 U.S. 371, 373 quoting *Stirone v. United States*, 361 U.S. 212, 215 (1960). The proper unit of prosecution intended by the language of the Hobbs Act is therefore "each restraint of commerce[.]" *Callanan v. United States*, 364 U.S. 587, 601 (1961) (STEWART, J. dissenting). Therefore, the statute's "language can be fairly read as imposing a maximum twenty-year sentence for each actual or threatened interference with interstate commerce accomplished by any one or more of the proscribed means." *Callanan*, 364 U.S. 587, 601 (1961) (STEWART, J. dissenting).

Because the unit of prosecution for a Hobbs Act violation is each interference with commerce through robbery or extortion, conspiracy and attempt to interfere with commerce by robbery or extortion are a means of committing a Hobbs Act violation. Conspiracy and attempt are therefore not elements of separately defined offenses under the Hobbs Act, but means of satisfying the elements of either Hobbs Act robbery or Hobbs Act extortion. Attempted Hobbs Act robbery does not require proof as an element the use, attempted to use, or threated use of force. *United States v. Taylor*, 142 S.Ct. 2015, 2020 (2022). Attempted Hobbs Act robbery is therefore not a crime of violence under the elements clause of § 924(c)(3)(A) as a matter of law. *United States v. Taylor*, 142 S.Ct. 2015, 2020 (2022).

Furthermore, although a court may apply the modified categorical approach to determine "which element[s] played a part in the defendant's conviction[,]" a court may not use the modified categorical approach to look at documents in the record to determine the means by which the defendant committed the elements of the offense. *Mathis*, 579 U.S. 500, 513-514 quoting *Descamps v. United States*, 133 S.Ct. 2276, 2285 (2013). Because attempt is the least culpable means of committing the offense, Hobbs Act robbery is therefore not a crime of violence as a matter of law under the modified categorical approach.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

By: /s/ John Riley Friesell
John Riley Friesell
FRIESELL WESTERLAGE, PLLC
Attorney at Law
Texas Bar No. 90001413
One City Centre
1021 Main Street, Suite 1250
Houston, Texas 77002
Telephone: (713) 236-9177
Fax: (888) 749-3831

Counsel for Petitioner

Date: March 4, 2024.

Appendix A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 24, 2023
Lyle W. Cayce
Clerk

No. 22-20397

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE SALOMON MADRID-PAZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CR-345-1

Before JONES, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:[*]

Jose Salomon Madrid-Paz ("Madrid-Paz") challenges his conviction and sentence stemming from his involvement in a series of armed robberies. Because we find no reversible error, we AFFIRM.

I.

Madrid-Paz was part of a "rip crew" that committed armed robberies of gaming rooms and retail businesses. He was charged with (1) one count of

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a); (2) four counts of aiding and abetting Hobbs Act robbery under 18 U.S.C. § 1951(a);[1] and (3) five counts of aiding and abetting the use and carrying of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c).[2]

Madrid-Paz moved to dismiss the § 924(c) counts of the indictment, arguing that substantive Hobbs Act robbery is not a crime of violence under § 924(c)(3) as a matter of law and that Hobbs Act robbery, therefore, was not a valid predicate to support a conviction under § 924(c). He argued that conspiracy to commit Hobbs Act robbery is not a separate offense from Hobbs Act robbery, but rather a manner or means of committing the indivisible offense of Hobbs Act robbery. Thus, he asserted that substantive Hobbs Act robbery is not a crime of violence under § 924(c)'s elements clause because conspiracy to commit Hobbs Act robbery is not a crime of violence.

The district court denied his motion and reasoned that Hobbs Act conspiracy is its own offense separate and apart from Hobbs Act robbery, not a manner or means of satisfying the elements of Hobbs Act robbery. Madrid-Paz then pleaded guilty to two counts of aiding and abetting Hobbs Act robbery and two counts of aiding and abetting violations of § 924(c)(1)(A)(ii), pursuant to a plea agreement. The plea agreement included a waiver of his right to appeal. The district court sentenced Madrid-Paz to a total of 312 months in prison, imposing concurrent terms of 144 months on the aiding

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[1] The indictment stated that Madrid-Paz and his co-defendants sought to commit robberies in violation of 18 U.S.C. §§ 2, 1951(a).

[2] One count applied to each of the four counts for aiding and abetting Hobbs Act robbery charged. The final count is applied to the one count for conspiracy to commit a Hobbs Act robbery.

and abetting Hobbs Act robbery charges and consecutive terms of 84 months on the § 924(c) charges. He timely appealed.

On appeal, Madrid-Paz challenges whether substantive Hobbs Act robbery is a crime of violence under § 924(c), arguing that conspiracy to commit and attempted Hobbs Act robbery are manners or means of committing substantive Hobbs Act robbery.[3]

II.

This court reviews the legal question of whether a predicate offense qualifies as a crime of violence under § 924(c) de novo. *See United States v. Smith*, 957 F.3d 590, 592 (5th Cir. 2020). Section 924(c)(3)(A), also known as the elements clause, sets the requirements for which predicate offenses qualify as a crime of violence. *Id.* at 592–93. It states that a felony offense is a crime of violence if it "has as an element, the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

The Supreme Court recently made clear that attempted Hobbs Act robbery is not a crime of violence. *United States v. Taylor*, 142 S. Ct. 2015, 2020–21 (2022). The *Taylor* Court determined that "attempted Hobbs Act robbery does not satisfy the elements clause" because the Government is not required to prove that a defendant "used, attempted to use, or even threatened to use force against" another or their property to achieve a conviction for attempt. *Id.* at 2020. However, the law of this circuit and our sister circuits demonstrate that substantive "Hobbs Act robbery is a crime of violence under the elements clause." *United States v. Hill*, 63 F.4th 335, 363

[3] Madrid-Paz's plea agreement included an appeal waiver. However, the Government has stated that it "is not asserting the waiver and accordingly this Court need not address its scope."

(5th Cir. 2023). In numerous cases, this court has rejected different formulations of the same argument that substantive Hobbs Act robbery cannot qualify as a crime of violence.[4]

The most recent iteration occurred in *United States v. Hill*, where the panel determined that aiding and abetting Hobbs Act robbery constitutes a crime of violence that is a valid predicate offense for § 924(c). 63 F.4th at 363. The *Hill* panel noted that "the substantive equivalence of aiding and abetting liability with principal liability means that aiding and abetting Hobbs Act robbery is, like Hobbs Act robbery itself, a crime of violence." *Id.* Thus, the panel concluded that aiding and abetting Hobbs Act robbery is a valid predicate offense for § 924(c). *Id.*

Hill controls the outcome here. Madrid-Paz pleaded guilty to two counts of aiding and abetting Hobbs Act robbery and two counts of aiding and abetting the use and carrying of a firearm during and in relation to a crime of violence under § 924(c). He now argues that substantive Hobbs Act robbery cannot qualify as a crime of violence under the elements clause because conspiracy to commit and attempted Hobbs Act robbery are manners or means of committing substantive Hobbs Act robbery. He maintains that because the Supreme Court has declared that attempted Hobbs Act robbery does not satisfy the elements clause, substantive Hobbs Act robbery cannot satisfy the elements clause either. In sum, he interprets § 1951(a) as prescribing one indivisible offense and not three separate offenses. This strained interpretation cannot be squared with our precedent.[5] Accordingly,

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[4] *See United States v. Bowens*, 907 F.3d 347, 353–54 & nn.10–11 (5th Cir. 2018) (collecting cases rejecting the argument that substantive Hobbs Act robbery is not a crime of violence under § 924(c)).

[5] *See Hill*, 63 F.4th at 363; *see also United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017) ("It was not error—plain or otherwise—for the district court to classify a Hobbs Act robbery as a crime of violence."); *Bowens*, 907 F.3d at 353 ("[B]inding circuit precedent

we reject Madrid-Paz's assertion that aiding and abetting Hobbs Act robbery is not a valid predicate offense for § 924(c).

III.

For the foregoing reasons, we AFFIRM.

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forecloses Bowens's claim that Hobbs Act robbery is not a [crime of violence] predicate under 18 U.S.C. § 924(c)(3)(A)."); 18 U.S.C. § 2 ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 24, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 22-20397 USA v. Madrid-Paz
USDC No. 4:17-CR-345-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

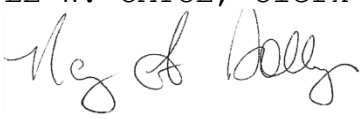
Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. John Riley Friesell
Ms. Carmen Castillo Mitchell
Mr. Jason B. Smith

Appendix B

United States Court of Appeals for the Fifth Circuit

No. 22-20397

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOSE SALOMON MADRID-PAZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CR-345-1

ON PETITION FOR REHEARING EN BANC

Before JONES, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.