No. 24-5834

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
OCT 18 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Geovani Hernandez — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Geovani Hernandez - Reg. No. 29339-479
(Your Name)
FCC Forrest City Low, P.O. Box 9000,
(Address)
Forrest City, AR 72336
(City, State, Zip Code)
N/A
(Phone Number)

RECEIVED
OCT 22 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. **COA Standard.** The COA inquiry requires courts to, among other things, conduct a general assessment of a defendant's claims. In his COA Brief to the Fifth Circuit, Mr. Hernandez supported his claims with the record, statutes, Pattern Jury Instructions, and 34 authorities. The Fifth Circuit did not state the requirement of a general assessment in its legal standard, and issued a summary denial of Mr. Hernandez's COA without issuing a reasoned opinion explaining why his claims were not debatable. Did the Fifth Circuit err in its application of the COA standard?

2. **Circuit Conflict.** The Fifth Circuit, relying on the D.C. Circuit, has held that attempting to aid and abet a crime is a valid offense. The Sixth, Seventh, and Ninth Circuits have held that attempted aiding and abetting does not even exist under federal law; the Second Circuit has held that there is no culpable aiding and abetting without an underlying crime committed by some other person. Mr. Hernandez was convicted of allegedly attempting to aid and abet a government informant in a ficticious drug operation organized solely by the government. Is attempting to aid and abet a valid offense under federal law and was the law applied properly to Mr. Hernandez?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- United States v. Geovani Hernandez, 7:17-CR-1352-1, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on July 18, 2019)
- United States v. Geovani Hernandez, 19-40655, United States Court of Appeals for the Fifth Circuit (Judgement affirmed on October 9, 2020)
- Geovani Hernandez v. United States, 7:21-CV-87, United States District Court for the Southern District of Texas, McAllen Division (Order denying relief entered on February 7, 2024)
- United States v. Geovani Hernandez, 22-40453, United States Court of Appeals for the Fifth Circuit (Dismissed on April 19, 2023.
- United States v. Geovani Hernandez, 24-40145, United States Court of Appeals for the Fifth Circuit (Order denying COA entered on August 7, 2024; Order denying reconsideration on September 27, 2024; Order denying rehearing en banc on September 27, 2024)

RELATED CASES (Continued)

- Geovani Hernandez v. Randy Crane, et al., 7-22-CV-00036, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on March 13, 2023)

- Geovani Hernandez v. Special Agent Antonio Perez IV, US Dept. of Homeland Security, et al., 7:22-CV-00339, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on March 13, 2023)

- Geovani Hernandez v. US Attorney's Office McAllen and Houston Offices/Divisions, et al., 7:22-CV-00416, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on March 13, 2023)

- Geovani Hernandez v. US Dept. of Homeland Security ICE/HSI, et al., 7:23-CV-00059, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on March 13, 2023)

- Geovani Hernandez v. United States, 7:23-CV-00362, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on October 8, 2024)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 08/07/2024.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 09/27/2024, and a copy of the order denying rehearing appears at Appendix C & D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 18 U.S.C. § 2
- 28 U.S.C. § 841
- 28 U.S.C. § 846

STATEMENT OF THE CASE

Geovani Hernandez, Police Officer and Private Security Owner/Operator, was arrested on August 12, 2017, following a Criminal Complaint. See Cr. Docs 1, 5. The Complaint charged Hernandez with "aiding and abetting the attempted possession with intent to distribute" drugs.

On September 5, 2017, Hernandez was indicted by a grand jury. See Cr. Doc. 14. The indictment varied from the charge in the Complaint and alleged that Hernandez "did knowingly and intentionally attempt to aid and abet possession with intent to distribute" drugs in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846, and 18 U.S.C. § 2. See Cr. Doc. 14.

On October 12, 2018, during a status conference, court appointed Defense Counsel Acosta expressed that he was "not very familiar with the charge of attempt to aid and abet." See ROA 19-40655.318. The Court acknowledged counsel's concerns, summarizing that "[Y]ou're concerned about what's the language going to say, what are the elements going to be that the Government is going to have to prove." See id. The Court responded to those concerns, stating "I mean, the charge is something we can take up, you know, along the way. ...It's not a pattern [instruction]. ... I assume the government will prepare some language." See id.

On March 7, 2019, the matter was taken up "along the way" during the jury charge conference. Defense Counsel expressed that attempt to aid and abet charge is "an improper charge" and that "I think that what we're doing is just watering it down and that we're leaving

the government without proving their burden of proof." See Civ. 127 at 1. The court ultimately allowed the instructions for aiding and abetting to be omitted from the charge of "attempt to aid and abet." The Court expressed that the omission was "the smartest thing to do." See id at 7. The Court's reasoning was based upon its "belief" that "the entire pattern jury instruction on aiding and abetting" is "redundant of attempt." See Civ. Doc. 96 at 48.

Although no aiding-and-abetting instruction was given to the jury, aiding-and-abetting terminology was used voluminously by the parties and the Court at trial. See, for example, ROAs 19-40655.1297, 1299, 1318, 1330.

Ultimately, Hernandez was convicted by the jury, and the verdict was given by the Court. See ROA 19-40655.1330 ("you've been convicted of a crime, aiding and abetting of a drug trafficking offense.").

On July 18, 2019, Hernandez was sentenced to 240 months of imprisonment to be followed by a 5 years of supervised released. See Cr. Doc. 125 at 43-44. 18 U.S.C. § 3553(c)(1) mandates that a specific statement of reasons for the imposition of a sentence be given when the guideline's "range exceeds 24 months." Hernandez had a guideline range from 235 - 293 months, resulting in a total range of 58 months. See Cr. Doc. 102 at 1. The Court did not elaborate upon its reasoning for Hernandez's sentence, holding that the range of 235 - 293 months "does not exceed 24 months." See id at 2.

At sentencing, Counsel raised objections to Hernandez's base offense level being based upon 16 kilos of cocaine when: (1) he "was not either the provider or the person who was acquiring" the cocaine; (2) he "had no control as to the amount or the type of substance";

(3) "he was not informed as to what was being transported"; and (4) the majority of the kilos were not cocaine and actually "contained a fake substance." See Cr. Doc. 125 at 4-8. Within its response, the Government asserted, inter alia, that "certainly he was convicted of the attempting to conspire." See id at 11. The Court upheld the base offense calculation.

Hernandez appealed to this Honorable Court of Appeals for the Fifth Circuit. See Appeal No. 19-40655. On October 9, 2020, this Court affirmed the district court. See 825 Fed. Appx. 219.

Hernandez continued his fight in the form of a Section 2255 collateral attack. See Civ. Doc. 1. Hernandez filed a flurry of supporting documents in which he continued his claims arguing, inter alia, that the jury was inadequately instructed, improper statutory interpretation/application, and trial counsel's failure to renew his motion for acquittal.

The magistrate over the proceeding issued Orders along with Reports and Recommendations which ultimately advocated for the dismissal and denial of Hernandez's claims and requests for relief. See Civ. Docs. 108 - 113. Hernandez, in turn, filed various Objections which artfully summarized and reasserted the totality of the merits in his claims. See Civ. Docs. 118 - 123, 127.

On February 7, 2024, the Court adopted the magistrate's Orders and Reports and recommendations. See Civ. Docs. 124-126. The Court characterized Hernandez's Objections as "non-specific, conclusary, and simply repetitive of what [he] has previously argued." See Civ. Doc. 126 at 1. On February 14, 2024, the Court issued an Order denying Hernandez's request to supplement his Objections, citing back to the original Order which characterized the Objections as simply repetitive

of what had been argued previously. See Civ. Doc. 128.

On March 4, 2024, the Court docketed a Notice of Appeal filed by Hernandez, which pertains to the Orders issued by the Court throughout February, 2024. See Civ. Doc. 131.

Hernandez motioned the Fifth Circuit for a Certificate of Appealability and submitted a brief in support. See Civ. App. Doc. 20. On August 7, 2024, Circuit Judge Stephen A. Higginson denied the motion, concluding that Hernandez did not make a substantial showing of the denial of a constitutional right. See APPENDIX B.

Hernandez contemporaneously sought reconsideration by a panel of the Fifth Circuit and rehearing en banc from the entire Court. Those efforts, however, were also denied.

Hernandez now seeks a writ of certiorari from the Honorable Supreme Court. This is his petition.

REASONS FOR GRANTING THE PETITION

1. COA Standard: The Fifth Circuit has concocted their own brand of the COA standard that fails to apply a general assessment of the merits.

The COA determination requires not only an overview of the claims, but also "a general assessment of their merits." See Miller-El v. Cockrell, 537 US 322, 336 (2003); See also Buck v. Davis, 580 U.S. 100, 116 (2017) ("threshold inquiry into the underlying merit of [the] claims").

In a case like Mr. Hernandez's, where a defendant offers much to support the debatability of his claims, "it may require several paragraphs to explain why a particular ruling is not debatable". Dansby v. Hobbs, 691 F.3d 934, 936 (8th Cir. 2012).

Mr. Hernandez, over the course of a 32 page COA Brief to the Fifth Circuit, supported his claims with the record, statutes, Pattern Jury Instructions, and 34 authorities. Mr. Hernandez, however, received a summary denial of the COA without the issuance of a reasoned opinion showing an application of the COA standard. In fact, the legal standard given by the Fifth Circuit in the denial selectively omits any mention of a general assessment of the merits or a threshold inquiry into the underlying merits.

"Unless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down. [The broken process] may turn the circumscribed COA standard of review into a rubber stamp [of denial], especially for pro se litigants." McGee v. McFadden, 139 S. Ct. 2608 (2019) (Sotomayor, J., Dissenting).

The requisite open mind involves adhering to a threshold inquiry; it means stating the complete standard and showing an honest application of that standard. See Champagne v. Marshal, 92 Fed. Appx. 804, 805 (1st Cir. 2004) (concluding a COA should not issue after "[a]pplying these standards to [each of the] Petitioner's claims"); Pabon v. Mahanoy, 654 F.3d 385, 393 (3rd Cir. 2010) ("To resolve whether this claim is debatable, we make a threshold inquiry regarding the application of Burton and its progeny to Pabon's trial and conviction"); United States v. Williams, 67 Fed. Appx. 164, 168 (4th Cir. 2003) ("we have jurisdiction to determine our jurisdiction and this 'requires an overview of [William's] claims ... and a general assessment of their merits'"); Long v. Davis, 663 Fed. Appx. 361, 365 (5th Cir. 2016) ("'This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims'; instead, it involves 'an overview of the claims in the habeas petition and a general assessment of their merits'"); Seay v. United States, 2023 U.S. App. LEXIS 18594 (6th Cir. 2023) ("this court 'requires an overview of the claims' and 'a general assessment of their merits'"); Stankewitz v. Woodford, 94 Fed. Appx. 600, 604 (9th Cir. 2003) (overviewing and generally assessing each claim individually); Throneberry v. Nunn, 2024 U.S. App. LEXIS 12819 (10th Cir. 2024) ("we undertake 'an overview of the claims' and give 'a general assessment of their merits'"); Ingram v. Warden, 2022 U.S. App. LEXIS 30074 (11th Cir. 2022) (stating the entire standard and "Applying this standard").

The COA review given to Mr. Hernandez was not carried out with the requisite open mind. There is no mention of an overview

of his claims nor a general assessment of their merits. The summary denial of Mr. Hernandez's request for COA is absent any indication that the full and proper standard was actually applied to him.

The Fifth Circuit is by no means a first-time offender in this Court against the COA process. See Miller-El; Tennard v. Dretke, 542 US 274 (2004); Jordan v. Fisher, 576 U.S. 1071 (2015); Buck; Ayestas v. Davis, 584 U.S. 28 (2018).

Repeatedly, the Fifth Circuit has strayed away from the proper application of the COA standard set forth by this Court, even when it "phrase[s] its determination in proper terms". See Buck at 115. Once again, and unfortunately for Mr. Hernandez, the Fifth Circuit has made its own brand of the COA inquiry.

Mr. Hernandez calls upon this Honorable Supreme Court to either grant a GVR Order on this issue so that the Fifth Circuit may apply the complete COA standard, or, in the alternative, grant certiorari on this issue to reaffirm that the only brand of the COA inquiry is the one defined by this Supreme Court and find that Mr. Hernandez has made a requisite showing under such standard.

2. Circuit Conflict: Hernandez is imprisoned for a crime that multiple Circuits have declared to not exist under federal law.

According to the D.C. Circuit, there are two offenses in federal law that mesh attempt liability and aiding-and-abetting liability together: (1) aiding and abetting an attempted crime "under the traditional aiding-and-abetting framework"; and (2) "attempting to aid and abet a crime" under the Model Penal Code. See United States v. Washington, 106 F.3d 983, 1004 (D.C. Cir.

1997).

Unlike "traditional aiding-and-abetting", attempting to aid and abet requires no proof of an offense committed, nor a guilty principal, nor a shared intent. Id. at 1005.

Hernandez was charged and convicted in the Southern District of Texas for allegedly attempting to aid and abet a government informant in their possession with intent to distribute cocaine in a reverse sting operation orchestrated by the government. Unfortunately for Hernandez, the Fifth Circuit also agrees that attempting to aid and abet is a valid offense under federal law. See United States v. Partida, 385 F.3d 546, 555 (5th Cir. 2004) ("As our fellow D.C. Circuit has emphasized, the justification for permitting convictions on the basis of 'attempt to aid and abet' is necessitated because 'even if an offense was not actually committed, the defendant manifests the same dangerousness of character as the actor himself who attempts to commit the offense'").

Partida was used to deny Mr. Hernandez relief on his direct appeal and in the district court on collateral attack.

Other Circuits that have addressed the charge, namely, the Sixth, Seventh, and Ninth Circuits, have held that the offense does not even exist in federal law and that attempt cannot be rationally read into the general aiding and abetting statute. See United States v. Samuels, 308 F.3d 662, 669 (6th Cir. 2002) ("an attempt to aid and abet is not a crime"); United States v. Giovanetti, 919 F.2d 1223, 1227 (7th Cir. 1990) (stating the crime "does not exist under federal law"); United States v. Kuok, 671 F.3d 931, 941 (9th Cir. 2011) ("argument that attempt should rationally be read into § 2(b) fails in light of the rule against

reading an attempt into a criminal statute that does not explicitly include it"); United States v. Jayavarman, 871 F.3d 1050, n.1 (9th Cir. 2017) ("the general aiding and abetting statute does not contain an attempt provision ... he cannot be convicted of attempting to aid and abet"). The Second Circuit would appear to hold the same. See United States v. Delgado, 972 F.3d 63, n.11 (2nd Cir. 2020) ("some of our sister circuits have suggested [the crime] does not exist under federal law"); United States v. McCoy, 995 F.3d 32, 58 (2nd Cir. 2021) ("There is no culpable aiding and abetting without an underlying crime committed by some other person").

A conviction for attempt requires proof that a defendant possessed the mens rea required for the underlying crime and took a substantial step toward the completion of the crime. The word "attempt" in another statute cannot then be used to create an inchoate version of the general aiding and abetting statute that Mr. Hernandez was convicted under because, as the Department of Justice has declared, "[w]hile aiding and abetting might commonly be thought of as an offense itself, it is not an independent crime under 18 U.S.C. § 2." See "2476. 18 U.S.C. § 2 Is Not an Independent Offense", justice.gov/archives/jm/criminal-resource-manual-2476-18usc-2-not-independent-offense, Department of Justice (October 1998).

Separation of Powers ensures that the laws of our federal system be specific and limited enough to leave no invitation for arbitrary enforcement by judges and prosecutors. This honorable pursuit also ensures that courts do not simply apply multiple versions of the law merely because another nuanced reading is

permissable. "In the business of statutory interpretation, if it is not the best, it is not permissible." Loper v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

However, Mr. Hernandez remains imprisoned today for a crime under a particular reading of the law that multiple Circuits have deemed invalid. Fifth Circuit and D.C. Circuit judges have declared that the crime is "necessitated", Ante at 11, but it is Congress who defines the law.

The enforcement of this supposed crime of attempting to aid and abet is arbitrary enough for a prosecutor to openly state that "It's still an inchoate crime right? I mean, attempt and conspiracy are essentially the same thing". See Civ. Doc. 96 at 40.

Mr. Hernandez's conviction rests upon 18 U.S.C. § 2 for aiding and abetting, yet the prosecution pushed for - and the judge advocated for and allowed - the omission of all aiding and abetting instructions from the jury. Then, when requesting COA and alleging that the evidence of his intent to attempt to aid and abet the possession with intent to distribute was insufficient because he did not participate in the possession aspect of the transaction and therefore could not have the culpability otherwise required for aiding and abetting the underlying offense; the COA standard applied to Mr. Hernandez peculiarly skipped giving a general assessment of the merits.

There is a growing concern across our great nation that our justice system is being weaponized and used to target particular members of the community. This concern is at the very heart of the recently formed Congressional Subcommittee on the Weaponization

of the Federal Government.

Mr. Hernandez was no ordinary citizen at the time of his arrest; a minority, a business owner, a former United Nations officer, a supervisor police officer, and a rising political figure.

Government agents had their sights set on Mr. Hernandez for years to no avail. See Civ. Doc. 108 at 2-3. After Mr. Hernandez begun an election campaign for a public office, the government began targeting him with a ficticious operation of their own fabrication to finally subdue their prey.

The result was a disrupted election and Mr. Hernandez serving a 20-year prison sentence for a crime that is not even recognized by multiple federal Circuits.

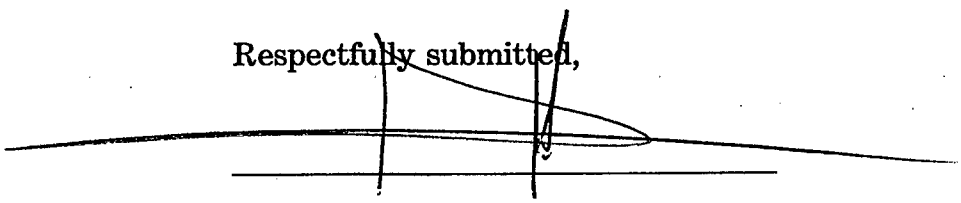
For those in the Circuits that do recognize the crime of attempting to aid and abet, like Mr. Hernandez, no protection currently exists against it until this Honorable Supreme Court steps in.

Today, Mr. Hernandez invites the Court to intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: October 13, 2024