United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 7, 2024
Lyle W. Cayce
Clerk

No. 24-40145

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GEOVANI HERNANDEZ,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 7:21-CV-87
USDC No. 7:17-CR-1352-1

ORDER:

Geovani Hernandez, federal prisoner # 29339-479, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his conviction for two counts of attempting to aid or abet the possession of cocaine with intent to distribute. He argues that the trial court violated Hernandez's due process rights because it did not give a jury instruction on aiding and abetting; that his trial counsel was ineffective because he did not renew a motion for a judgment of acquittal; and that there is no general federal attempt statute and the trial

court did not ensure that he had fair notice of the offense charged in the indictment.

To obtain a COA, Hernandez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A movant satisfies this standard by showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336. The COA inquiry is a "threshold question [that] should be decided without full consideration of the factual or legal basis adduced in support of the claims." *Buck v. Davis*, 580 U.S. 100, 115 (2017) (internal quotation marks and citation omitted). Hernandez has not made such a showing. Accordingly, his COA motion is DENIED.

In his COA motion, Hernandez does not argue that the district court erred in denying his motion to amend his § 2254 application, in which he sought to argue that the trial court applied the law concerning aiding and abetting incorrectly and did not ensure that he had fair notice of the offense charged in the indictment. He also does not raise the remaining issues that he raised in the district court. Accordingly, he has abandoned these unraised issues. *See United States v. Davis*, 971 F.3d 524, 532 n.4 (5th Cir. 2020); *see also Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

STEPHEN A. HIGGINSON
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

GEOVANI HERNANDEZ,	§	
	§	
Movant,	§	
	§	
VS.	§	**CIVIL ACTION NO. 7:21-CV-0087**
	§	**CRIM. ACTION NO. 7:17-CR-1352-1**
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

REPORT AND RECOMMENDATION

This report and recommendation is being issued contemporaneously with a report and recommendation for the dismissal of Movant GEOVANI HERNANDEZ's motion for collateral relief pursuant to 28 U.S.C. § 2255.

Addressed here is a motion by Movant to disqualify nine federal prosecutors from participating in this action (the "Motion") (Civ. Dkt. No. 30; Cr. Dkt. No. 176).[1] In support, Movant notes that he filed a separate civil action against those prosecutors on grounds that they violated his constitutional rights in the context of the underlying criminal proceedings. (Civ. Dkt. No. 30 at 2). According to Movant, the prosecutors "are in direct conflict of interest in this falsely fabricated case against [him] and in . . . all past, current[,] and future appeals." (*Id.*).

The Government, through Assistant U.S. Attorney John A. Reed, has filed a response in opposition. (Civ. Dkt. No. 53; Cr. Dkt. No. 197). Notably, Mr. Reed is one of the prosecutors who is subject to both the lawsuit and the Motion. Through its response, the Government offers

[1] Unless otherwise noted, citations to specific pages in the record refer to the pagination of docket entries in the case management/electronic case-file (CM/ECF) system. As used here, "Civ. Dkt." is a citation to Civil Action No. 7:21-CV-0087, and "Cr. Dkt." is a citation to Criminal Action No. 7:17-CR-1352-1.

case law for the proposition that the filing of a civil suit against a prosecutor does not require their disqualification absent proof of prosecutorial misconduct. (Civ. Dkt. No. 53 at 5-7).

This case was referred to the Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1). Considering the record, the applicable law, and the briefs, the Magistrate Judge RECOMMENDS that the Motion (Civ. Dkt. No. 30; Cr. Dkt. No. 176) be DENIED.

I. BACKGROUND

A detailed factual background is provided in the contemporaneous report and recommendation as to the pending § 2255 motion. In short, Movant is a former police officer who was involved in scouting for two loads of what he believed to be cocaine as part of a reverse sting by federal investigators. Upon his conviction by jury, Movant was sentenced to concurrent terms of 240 months of imprisonment on two counts of attempting to aid and abet the possession of a controlled substance with intent to distribute. (Cr. Dkt. No. 101).

After an unsuccessful appeal (*see* Cr. Dkt. Nos. 149, 149-1), Movant filed his § 2255 motion, raising a multitude of claims for relief from his conviction and sentence (*see* Civ. Dkt. No. 1). Most of these are based on allegations of prosecutorial misconduct involving the destruction of evidence and the use of perjured testimony. For example, Movant claims that prosecutors knowingly offered before the grand and petit juries the perjured testimony of the main case agent, Antonio Perez, a Special Agent with Homeland Security Investigations.

Following the filing of his § 2255 motion, Movant instituted Civil Action No. 7:22-CV-0036, or the pending action against the prosecutors (the "Civil Action"). The Motion was filed soon thereafter. Since then, however, the Civil Action has been dismissed by the District Court on grounds that it constituted an attack on Movant's conviction and was thus barred by the doctrine announced in *Heck v. Humphrey*, 512 U.S. 477 (1994). *See* Civil Action, Dkt. No. 16.

II. LEGAL STANDARDS

Generally, a federal prosecutor is subject to disqualification where they are laboring under a conflict of interest, whether that interest be personal, financial, or political. *See United States v. Houston*, 2015 WL 6449519, at *2 (E.D. Tenn. Oct. 26, 2015) (citing 28 U.S.C. § 528 ("The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or appearance thereof . . . .")); *see also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987) ("[F]ederal prosecutors are prohibited from representing the Government in any matter in which they, their family, or their business associates have any interest.").

Among the circumstances that can give rise to a conflict of interest are a prosecutor's prior interactions with a defendant. *See Cardenas v. United States*, 2018 WL 4599838, at *14 (S.D. Tex. May 7, 2018) (collecting cases), *report and recommendation adopted*, 2018 WL 3954154 (S.D. Tex. Aug. 17, 2018), *aff'd*, 13 F.4th 380 (5th Cir. 2021). In one clear example, the Eleventh Circuit held that a prosecutor should have been removed after the defendant fashioned and secreted a shank with the intent to kill the prosecutor in open court. *United States v. Spiker*, 649 F. App'x 770, 771-74 (11th Cir. 2016) (per curiam). That said, not all prior interactions with a defendant are automatically disqualifying, *see Cardenas*, 2018 WL 4599838, at *15 (collecting cases), including the situation where a defendant files a civil rights action against the prosecutor, *see, e.g.*, *United States v. Kahre*, 737 F.3d 554 (9th Cir. 2013) (per curiam).

Indeed, those circuit courts to have directly considered the matter apply the rule that, to disqualify a prosecutor based on a pending civil action, the defendant must present "clear and

convincing evidence" of prosecutorial misconduct. *See id.* at 573-75 (citing *United States v. Kember*, 685 F.2d 451, 459 (D.C. Cir. 1982)).

This burden of presentation is logical, otherwise any defendant could disqualify a prosecutor by simply filing a [civil rights] action without presenting clear and convincing evidence of prosecutorial misconduct, but only complaining of some action taken by the prosecutor outside of his quasi-judicial capacity. *Id.* at 574-75 (quoting *United States v. Heldt*, 668 F.2d 1238, 1276 (D.C. Cir. 1981) (per curiam)) (quotations and brackets omitted).

III. ANALYSIS

As a threshold matter, the Motion would appear to be moot on multiple grounds. For one, the Civil Action has been dismissed based on the *Heck* bar. Separately, according to the Government, some of the named prosecutors are not currently employed by the U.S. Attorney's Office for the Southern District of Texas.[2] (Civ. Dkt. No. 53 at 3 n.2).

Even ignoring the matter of mootness, it is unclear from the Motion, and the underlying record, what connection some of the named prosecutors may have had to Movant's investigation, prosecution, and conviction. Perhaps the most extreme example involves that of Mr. Reed himself. As part of the Civil Action, Movant alleges for the first time—in conclusory fashion and without pointing to any evidence—that Mr. Reed "participated [with] and supported" Agent Perez and engaged in numerous civil rights violations, like the refusal to disclose *Brady* material. Civil Action, Dkt. No. 1-1 at 11. Yet, all indications are that Mr. Reed became involved only after the filing of the § 2255 motion. (*See* Civ. Dkt. No. 6; *see also* Cr. Dkt. No. 152).

[2] The Government refers here to Ryan K. Patrick, Abe Martinez, and Kristen Rees. Mr. Patrick is a now-former U.S. Attorney for the Southern District of Texas, and Mr. Martinez is a now-former Acting U.S. Attorney for the Southern District of Texas. Ms. Rees was one of the Assistant U.S. Attorneys directly involved in Movant's prosecution.

Here, Movant fails to offer a shred of evidence that any of the named prosecutors engaged in the prosecutorial misconduct alleged in the Civil Action. To the contrary, for reasons detailed in the report and recommendation as to the mirroring § 2255 motion, Movant's claims would appear to be meritless. Otherwise, Movant is unable to show that the named prosecutors are laboring under a conflict of interest based on the mere filing of the Civil Action.

IV. CONCLUSION

Recommendation

For these reasons, the Magistrate Judge RECOMMENDS that the Motion (Civ. Dkt. No. 30; Cr. Dkt. No. 176) be DENIED.

Notice to the Parties

Within fourteen (14) days after being served a copy of this report, a party may serve and file specific, written objections to the proposed recommendations. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). Failure to file written objections within fourteen (14) days after service shall bar an aggrieved party from de novo review by the Court on an issue covered in this report and from appellate review of factual findings accepted or adopted by the Court, except on grounds of clear error or manifest injustice.

Directive of Clerk of Court

The Clerk of Court is DIRECTED to forward a copy of this report to the parties by any receipted means.

DONE at McAllen, Texas this 18th day of December 2023.

J. SCOTT HACKER
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

GEOVANI HERNANDEZ,	§	
	§	
Movant,	§	
	§	
VS.	§	**CIVIL ACTION NO. 7:21-CV-0087**
	§	**CRIM. ACTION NO. 7:17-CR-1352-1**
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER

The Court now considers "Movant's Motion for Leave to Supplement Objections."[1] This Court entered orders adopting the Magistrate Court's report and recommendations on February 7, 2024.[2] Those orders dismissed Movant's claims and closed this matter. Movant now wishes to supplement the objections the Court previously considered in adopting the Magistrate Court's report and recommendation. As was the case with the prior objections, these supplemental objections are non-specific, conclusory, and simply repetitive of what Movant has previously argued. Accordingly, Movant's motion is hereby **DENIED**.

IT IS SO ORDERED.

DONE at McAllen, Texas, this 14th day of February 2024.

Micaela Alvarez
Senior United States District Judge

[1] Dkt. No. 127.
[2] Dkt. Nos. 124-126.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

GEOVANI HERNANDEZ,	§	
	§	
Movant,	§	
	§	
VS.	§	**CIVIL ACTION NO. 7:21-CV-0087**
	§	**CRIM. ACTION NO. 7:17-CR-1352-1**
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER ADOPTING REPORT AND RECOMMENDATION

Before the Court is Movant Geovani Hernandez's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, which had been referred to the Magistrate Court for a report and recommendation. On December 18, 2023, the Magistrate Court issued the Report and Recommendation, recommending that the Section 2255 motion be **DENIED**, and that Movant's claims be **DISMISSED**.[1] Movant also filed a Motion for Summary Judgment, which the Magistrate Judge also recommended be **DENIED**. It was further recommended that a Certificate of Appealability be **DENIED**. After being granted an extension of time to file objections, Movant filed his objections to the Magistrate Court's report and recommendation.[2] Movant has also filed several other objections which, although not specifically addressed to this report and recommendation, the Court considers.[3] These objections are non-specific, conclusory, and simply repetitive of what Movant has previously argued.

Pursuant to 28 U.S.C. § 636(b)(1)(c), the Court has made a de novo determination of those portions of the report to which objections have been made. As to those portions to which no

[1] Dkt. No. 108.
[2] Dkt. No. 123.
[3] Dkt. Nos. 118-122.

objections have been made, in accordance with Federal Rule of Civil Procedure 72(b), the Court has reviewed the report for clear error.[4]

Having thus reviewed the record in this case, the parties' filings, and the applicable law, the Court adopts the Report and Recommendation in its entirety. Accordingly, the Section 2255 Motion is **DENIED**, Movant's Motion for Summary Judgment is **DENIED**, and Movant's claims are **DISMISSED**. The Court also affirms the Magistrate orders denying appointment of counsel,[5] production of the *Bell* opinion,[6] and leave to amend.[7] Finally, a Certificate of Appealability is **DENIED**.

IT IS SO ORDERED.

DONE at McAllen, Texas, this 7th day of February 2024.

Micaela Alvarez
Senior United States District Judge

[4] As noted by the Fifth Circuit, "[t]he advisory committee's note to Rule 72(b) states that, '[w]hen no timely objection is filed, the [district] court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Douglas v. United States Servs. Auto. Ass'n*, 79 F.3d 1415, 1420 (5th Cir. 1996) (quoting Fed. R. Civ. P. 72(b) advisory committee's note (1983)), *superseded by statute on other grounds by* 28 U.S.C. § 636(b)(1), *as stated in ACS Recovery Servs., Inc. v. Griffin*, No. 11-40446, 2012 WL 1071216, at *7 n. 5 (5th Cir. April 2, 2012).
[5] Dkt. No. 109.
[6] Dkt. No. 110.
[7] Dkt. No. 111.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 7, 2024
Lyle W. Cayce
Clerk

No. 24-40145

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GEOVANI HERNANDEZ,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 7:21-CV-87
USDC No. 7:17-CR-1352-1

ORDER:

Geovani Hernandez, federal prisoner # 29339-479, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his conviction for two counts of attempting to aid or abet the possession of cocaine with intent to distribute. He argues that the trial court violated Hernandez's due process rights because it did not give a jury instruction on aiding and abetting; that his trial counsel was ineffective because he did not renew a motion for a judgment of acquittal; and that there is no general federal attempt statute and the trial

"APPENDIX B"

court did not ensure that he had fair notice of the offense charged in the indictment.

To obtain a COA, Hernandez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A movant satisfies this standard by showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336. The COA inquiry is a "threshold question [that] should be decided without full consideration of the factual or legal basis adduced in support of the claims." *Buck v. Davis*, 580 U.S. 100, 115 (2017) (internal quotation marks and citation omitted). Hernandez has not made such a showing. Accordingly, his COA motion is DENIED.

In his COA motion, Hernandez does not argue that the district court erred in denying his motion to amend his § 2254 application, in which he sought to argue that the trial court applied the law concerning aiding and abetting incorrectly and did not ensure that he had fair notice of the offense charged in the indictment. He also does not raise the remaining issues that he raised in the district court. Accordingly, he has abandoned these unraised issues. *See United States v. Davis*, 971 F.3d 524, 532 n.4 (5th Cir. 2020); *see also Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

STEPHEN A. HIGGINSON
United States Circuit Judge

Certified as a true copy and issued as the mandate on Oct 07, 2024

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals for the Fifth Circuit

No. 24-40145

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GEOVANI HERNANDEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:21-CV-87

UNPUBLISHED ORDER

Before STEWART, HAYNES, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

A member of this panel previously DENIED Appellant's motion for a certificate of appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

"APPENDIX C"

United States Court of Appeals for the Fifth Circuit

No. 24-40145

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GEOVANI HERNANDEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:21-CV-87

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Before STEWART, HAYNES, and HIGGINSON, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration 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.

"APPENDIX D"

United States Court of Appeals
for the Fifth Circuit

Appeal Case No. 24-40145

United States of America,
Plaintiff - Appellee

v.

Geovani Hernandez,
Defendant - Appellant

BRIEF IN SUPPORT OF MOTION FOR COA

Appeal from the United States District Court
for the Southern District of Texas
McAllen Division
Civil Case No. 7:21-CV-00087
Criminal Case No. 7:17-CR-1352

"APPENDIX E"

Certificate of Interested Persons

Appeal No. 24-40145

The undersigned appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. The representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Geovani Hernandez, Appellant

Robert Randall "Randy" Crane, Chief Judge

Juan F. Alanis, U.S. Magistrate Judge

Kristen Joy Rees, AUSA

James Sturgis, AUSA

Jennifer B. Lowery, AUSA

John A. Reed, AUSA

Carmen Castillo Mitchell, AUSA

Abe Martinez, AUSA

Ryan K. Patrick, AUSA

Anibal Alaniz, AUSA

Alamdar S. Hamdani, Chief U.S. Attorney

J. Scott Hacker, U.S., Magistrate Judge

Micaela Alvarez, U.S. District Judge

Lee H. Rosenthal, U.S. District Judge

Dorina Ramos, U.S. Magistrate Judge

Peter E. Ormsby, U.S. Magistrate Judge

David Acosta, Former Defense Attorney

Certificate of Interested Persons

(Continues)

Kyle Blair Welch, Former Defense Attorney

Gregory Don Sherwood, Former Appellate Attorney

Hector Obed Saucedo Rodriguez, Criminal Informant

Maritssa Salinas, Criminal Informant

Arturo Cuellar , Jr., Criminal Informant

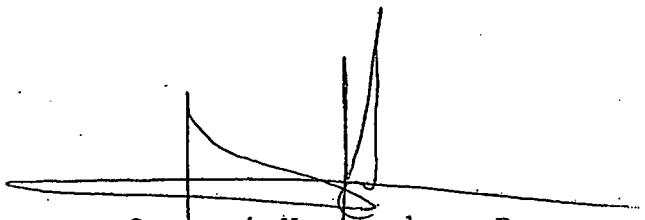
Antonio Perez IV, Special Agent / U.S. Department of Homeland Security - Immigration and Customs Enforcement (I.C.E.) - Homeland Security Investigations (HSI)

Raul Garza, Special Agent / U.S. Department of Homeland Security - Immigration and Customs Enforcement (I.C.E.) - Homeland Security Investigations (HSI)

Davis, Fifth Circuit Judge

Stewart, Fifth Circuit Judge

Dennis, Fifth Circuit Judge



Geovani Hernandez, Pro se.
Appellant.
REG. NO. 20339 479
FCC Forrest City - LOW
P.O. BOX 9000
Forrest City, AR. 72336

STATEMENT REGARDING ORAL ARGUMENT

Appellant is incarcerated and currently proceeding Pro Se, which consequentially renders oral argumentation a matter which would require coordination with Appellant's institution of incarceration should the Court grant it for the respective appeal.

Appellant asserts that Oral Argument of the issues would benefit the Court's careful consideration, and is thus necessary. Appellant requests that, should the Court agree on benefit and necessity of oral argumentation, that the Court order and schedule oral argumentation for this appeal.

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STATEMENT OF SUBJECT - MATTER AND APPELLATE JURISDICTION

This is a 28 U.S.C. § 2255 appeal from the Final Orders of the United States District Court for the Southern District of Texas, McAllen Division, entered on February 7, 2024 and February 14, 2024. See Docs. 124, 125, 126, 128. The district court had jurisdiction under 28 U.S.C. § 2241. Mr. Hernandez filed a pro se notice of appeal on February 22, 2024. See Doc. 131. The district court made notice of the filing of an appeal on March 6, 2024. See Doc. 133. This court has jurisdiction under U.S.C. § 1291. This court has jurisdiction under U.S.C. §§ 1291 and 2253(a).

STATEMENT OF THE ISSUES

1. Jury Instructions: A jury cannot convict a defendant upon a a theory of liability they were not instructed on. Hernandez was charged and convicted of attempting to aid and abet a drug offense. The Court gave an attempt instruction, which placed "aid and abet" within the substantive offense section, but omitted the entire Fifth Circuit Pattern Jury Instruction 2.04 for aiding and abetting. The omitted instruction contained distinct elements, definitions, and requirements. Did the Court violate Hernandez's due process?

2. Failure to Renew. This Circuit has stated that the term aid-and-abet is not self explanatory; and a defendant must aid or abet each element of the underlying offense. The jury was never instructed on aiding-and-abetting, nor did any evidence allege Hernandez participated in the element of drug possession. Counsel can renew a motion for acquittal if there is insufficient evidence or a manifest miscarriage of justice, but no renewal was made. Did Counsel fail Hernandez's constitutional guarantees?

3. Statutory Interpretation. This Circuit has recognized that there is no general federal attempt statute; an attempt to commit criminal conduct is only actionable where a specific statute prohibits attempts. Hernandez was indicted and convicted by inclusion of 18 U.S.C. § 2 under the theory that he attempted to aid and abet a drug offense. The word attempt is absent from 18 U.S.C. § 2, and other Circuits have declared that attempting to aid and abet is not a crime. Did the Court apply the law constitutionally and ensure Hernandez's right to a fair notice?

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 Doc. 131.

Hernandez requires, and thus seeks, a Certificate of Appeal from this Honorable Court of Appeals for the Fifth Circuit. This is Hernandez's Brief in Support of his Motion for COA.

SUMMARY OF THE ARGUMENT

1. Jury Instructions. A jury cannot convict a defendant upon a theory of liability they were not instructed on. Hernandez was charged and convicted of attempting to aid and abet a drug offense. The court gave an attempt instruction, which placed "aid and abet" within the substantive offense section, but omitted the entire Fifth Circuit Pattern Jury Instruction 2.04 for aiding and abetting. The omitted instruction contained distinct elements, definitions, and requirements. Did the Court violate Hernandez's due process?

Precedent is clear that when a jury is not instructed on aiding and abetting, the jury is not allowed to convict a defendant upon that theory. Additionally, this Circuit has stated that the term of aiding and abetting is not self explanatory. In other words, aiding and abetting must be defined to save the jury from being confused or misled.

In Hernandez's case, even though he was charged under the theory of attempt-to-aid-and-abet, the Court allowed the omission of all aiding and abetting instructions. No section of the Fifth Circuit Pattern Jury Instruction 2.04 for aiding and abetting was given to the jury. The omission left the jury uninformed on any of the specific elements, definitions, or requirements of aiding and abetting liability.

The only information that the jury was given about aiding and abetting was its name in passing as it was crammed into the substantive offense section of the Fifth Circuit Pattern Jury Instruction 1.34 for attempt. Aiding and abetting was placed as an object of attempt, but no underlying elements of aiding and abetting were given to the jury..

When this Circuit ruled on Hernandez's direct appeal, the "actual elements" for the offense were stated. The "actual elements"

of the attempt-to-aid-and-abet offense include the elements of 18 U.S.C. § 2 for aiding and abetting.

The jury was plainly not instructed on the entirety of the actual elements of the offense of attempting to aid and abet. The Government's burden of proof was improperly alleviated, as they were allowed to use the theory of aiding and abetting in name without allowing the jury to decide whether they proved its statutory elements.

Beyond the improper omission and the improprietary of making aiding-and-abetting an object of attempt, the jury instructions given misrepresent the law in two key ways; (1) conflating attempt with a conspiracy instruction; and (2) broadening the elements of 21 U.S.C. § 841(a)(1) - Possession with Intent to Distribute.

Were the jury given a complete and accurate instruction of the law, there is substantial probability that a reasonable jurist would not have been able to convict Hernandez beyond a reasonable doubt. While Counsel may have also been ineffective in this regard, the improprieties allowed by the Court in the jury instructions were an abuse of discretion which violated Hernandez's right to due process of law.

2. Failure to Renew. This Circuit has stated that the term aid-and-abet is not self explanatory; and a defendant must aid or abet each element of the underlying offense. The jury was never instructed on aiding and abetting, nor did any evidence allege Hernandez participated in the element of drug possession. Counsel can renew a motion for acquittal if there is insufficient evidence or a manifest miscarriage of justice, but no renewal was made. Did Counsel fail Hernandez's constitutional guarantees?

This Honorable Circuit has stated that the term aid-and-abet is not self explanatory; it requires instruction and definition. Further, this Honorable Circuit has clarified that when it comes to aiding and abetting, a defendant must aid or abet each element of the offense. After all, the theory requires a showing of not only some degree of participation, but also a shared intent with the principal's fulfillment of the entire crime committed.

As discussed at length in the jury instruction issue, the jury in Hernandez's case was not instructed on aiding and abetting despite being tasked to convict upon an attempt to aid and abet the possession with intent to distribute drugs. Since aiding and abetting is not self explanatory, and the jury did not have the term defined for them, they were left to make an uninformed decision.

In part, the decision was already made for the jury, as they were not given the opportunity to determine if the Government had demonstrated any elements of aiding and abetting. The jury was not allowed to determine if the underlying offense was actually committed by some person, despite Hernandez's conviction relying upon 18 U.S.C. § 2.

This is a defect which affected the fairness of the trial which Hernandez was entitled to. Therefore, a grave miscarriage of justice occurred, and is to be evaluated upon a different standard than a sufficiency of evidence claim.

However, there is also a key insufficiency of the evidence as to the element of possession in the underlying offense. It was admitted at trial that Hernandez never possessed the drugs actually or constructively. The Fifth Circuit Pattern Jury Instruction 1.33

for possession explains that one who constructively possesses something is one who has the knowing power and intention to exercise dominion or control over a thing directly or through others. In other words, if Hernandez did not even constructively possess the drugs, he did not have sufficient knowledge, power, nor intention to possess, attempt to possess, or participate in the possession of drugs.

This Circuit stated in the opinion for Hernandez's direct appeal, in reliance on the Partida case, that proving an attempt to aid and abet the offense requires, inter alia, that Hernandez acted with the kind of culpability otherwise required for the commission of the underlying substantive offense. Without the sufficient knowledge, power, nor intention to possess drugs constructively through others, Hernandez did not act with the kind of culpability otherwise required for the crime of possession with intent to distribute.

With a lack of sufficient culpability, the evidence for conviction is insufficient even if Hernandez had allegedly engaged in conduct which constitutes a substantial step toward the commission of the crime.

Hernandez had two constitutional pillars to ensure his acquittal given the circumstances: (1) due process from the Court on the initial motion; and (2) the effective assistance of Counsel to renew the motion. Both constitutional pillars failed Hernandez.

3. Statutory Interpretation. This Circuit has recognized that there is no general federal attempt statute; an attempt to commit criminal conduct is only actionable where a specific statute prohibits attempts. Hernandez was indicted and convicted by inclusion of 18 U.S.C. § 2 under the theory that he attempted to aid and abet a drug offense. The word attempt is absent from 18 U.S.C. § 2, and other Circuits have declared that attempting to aid and abet is not a crime. Did the Court apply the law constitutionally and ensure Hernandez's right to fair notice?

Unlike aiding and abetting, there is no general federal attempt statute. In other words, for an attempt to be punishable under law, Congress must use the word attempt or some variation thereof. Adherence to the separation of powers dictates that Courts shall not legislate, as that duty is reserved for the elected members of Congress. It follows, then, that where Congress knows how to say something but chooses not to, its silence is controlling; a Court shall not supplant Congressional intent and read absent language into a statute. To do otherwise would prevent the guarantee of fair notice in our criminal laws.

With these precepts of law in mind, this Honorable Circuit refused to infer attempt liability into a section of a statute which did not contain the word attempt. Hernandez was charged and convicted, with the inclusion of 18 U.S.C. § 2, for the offense of attempting to aid and abet a drug offense. However, 18 U.S.C. § 2 does not contain the word "attempt" or any variation of it; and in fact requires that an offense actually be committed. It is important to note that Hernandez was not charged with the common theory of aiding and abetting an attempt; he was charged loosely with attempting to aid and abet. Further, despite the position of the Partida case used to deny Hernandez relief through his case, asserting that aiding and abetting liability is implicit within the Model Penal Code's common law definition of attempt; Hernandez's charge relies upon 18 U.S.C. § 2, not just attempt alone.

To use a common law definition to nullify any of the statutory elements and requirements of 18 U.S.C. § 2 codified by Congress, while still basing a conviction upon that statute, is an impermissible alteration of the law that undermines fair notice. Fair notice is

further undermined by the fact that other Circuits and Districts have declared that attempt-to-aid-and-abet is not a crime and that the theory is invalid.

If it is to be held that the existence of attempting-to- aid-and-abet is a reasonable interpretation of the statute, then the existence of multiple yet conflicting reasonable interpretations of a statute evidences an issue of unconstitutional ambiguity. If it is to be held permissible that aiding-and-abetting have attempt read into it, or for it to be an object of attempt, when the word is absent from the statute, suggests that 18 U.S.C. § 2 evinces an ambiguous and absurd meaning. This Honorable Circuit is no stranger to these principles, and has refrained on multiple occasions from reading additional words into language which is already clear. The administration of justice demands a similar result in this matter for Hernandez's case.

ARGUMENT

1. Jury Instruction. A jury cannot convict a defendant upon a theory of liability they were not instructed on. Hernandez was charged and convicted of attempting to aid and abet a drug offense. The Court gave an attempt instruction, which placed "aid and abet" within the substantive offense section, but omitted the entire Fifth Circuit Pattern Jury Instruction 2.04 for aiding and abetting. The omitted instruction contained distinct elements, definitions, and requirements. Did the Court violate Hernandez's due process?

Precedent is clear that when a jury is not instructed on aiding and abetting, the jury is not allowed to convict a defendant upon that theory. See United States v. Acosta, 763 F.2d 671, 681 (5th Cir. 1985) ("reliance on the aider and abettor theory is misplaced in view of the fact that no jury instruction was given on that theory"). See also United States v. Basey, 816 F.2d 980, 997 (5th Cir. 1987) ("Because no aiding and abetting instruction was given to the jury, [the defendant's] substantive conviction cannot rest on that basis"). Additionally, this Circuit has stated that "the words 'aiding and abetting' are not self-explanatory." See Moore v. United States, 356 F.2d 39 (5th Cir. 1966). See also United States v. Hansen, 143 Ct. 1932 (2023) ("If the words 'aid or abet' [] were considered in a vacuum, they could be read to cover a person who inadvertently helps another commit a [substantive] offense. But a prosecutor who tried to bring such a case would not succeed. Why? Because aiding and abetting implicitly carries a mens rea requirement - the defendant generally must intend to facilitate the commission of [the] crime"). In other words, aiding and abetting must be defined to save the jury from being confused or misled.

A. Omission of the aiding and abetting instructions.

In Hernandez's case, even though he was charged under the theory of attempt-to-aid-and-abet, the Court allowed the omission of all aiding and abetting instructions. See Civ. Doc. 96 at 40-51. Further, while the Fifth Circuit Pattern Jury Instruction 2.04 for aiding and abetting provides an accurate reflection of the aiding and abetting law, no section of the instruction was given to the jury.

The Fifth Circuit Pattern Jury Instruction 2.04 contains the following concepts which were absent from the jury instructions given in Hernandez's case: (1) a distinct instruction on "mere presence" that emphasizes finding the defendant's participation beyond a reasonable doubt; (2) a substantive offense requirement which demands that "every element of the offense" be committed by a person and that the defendant "participated in its commission" with sufficient intent; (3) an element and definition for association with a criminal venture; and (4) an element and definition for participation in the criminal venture. The omission of these numerous and proper representations of the aiding and abetting law left the jury uninformed on any of the specific elements, definitions, requirements, or mens rea of the aiding and abetting liability.

This prejudiced Hernandez, as the jury was allowed to consider the words "aid and abet" without further clarification upon its legal requirements or its implicit mens rea. In other words, the jury was left to guess as to the meaning of aiding and abetting in a complex case such as Hernandez's, where the term is not self-explanatory.

Without explicit boundaries given to the jury for the aiding and abetting liability, the jury was allowed to convict Hernandez upon a broader theory than a properly instructed jury.

A properly instructed jury would have concluded that Hernandez did not aid or abet the specific offense of possession with the intent to distribute because he had no association or participation with the act of possession. See Civ. Doc. 18 at 25-27 (Agent Perez confirms that: (1) the drugs stayed within agency custody and control during the entire operation; (2) Hernandez never actually (himself) or constructively (through others) possessed the drugs; and (3) Hernandez never saw, touched, or smelled the drugs, nor knew which vehicle was allegedly hiding the drugs). See also Cr. Doc. at 4-8 (Counsel states that Hernandez "was not either the provider or the person who was acquiring" the cocaine); United States v. Simons, 540 Fed. Appx. 282, 284-285 (5th Cir. 2013) ("the factual basis must 'link the defendant to both aspects of the crime, possession and intent to distribute.' ... This Court explained that [the defendant] was improperly charged with possession because although the evidence was sufficient to sustain the aiding and abetting charge of distribution, it failed to prove he aided and abetted possession of the cocaine with intent to distribute."). Likewise, a properly instructed jury would have concluded that Hernandez did not cause a criminal act through another as he was the one allegedly paid for scouting for a distribution run. In other words, the government tried to cause alleged criminality through Hernandez.

B. Placing aiding and abetting as an object of attempt.

The only information that the jury was given in Hernandez's case about aiding and abetting was its name in passing as it was placed into the substantive offense section of the Fifth Circuit Pattern Jury Instruction 1.34 for attempt. See Cr. Doc. 81 at 9. However, aiding and abetting "is not a separate offense" and still requires the Government to prove that the crime was committed by someone." See United States v. Sanders, 952 F.3d 263, 277 (5th Cir. 2020). See also United States v. Vargas, 74 F.4th 637, n.6 (5th Cir. 2023) ("An 'inchoate crime' is one that involves '[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment.' The term includes conspiracies and attempts. It does not include aiding and abetting, which 'is simply a different method for demonstrating liability for the substantive offense.'") (Citations omitted).

Aiding and abetting is simply an alternative theory of liability indistinct from the substantive crime. In other words, unlike a conspiracy or attempt—which are separate, inchoate offenses—aiding and abetting is a theory of liability that requires the jury to find a completed, principle offense. Additionally, "it is improper to impute the conduct of [the defendant's] coconspirators to [the defendant] to sustain a conviction for attempt" because "criminal attempt is not a 'group crime'". See United States v. Thomas, 690 F.3d 358, 370 (5th Cir. 2012).

By placing the words "aid and abet" as an object of attempt, via the substantive offense section of FCPJI 1.34, the aiding and abetting theory was presented to the jury as an inchoate crime; and attempt was presented to the jury as a group crime. This prejudiced Hernandez by allowing the reliance on an inchoate aiding

and abetting theory which did not require the Government to prove all of its statutory requirements. See Civ. Doc. 120 at 4 ("MR. STURGIS: We don't have to prove he actually aided and abetted").

C. Failure to instruct on actual elements of the offense.

When this Circuit ruled on Hernandez's direct appeal, the "actual elements" for the offense of attempting to aid and abet the possession with intent to distribute were stated. See United States v. Hernandez, 825 Fed. Appx. 219, 219-220 (5th Cir. 2020). The approach for the actual elements given by this Circuit are straightforward: (1) the elements for possession with intent to distribute; (2) elements for aiding and abetting—which makes for aiding and abetting the possession with intent to distibute; and (3) the elements for attempt—which makes for "an 'attempt' to aid and abet the possession with intent to distribute a controlled substance." See id.

It is clear that the "actual elements" of the offense of attempting to aid and abet the possession with intent to distribute necessarily involves elements of aiding and abetting. The jury in Hernandez's case were given no instructions or definitions on aiding and abetting. Therefore, the jury in Hernandez's case was not instructed on the "actual elements" of the offense. This prejudiced Hernandez by allowing the jury to convict without allowing them to consider if the "actual elements" of the offense were satisfied.

D. Conflating attempt with a conspiracy instruction.

Conspiracy is distinct from both attempt and aiding and abetting. See United States v. Marden, 872 F.2d 123 (5th Cir. 1989) ("attempt and conspiracy are distinct offenses"); United States v. Pena, 949 F.2d 751, 755 (5th Cir. 1991)

("the crimes of conspiracy and aiding and abetting are separate and distinct"); United States v. Lott, F.4th 280 (5th Cir. 2023)("conspiracy and aiding and abetting are distinct offenses").

There is no Fifth Circuit Pattern Jury Instruction for a 21 U.S.C. § 846 attempt at 21 U.S.C. § 841(a)(1). There is, however, FCPJI 2.97 for a 21 U.S.C. § 846 conspiracy. 21 U.S.C. § 846 targets "[a]ny person who attempts or conspires to commit any offense" defined in Title 21 of the United States Code. As relevant here, and true to the group nature of conspiracy, FCPJI 2.97 states that "Title 21, United States Code, section 846, makes it a crime for anyone to conspire with someone else to commit a violation of certain controlled substances laws." Additionally, FCPJI 2.97 borrows a "mere presence" instruction from FCPJI 2.15A for general conspiracy.

When the jury instructions were crafted in Hernandez's case, the District Court, as discussed previously, did not adhere to the "actual elements" for the offense as defined by the Circuit. In other words, when the District Court charged the jury on the offense of attempting to aid and abet a 21 U.S.C. § 841(a)(1) offense, they did not simply give an attempt instruction followed by an aiding and abetting instruction followed by a § 841(a)(1) instruction. Instead, the District Court, inter alia, modified the FCPJI 2.97 for conspiracy. While conspiracy is distinct from attempt and aiding and abetting, concepts of conspiracy remained in the jury instructions in two key ways.

First, as noted previously, FCPJI 2.04 for aiding and abetting carries with it a distinct instruction on "mere presence" that emphasizes finding the defendant's participation beyond a reasonable doubt. In Hernandez's case, the "mere presence" instruction for conspiracy was modified by removing the last part of the last sentence. Further, any use of the word conspiracy was replaced with use of attempt. This modification still left the jury without any instruction on finding Hernandez's participation beyond a reasonable doubt. This prejudiced Hernandez because a

portion of his defense relied on the assertion that his participation was merely incidental and not knowingly or purposeful.

Second, as noted previously, criminal attempt is not a group crime. However, the District Court's modification of the conspiracy instruction broadened attempt into a group crime. While the District Court replaced the word "conspiracy" with the word "attempt", it inadvertently and improperly meshed attempt and conspiracy together. See Cr. Doc. 81 at 9 ("Title 21, United States Code, section 846, makes it a crime for anyone to attempt with someone else to commit a violation of certain controlled substances laws"). That statement misrepresented the law to the jury by purporting it to cover a broader swath of conduct than it was written to. Further, without any aiding and abetting instructions to clarify the boundaries of the charge,Hernandez's conviction by the jury was allowed to be sustained upon broad concepts of conspiracy that he was never indicted for. Were Hernandez properly charged with conspiracy, the charge would necessarily fail. See Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965)("as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy").

Blurring the lines between conspiracy and other distinct theories is highly prejudicial where, as in Hernandez's case, a particular defendant cannot be guilty of conspiracy as a matter of law. This conflation is harmful in Hernandez's case due to the fact that "[t]he evidence supporting a conspiracy conviction typically supports an aiding and abetting conviction." See United States v. Montgomery, 210 F.3d 446, 450 (5th Cir. 2000); United States v. Ndemba, 463 Fed. Appx. 396, 404 (5th Cir. 2012); United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991). Further harming Hernandez is specifically

how the District Court in his case not only omitted all aiding and abetting instructions, but further errored by conflating conspiracy with attempt. The Government, however, deliberately dared to transgress this line in Hernandez's case. See Civ. Doc. 96 at 22 ("MS[.] REES: It's still an inchoate crime, right? I mean, attempt and conspiracy are essentially the same thing").

E. Broadening the elements of 21 U.S.C. § 841(a)(1).

21 U.S.C. § 841(a)(1) prohibits the possession with intent to distribute a controlled substance. FCPJI 2.95A, which contains the title of "POSSESSION WITH INTENT TO DISTRIBUTE," properly represents 21 U.S.C. § 841(a)(1). As relevant here, the elements of the instruction require, inter alia, that "the defendant [Hernandez] knowingly possessed a controlled substance" and that "the defendant [Hernandez] possessed the substance with the intent to distribute it."

The instructions given to the jury in Hernandez's case stated "[t]he elements of the crime of possession with intent to distribute a controlled substance." However, the elements stated to the jury varied from the language of FCPJI 2.95A. See Civ. Doc. 96 at 24 ("MS. REES: [] I thought it at first said that a person, but it says defendant. ... THE COURT: You're going to have issues with that on appeal") As relevant here, the jury was told the elements merely required that "a person knowingly possessed a controlled substance" and that "a person possessed the substance with the intent to distribute it." See Cr. Doc. 81 at 9. In this way, the elements stated to the jury were for aiding and abetting the possession with

the intent to distribute cocaine. However, as discussed voluminously, the jury was not informed on any of the specific elements, definitions, requirements, or mens rea of the aiding and abetting liability.

Without the proper instructions on the aiding and abetting liability, the broadening of the elements of 21 U.S.C. § 841(a)(1) were particularly prejudicial to Hernandez. As the Government admitted at trial, "there was never ever the possession with intent to distribute by any load driver." See Civ. Doc. 96 at 23. Therefore, Hernandez and anyone that Hernandez allegedly associated with did not possess a controlled substance with the intent to distribute it. A properly instructed jury would have concluded that Hernandez did not have the requisite intentional association and participation with the underlying elements that must be comitted by a person.

F. Cumulative Prejudice

The jury instruction issues in Hernandez's case did not just effect him in isolation. The issues in totality had a great and substantial prejudicial impact upon his conviction by the jury.

The jury did not have aiding and abetting explained to them, even though the term is not self-explanatory and carries an implicit mens rea. Even worse, absolutely no aiding and abetting instructions were given as they were considered but omitted. The words aiding and abetting, without their proper explanation, were then given to the jury as an object of attempt even though aiding and abetting is not an inchoate crime like attempt or conspiracy.

Further, attempt was presented to the jury as if it were related to conspiracy even though the concepts are distinct and Hernandez cannot be guilty of conspiracy as a matter of law. Additionally, the elements of the underlying crime were broadened to allege aiding and abetting even though, circularly, aiding and abetting was never explained to the jury.

The resulting prejudice from these transgressions is an attempt-to-aid-and-abet-possession-with-intent-to-distribute charge that was in fact boundless and shape-shifting. The complex charge was allowed to embody a wide variety of alleviating characteristics for the Government according to the context of its surrounding legal analysis. The fact that the charge given to the jury in Hernandez's case failed to adhere to the "actual elements" defined for the offense by this Circuit is proof-positive of prejudice toward the fairness given to Hernandez.

Were the jury given a complete and accurate instruction of the law, there is a substantial probability that a reasonable jurist would not have been able to convict Hernandez beyond a reasonable doubt. If counsel waived any arguments of this magnitude in the jury instructions, the waiver would be ineffective assistance. While counsel may have been ineffective in this regard, this does not wash the District Court's hands clean. The improprieties allowed by the Court in the jury instructions were plain, and therefore were also an abuse of discretion which violated the right to due process of law that Hernandez was entitled to.

2. Failure to Renew. This Circuit has stated that the term aid-and-abet is not self-explanatory; and a defendant must aid or abet each element of the underlying offense. The jury was never instructed on aiding and abetting, nor did any evidence allege Hernandez participated in the element of drug possession. Counsel can renew a motion for acquittal if there is insufficient evidence or a manifest miscarriage of justice, but no renewal was made. Did counsel fail Hernandez's constitutional guarantees?

This Honorable Circuit has stated that the term aid-and-abet is not self explanatory. See supra. The term requires instruction and definition. Further, this Circuit has stated that even if a defendant can be held liable without committing "each element of the crime", they need to at least aid and abet the elements. See Simons at 284. In other words, for Hernandez's case, "the factual basis must link the defendant to both aspects of the crime, possession and intent to distribute." Id. See also United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976)(reversing conviction of aiding and abetting possession with intent to distribute due to lack of evidence of possession or constructive possession). After all, the theory requires a showing of not only some degree of participation, but also a shared intent by the association with the principal's fulfillment of the entire crime committed.

A. The jury instructions caused a grave miscarriage of justice.

As discussed at length in the jury instruction issue, the jury in Hernandez's case was not instructed on aiding and abetting despite being tasked to convict upon an attempt to aid and abet the possession with intent to distribute cocaine. Further, among other things, attempt was conflated with concepts of conspiracy. Since aiding and abetting is not self-explanatory, and the jury did not have the

term explained for them to mitigate the other instructional errors, the jury was left to make an uninformed decision.

In part, the decision was already made for the jury, as they were not given the opportunity to determine if the underlying offense was actually committed by some person, nor the opportunity to consider any statutory elements of aiding and abetting, despite Hernandez's conviction relying upon 18 U.S.C. § 2.

This is a defect which affected the fairness of the trial which Hernandez was entitled to. In Hernandez's case, the law as a whole was not correctly stated and the jurors were not clearly instructed on numerous aspects of aiding and abetting. The jury instructions as given, inter alia, eviscerated Hernandez's ability to present a defense regarding insufficient association and participation although those are elements of aiding and abetting. The jury instruction errors in Hernandez's case are plain because "it could have meant the difference between acquittal and conviction." See United States v. Green, 47 F.4th 279 (5th Cir. 2022). Therefore, a grave miscarriage of justice occurred, and is to be evaluated differently than a sufficiency of evidence claim. See id (jury instruction review and standard of review to show a grave miscarriage of justice).

B. Insufficient evidence of participation in possession.

Regarding sufficiency of the evidence, inter alia, while the evidence is viewed in the light most favorable to the government, "the jury may not 'pile inference upon inference to' find possession with intent to distribute and it must 'limit itself to reasonable constructions of the evidence.'" See United States v. Campos-Ayala,

70 F.4th 261 (5th Cir. 2023). FCPJI 1.33 for possession is an accurate reflection of the legal concept of possession. The instruction explains more than actual possession, it explains that "[a] person who, although not in actual possession, knowingly has both the power and the intention at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is in constructive possession of it." See id. As discussed above, the Government admitted that Hernandez did not actually or constructively possess cocaine, therefore he never had power and intention to exercise domain or control over the cocaine.

In Jackson, this Circuit reversed a conviction of aiding and abetting possession with intent to distribute cocaine. In its ruling, this Honorable Circuit declared that the Government "Failed to prove a Prima Facie case of guilt as to the offense charged" because "[t]here was no participation by [the defendant] in the possession aspect of the transaction on which his conviction of aiding and abetting possession with intent to distribute can be sustained." See Jackson at 1237, 1238.

In Jackson, this Circuit expressed that the evidence viewed in the light most favorable to the Government did establish sufficient association and participation with the criminal venture, and action to make it succeed. However, the Circuit held that because "[the defendant] did not exercise dominion or control over the cocaine", he "was improperly indicted under the possession clause of 21 U.S.C. § 841(a)(1)." See id at 1237. Further, this Circuit added that "[the defendant's] conviction cannot be sustained under a theory of constructive possession, because there is no evidence that he exercised any measure of dominion or control over the contraband." Id.

When this Circuit ruled on Hernandez's direct appeal, they stated that to "prove an 'attempt' to aid and abet the possession with intent to distribute a controlled substance, the prosecution must prove", inter alia, "that the defendant acted with the kind of culpability otherwise required for the commission of the underlying substantive offense." See Hernandez at 219. The Circuit added that "[t]he Government was not required to prove that Hernandez possessed or attempted to possess the cocaine" because "aiding and abetting the possession of a controlled substance with the intent to distribute does not require the Government to prove actual or constructive possession." See id at 220.

Even were it true that the Government does not have to prove actual or constructive possession as an element, the concepts involve measures of dominion and control which evidence the "Participation by [the defendant] in the possession aspect of the transaction on which his conviction of aiding and abetting possession with intent to distribute can be sustained." See Jackson at 1237, 1238. Without the specific participation in the possession aspect of the charge, Hernandez could not have acted with the kind of culpability otherwise required for the commission of the underlying substantive offense.

As discussed above, the Government admitted that Hernandez did not actually or constructively possess cocaine, he did not see or interact with it, nor did he know what vehicle was hiding it. As pointed out by trial counsel, Hernandez was not the requestor or acquirer of the drugs. Hernandez's alleged scouting for a transport could not have served the aspect of possession because his alleged associates he allegedly participated with already had possession of the cocaine before ever associating with Hernadez. Therefore,

Hernadez could not have participated in the possession aspect of the transaction.

The holding of Jackson stands for the proposition that where there is "no participation by [the defendant] in the possession aspect" of the charge, there is a failure to "prove a prima facie case of guilt as to the offense charged." To defy this proposition in Hernandez's case would be to sustain his conviction upon evidence that this Honorable Circuit previously held was insufficient to even make a prima facie showing. To hold this evidence as sufficient in Hernandez's case would be a plain manifest miscarriage of justice.

C. Counsel and the Court failed Hernandez.

Hernandez had two constitutional pillars to ensure his acquittal given the circumstances: (1) due process from the court on the initial motion for acquittal; and (2) the effective assistance of counsel to renew the motion for acquittal. Both constitutional pillars failed Hernandez.

First, to counsel's credit, an initial motion for acquittal was made. Miscarriages of justice aside, "the court on the defendant's motion must enter a judgement of acquittal of any offense for which the evidence is insufficient to sustain a conviction." See Federal Rules of Criminal Procedure Rule 29(a). However, the court failed Hernandez by erroneously finding sufficient evidence when there was a clear lack of participation in the possession aspect of the charge.

Second, to counsel's discredit, a renewal of the motion of acquittal was not made despite the clear merits in such a request. Due to counsel's ineffectiveness to renew the motion for acquittal, Hernandez's

claim on direct appeal was confined to a narrower standard of review which prejudiced him. Hernandez's appellate claim which underwent the narrower standard of review was denied, whereas a properly preserved review could have sustained his claim on the merits. Counsel, therefore, failed Hernandez by failing to renew the motion for acquittal.

3. This Circuit has recognized that there is no general federal attempt statute; an attempt to commit criminal conduct is only actionable where a specific statute prohibits attempts. Hernandez was indicted and convicted by inclusion of 18 U.S.C. § 2 under the theory that he attempted to aid and abet a drug offense. The word attempt is absent from 18 U.S.C. § 2, and other Circuits have declared that attempting to aid and abet is not a crime. Did the court apply the law constitutionally and ensure Hernandez's right to fair notice?

Unlike aiding and abetting, there is "no general attempt statute." See United States v. Hagman, 740 F.3d 1044, 1051 (5th Cir. 2014). In other words, for an attempt to be punishable under law, Congress must use the word "attempt" or some variation therof. See id ("an attempt to commit criminal conduct is ... actionable only where ... a specific criminal statute makes impermissable its attempted as well as actual violation").

Adherence to the separation of powers doctrine dictates that Courts shall not legislate and craft new laws, as that duty is reserved for the elected members of Congress. In other words, Article I gives Congress, "not the [c]ourt," the power to "define a crime, and ordain its punishment." See United States v. Wiltberger, 5 wheat 76, 95, 5 L.Ed. 37 (1820). It follows, then, that, where Congress knows how to say something but chooses not to, its silence is controlling. See BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1761 (1994).

Further, a court shall not supplant congressional intent and read absent language into a statute. See Lamie v. United States Tr., 540 U.S. 526, 538 (2004)(holding that if the text evinces "a plain, nonabsurd meaning" then the court should not "read an absent word into the statute"); Bates v. United States, 522 U.S. 23, 29 (1997) (holding that courts "ordinarily" should "resist reading words or elements into a statute that do not appear on its face"); Wheeler v. Hilgrim's Hride Corp., 536 F.3d 455, 459 (5th Cir. 2008)("under well-settled principles, we must refrain from reading additional terms" into statutes). Defying these principles would prevent the guarantee of fair notice in our criminal laws.

With these percepts of law in mind, this Honorable Circuit refused to infer attempt liability into a section of a statute which did not contain the word "attempt". See Hagman. Hernandez was charged and convicted, with the inclusion of 18 U.S.C. § 2, for the offense of attempting to aid and abet a drug offense. However, 18 U.S.C. § 2 does not contain the word "attempt" or any variation of it; and in fact requires that an offense be committed.

It is important to note that Hernandez was not charged with the common theory of aiding and abetting an attempt; he was charged loosely with attempting to aid and abet. United States v. Hartida, 385 F.3d 546 (5th Cir. 2004) was used to deny Hernandez relief throughout his case upon the proposition that aiding and abetting liability is implicit within the Model Penal Code's common law definition of attempt. However, in the context of Hernandez's case, this proposition reads too much into "attempt" by ignoring the fact that Hernandez's charge is based upon 18 U.S.C. § 2 aiding and abetting and not just attempt alone. If "attempt" carried the weight in federal law that

Hartida purports it to, use of 18 U.S.C. § 2 would be purely unecessary.

To use a common law definition to nullify any of the statutory elements and requirements of 18 U.S.C. § 2 codified by Congress while still basing a conviction upon that statute is an impermissable alteration of the law which undermines fair notice. Fair notice is further undermined by the fact that other Circuits and Districts have declared that attempt-to-aid-and-abet is not a crime and that the theory is invalid. See United States v. Kuok, 671 F.3d 931, 941 (9th Cir. 2012)("the government's argument that attempt should rationally be read into 18 U.S.C. section 2(b) fails"); United States v. Aydin, 2015 U.S. Dist. LEXIS 27033 (N.D. GA); 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"); 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)("attempted aiding and abetting, a crime that the American Law Institute thinks should exist, Model Penal Code § 2.06(3)(a)(ii), but that probably does not exist under federal law because of the interpretation that courts place on aiding and abetting, [] combined with the absence of a general federal attempt statute'); United States v. Delgado, 972 F.3d 63, n.11 (2nd Cir. 2020) ("The Government did not charge [the defendant] with attempted aiding and abetting, a putative crime that some of our sister circuits have suggested does not even exist under federal law"). See also Civ. Docs. 103, 114.

If it is to be held that the existence of attempting-to-aid-and-abet is a reasonable interpretation of the statute, then the existence

of multiple yet conflicting reasonable interpretations of a statute evidences an issue of unconstitutional ambiguity that merits analysis by this Honorable Circuit. See Jennings v. Rodriguez, 583 U.S. 281, 286 (2018)("under the constitutional-avoidance cannon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts").

If it is to be held permissible that aiding-and-abetting have attempt read into it or for it to be an object of attempt, when the word is absent from the statute, suggests that 18 U.S.C. § 2 evinces an ambiguous and absurd meaning. This Honorable Circuit is no stranger to these principles, and has refrained on multiple occasions from reading additional words into language which is already clear. See Hagman; Esquivel v. Lynch, 803 F.3d 699, 700-703 (5th Cir. 2015). The administration of justice demands a similar result in this matter for Hernandez's case.

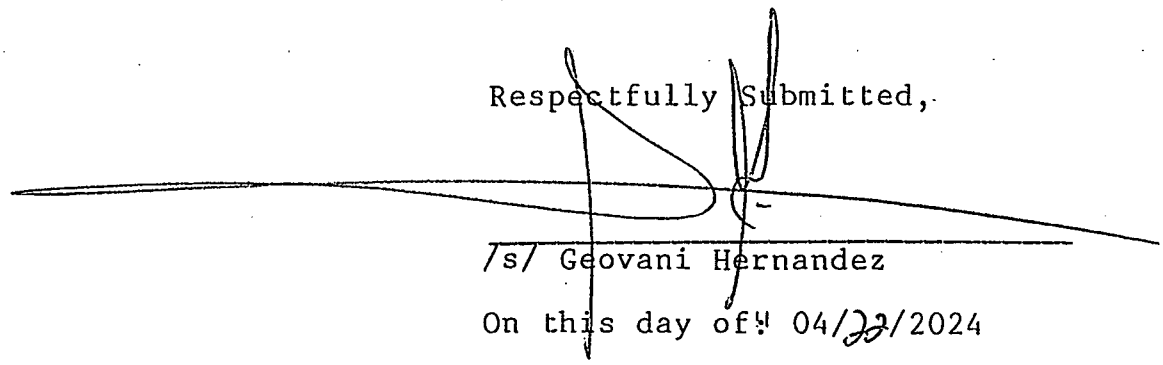
CONCLUSION

Hernandez's trial contained multiple plain and prejudicial errors in the jury instructions. Through trial, the District Court deprived Hernandez of due process of law, and counsel ultimately failed to deliver effective assistance which could have secured Hernandez's acquittal. Additionally, the law as interpreted and applied to Hernandez raises constitutional concerns of, inter alia, fair notice and the separation of powers.

It is for these reasons that Hernandez asks this Honorable Circuit to GRANT a certificate of Appealability. Hernandez further requests that this Honorable Circuit VACATE his conviction, or, in

the alternative, REVERSE his conviction and REMAND to the District Court for a new trial.

Respectfully Submitted,



/s/ Geovani Hernandez

On this day of: 04/22/2024

Geovani Hernandez
Reg. No. 29339-479
FCI Forrest City Low
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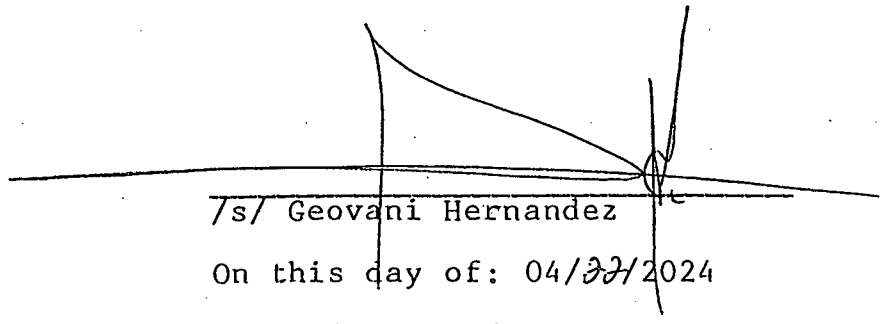
Forrest City, AR 72336

CERTIFICATE OF SERVICE

I certify, under the penalty of perjury, that the foregoing Motion for COA and Brief in Support was placed in FCI Forrest City Low's internal mail system, first-class postage pre-paid, for service upon this court via U.S. mail on this 22nd day of April, 2024.

CERTIFICATE OF COMPLIANCE

Pursuant to federal Rules of Appellate Procedure Rule 32(Q)(7), this document has been produced within the page limitation or is otherwise compliant with Fifth Circuit Rule 32.4. Additionally, pursuant to the relevant rule, this document has been produced with a proportionally spaced typeface on a Swintec 2410 CC Typewriter.



/s/ Geovani Hernandez

On this day of: 04/22/2024

Geovani Hernandez
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"APPENDIX F"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEOVANI HERNANDEZ, PETITIONER,	)	
v.	)	Appeal No. 24-40145
UNITED STATES OF AMERICA, RESPONDENT	)	

MOTION FOR RECONSIDERATION

Circuit Judge Higginson, in denying Petitioner Geovani Hernandez's Motion for COA to the Honorable Court, stated that "Hernandez does not argue that the district court erred in denying his motion to amend his [habeas] application." Civ. App. Doc. 37 at 2. This conclusion did not afford Hernandez a liberal construction of his pleadings that a pro se litigant is entitled to. As a result, the Circuit Judge misapprehended the fact that Hernandez put forth the argument, however inartfully worded it may have been.

The Circuit Judge also concluded that all issues presented by Hernandez failed to make a substantial showing of the denial of a constitutional right because reasonable jurists could not find the claims and their assessment debatable. Id. This conclusion would overlook prior binding precedent cited, overlook allegations made in the lower court, and misapprehend debatability inherent in other Circuits' findings that the charge of attempting to aid and abet is legally invalid.

Hernandez, pro se, calls upon this Honorable Court for reconsideration to find that he has challenged the denial of his motion to amend and that he has made requisite threshold showings on the issues presented.

ARGUMENT

As an initial matter, the Circuit Judge's conclusions would appear to be non-specific and conclusory. The Circuit Judge gives no reasoning nor cites to any authority to support his conclusions that Hernandez did not make a requisite threshold showing. The Circuit Judge has given such sound reasoning in his explanations to several other petitioners that were ultimately denied. See United States v. Cherry, 2023 U.S. App. LEXIS 2669 (5th Cir.); Jackson v. Vannoy, 981 F.3d 408 (5th Cir. 2020); United States v. Vogel, 2019 U.S. App. LEXIS 39346 (5th Cir.); United States v. Evans, 2019 U.S. App. LEXIS 40195 (5th Cir.); Mathis v. Goodwin, 2019 U.S. App. LEXIS 39520 (5th Cir.); Perez v. Davis, 2017 U.S. App. LEXIS 27541 (5th Cir.); United States v. Lewis, 2017 U.S. App. LEXIS 28955 (5th Cir.); Colbert v. Vannoy, 2017 U.S. App. LEXIS 28902 (5th Cir.); United States v. El-Mezain, 2016 U.S. App. LEXIS 25022 (5th Cir.); United States v. Johnson, 2016 U.S. App. LEXIS 23632 (5th Cir.); Wetzel v. Leblanc, 2015 U.S. App. LEXIS 23334 (5th Cir.); Adams v. Stephens, 2015 U.S. App. LEXIS 23264 (5th Cir.); Mitchell v. Cain, 2015 U.S. App. LEXIS 23797 (5th Cir.); Guerrero v. Stephens, 2015 U.S. App. LEXIS 23928 (5th Cir.); Quinonez v. Stephens, 2014 U.S. App. LEXIS 25058 (5th Cir.); Moore v. Thaler, 2012 U.S. App. LEXIS 26990 (5th Cir.). In the absence of such clear reasoning, Hernandez is left to assume that the conclusion reached by the Circuit Judge was the result of oversight or misapprehension.

At the outset, it is worth noting that the threshold for COA is only a modest standard - while there must be merit behind the claims, evaluating whether those merits would even

prevail ultimately is beyond the scope of review at this stage. See Batiste v. Davis, 747 Fed. Appx. 189, 192-193 (5th Cir. 2018) ("we are restricted to asking only if the District Court's decision was debatable; if not, a COA may not issue. This standard allows a COA to issue even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the petitioner will not prevail") (quotes and citations omitted). Additionally, while "[d]eciding which issues were raised in [a pro se litigant's habeas] application is complicated", jurisprudence of the Fifth Circuit holds "that a pro se 'habeas petition need only set forth facts giving rise to the cause of action.'" Black v. Davis, 902 F.3d 541, 546 (5th Cir. 2018) (citation omitted).

A. The Circuit Judge misapprehended the fact that Hernandez, afforded a liberal construction of his pleadings, argued that the district court erred in denying his motion to amend by continuing the very arguments the district court claimed were meritless.

In the District Court, Hernandez filed an assortment of supplements that were construed as a motion to amend. See Civ. Doc. 111 at 1 ¶ 2. Additionally, the Court considered a memorandum of law that Hernandez submitted to support his position in the construed motion to amend. See Id. at 2 ¶ 1 (referencing submission at Civ. Doc. 96).

Within the scope of this consideration, Hernandez laid the foundation for the arguments he would continue to press in the District Court and carry on to this Honorable Court. He presented the fact that his case "was prosecuted as an 'attempt'" under 18 U.S.C. § 2 even though the statute does not "include[]

inchoate offense elements [] according to its text." See Civ. Doc. 68 at 1. He alleged "erroneous jury instructions" as to the "elements". Id. See also Civ. Doc. 96 at 22 ("[The prosecution] was doing every possible thing to create a Jury Charge confusing enough for the jury to convict and to minimize the burden of proof for the government"). He presented that the instructions were conflating attempt and conspiracy. Id. He specified that "[t]he trial Judge, Randy Crane, did not instruct the jury [on aiding and abetting] and allowed the [] jury to convict" him. Id. at 36. Additionally, as the Circuit Judge summarized, the "motion to amend his [habeas] application [] sought to argue that the trial court applied the law concerning aiding and abetting incorrectly and did not ensure that he had fair notice of the offense charged in the indictment." The District Court denied the motion to amend. See Civ. Doc. 111.

The District Court relied on United States v. Partida, 385 F.3d 546 (5th Cir. 2004), and ordered that the motion to amend "be denied as futile" because the "claim[s] would be dismissed for lack of merit." Civ. Doc. 111 at 1, 3. Hernandez objected to the Order denying his motion to amend. See Civ. Doc. 120.

Hernandez continued his textual argument, specifying that "§ 2 does not contain the word 'attempt', [] there is no general federal attempt statute". Id. at 9. Hernandez's objection was considered by the District Court but was deemed "non-specific, conclusory, and simply repetitive of what [Hernandez] had previously argued." See Civ. Doc. 126 at 1, n.3.

Hernandez sought leave to supplement his Objections and addressed the Court's conclusion by continuing to demonstrate

the merits of his constitutional arguments. See Civ. Doc. 127. Hernandez additionally continued his jury instruction arguments. See Id. at 7 (specifying "the error of the government arguing an aiding and abetting theory without the jury ever being instructed on that theory"). Hernandez's motion for leave to supplement his objections was also denied by the Court which stated that "[a]s was the case with the prior objections, these supplemental objections are non-specific, conclusory, and simply repetitive". See Civ. Doc. 128.

In summary, Civ. Docs. 126 and 128 are both poised upon Hernandez's objections to the denial of his motion to amend on the basis that his claims were without merit. These objections intended to demonstrate the merits of the allegations considered by the Court but deemed meritless. Hernandez included both Civ. Docs. 126 and 128 in his Notice of Appeal to this Honorable Court.

In his COA Brief, Hernandez challenged the denial of his motion to amend necessarily by continuing the very same arguments that the District Court found meritless in its denials. See Civ. App. Doc. 20. Hernandez specifically challenged Partida, "which was used to deny Hernandez relief throughout his case" including his motion to amend. See Civ. App. Doc. 20 at 28.

In conclusion, Hernandez specifically sought to appeal multiple Orders that related to the denial of his construed motion to amend. The District Court labeled his submissions meritless and his objections non-specific and conclusory. Hernandez continued to argue the merits of his claims in his COA Brief and made specific challenges to Partida, which was at the heart of the District Court's denial. Given these facts and bearing in mind that Hernandez

is a pro se litigant entitled to a liberal construction of his pleadings, the Circuit Judge misapprehended that Hernandez was indeed challenging the District Court's denial of his motion to amend as erroneous however inartfully worded his pleadings may have been.

Therefore, Hernandez asserts that upon reconsideration this argument should be properly considered.

B. The Circuit Judge overlooked the fact that Hernandez made a requisite showing that reasonable jurists could find the District Court's assessment of the failure to instruct on aiding and abetting claim debatable.

In his COA Brief, Hernandez demonstrates that juries are not allowed to rely on an aiding and abetting theory when they are not instructed on it. See Civ. App. Doc. 20 at 12. He further demonstrated that the elements of aiding and abetting are necessarily elements of the attempt to aid and abet theory. Id. at 16. Hernandez has also shown that the jury in his case received no aiding and abetting instructions yet convicted him of attempting to aid and abet. Id. at 13. Hernandez also demonstrated that the failure to instruct further harmed his Fifth Amendment Due Process rights by allowing attempt and conspiracy to be conflated to the jury. Id. at 16 - 19.

Hernandez made a requisite showing that reasonable jurists could debate the District Court's assessment of the claims as meritless, non-specific, and conclusory.

C. The Circuit Judge misapprehended the fact that Hernandez made a requisite showing that reasonable jurists could find the District Court's assessment of the constitutional / fair notice claim debatable through the findings of other Circuits.

In his COA Brief, Hernandez demonstrates that there are cases within the Circuit that supported his positions that there is no general federal attempt statute and as such attempt cannot be read into where it simply is not present. See Civ. App. Doc. 20 at 27 - 28. The teeth of his claims, however, come from the holdings of other circuits that have either discredited or debunked the validity of an attempt to aid and abet charge. Id. at 29.

At this stage, however, Hernandez does not need to show that his claims will ultimately succeed; he only needs to show that reasonable jurists could debate the issue. Even settled issues can be at the heart of a finding of debatability.

The Supreme Court has held that even though a question may be well settled in a particular Circuit, the petitioner can meet the modest substantial showing standard where another Circuit has reached a conflicting point of view. See Lozada v. Deeds, 498 U.S. 430 (1991). Similarly, in Slack v. McDaniel, 529 U.S. 473 (2000), the Supreme Court held that an issue apparently settled by the law of a particular Circuit remained debatable for the purposes of issuing a COA. Under Slack, it is thus clear that a Circuit should not deny a petitioner an opportunity to persuade the Court through full briefing and argument to reconsider Circuit law that apparently forecloses relief. See also United States v. Crooks, 769 F. App'x 569, 572 (10th Cir. 2019) (stating that another Court of Appeals's opinion "demonstrates that a reasonable jurist could debate the merits of the procedural ruling that barred relief in this case"); Lambright v. Stewart, 220 F.3d 1022, 1027-28 (9th Cir. 2000) ("the fact that another circuit opposes our view satisfies the standard for obtaining a COA");

Wilson v. Sec'y Pa. Dep't of Corr., 782 F.3d 110, 115 (3rd Cir. 2015) (stating that a contrary United States Court of Appeals for the Sixth Circuit decision demonstrates that jurists of reason would debate the issue).

Hernandez has made a requisite threshold showing that jurists of reason could debate the District Court's assessment on the constitutionality and fair notice of the charge of attempting to aid and abet. At a minimum, Hernandez made this showing by relying on opinions of other Circuits that have suggested that the crime does not even exist under federal law, and that the aiding and abetting statute contains no attempt provision. See Civ. App. Doc. 20 at 29.

D. The Circuit Judge overlooked the fact that Hernandez made a requisite showing that reasonable jurists could find the District Court's assessment of the IAC claim for failing to renew a motion for acquittal debatable because he presented prior precedent that would have called into question the sufficiency of the evidence against him had counsel presented it.

The District Court considered Hernandez's argument that trial counsel was ineffective for failing to "(ix) renew the Rule 29 motion for acquittal". See Civ. Doc. 108 at 50, 161. The District Court denied the claim, holding that:

> "[E]ven if defense counsel had renewed the Rule 29 motion, [Hernandez] is unable to show either that the court would have granted it or that the Fifth Circuit, in applying the de novo standard of review, would have overruled the decision below. Any further sufficiency challenge was bound to fail whether before the trial court or on appeal. The evidence that [Hernandez] attempted to aid and abet the possession of cocaine with intent to distribute [] was sufficient to sustain a conviction." Civ. Doc. 108 at 188-189.

The Circuit Judge acknowledged that Hernandez argued "that his trial counsel was ineffective because he did not renew

a motion for a judgement of acquittal" but concluded Hernandez did not make a showing "that reasonable jurists could debate" whether the petition should have been resolved differently. See Civ. App. Doc. 37.

In his COA Brief, Hernandez's arguments cut against the District Court's conclusion of sufficient evidence. Specifically, Hernandez cited to United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976), to argue that because he had no participation with the possession aspect of the charge (as the Government has conceded), the evidence was insufficient to even make a prima facie showing of guilt for aiding and abetting. See Civ. App. Doc. 20 at 25.

Hernandez further used Jackson to support that since attempt liability requires acting with the kind of culpability otherwise required for the underlying offense, he cannot be guilty of attempting to aid and abet because, circularly, he had no participation with the possession aspect of the charge; which is culpability that is insufficient for the underlying offense. Id.

Jackson predates Partida and therefore was available for counsel to assert. Further, if Jackson and Partida were in conflict, Jackson would have carried more precedential weight. See United States v. Guzman-Rendon, 864 F.3d 409, 411 n.1 (5th Cir. 2017) ("[T]his circuit's rule of orderliness ... prohibits one panel from overruling another panel").

Therefore, Hernandez made the threshold demonstration that reasonable jurists could find the District Court's assessment of the Sixth Amendment constitutional claim for ineffective assistance of counsel claim debatable. The Circuit Judge overlooked this showing.

CONCLUSION

Hernandez petitions the Honorable Court today to address a fundamental miscarriage of justice. The District Court erred egregiously in its application of 18 U.S.C. § 2, resulting in a conviction that violates Hernandez's Fifth Amendment right to due process.

The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. Implicit in this guarantee is the right to be informed of the charges against you with sufficient specificity to enable a defense. The indictment in this case charged Hernandez under 18 U.S.C. § 2, a statute that, by its plain language, does not encompass inchoate offenses such as attempt.

The Government, however, through erroneous jury instructions, transformed § 2 into a general federal attempt statute. This was a fundamental error of constitutional magnitude. The jury was instructed to convict if they found that Hernandez took a substantial step towards the commission of an offense, even though the statute itself contains no such language. This effectively deprived Hernandez of fair notice of the charges against him and the opportunity to mount an adequate defense.

The Court's modest substantial showing standard for issuing a certificate of appealability is easily met in this case. The error in the jury instructions is clear and indisputable. The potential for prejudice to Hernandez is equally apparent. A conviction based on a charge not contained in the statute, and on jury instructions that misstate the law, cannot stand.

Hernandez urges this Court, via reconsideration to grant a certificate of appealability.

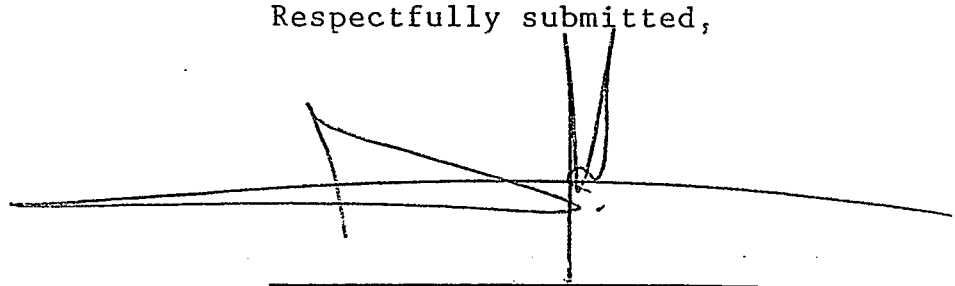
CERTIFICATE OF SERVICE

I certify, under the penalty of perjury, that the foregoing Petition for Panel Rehearing was placed in the FCI Forrest City Low's internal mail system, first-class postage prepaid, for service upon this court via U.S. Mail on this 10th day of September, 2024.

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. Rules 35(b)(2) and 40(b), this document has been produced within the page limitation. Additionally, pursuant to the relevant rule, this document has been produced with a proportionally spaced typeface on a Swintec 2410 CC Typewriter.

Respectfully submitted,



/s/ Geovani Hernandez

On this day of: 09/10/2024

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"APPENDIX F"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEOVANI HERNANDEZ, PETITIONER,	)	
v.	)	Appeal No. 24-40145
UNITED STATES OF AMERICA, RESPONDENT	)	

MOTION FOR RECONSIDERATION

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B. The Circuit Judge overlooked the fact that Hernandez made a requisite showing that reasonable jurists could find the District Court's assessment of the failure to instruct on aiding and abetting claim debatable.

In his COA Brief, Hernandez demonstrates that juries are not allowed to rely on an aiding and abetting theory when they are not instructed on it. See Civ. App. Doc. 20 at 12. He further demonstrated that the elements of aiding and abetting are necessarily elements of the attempt to aid and abet theory. Id. at 16. Hernandez has also shown that the jury in his case received no aiding and abetting instructions yet convicted him of attempting to aid and abet. Id. at 13. Hernandez also demonstrated that the failure to instruct further harmed his Fifth Amendment Due Process rights by allowing attempt and conspiracy to be conflated to the jury. Id. at 16 - 19.

Hernandez made a requisite showing that reasonable jurists could debate the District Court's assessment of the claims as meritless, non-specific, and conclusory.

C. The Circuit Judge misapprehended the fact that Hernandez made a requisite showing that reasonable jurists could find the District Court's assessment of the constitutional / fair notice claim debatable through the findings of other Circuits.

In his COA Brief, Hernandez demonstrates that there are cases within the Circuit that supported his positions that there is no general federal attempt statute and as such attempt cannot be read into where it simply is not present. See Civ. App. Doc. 20 at 27 - 28. The teeth of his claims, however, come from the holdings of other circuits that have either discredited or debunked the validity of an attempt to aid and abet charge. Id. at 29.

At this stage, however, Hernandez does not need to show that his claims will ultimately succeed; he only needs to show that reasonable jurists could debate the issue. Even settled issues can be at the heart of a finding of debatability.

The Supreme Court has held that even though a question may be well settled in a particular Circuit, the petitioner can meet the modest substantial showing standard where another Circuit has reached a conflicting point of view. See Lozada v. Deeds, 498 U.S. 430 (1991). Similarly, in Slack v. McDaniel, 529 U.S. 473 (2000), the Supreme Court held that an issue apparently settled by the law of a particular Circuit remained debatable for the purposes of issuing a COA. Under Slack, it is thus clear that a Circuit should not deny a petitioner an opportunity to persuade the Court through full briefing and argument to reconsider Circuit law that apparently forecloses relief. See also United States v. Crooks, 769 F. App'x 569, 572 (10th Cir. 2019) (stating that another Court of Appeals's opinion "demonstrates that a reasonable jurist could debate the merits of the procedural ruling that barred relief in this case"); Lambright v. Stewart, 220 F.3d 1022, 1027-28 (9th Cir. 2000) ("the fact that another circuit opposes our view satisfies the standard for obtaining a COA");

Wilson v. Sec'y Pa. Dep't of Corr., 782 F.3d 110, 115 (3rd Cir. 2015) (stating that a contrary United States Court of Appeals for the Sixth Circuit decision demonstrates that jurists of reason would debate the issue).

Hernandez has made a requisite threshold showing that jurists of reason could debate the District Court's assessment on the constitutionality and fair notice of the charge of attempting to aid and abet. At a minimum, Hernandez made this showing by relying on opinions of other Circuits that have suggested that the crime does not even exist under federal law, and that the aiding and abetting statute contains no attempt provision. See Civ. App. Doc. 20 at 29.

D. The Circuit Judge overlooked the fact that Hernandez made a requisite showing that reasonable jurists could find the District Court's assessment of the IAC claim for failing to renew a motion for acquittal debatable because he presented prior precedent that would have called into question the sufficiency of the evidence against him had counsel presented it.

The District Court considered Hernandez's argument that trial counsel was ineffective for failing to "(ix) renew the Rule 29 motion for acquittal". See Civ. Doc. 108 at 50, 161. The District Court denied the claim, holding that:

> "[E]ven if defense counsel had renewed the Rule 29 motion, [Hernandez] is unable to show either that the court would have granted it or that the Fifth Circuit, in applying the de novo standard of review, would have overruled the decision below. Any further sufficiency challenge was bound to fail whether before the trial court or on appeal. The evidence that [Hernandez] attempted to aid and abet the possession of cocaine with intent to distribute [] was sufficient to sustain a conviction." Civ. Doc. 108 at 188-189.

The Circuit Judge acknowledged that Hernandez argued "that his trial counsel was ineffective because he did not renew

a motion for a judgement of acquittal" but concluded Hernandez did not make a showing "that reasonable jurists could debate" whether the petition should have been resolved differently. See Civ. App. Doc. 37.

In his COA Brief, Hernandez's arguments cut against the District Court's conclusion of sufficient evidence. Specifically, Hernandez cited to United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976), to argue that because he had no participation with the possession aspect of the charge (as the Government has conceded), the evidence was insufficient to even make a prima facie showing of guilt for aiding and abetting. See Civ. App. Doc. 20 at 25.

Hernandez further used Jackson to support that since attempt liability requires acting with the kind of culpability otherwise required for the underlying offense, he cannot be guilty of attempting to aid and abet because, circularly, he had no participation with the possession aspect of the charge; which is culpability that is insufficient for the underlying offense. Id.

Jackson predates Partida and therefore was available for counsel to assert. Further, if Jackson and Partida were in conflict, Jackson would have carried more precedential weight. See United States v. Guzman-Rendon, 864 F.3d 409, 411 n.1 (5th Cir. 2017) ("[T]his circuit's rule of orderliness ... prohibits one panel from overruling another panel").

Therefore, Hernandez made the threshold demonstration that reasonable jurists could find the District Court's assessment of the Sixth Amendment constitutional claim for ineffective assistance of counsel claim debatable. The Circuit Judge overlooked this showing.

CONCLUSION

Hernandez petitions the Honorable Court today to address a fundamental miscarriage of justice. The District Court erred egregiously in its application of 18 U.S.C. § 2, resulting in a conviction that violates Hernandez's Fifth Amendment right to due process.

The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. Implicit in this guarantee is the right to be informed of the charges against you with sufficient specificity to enable a defense. The indictment in this case charged Hernandez under 18 U.S.C. § 2, a statute that, by its plain language, does not encompass inchoate offenses such as attempt.

The Government, however, through erroneous jury instructions, transformed § 2 into a general federal attempt statute. This was a fundamental error of constitutional magnitude. The jury was instructed to convict if they found that Hernandez took a substantial step towards the commission of an offense, even though the statute itself contains no such language. This effectively deprived Hernandez of fair notice of the charges against him and the opportunity to mount an adequate defense.

The Court's modest substantial showing standard for issuing a certificate of appealability is easily met in this case. The error in the jury instructions is clear and indisputable. The potential for prejudice to Hernandez is equally apparent. A conviction based on a charge not contained in the statute, and on jury instructions that misstate the law, cannot stand.

Hernandez urges this Court, via reconsideration to grant a certificate of appealability.

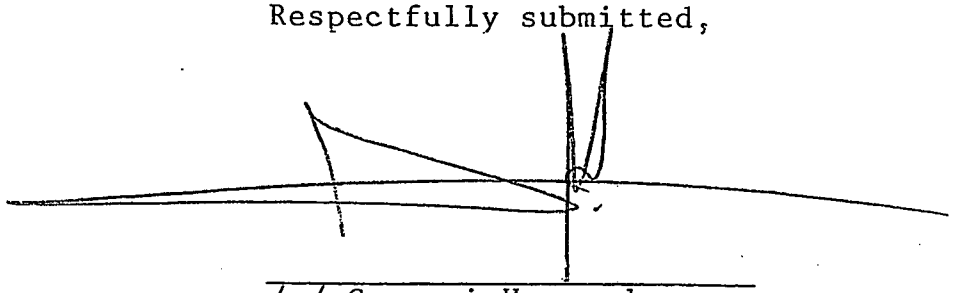
CERTIFICATE OF SERVICE

I certify, under the penalty of perjury, that the foregoing Petition for Panel Rehearing was placed in the FCI Forrest City Low's internal mail system, first-class postage prepaid, for service upon this court via U.S. Mail on this 10th day of September, 2024.

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. Rules 35(b)(2) and 40(b), this document has been produced within the page limitation. Additionally, pursuant to the relevant rule, this document has been produced with a proportionally spaced typeface on a Swintec 2410 CC Typewriter.

Respectfully submitted,



/s/ Geovani Hernandez

On this day of: 09/10/2024

Geovani Hernandez
Reg. No. 29339-479
FCI Forrest City Low
P.O. Box 9000
Forrest City, AR 72336

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal No. 24-40145

GEOVANI HERNANDEZ,
PETITIONER - APPELLANT,

v.

UNITED STATES OF AMERICA,
RESPONDENT - APPELLEE.

PETITION FOR REHEARING EN BANC

Appeal from the United States District Court
for the Southern District of Texas
McAllen Division

Criminal Case No. 7:17-CR-1352

Civil Case No. 7:21-CV-00087

Petition by: Geovani Hernandez
Petitioner - Appellant
Pro Se
Reg. No. 29339-479
FCI Forrest City Low
P.O. Box 9000
Forrest City, AR 72336

"APPENDIX G"

Certificate of Interested Persons

Appeal No. 24-40145

The undersigned appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. The representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Geovani Hernandez, Appellant

Robert Randall "Randy" Crane, Chief Judge

Juan F. Alanis, U.S. Magistrate Judge

Kristen Joy Rees, AUSA

James Sturgis, AUSA

Jennifer B. Lowery, AUSA

John A. Reed, AUSA

Carmen Castillo Mitchell, AUSA

Abe Martinez, AUSA

Ryan K. Patrick, AUSA

Anibal Alaniz, AUSA

Alamdar S. Hamdani, Chief U.S. Attorney

J. Scott Hacker, U.S., Magistrate Judge

Micaela Alvarez, U.S. District Judge

Lee H. Rosenthal, U.S. District Judge

Dorina Ramos, U.S. Magistrate Judge

Peter E. Ormsby, U.S. Magistrate Judge

David Acosta, Former Defense Attorney

Certificate of Interested Persons

(Continues)

Kyle Blair Welch, Former Defense Attorney

Gregory Don Sherwood, Former Appellate Attorney

Hector Obed Saucedo Rodriguez, Criminal Informant

Maritssa Salinas, Criminal Informant

Arturo Cuellar, Jr., Criminal Informant

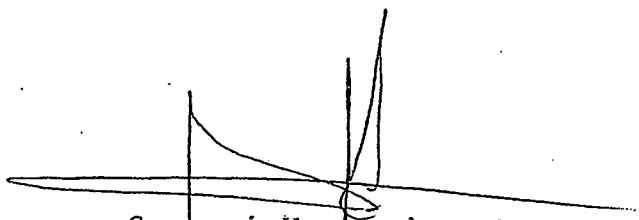
Antonio Perez IV, Special Agent / U.S. Department of Homeland Security - Immigration and Customs Enforcement (I.C.E.) - Homeland Security Investigations (HSI)

Raul Garza, Special Agent / U.S. Department of Homeland Security - Immigration and Customs Enforcement (I.C.E.) - Homeland Security Investigations (HSI)

Davis, Fifth Circuit Judge

Stewart, Fifth Circuit Judge

Dennis, Fifth Circuit Judge



Geovani Hernández, Pro se.
Appellant.
REG. NO. 20339 479
FCC Forrest City - LOW
P.O. BOX 9000
Forrest City, AR. 72336

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2. Sufficient Evidence. This Circuit has held that aiding and abetting the possession with intent to distribute drugs requires participation in the possession aspect of the transaction to support a conviction; the possession must be but for the defendant's actions and not obtained independently from the defendant's efforts. Hernandez was convicted of attempting to aid and abet the possession with intent to distribute cocaine, but the alleged "load driver" (Government Informant) already possessed the drugs independent from Hernandez's alleged "scouting". Is Hernandez's conviction in conflict with precedent?

3. Unconstitutional Vagueness. This Circuit has previously upheld the constitutionality of the charge of attempting to aid and abet. The Sixth, Seventh, and Ninth Circuits have held that attempted aiding and abetting does not even exist under federal law. 18 U.S.C. § 2 does not contain the word attempt. The Seventh and Ninth Circuit's detailed conclusions were based on the fact that there is no general federal attempt statute; a fact which this Circuit agrees with and has relied on in other contexts. Is the charge of attempting to aid and abet constitutional and does it provide fair notice?

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 issues by the Court throughout February, 2024. See Civ. Doc. 131.

Hernandez motioned this Honorable Court of Appeals 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 Civ. App. Doc. 37.

Consequentially, Hernandez now seeks Rehearing En Banc from this Honorable Court. This is his petition. A separate petition for Panel Rehearing has been contemporaneously submitted by Hernandez.

ARGUMENT AND AUTHORITIES

1. Jury Instructions. Fifth Circuit jurisprudence is clear that a jury must be instructed on aiding and abetting to convict a defendant of aiding and abetting. Hernandez was convicted of attempting to aid and abet the possession with intent to distribute cocaine, but the jury was never instructed on aiding and abetting. Does a court err when it allows a conviction for attempting to aid and abet without giving an aiding and abetting instruction?

Our precedent is clear that when a jury is not instructed on aiding and abetting, the jury is not allowed to convict a defendant upon that theory. See United States v. Acosta, 763 F.2d 671, 681 (5th Cir. 1985); United States v. Basey, 816 F.2d 980, 997 (5th Cir. 1987).

Our precedent and a crucial case it relies on also shows that a proper jury instruction for an attempt to aid and abet charge requires instructing the jury on aiding and abetting. See United States v. Partida, 385 F.3d 546, 558 (5th Cir. 2004) ("the district court instructed the jury [] on the elements required to prove the charge of attempting to aid and abet the possession of marijuana with intent to distribute -- the instructions first covered the substantive offense of possession of marijuana with intent to distribute and next covered the meaning of 'attempt' and 'aiding and abetting'"); United States v. Washington, 106 F.3d 983, 1007 (D.C. Cir. 1997) ("the instructions [] provided an entirely adequate explanation of all the elements that go into a proper attempt to aid and abet charge[;] the requirements for the offense of possession of cocaine with intent to distribute[,] the requirements for convicting a defendant of an attempt crime, and the requirements for finding accomplice liability").

No aiding and abetting instructions were given to the

jury in Hernandez's case. Hernandez was right to allege that the jury in his case were "not instructed on the 'actual elements' of the offense." See Civ. App. Doc. 20 at 16.

Due process under the Fifth Amendment requires that the Government prove every element of the offense to the jury beyond a reasonable doubt. The lack of any required instructions on the elements to the jury necessarily violates due process by interfering with the requirement that the Government prove every element of the offense to the jury.

Such a fundamental and plain error, however, without this full court's attention, will be buried as insufficient to even make a substantial showing of the denial of a constitutional right. See Civ. App. Doc. 37. This novel issue is therefore a question of exceptional importance; it is imperative on this full court to declare unequivocally that it is erroneous to allow a conviction for attempting to aid and abet without instructing the jury on aiding and abetting.

2. Sufficient Evidence. This Circuit has held that aiding and abetting the possession with intent to distribute drugs requires participation in the possession aspect of the transaction to support a conviction; the possession must be but for the defendant's actions and not obtained independently from the defendant's efforts. Hernandez was convicted of attempting to aid and abet the possession with intent to distribute cocaine, but the alleged "load driver" (Government Informant) already possessed the drugs independent from Hernandez's alleged "scouting". Is Hernandez's conviction in conflict with precedent?

This Circuit has held that aiding and abetting the possession with intent to distribute drugs requires participation in the possession aspect of the transaction to support a conviction. See United States v. Jackson, 526 F.2d 1236, 1238 (5th Cir. 1976).

In other words, the evidence is sufficient if it shows that but for the defendant's actions the principal would have never come into the possession of the drugs; the evidence is insufficient if the principal obtains the drugs independently of the defendant's efforts. See United States v. Scott, 892 F.3d 791, 800 (5th Cir. 2018).

Hernandez was charged and convicted of attempting to aid and abet the possession of cocaine with intent to distribute it. The Government is required to prove that Hernandez would have aided and abetted both the possession of cocaine and the intent to distribute it. Id. at 798. While Hernandez need not commit each element of the substantive offense, he would need to aid and abet each element. Id. at 799.

Like in Jackson, there was no evidence that Hernandez helped a principal obtain cocaine, or that he exercised any control over it. The Government conceded that Hernandez had no control over the cocaine. See Civ. Doc. 18 at 25-27. The "load driver" (Government Informant) had already obtained the cocaine independently from Hernandez's later alleged "scouting"; the possession was already completed before Hernandez's alleged participation. Hernandez had no contact with the "load driver", and unlike Scott and Partida, had no knowledge as to even what vehicle was supposedly transporting drugs because the Government deliberately witheld that information from Hernandez. See Id.

The district court characterized these facts and charges as "basically saying [Hernandez is] aiding and abetting aiding and abetting". See Civ. Doc. 96 at 40. The Government remained nonetheless overzealous. See Id. at 22 ("It's still an inchoate

crime, right? I mean, attempt and conspiracy are essentially the same thing").

Hernandez's conviction, which is upheld by Partida, is in conflict with the principles of sufficient evidence for aiding and abetting liability announced in Jackson and explained further in Scott. Hernandez's charge of attempting to aid and abet rather than aid and abet is of no difference. Without helping a principal obtain the cocaine, nor exercising any control over it, Hernandez could not have acted with the kind of culpability otherwise required for the commission of aiding and abetting the possession with intent to distribute cocaine in light of Jackson. Hernandez therefore calls upon this Honorable Court en banc to exercise its consideration as it is necessary to secure and maintain uniformity of the Court's decisions.

3. Unconstitutional Vagueness. This Circuit has previously upheld the constitutionality of the charge of attempting to aid and abet. The Sixth, Seventh, and Ninth Circuits have held that attempted aiding and abetting does not even exist under federal law. 18 U.S.C. § 2 does not contain the word attempt. The Seventh and Ninth Circuit's detailed conclusions were based on the fact that there is no general federal attempt statute; a fact which this Circuit agrees with and has relied on in other contexts. Is the charge of attempting to aid and abet constitutional and does it provide fair notice?

Based upon the Model Penal Code, the D.C. Circuit's holding in Washington, and other Fifth Circuit precedent, the Partida court concluded that federal criminal law prohibits attempting to aid and abet. See Partida at 556.

The Sixth Circuit has held that "an attempt to aid and abet is not a crime." United States v. Samuels, 308 F.3d 662, 669 (6th Cir. 2002). The Seventh Circuit has held that attempted

aiding and abetting "does not exist under federal law" due to interpretation of 18 U.S.C. § 2 and the absence of a general federal attempt statute. See United States v. Giovanetti, 919 F.2d 1223, 1227 (7th Cir. 1990). The Ninth Circuit has held that the crime of attempting to aid and abet is invalid because there is no general federal attempt statute, 18 U.S.C. § 2 does not contain an attempt provision, nor can attempt be rationally read into the statute. See United States v Kuok, 671 F.3d 931, 941 (9th Cir. 2012); United States v. Jayavarman, 871 F.3d 1050, n.1 (9th Cir. 2017). The Second Circuit has acknowledged the conflict, summarizing that "some of our sister circuits have suggested [the crime] does not even exist under federal law." United States v. Delgado, 972 F.3d 63, n.11 (2nd Cir. 2020). See also 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").

This Circuit has recognized, like the Seventh and Ninth Circuits, that there is no general federal attempt statute and has used that fact to deny Government efforts to read attempt where Congress did not use it. See United States v. Hagman, 740 F.3d 1044, 1051 (5th Cir. 2014).

Hernandez's charge, however, is a de facto general federal attempt - a conviction sustained upon 18 U.S.C. § 2 with no completed offense, no guilty principal, and no inclusion of the word attempt in the general federal aiding and abetting statute.

There is a distinction between aiding and abetting an attempt and attempting to aid and abet. See Washington at 1003-1005. The former respects the language framed by Congress

in 18 U.S.C. § 2 and adheres to its statutory requirements; the latter relies on the Model Penal Code to overwrite Congress. See Id. at 1004-1005 ("It is important to highlight the fact that this passage [in the Model Penal Code] does not describe an offense of aiding and abetting an attempted crime (in that case, there would be a guilty principal and an offense, thus posing no problem under the traditional aiding-and-abetting framework), but rather refers to attempting to aid and abet a crime (an offense for which there may not be a guilty principal)").

The fact that federal Courts of Appeals even vary as to the very existence of attempting to aid and abet in federal law is proof positive of statutory vagueness that denies fair notice and invites arbitrary enforcement by judges and prosecutors.

Hernandez was no ordinary citizen at the time of his arrest; he was a minority, a business owner, a government official, and a rising political figure. There is a growing concern in our great society that the justice system is being weaponized against such individuals; this concern is at the heart of the recently formed Congressional Subcommittee on the Weaponization of the Federal Government. Hernandez was charged and convicted of a crime that other Circuits have held to be non-existent. This crime, no less, did not naturally occur, but was driven at the behest of government agents who had Hernandez peculiarly in their crosshairs for several years with no evidence of criminal activity. See Civ. Doc. 108 at 2-3. For these reasons, this is a question of exceptional importance in which the great consideration of this Honorable Court en banc is warranted.

CONCLUSION

Geovani Hernandez, pro se, comes before this Honorable Court en banc to respectfully ask for its consideration to grant rehearing en banc.

Hernandez asserts that en banc consideration is necessary to secure and maintain the uniformity of the Court's decisions; his case must be reconciled with Jackson, a case of prior precedent that drew the line between sufficient and insufficient evidence in the context of aiding and abetting the possession with intent to distribute cocaine.

Hernandez asserts that the proceeding involves multiple questions of exceptional importance that demands the full Court's attention. If the full Court does not intervene, the injustice of failing to instruct the jury on aiding and abetting, a failure of constitutional magnitude, will be buried alive with no remedy in sight. If the full Court does not render its guidance, the attempt to aid and abet theory will have been successfully enforced as a de facto federal general attempt that undermines Congress's own codification of accomplice liability. If the full Court does not address its own precedent in light of the holdings of the Sixth, Seventh, and Ninth Circuits, the Court will risk undermining the separation of powers doctrine at a time in our country where the weaponization of our federal government is a rising concern to we the people.

Hernandez concludes that for the reasons above, en banc consideration from this Honorable Court of Appeals is merited.

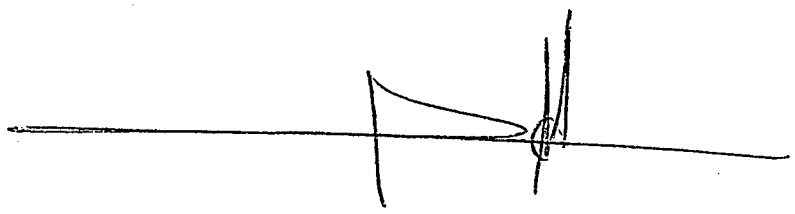
CERTIFICATE OF SERVICE

I certify, under the penalty of perjury, that the foregoing Petition for Rehearing En Banc was placed in the FCI Forrest City Low's internal mail system, first-class postage prepaid, for service upon this court via U.S. Mail on this 3rd day of September, 2024.

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. Rules 35(b)(2) and 40(b), this document has been produced within the page limitation. Additionally, pursuant to the relevant rule, this document has been produced with a proportionally spaced typeface on a Swintec 2410 CC Typewriter.

Respectfully submitted,



/s/ Geovani Hernandez

On this day of: Sept. 3, 2024

Geovani Hernandez
Reg. No. 29339-479
FCI Forrest City Low
P.O. Box 9000
Forrest City, AR 72336

"APPENDIX H"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEOVANI HERNANDEZ, APPELLANT,	)	
v.	)	Appeal No. 24-40145
UNITED STATES OF AMERICA, APPELLEE.	)	

MOTION TO RECALL THE MANDATE

Comes now, Geovani Hernandez, pro se, before the Honorable Court to request that the mandate in this respective appeal be recalled to prevent injustice.

Mr. Hernandez requested COA from the Court, which was denied. Reconsideration and rehearing en banc were also denied on the matter.

In denying Mr. Hernandez, the Court has applied too heavy a standard at the COA stage. The COA determination is supposed to be distinct from the underlying merits.

For his part, Mr. Hernandez has presented to the Court a sea of precedent from this Circuit and other Circuits to support his claims. Mr. Hernandez has shown where his claims were presented to the district court. Mr. Hernandez has also shown affirmatively on the record that no jury instruction for aiding and abetting was given in his case despite multiple cases cited involving the "attempt to aid and abet" charge holding that the instruction is required. Mr. Hernandez has also shown that other Circuits have held the "attempt to aid and abet" charge to be non-existent. Mr. Hernandez has additionally shown that prior precedent of this Circuit, which has not been overruled, supports his claim of insufficient evidence.

Mr. Hernandez's only burden at this stage is to modestly show that reasonable jurists could debate his claims. This is not a high bar, and Mr. Hernandez has certainly hit it with what he has presented in his filings for this appeal. See Buck v. Davis, 580 U.S. 100, 117 (2017) ("A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail"); Miller-El v. Cockrell, 537 US 332, 342 (2003) ("The question is the debatability of the underlying constitutional claim, not the resolution of the debate").

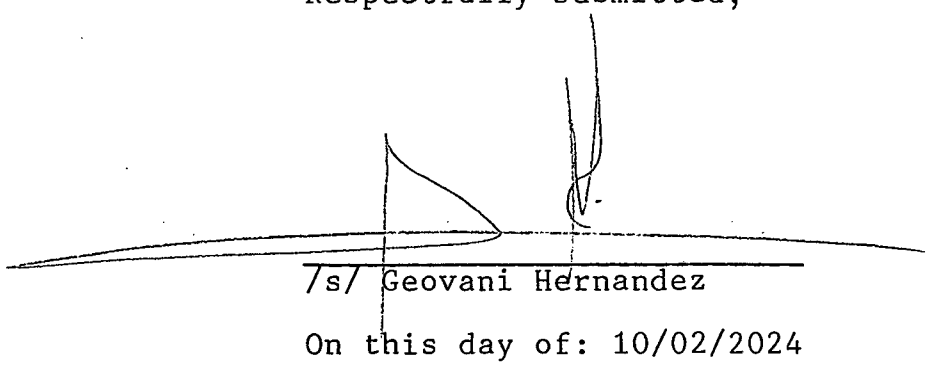
Mr. Hernandez has shown, at a minimum, that his constitutional claims are debatable; they are supported by the record and authorities. The Court has not demonstrated otherwise and has instead invoked a summary dismissal with no argument, explanation, or authorities to support the conclusion that everything Mr. Hernandez has presented does not support debatability. The Court's opaque ruling is no different from a summary dismissal on the merits and it has wholly disregarded every contention, argument, and citation made by Mr. Hernandez. Should the mandate remain, Mr. Hernandez's debatable and supported constitutional claims will be deprived of a full consideration respective to the appellate process. That would be an injustice, and therefore, Mr. Hernandez calls upon the Court to prevent that injustice by recalling the mandate.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury, that the foregoing Motion to Recall the Mandate was placed in FCI Forrest City Low's internal mail system, first-class postage pre-paid, for service

upon this court via U.S. mail on this 2nd day of October, 2024.

Respectfully submitted,



/s/ Geovani Hernandez

On this day of: 10/02/2024

Geovani Hernandez
Reg. No. 29339-479
FCI Forrest City Low
P.O. Box 9000
Forrest City, AR 72336

"APPENDIX I"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEOVANI HERNANDEZ, APPELLANT,	)	
v.	)	Appeal No. 24-40145
UNITED STATES OF AMERICA, APPELLEE.	)	

ADDENDUM TO MOTION TO RECALL THE MANDATE

Appellant Geovani Hernandez, pro se, respectfully adds to his previously submitted Motion to Recall the Mandate for consideration before the Honorable Court.

The Court has improperly applied the COA inquiry standard to Mr. Hernandez; the Order denying his COA at Doc. 37-2 makes this injustice quite clear. While the Court's decision even cites to Miller-El v. Cockrell, 537 U.S. 322 (2003), it has applied it half-heartedly and therefore incorrectly.

Determining whether a COA should issue "requires an overview of the claims in the habeas petition and a general assessment of their merits," but not "full consideration of the factual or legal bases adduced in support of the claims," Miller-El at 336.

The Court's decision by Circuit Judge Higginson correctly noted that full consideration would not be given to the underpinnings of the claims made by Mr. Hernandez. However, Mr. Hernandez's claims did not receive the required general assessment of their merits. In fact, no assessment was given at all nor did the Court's purported standard identify this requirement of the COA inquiry. The Court has seemingly disregarded this requirement just as it has seemingly disregarded addressing the factual and legal

basis adduced in support of Mr. Hernandez's claims. The Court appears to have ruled on the notion that because the COA inquiry should be decided without full consideration it is absolved of its requirement to give a general assessment of the merits. This is not so.

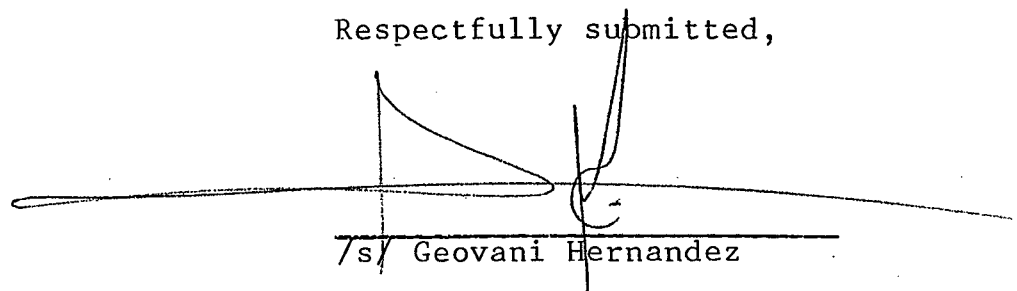
It would be injust to deny Hernandez the appellate process without even giving him a proper COA inquiry; a proper inquiry that provides a general assessment of the merits upholds the integrity of the Court by ensuring that the claims are debatable or not.

Mr. Hernandez, therefore, calls upon this Honorable Court to recall the mandate to prevent the injustice of denying an appellant of the proper COA inquiry.

CERTIFICATE OF SERVICE

I declare, under penalty of perjury, that the foregoing Addendum to Motion to Recall the Mandate was placed in FCI Forrest City Low's internal mailing system, first-class postage pre-paid, for service upon this Court via U.S. Mail on this 3rd day of October, 2024.

Respectfully submitted,



/s/ Geovani Hernandez

On this day of: 10/03/2024

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