IN THE SUPREME COURT OF THE UNITED STATES

GEOVANI HERNANDEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

No. 24-5834

PETITION FOR REHEARING

Petitioner Geovani Hernandez, pro se, requests that this Honorable Supreme Court grant rehearing of the order denying his petition for writ of certiorari in light of other substantial grounds not previously presented before the court pursuant to Supreme Court Rule 44.2.

**1. Whether the use of "attempt" in 21 U.S.C. § 846 is void for vagueness?**

> "Our doctrine of prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. Vague laws contravene the first essential of due process of law that statutes must give people of common intelligence fair notice of what the law demands of them. Vague laws also undermine the Constitution's Separation of Powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to make an act a crime. Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." United States v. Davis 588 U.S. 445, 451 (2019) (inner quotes and citations omitted).

For the people of common intelligence whom would consult a dictionary, "attempt", in its "ordinary sense", simply means "try". United States v. Hansen, 599 U.S. 762, 775 (2023).

There is a "doubt that the common meaning of the word

'attempt' conveys with precision what conviction of that crime requires". United States v. Resendiz-Ponce, 549 U.S. 102, 112 (2007) (Scalia J., Dissenting). As Justice Scalia also posited, "[a] reasonable juror, relying on nothing but that term, might well believe that it connotes intent plus any minor action toward the commission of the crime, rather that the 'substantial step' that the Court acknowledges is required". Id.

Even if "attempt" has had some specialized and artful meaning in common-law for centuries (and therefore common to those practicing in law), that does nothing to give the people of common intelligence a fair notice.

Unlike the many other common-law crimes that "have retained relatively static elements throughout history ... the definition of attempt has not been nearly as consistent". Id. "Nearly a century ago, a leading criminal law treatise pointed out that 'attempt is a term peculiarly indefinite' with 'no prescribed legal meaning'[; a modern treatise also acknowledged by this court] explains-in a subsection entitled 'The Confusion'-that jurisdictions vary widely in how they define the requisite actus reus [of attempt]." Id. at 112-113.

In this way, fair notice is undermined because even the common-law definition is not universal. While federal courts, to their credit, routinely rely on the Model Penal Code definition of attempt, this reliance stems two problems: due process and separation of powers.

Even with a routine deference to the Model Penal Code, the federal courts vary to the degree of deference. After all, the Model Penal Code "is just that: a model. It does not establish

[a sufficient] degree of homogenity". Id. at 113. As relevant to Mr. Hernandez's case, two Circuits believe that the Model Penal Code definition for attempt necessitates an attempt-to-aid-and-abet theory in federal law while other Circuits have expressed that such a crime does not even exist in federal law. See Petition for Certiorari at 10-12.

When even the Circuits are in disagreement as to the very existence of a crime, the people of common intelligence are left to guess at what the law demands of them; due process is undermined by the lack of fair notice. "Vague laws invite arbitrary power ... by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." Sessions v. Dimaya, 138 S. Ct. 1204, 1223-1224 (2018) (Gorsuch J., Concurring).

Exclusive deference to the Model Penal Code has handed the responsibility of defining crime to unelected individuals rather than the people's elected representatives in the legislature. Since 1950, Congress has defined attempt in law, albeit only military law thus far. See 10 U.S.C. 880.

Today, no general federal attempt exists, and in its stead the Model Penal Code is relied on extensively as if it were a federal statute itself rather than compelling Congress to provide a clear definition for the public to have notice of before entering a courtroom.

In totality, the indefinite, varied, and illusive contours of "attempt", at least in the context of the attempt-to-aid-and-abet crimes that Mr. Hernandez was charged under, has positioned the courts in a role of "filling gaps so large that doing so

becomes essentially legislative". United States v. Evans, 333 U.S. 483, 487 (1948).

It is the duty of Congress, not the Courts, to declare what crimes are necessitated. Mr. Hernandez posits that the use of "attempt" via 21 U.S.C. § 846 to conjure the crime of attempt-to-aid-and-abet in his case is void for vagueness because it does not provide fair notice and undermines separation of powers.

**2. Whether the omission of an aiding and abetting jury instruction from an attempt-to-aid-and-abet charge in a case involving a government sting operation is structural error?**

This Court has long held that "the omission of an element from a jury charge is subject to harmless-error analysis." McFadden v. United States, 576 U.S. 186, 197 (2015). This Court has also clarified that "the harmless-error inquiry" is whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder v. United States, 527 U.S. 1, 18 (1999).

The Government cannot dispute that, following the district court's dogged insistance that overbore the prosecution and the defense on the matter, the district court omitted all aiding-and-abetting instructions from the jury's charge of attempting-to-aid-and-abet. See, ROA 19-40655 at 1221-1238, 1245-1281.

The Government also cannot dispute that an aiding-and-abetting instruction is required and necessary for the charge of attempt-to-aid-and-abet. See United States v. Partida, 385 F.3d 546, 558 (5th Cir. 2004); United States v. Washington, 106 F.3d 983, 1007 (D.C. Cir. 1997).

In his application to the Fifth Circuit for a Certificate

of Appealability, Mr. Hernandez argued "that the trial court violated [his] due process rights because it did not give a jury instruction on aiding and abetting". See Petition for Certiorari APPENDIX B. The Fifth Circuit, in its denial, decided that the claim did not make a substantial showing of the denial of a constitutional right. Id. The Fifth Circuit did not provide any discussion, precedent, or analysis to the specific claim. Id. In other words, the claim was not even given a harmless-error analysis that such a claim should have been subject to.

Without an aiding and abetting instruction, the jury was allowed to convict Mr. Hernandez solely with instructions that pertained to attempt and the underlying offense.

Mr. Hernandez posits that a rational jury would have found him **innocent** were it not for the omission. The trial court agreed with this position at the very moment it resolved to omit the aiding and abetting instruction from the charge:

> "Let's just omit it. The evidence doesn't support this anyways. They're going to, it was either attempt **or they're going to acquit him.** I mean it's aiding and abetting an attempt. That just isn't consistent with the fatcs, given that this was an undercover operation. All right. So I've convinced myself just to omit this whole section on aiding and abetting." See ROA 19-40655 at 1266, Lines 5-11.

To summarize, Mr. Hernandez was deprived a required aiding and abetting instruction despite his conviction being hinged upon 18 U.S.C. § 2. Were it not for the omission, as the district court alluded, Mr. Hernandez would have been **acquitted** by the jury because his case exclusively involved an undercover operation.

Necessarily, Mr. Hernandez posits, that the Government would be unable to properly claim that the error was merely harmless because there is a reasonable doubt that a rational jury would

found him guilty absent the error.

The omission, in any case exclusively involving a undercover operation, would render a trial fundamentally unfair. Hernandez posits the omission under such circumstances is an error of structural magnitude. In any event, the Fifth Circuit errored in determining that Mr. Hernandez's claim did not demonstrate a substantial showing of the denial of a constitutional right.

**3. Whether the Fifth Circuit erred in applying the principles governing review of the sufficiency of the evidence by not addressing every element of the crime?**

The principles governing review of the sufficiency of the evidence to support a criminal conviction are laid out in the jurisprudence of this Court.

There must be substantial evidence, viewed in a light most favorable to the Government, to support the conviction. Glasser v. United States, 315 U.S. 60, 80 (1942). The evidence must be sufficient to prove the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 313-320 (1979).

The previous ground necessarily implicates whether the evidence would have been sufficient for a properly instructed jury to convict Mr. Hernandez.

Trial counsel for Mr. Hernandez attempted to challenge the sufficiency of the evidence during trial through a verbal motion for acquittal but was denied before he could even finish his sentence. See ROA 19-40655 at 1136-1137.

Mr. Hernandez continued to challenge the sufficiency of the evidence on direct appeal, but the Fifth Circuit also

denied the argument. See United States v. Hernandez, 825 Fed. Appx. 219, 219 (5th Cir. 2020).

Mr. Hernandez also invoked challenges to the sufficiency of the evidence on collateral attack and in his application for Certificate of Appeal to the Fifth Circuit. See Civ. Doc. 108. at 186-192; Petition for Certiorari APPENDIX E at 23-26.

To start, it is telling that the trial court would suggest that Mr. Hernandez would be acquitted if an aiding and abetting instruction were given. See Ante at 5.

On the topic of aiding and abetting, the direct appeal panel iterated the elements that the Government would be required to show: (1) association; (2) participation; and (3) action to make the venture successful. See Hernandez at 220.

The Fifth Circuit denied the claim, finding that: "A rational jury could find [] his participation in the criminal endeavor. His actions [] demonstrate criminal intent consistent with the intent to attempt to aid and abet the cocaine possession, and his conduct amounted to a substantial step". Id.

The panel's finding of sufficiency cut against the very first element of aiding-and-abetting to which they professed; they made no mention of whether a rational jury could have found the element of association in Mr. Hernandez's case.

A rational jury cannot legally find association in the facts of Mr. Hernandez's case. Why? Because a government informant who intends to foil a venture cannot have the intent to violate the law; just as conspiritorial agreement requires more than one culpable conspirator, association for aiding and abetting requires a shared criminal intent. See United States v. Holcomb,

797 F.2d 1320, 1328 (5th Cir. 1986) ("One can 'associate' with a criminal venture only if he shares the principal's criminal intent"). But for the fact that a defendant's actions fall short of success, an attempt requires the same elements as the underlying offense.

Beyond association, the panel's finding of participation is also tenuous because they made no distinction between the possession and distribution elements of the underlying offense. Even viewing the evidence in a light most favorable to the Government, Hernandez's supposed scouting would have had nothing to do with the possession element which was already completed independent from his participation. See Petition for Certiorari APPENDIX E at 23-26; APPENDIX G at 7-9.

On collateral attack, the district court engaged in strikingly similar shenanigans in its sufficiency of evidence review. Most significantly, although the underlying offense charged is possession with the intent to distribute, the district court could only conclude that Mr. Hernandez "scouted with the purpose of facilitating the drug distribution." See Civ. Doc. 108 at 192.

The Fifth Circuit, on application for Certificate of Appealiability, found that the discrepencies presented to them did not show the substantial denial of a constitutional right. Mr. Hernandez posits that such a conclusion is a disservice to the governing principles of this Honorable Supreme Court and that the Fifth Circuit erred in applying those principles on both initial and collateral review.

Mr. Hernandez concludes that a properly instructed rational jury would have found him innocent.

## CONCLUSION

Mr. Hernandez contends that the use of "attempt" in 21 U.S.C. § 846, at least in the context of attempt-to-aid-and-abet charges, is void for vagueness because it lacks fair notice and delegates unto the Model Penal Code a responsibility reserved for the people's elected representative - a violation of separation of powers. Mr. Hernandez also contends that the omission of an aiding and abetting jury instruction from an attempt-to-aid-and-abet charge is a structural error that renders any trial unfair in cases that exclusively involve an undercover operation; the jury would have found him innocent were they given the instruction. Lastly, Mr. Hernandez contends that the Fifth Circuit erred in applying the governing principles of review of the sufficiency of the evidence of his case; no rational juror would have been able to find the association element of aiding-and-abetting nor would any rational juror be able to find participation in the possession aspect of the underlying offense.

For the foregoing reasons, Mr. Hernandez, pro se, requests that this Honorable Supreme Court GRANT rehearing on his petition for writ of certiorari.

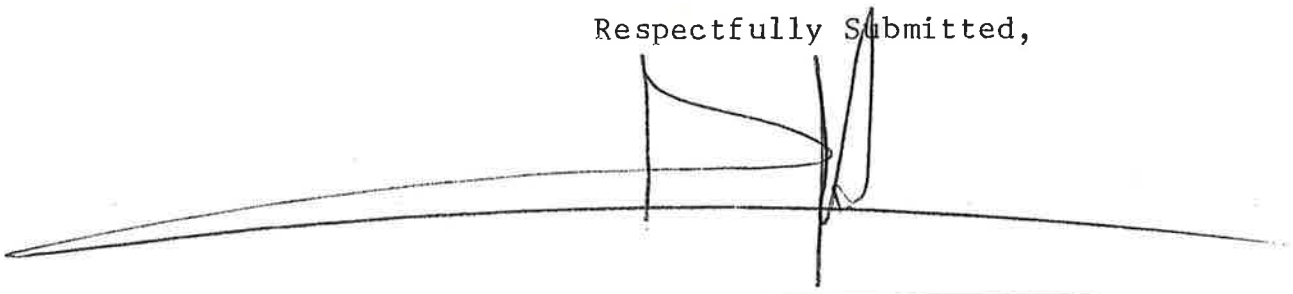
## CERTIFICATE OF PARTY UNREPRESENTED BY COUNSEL

I, Geovani Hernandez, pro se, do hereby certify that this petition is presented in good faith and not for delay. I further certify that the grounds presented in this petition are other substantial grounds which were not previously presented to this court in my previous petition for writ of certiorari. I certify the above on this 13th day of December, 2024.

## CERTIFICATE OF SERVICE

I, Geovani Hernandez, hereby certify that I have served the foregoing petition for rehearing by submitting the document into FCI Forrest City Low's internal mailing system via FCI Forrest City Low's Mailroom for service upon the Supreme Court via U.S. Mail, first-class postage pre-paid on this 13th day of December, 2024.

Respectfully Submitted,



/s/ Geovani Hernandez

On this day of: 12/13/2024

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