

ORIGINAL

No. 25-5041

FILED

MAY 24 2025

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Geovani Hernandez — PETITIONER  
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit

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

PETITION FOR WRIT OF CERTIORARI

Geovani Hernandez - Reg. No. 29339-479

(Your Name)

FCC Forrest City Low, P.O. Box 9000,

(Address)

Forrest City, AR 72336

(City, State, Zip Code)

N/A

(Phone Number)

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## QUESTION(S) PRESENTED

1. Whether a court of appeals violates due process by declining to recall a mandate where a petitioner demonstrates that he was convicted of a non-existent offense, specifically, "attempting to aid and abet" and the court's judgement relied on a theory not authorized by statute or federal precedent.
2. Whether the omission of jury instructions on aiding and abetting when the government's entire theory of liability rested on that construct requires a court to conduct a harmless-error analysis under *Neder v. United States*, and whether the failure to do so renders subsequent appellate and postconviction review fundamentally flawed.
3. Whether a defendant's Sixth Amendment right to notice is violated where the indictment fails to specify the subsection of 18 U.S.C. § 2 — § 2(a) or § 2(b) — under which he is charged, particularly where that statutory ambiguity becomes dispositive in postconviction review.
4. Whether the appellate court's denial of a motion to recall the mandate without addressing substantial, intervening, and unadjudicated arguments that concern the legality and constitutionality of a conviction conflicts with this Court's holdings that appellate courts have a continuing duty to prevent miscarriages of justice.

## **LIST OF PARTIES**

[x] All parties appear in the caption of the case on the cover page. See Rule 1.1(e)(1)(B) of the Local Rules of Court.

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

## RELATED CASES

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

RELATED CASES (Continued)

- Geovani Hernandez v. Randy Crane, et al., 7-22-CV-00036, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on March 13, 2023)
- Geovani Hernandez v. Special Agent Antonie Perez IV, US Dept. of Homeland Security, et al., 7:22-CV-00339, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on March 13, 2023)
- Geovani Hernandez v. US Attorney's Office McAllen and Houston Offices/Divisions, et al., 7:22-CV-00416, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on March 13, 2023)
- Geovani Hernandez v. US Dept. of Homeland Security ICE/HSI, et al., 7:23-CV-00059, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on March 13, 2023)
- Geovani Hernandez v. United States, 7:23-CV-00362, United States District Court for the Southern District of Texas, McAllen Division (Judgement entered on October 8, 2024)
- United States v. Geovani Hernandez, 7:25-CV-129, United States District Court for the Southern District of Texas, McAllen Division (Judgement Pending)

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

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

The opinion of the United States court of appeals appears at Appendix B to the petition and is  
[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[X] is unpublished.

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

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

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

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

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

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

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

## **JURISDICTION**

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

The date on which the United States Court of Appeals decided my case was 10/09/2020

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 02/12/2021, and a copy of the order denying rehearing appears at Appendix G.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

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

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

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

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

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 18 U.S.C. § 2
- 28 U.S.C. § 841
- 28 U.S.C. § 846
- U.S. Const. Amend. V
- U.S. Const. Amend. VI

## STATEMENT OF THE CASE

Petitioner Geovani Hernandez was convicted in the United States District Court for the Southern District of Texas, McAllen Division, following a jury trial, of attempting to aid and abet the possession with intent to distribute cocaine. The government and the court ultimately relied on a novel theory of liability, that by allegedly "scouting" for a drug shipment he never encountered or interacted with, nor helped procure, Mr. Hernandez had "attempted to aid and abet" possession and the intent to distribute cocaine in a scenario purely orchestrated by the government and their informants.

The jury convicted Mr. Hernandez of "attempting to aid and abet" the offense. However, the jury was never instructed on aiding and abetting liability, and the indictment never specified whether Mr. Hernandez was charged under 18 U.S.C. § 2(a) or 2(b).

The Sixth, Seventh, Ninth, and Second Circuits, as alluded to in a previous petition by Mr. Hernandez to this Court (No. 24-5834), have outright rejected or otherwise supported that the "attempt to aid and abet" theory does not even exist in federal law.

Mr. Hernandez raised these defects in a motion to recall the mandate in his direct appeal case following postconviction review. The Fifth Circuit denied the motion in a single sentence without addressing the merits. This petition follows.

## REASONS FOR GRANTING THE PETITION

### I. Conviction for a Non-Existente Offense Violates Due Process and Requires Appellate Redress

Mr. Hernandez's conviction for "attempting to aid and abet" reflects a theory unrecognized in any federal statute. This Court has made clear that criminal liability must be tied to enacted law. United States v. Lanier, 520 U.S. 259, 266 (1997). Yet Mr. Hernandez was convicted on a compound inchoate theory not authorized by 18 U.S.C. § 2 or 21 U.S.C. § 846.

Courts including the Second, Sixth, Seventh, and Ninth Circuits have rejected such hybrid theories. See United States v. Delgado, 972 F.3d 63, n.11 (2nd Cir. 2020); United States v. Samuels, 308 F.3d 662, 669 (6th Cir. 2002); United States v. Giovanetti, 919 F.2d 1223, 1227 (7th Cir. 1990); United States v. Jayavarman, 871 F.3d 1050, 1056 (9th Cir. 2017); United States v. Kuok, 671 F.3d 931, 941-42 (9th Cir. 2012).

The Fifth Circuit's refusal to address this claim when presented in a motion to recall the mandate raises grave constitutional concerns.

Courts of appeals have a duty not to permit manifest injustice, even after issuance of a mandate. In Calderon v. Thompson, 523 U.S. 538, 554 (1998), this Court held that a court of appeals may recall its mandate "to prevent a miscarriage of justice." The Fifth Circuit's denial of Mr. Hernandez's motion to recall the mandate without addressing his statutory claim refuses that duty. Because this novel charging theory would not withstand scrutiny in any court of law, the denial violated Mr. Hernandez's due process right to be convicted only of an offense Congress has enacted.

## II. The Omission of an Aiding and Abetting Instruction Required Neder Review

The trial court removed aiding and abetting instructions from the final jury charge. Nonetheless, appellate and postconviction courts reviewed Mr. Hernandez's conviction as though aiding and abetting had been found by the jury. Neder v. United States, 527 U.S. 1 (1999), requires a harmless-error analysis whenever an element of the offense is omitted from the jury instructions.

Neither the Fifth Circuit nor the district court applied Neder. Instead, they presumed the omitted theory was proven. This is incompatible with the Sixth Amendment and undermines the integrity of the verdict.

The government, after trial, adopted an aiding and abetting theory as the primary basis for upholding Mr. Hernandez's conviction. However, the jury was never instructed on aiding and abetting — an omission acknowledged in the trial record itself.

Despite this, both the Fifth Circuit and district court reviewed the sufficiency of the evidence as though the jury had been properly instructed. The failure to apply Neder led the courts to review Mr. Hernandez's conviction through a lens of assumptions — not facts found by a properly instructed jury.

As a result, all subsequent reviews of Mr. Hernandez's case relied on a theoretical framework divorced from what the jury was even asked to decide.

This error is structural. It tainted not just the trial, but the appellate and postconviction record as a whole. It also conflicts with this Court's emphasis that jurors must decide every element of a crime under correct legal guidance. See United States v. Gaudin, 515 U.S. 506, 511 (1995).

The courts' failure to apply Neder invited this Court's intervention to prevent the endorsement of appellate procedures that rubber-stamp verdicts never properly rendered.

### III. The Indictment's Failure to Specify § 2(a) or § 2(b) Violated the Right to Fair Notice

The Sixth Amendment requires that a defendant be "informed of the nature and cause of the accusation." Mr. Hernandez was charged generically under 18 U.S.C. § 2 without the indictment ever specifying whether the government relied on § 2(a) (direct aiding and abetting) or § 2(b) (causing an act to be done by another). This ambiguity was never clarified at trial, during jury instructions, or in post-trial proceedings. It became especially prejudicial in postconviction review, when the government and courts alternated between theories, treating Mr. Hernandez alternately as an aider, an attender, or an instigator.

Because the government's post-trial arguments invoked both theories interchangeably, Mr. Hernandez was forced to defend against a moving target. The Sixth Amendment right to notice prohibits such ambiguity.

This shifting liability framework violated Mr. Hernandez's right to notice, and no court ever reconciled this defect. The Fifth Circuit's refusal to address it, even when raised in litigating a motion to recall the mandate, stands in tension with this Court's guidance in Russell v. United States, 369 U.S. 749 (1962), which held that an indictment must be sufficiently specific to enable a defendant to prepare a defense.

This case presents a live and unresolved question of federal law that affects how courts interpret ambiguous statutory charges across the country.

### IV. The Fifth Circuit Erred by Denying the Motion to Recall the Mandate Without Addressing the Merits

While finality is a necessary value in the justice system, it cannot supersede the constitutional requirement that a person be convicted under

valid and properly adjudicated legal grounds. The Fifth Circuit denied Mr. Hernandez's motion to recall the mandate without considering intervening arguments that his conviction lacked legal foundation and involved unadjudicated instructional errors and notice issues.

This Court has repeatedly held that the appellate courts have a continuing duty to prevent miscarriages of justice. See Calderon v. Thompson; Henderson v. Morgan, 426 U.S. 637 (1976). Mr. Hernandez raised statutory and constitutional errors that had not been addressed in earlier proceedings. The Fifth Circuit denied the motion summarily. In doing so, it abdicated its duty to ensure that convictions rest on lawful and constitutional grounds.

When such grave questions are presented post-mandate and are supported by a compelling showing, a court's refusal to fully and fairly consider them frustrates their duty to prevent miscarriages of justice. This Court should clarify the standard for mandate recall when unaddressed legal defects are raised after final judgement.

This petition does not ask the Court to review every motion to recall a mandate. It asks whether, when substantial legal and constitutional errors are raised that were never adjudicated, a court of appeals must at least consider the merits before refusing relief. The answer to that question implicates the integrity of appellate procedure nationwide and warrants this Court's review.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: May 21, 2025