

**United States Court of Appeals
for the Fifth Circuit**

United States Court of Appeals
Fifth Circuit

FILED

October 9, 2020

No. 19-40655

Summary Calendar

Lyle W. Cayce
Clerk

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. 7:17-CR-1352-1**

Before DAVIS, STEWART, and DENNIS, *Circuit Judges.*

PER CURIAM:*

Geovani Hernandez was convicted by a jury of two counts of attempting to aid or abet the possession with intent to distribute cocaine. He was sentenced to concurrent terms of 240 months of imprisonment and five years of supervised release.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

"APPENDIX B"

No. 19-40655

First, Hernandez argues that the evidence is insufficient to support the jury's verdict that he was guilty of attempting to aid or abet possession with intent to distribute a controlled substance. He asserts that the evidence does not show that he had actual or constructive possession of controlled substances.

Because Hernandez did not preserve this issue by renewing his motion for a judgment of acquittal at the close of the evidence, we review his sufficiency-of-the-evidence claim for plain error. *See United States v. Campbell*, 775 F.3d 664, 668 (5th Cir. 2014). We will reverse only if there is a manifest miscarriage of justice. *United States v. Delgado*, 672 F.3d 320, 331 (5th Cir. 2012) (en banc). An unpreserved insufficiency claim must be rejected “unless the record is *devoid of evidence* pointing to guilt or if the evidence is so tenuous that a conviction is shocking.” *Id.* at 330-31 (internal quotation marks and citation omitted).

A conviction for possession with the intent to distribute a controlled substance requires “(1) knowledge, 2) possession, and 3) intent to distribute the controlled substances.” *United States v. Solis*, 299 F.3d 420, 446 (5th Cir. 2002) (internal quotation marks and citation omitted). “To establish aiding and abetting under 18 U.S.C. § 2, the government must show that the defendant (1) associated with a criminal venture, (2) participated in the venture, and (3) sought by action to make the venture successful.” *United States v. Ramirez-Velasquez*, 322 F.3d 868, 880 (5th Cir. 2003). To prove an “attempt” to aid and abet the possession with intent to distribute a controlled substance, the prosecution must prove “(1) that the defendant acted with the kind of culpability otherwise required for the commission of the underlying substantive offense, and (2) that the defendant had engaged in conduct which constitutes a substantial step toward commission of a crime.” *United States v. Partida*, 385 F.3d 546, 560 (5th Cir. 2004).

No. 19-40655

Hernandez, a sergeant with the City of Progreso Police Department in Texas, made an agreement with Hector Saucedo-Rodriguez (Saucedo), a confidential informant working undercover with federal law enforcement, to act as a scout for vehicles carrying drugs moving through Progreso in exchange for money. Hernandez accepted payment from Saucedo after performing those scout duties on July 15 and July 31, 2017. Hernandez, with Saucedo riding with him as a passenger, drove up and down the route used by the undercover vehicles carrying the loads of cocaine, while Saucedo was in contact with the driver of the load vehicles giving the all clear. On the first date Hernandez used his private vehicle, but on the second date, Hernandez used his marked patrol car to scout the area to clear a safe passage for the load vehicle. A rational jury could find that Hernandez provided protection for the drug loads, which conduct is the kind of supporting action that proves his participation in the criminal endeavor. His actions in meeting with Saucedo to discuss the drug loads, acting as a scout, and accepting payment, demonstrate criminal intent consistent with the intent to attempt to aid and abet the cocaine possession, and his conduct amounted to substantial steps beyond mere preparation toward completion of the crime. *See Partida*, 385 F.3d at 560-61; *United States v. Carlidge*, 808 F.2d 1064, 1068-69 (5th Cir. 1987).

According to Hernandez, there was no evidence that he actually possessed or constructively possessed a controlled substance. However, 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. *United States v. Scott*, 892 F.3d 791, 799 (5th Cir. 2018). "Aiding and abetting merely requires that the defendant's association and participation in a venture were calculated to bring about the venture's success." *Id.* The Government was not required to prove that Hernandez possessed or attempted to possess the cocaine. *See id.*

No. 19-40655

To the extent that Hernandez suggests the jury charge required the Government to prove that he had actual or constructive possession, “[s]ufficiency is measured against the *actual* elements of the offense, not the elements stated in the jury instructions.” *United States v. Stagers*, 961 F.3d 745, 756 (5th Cir. 2020).

Last, Hernandez argues that his trial counsel rendered ineffective assistance by failing to renew the motion for a judgment of acquittal at the close of all the evidence to preserve his claim of insufficient evidence. We generally will not consider the merits of an ineffective assistance of counsel claim on direct appeal. *See United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014). We decline to consider Hernandez’s ineffective assistance claim at this time, without prejudice to collateral review. *See id.*

AFFIRMED.

**United States Court of Appeals
for the Fifth Circuit**

No. 19-40655

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. 7:17-CR-1352-1

ON PETITION FOR REHEARING EN BANC

(Opinion October 9, 2020, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, STEWART, and DENNIS, *Circuit Judges.*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in McAllen

ENTERED

July 29, 2019

David J. Bradley, Clerk

UNITED STATES OF AMERICA

V.

GEOVANI HERNANDEZ

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 7:17CR01352-001

USM NUMBER: 29339-479

☐ See Additional Aliases.David Acosta

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
- ☒ was found guilty on count(s) 1 and 2 on March 7, 2019.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2	Attempt to aid and abet possession with intent to distribute 5 kilograms or more, that is, approximately 10 kilograms of cocaine.	07/15/2017	1

☒ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 18, 2019

Date of Imposition of Judgment

Randy Crane

Signature of Judge

RANDY CRANE

UNITED STATES DISTRICT JUDGE

Name and Title of Judge

July 29, 2019

Date

"APPENDIX A"

19-40655-152
19-40655-152

Respectfully submitted,

May 21, 2025

DEFENDANT: GEOVANI HERNANDEZ
CASE NUMBER: 7:17CR01352-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2	Attempt to aid and abet possession with intent to distribute 5 kilograms or more, that is, approximately 6 kilograms of cocaine.	07/31/2017	2

DEFENDANT: GEOVANI HERNANDEZ
CASE NUMBER: 7:17CR01352-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 240 months, as to each of Counts 1 and 2, said imprisonment terms to run concurrently with each other.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in an institution as close as possible to his family and one where he can receive drug and/or alcohol abuse treatment and/or counseling. That the defendant be placed in an institution where he can receive mental health treatment and/or counseling.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: GEOVANI HERNANDEZ
CASE NUMBER: 7:17CR01352-001

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 5 years.
as to each of Counts 1 and 2, said Supervised Release Terms to run concurrently with each other.

☐ See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
7. ☐ You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: GEOVANI HERNANDEZ
CASE NUMBER: 7:17CR01352-001

SPECIAL CONDITIONS OF SUPERVISION

You must participate in an inpatient or outpatient substance-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program, if financially able.

You must participate in an inpatient or outpatient alcohol-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program if financially able.

You may not possess any controlled substances without a valid prescription. If you do have a valid prescription, you must follow the instructions on the prescription.

You must submit to substance-abuse testing to determine if you have used a prohibited substance, and you must pay the costs of the testing if financially able. You may not attempt to obstruct or tamper with the testing methods.

You may not use or possess alcohol.

You may not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances, including synthetic marijuana or bath salts, that impair a person's physical or mental functioning, whether or not intended for human consumption, except as with the prior approval of the probation officer.

You must participate in a mental-health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the cost of the program, if financially able.

You must take all mental-health medications that are prescribed by your treating physician. You must pay the costs of the medication, if financially able.

DEFENDANT: **GEOVANI HERNANDEZ**
CASE NUMBER: **7:17CR01352-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200.00		

- ☐ See Additional Terms for Criminal Monetary Penalties.
- ☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

- ☐ See Additional Restitution Payees.

TOTALS	\$0.00	\$0.00	
---------------	---------------	---------------	--

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:
- ☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GEOVANI HERNANDEZ
CASE NUMBER: 7:17CR01352-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$200.00 due immediately, balance due ☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or
- D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
 Attn: Finance
 P.O. Box 5059
 McAllen, TX 78502

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number

Defendant and Co-Defendant Names
 (including defendant number)

Joint and Several

Corresponding Payee,
 if appropriate

Total Amount

Amount

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

19-40655.158

"APPENDIX C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

Appeal No. 19-40655

GEOVANI HERNANDEZ,
DEFENDANT-APPELLANT.

MOTION TO RECALL THE MANDATE

Comes now, Geovani Hernandez, pro se, before the Honorable Court to request that the mandate in the respective appeal be recalled to prevent injustice. Specifically, Mr. Hernandez alleges that the omission of aiding-and-abetting elements from the jury instructions pertaining to attempt-to-aid-and-abet charges rendered his trial unfair and that a rational jury would not have been able to find him guilty absent that error. Mr. Hernandez also alleges that the Court committed a significant error in the sufficiency of evidence analysis of his direct appeal by failing to address the association element of aiding-and-abetting.

1. Omission of jury instructions rendered the trial unfair.

The Government cannot dispute that, following the district court's dogged insistence that overbore the parties 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) (explaining that "the elements required to prove the charge of attempting to aid and abet" involve instructing the jury on "the substantive offense", "the meaning of 'attempt' and [the meaning of] 'aiding and abetting'"). See also United States v. Washington, 106 F.3d 983, 1007 (D.C. Cir. 1997) (explaining the same).

"The Supreme Court has long held that 'the omission of an element from a jury charge is subject to harmless-error analysis.'" United States v. Muhammad, 14 F.4th 352 (5th Cir. 2021) (citing McFadden v. United States, 576 U.S. 186, 197 (2015)). The Supreme 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.'" Muhammad (citing Neder v. United States, 527 U.S. 1, 18 (1999)).

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

Mr. Hernandez righteously asserts that a rational jury would have found him innocent were it not for this error and that the statements from the trial court prove this contention at the very moment the court resolved to omit the aiding-and-abetting instruction from the charge:

"Let's just omit it. The evidence doesn't support this anyway. 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 facts, 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; necessarily meaning that the Government would be unable to claim the error was merely harmless because there is a reasonable doubt that a rational jury would have found Mr. Hernandez guilty absent the error.

Mr. Hernandez calls upon this Honorable Court to recall the mandate to prevent this injustice.

2. Significant error in the sufficiency-of-the-evidence analysis.

The previous claim necessarily implicates whether the evidence would have been sufficient for a properly instructed jury to convict. To Mr. Hernandez's credit, he properly raised an insufficient evidence claim before the Panel. See United States v. Hernandez, 825 Fed. Appx. 219, 219 (5th Cir. 2020). It is, after all, very telling that the district court would suggest that Mr. Hernandez would be acquitted if an aiding and abetting instruction were given.

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

The Panel denied Mr. Hernandez's claim of insufficient evidence. The Panel found 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 elements of aiding-and-abetting of which they professed.

The Panel made no mention of whether a rational jury could have found the element of association in Mr. Hernandez's case.

The answer is simply that a rational jury cannot legally find association in the facts of Mr. Hernandez's case. See Ante at 2 ("That just isn't consistent with the facts, given that this was an undercover operation"). Why? Because a government informant who intends to foil a venture cannot have the intent to violate the law; association requires a shared 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").

Further, the Panel's finding of participation is on weak footing because they made no distinction between the possession and distribution elements of the underlying offense. See United States v. Scott, 892 F.3d 791, 798-800 (5th Cir. 2018) (discussing sufficient evidence for aiding and abetting possession with intent to distribute drugs, including the need for a degree of involvement in each element of the underlying offense); United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976) (reversed after finding participation in distribution but not the principal's possession).

Mr. Hernandez had no control over the drugs, was kept from knowing what vehicle was transporting the drugs that stayed in the Government's control at all times, and the "load driver" (Government Informant) had already obtained the cocaine independently

from Mr. Hernandez's later alleged "scouting"; the possession was already completed before Hernandez's alleged participation.

In summary, the Panel committed significant error in evaluating the sufficiency of the evidence in Mr. Hernandez's case.

The evidence may be facially insufficient in showing participation in the possession aspect of the offense. Notwithstanding, the Panel did not address whether a rational jury could have found the association element in aiding and abetting; prior precedent of this Circuit binds this Panel to hold that association requires a shared criminal intent. The jury was never instructed on this requirement and nevertheless such intent is absent from this case because Mr. Hernandez only interacted with a government informant with no criminal intent and no real crime committed.

Mr. Hernandez asserts that resting his conviction upon such an incomplete sufficiency analysis that fails to carefully address all of the elements is problematic; leaving it as so where a proper analysis would have yielded a different outcome is nothing short of an injustice.

Mr. Hernandez calls upon this Honorable Court to demonstrate its fairness and integrity by preventing this injustice and recalling the mandate.

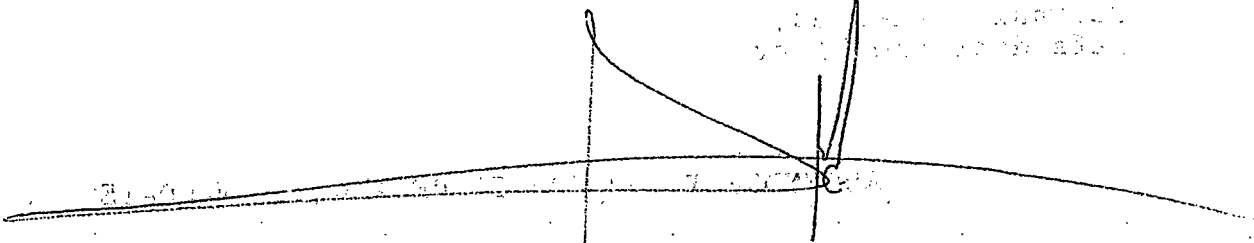
CONCLUSION

For the foregoing reasons, Mr. Geovani Hernandez, pro se, respectfully requests that this Honorable Court recall the mandate in the respective appeal to prevent injustice.

CERTIFICATE OF SERVICE

I, Geovani Hernandez, certify that the foregoing motion to recall the mandate was serviced upon the court by placing this document into FCI Forrest City Low's internal mailing system with first-class postage pre-paid for delivery via U.S. Mail on this 4th day of December, 2024.

Respectfully submitted,



/s/ Geovani Hernandez

On this day of: 12/04/2024

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

"APPENDIX D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States of America,
Plaintiff-Appellee

v.

Appeal No. 19-40655

Geovani Hernandez,
Defendant-Appellant

ADDENDUM TO MOTION TO RECALL THE MANDATE

Appellant Geovani Hernandez, a former law enforcement officer and a political candidate, seeks to recall the mandate in the respective appeal, challenging the application of 18 U.S.C. § 2 to sustain his conviction for "attempting to aid and abet" a controlled substance offense under 21 U.S.C. §§ 841 and 846, when the jury was not instructed on aiding and abetting, thus constituting a structural error.

This addendum lays out in extensive detail why the hybrid charge is fundamentally flawed beyond instructional issues, unconstitutional, and reflective of broader systemic abuses. From statutory ambiguity to prosecutorial overreach, Mr. Hernandez's case highlights the risk of weaponized federal power targeting politically disfavored individuals.

Mr. Hernandez's conviction under these circumstances constitutes a significant breach of constitutional norms and demands careful reconsideration upon recalling the mandate.

This addendum comports with the showing of injustice to necessitate a recall of the mandate. The validity of this hybridized charge is unsupported by clear statutory authority and contravenes constitutional principles of due process, statutory clarity, and fair notice and is therefore unjust in Mr. Hernandez's case. Movant's prosecution implicates key constitutional infirmities that warrant judicial review, scrutiny and relief under binding precedents.

Mr. Hernandez challenges the constitutionality of 18 U.S.C. as applied to his prosecution. The cases raised profound constitutional concerns about the erosion of due process, weaponization of federal authority, and improper hybridization of criminal charges.

Furthermore, Mr. Hernandez's prosecution involved deliberate blurring of statutory lines and questionable prosecutorial conduct, including reliance on untraditional legal theories such as "attempting to aid and abet." This charge rests on the improper hybridization of aiding and abetting principles with inchoate attempt liability, creating a crime unmoored from statutory language or Congressional intent.

Further complicating the matter are allegations of disproportionate governmental targeting indicative of a broader

concern about federal law enforcement being weaponized to neutralize political adversaries rather than to uphold justice.

Movant Hernandez respectfully challenges the constitutionality of 18 U.S.C. § 2 as applied in his prosecution for "attempting to aid and abet" cocaine possession with intent to distribute under 21 U.S.C. §§ 841 and 846. This hybrid theory fundamentally misinterprets aiding and abetting as an inchoate offense, unlawfully conflating it with attempt liability.

The Fifth Circuit's decisions in the United States v. Scott, 48 F.3d 1339 (5th Circuit 1995) and United States v. Jackson, 986 F.2d 256 (5th Cir. 1993), demonstrate critical errors in the government's theory and misapplications during trial. Specifically, these cases clarify that aiding and abetting cannot exist absent a completed substantive offense, and they reject prosecutorial attempts to dilute essential elements through conflated liability theories.

I. PROCEDURAL BASIS

Circuits have broad authority to recall mandates it has previously issued in appeals to prevent injustice. This addendum brings light to the injustice present in Mr. Hernandez's case by questioning the validity, as-applied, of a federal statute, in this case Title 18 U.S.C. § 2 Aiding and Abetting.

II. Procedural Background

Mr. Hernandez was charged and convicted of "attempting to aid and abet the possession with intent to distribute cocaine" under 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1) and 846. This charge arose from a federal reverse sting operation entirely orchestrated by federal agents. Despite the prosecution's reliance on the hybrid theory, evidence of Hernandez's association with or participation in the possession, a necessary element for aiding and abetting liability, was insufficient.

Mr. Hernandez was convicted in connection with a government-engineered reverse sting operation conducted at the height of his campaign for Hidalgo County Sheriff. Federal law enforcement agents meticulously orchestrated every aspect of a fictitious drug transaction to implicate him, relying on paid informants and strategically designed scenarios. The underlying crime, a scheme the government controlled from inception to execution, existed solely in their minds and within the confines of this operation.

The prosecution relied on an unprecedented hybrid charge of "attempting to aid and abet," arguing that Mr. Hernandez's actions met the elements of both doctrines despite the inherently distinct legal foundations of each. The hybrid charge blurred critical legal standards, leaving the jury with unclear guidance on mens rea causation, and actus rea all compounded by procedural omissions in the jury instructions. The conviction relied on an overly permissive interpretation of aiding and abetting law. On Mr. Hernandez's direct appeal, the Fifth Circuit relied on Scott and Jackson (because Scott, in part, relied on Jackson), but misapplied their holdings by failing to sufficiently and properly address the

substantive flaws in the prosecution's theory.

III. KEY FINDINGS

This case presents substantial claims of prosecutorial misconduct and reliance on improper legal theories. Specifically:

1. **Improper Broadening of Statutory Scope:** The government relied on an untraditional combination of aiding-and-abetting liability with attempt liability, creating a "hybrid offense" that lacks any basis in statutory or common law.
2. **Procedural Defects:** The jury instructions omitted critical elements of aiding-and abetting liability (e.g., specific intent and substantial participation), which deprived Mr. Hernandez of his right to a fair trial.

These flaws illustrate systemic flaws in the administration of justice and underscore why 18 U.S.C. § 2, as applied in this case violates due process principles.

IV. CONSTITUTIONAL INFRINGEMENTS AND LEGAL CHALLENGES

Mr. Hernandez was charged, convicted and sentenced for attempting to aid and abet a controlled substance offense under 21 U.S.C. §841, § 846, and 18 U.S.C. § 2. Mr. Hernandez asserts that his prosecution infringes upon structural and procedural

constitutional guarantees. The following defects are presented:

1. As-Applied Vagueness Under the Due Process Clause:

The application of 18 U.S.C. § 2 and its inclusion of "attempting to aid and abet" violates due process due to statutory vagueness. Supreme Court precedent establishes that laws must provide clear guidance to ensure ordinary individuals may conform their conduct to lawful standards. See *Kolender v. Lawson*, 461 U.S. 352 (1983); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Circuits have long disagreed on whether "attempting to aid and abet" constitutes an offense absent the existence of a principal offender. See *United States v. Samuels*, 308 F.3d 662 (6th Cir. 2002); *United States v. Giovanetti*, 919 F.2d 1223 (7th Cir. 1990); *United States v. Delgado*, 972 F.3d 63 (2nd Cir. 2020). The inconsistency undermines statutory clarity and invalidates the statutory charge against Mr. Hernandez.

2. Improper Broadening of Federal Attempt and Aiding and Abetting Statutes!

The court improperly conflated aiding and abetting liability (which requires a principal) with the crime of attempt (which does not require actual commission). The use of an improper hybrid theory permitted conviction without the government proving that underlying offense occurred. See *Rosemond v. United States*, 572 U.S. 65, 75 (2014).

This hybrid construction also lacks statutory authorization, as 18 U.S.C. § 2 contains no attempt provision. See *United States v. McCoy*, 995 F.3d 32, 58 (2nd Cir. 2021).

3. Violation of Fair Notice Guarantees in the Criminal Law!

Due process requires individuals to receive fair notice of the conduct proscribed by the statute. See *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). However, Mr. Hernandez was convicted of a theory under 18 U.S.C. § 2 (attempting to aid and abet") that several Circuits declare does not exist under federal law. See e.g. *United States v. Kuok*, 671 F.3d 931 (9th Cir. 2011).

Congress knows how to clearly create "attempt" liability in aiding statutes but did not do in drafting § 2. Applying conflicting interpretations violates the doctrine of lenity. See *United States v. Bass*, 404 U.S. 336, 347 49 (1971).

V. CONSTITUTIONAL AND LEGAL CHALLENGES

1. Vagueness and Ambiguity of Attempting to Aid and Abet

Aiding and abetting under 18 U.S.C. § 2 relies on principles requiring clear statutory elements, and further, attempt liability depends on Congressional authorization for specific intent crimes. Movant's prosecution blends two doctrines, attempt and aiding and abetting, resulting in an untraditional, non-universal, unsupported hybrid charge and theory that introduces ambiguity.

The Fifth Circuit's reliance on precedent like *United States v. Partida*, 385 F.3d 546 (5th Cir. 2004), conflicts with holdings in other circuits that have rejected "attempt to aid and abet" as a recognized federal crime. See *United States v. Giovanetti*, 919 F.2d 1223 (7th Cir. 1990); *United States v. Delgado*, 972 F.3d 63 (2nd Cir. 2020). This inconsistency undermines fair notice and subjects individuals like Mr. Hernandez to arbitrary and disparate treatment, a direct violation of the Fifth Amendment's due process protections.

2. Fundamental Due Process Flaws in the Jury Instructions

The omission of Fifth Circuit Pattern Jury Instruction 2.04 for aiding and abetting stripped the jury of guidance on elements such as the necessity for association with a criminal venture and actual participation in the offense.

By cramming "aiding and abetting" into an attempt instruction, the prosecution and court circumvented statutory boundaries, leading and allowing an unlawful and improper conviction to rest on imprecise, conflated legal theories. See *Rosemond v. United States*, 572 U.S. 65

(2014) (emphasizing aiding and abetting's distinct mens rea requirement). These instructional flaws constitute structural error. A hybrid "attempt to aid and abet" charge presents conflicting statutory interpretations that require elements of possession to support the aiding theory but relax those same elements to sustain an attempt theory.

3. Reliance On Improperly Broad Interpretations

"Mere presence" or passive participation is insufficient to sustain conviction under aiding and abetting doctrine. However, Mr. Hernandez's conviction lacks proof that he engaged in the substantive elements of the crime, including actual or constructive possession of the alleged controlled substance. The evidence consisted solely of alleged "scouting" activities coordinated and controlled by government agents, a degree of involvement insufficient to meet the elements required for aiding and abetting the possession aspect of the underlying offense.

Conflating aiding and abetting liability with conspiratorial doctrines allowed prosecutorial overreach by lowering the government's burden of proof to include actions orchestrated entirely by federal operatives. Such expansive interpretations directly contradict *United States v. Simons*, 540 F. App'x 282, 284 85 (5th Cir. 2013), which emphasizes that liability under § 841(a)(1) requires a nexus between the defendant's conduct and the possession with intent to distribute.

4. Improper Role of Statutory Silence and Separation of Powers

Statutory silence on whether "attempting to aid and abet" is

a federal crime highlights separation-of-powers concerns. Courts over step their constitutional authority when crafting offenses based on expansive interpretations rather than Congressional text. Supreme Court precedent consistently warns against judicially manufacturing crimes not plainly authorized by a statute. See *United States v. Bass*, 404 U.S. 336, 347 (1971); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004).

In Mr. Hernandez's case, the statutory text of 18 U.S.C. § 2 contains no reference to attempt liability, while § 841 imposes strict requirements for proving possession with intent to distribute. The hybrid theory of liability not only impermissibly creates a new crime but also denies the defendant fair notice, compounding due process violations.

VI. LEGAL ANALYSIS

A. The Nature of Aiding and Abetting Liability

1. Aiding and Abetting Requires a Completed Offense

Under 18 U.S.C. § 2, aiding and abetting liability is derivative; it depends entirely on the existence of a completed substantive offense. The Fifth Circuit, in *Jackson*, emphasized this principle, holding that aiding and abetting requires proof that the underlying crime was completed and that the defendant intentionally associated with and participated in its commission.

In *Jackson*, the court stated:

"Aiding and abetting is not an independent crime; rather, it is an alternate theory of liability for the substantive offense."

This doctrine underscores that aiding and abetting cannot stand alone as an inchoate offense. By attaching "attempt" to aiding and abetting, the government improperly extended § 2 beyond its intended scope, creating liability for an incomplete and speculative conduct.

B. The Elements of Aiding and Abetting

The Fifth Circuit has consistently required the prosecution to prove four elements to establish aiding and abetting liability:

- 1- A substantive offense was committed by someone else;
- 2- The defendant associated with the criminal venture;
- 3- The defendant participated in the venture as something he wished to bring about; and
- 4- The defendant took affirmative steps to make the venture succeed (United States v. Ledezma, 26 F.3d 636 (5th Cir. 1994)).

The government failed to meet these elements in Mr. Hernandez's case. The absence of evidence tying Hernandez to the possession aspect of the offense is necessary predicate for aiding and abetting. Instead, the prosecution improperly relied on speculative evidence of preparatory conduct to satisfy these elements, a clear violation of Fifth Circuit precedent.

C. Errors in the Hybrid Theory's Application

1- Improper Expansion of Attempt Liability

Attempt liability allows for the prosecution of incomplete crimes but requires proof of a "substantial step" toward committing

the substantive offense. The government hybrid theory conflated attempt with aiding and abetting, creating a doctrine where liability attaches without proof of either a completed offense or substantial participation.

In Scott, the Fifth Circuit rejected such expansive interpretations, emphasizing that attempt and aiding and abetting are distinct doctrines with separate requirements. The court cautioned against allowing one theory to dilute the evidentiary burden of the other, a principle violated in Mr. Hernandez's case.

2- Misapplication of Scott and Jackson

The Fifth Circuit's decisions in Scott and Jackson underscore the procedural and substantive errors in Mr. Hernandez's Prosecution:

- A. In Scott, the court reaffirmed that aiding and abetting requires clear evidence of participation in the underlying offense. The government in Hernandez's case relied on attenuated evidence of preparatory discussions, failing to establish association with or facilitation of possession.
- B. In Jackson, the court rejected prosecutorial attempts to use aiding and abetting theories to side step the need for direct evidence of substantive crimes. This principle was ignored when the government charged Mr. Hernandez with "attempting to aid and abet" possession without proving that possession occurred or that Hernandez meaningfully associated with it. The government conceded that Hernandez never possessed any illegal drugs constructively or actually, physically.

D. Expansive Constitutional Issues Invalidating the Conviction

1. Vagueness and Overbreadth: The Hybrid Charge's Lack of Clarity

A. Ambiguity Between Aiding and Abetting and Attempt

Aiding and abetting Under U.S.C. § 2 traditionally requires the prosecution to prove:

- 1- A completed offense;

- 2- The defendant's association with principal's criminal venture;
- 3- Specific intent to facilitate the offense; and
- 4- An affirmative act furthering its commission.

By contrast, attempt liability under 21 U.S.C. §§ 841 and 846 criminalizes incomplete offenses, focusing on an individual's substantial step with intent to commit a crime. These two frameworks serve distinct legal purposes and cannot reasonably be merged without explicit Congressional authorization.

The Fifth Circuit's validation of this hybrid theory conflicts with other circuit's treatment. See *United States v. Samuels*, 308 F.3d 662 (6th Cir. 2002) (holding that aiding and abetting requires a completed offense); *United States v. Jayavarman*, 871 F.3d 1050 (9th Cir. 2017). The inconsistency creates significant due process concerns by allowing fundamental elements of the charge to vary across jurisdictions.

2. Fundamental Fairness and the Doctrine of Lenity

The hybrid charge leaves the law unintelligible for defendants attempting to conform their conduct to legal boundaries, violating the Fifth Amendment's due process protections. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (laws must define criminal offenses with sufficient definiteness). When statutes are unclear or ambiguous, courts must apply the doctrine of lenity. See *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). The government's expansive interpretation violates this principle, allowing prosecutors to create crimes not expressly delineated in law.

E. Procedural Due Process: Flawed Instructions and Unconstitutional Burden Shifting

1. Failures in the Jury Instructions

The trial court failed to adequately instruct the jury on the distinct requirements for aiding and abetting versus attempt. As a result, the jury likely convicted Mr. Hernandez without fully understanding that aiding and abetting liability hinges on specific intent and significant affirmative acts beyond mere preparation. See *Rosemond v. United States*, 572 U.S. 165, 76 (2014).

Critically, the instructions omitted guidance on deliberate participation in a criminal venture, a core requirement of aiding and abetting charges. Additionally, the government's conflation of incomplete conduct (attempt) with facilitative conduct (aiding and abetting) created confusion that rendered a fair trial impossible.

F. Procedural Impact of Reverse Sting Scenarios

Reverse sting operations allow law enforcement to fabricate entire criminal scenarios but they must be limited by the requirement that a defendant freely act with the criminal intent. Federal agents' dominance over every facet of this operation, including its logistics and execution, undermined the voluntariness of Mr. Hernandez's actions. Without clear standards, such operations enable law enforcement to impose guilt without substantive proof of wrongdoing.

The hybrid charge of "attempting to aid and abet" lacks a clear statutory basis. Congress has not authorized such a crime under either 18 U.S.C. § 2 (aiding and abetting) or 21 U.S.C. §§ 841/846 (drug-related offenses). The combination of these doctrines creates ambiguity that violates due process. See *Kolender v. Lawson*,

461 U.S. 352, 357 (1983) (criminal statutes must provide "a person of ordinary intelligence fair notice of what is prohibited"). Other circuits have explicitly rejected the existence of "attempt to aid and abet" as a federal crime. See *United States v. Samuels*, 308 F.3d 662 (6th Cir. 2002); *United States v. Giovanetti*, 919 F.2d 1223 (7th Cir. 1990). The disparate interpretations among circuits further undermine the statute's clarity, depriving defendant like Mr. Hernandez of fair notice.

In Mr. Hernandez, the jury instructions failed to include key elements of aiding-and-abetting liability, such as specific intent and substantial participation. By omitting these critical elements, the trial court relieved the prosecution of its burden, violating Mr. Hernandez's procedural due process rights. See *Rosemond v. United States*, 572 U.S. 65, 77 (2014). Moreover, the government's reliance on broad and conflated theories of attempt and aiding-and-abetting liability undermines the fundamental principle that laws must have ascertainable standards. See *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964).

VII. WEAPONIZATION OF FEDERAL AUTHORITY

1. Selective Targeting of a Political Candidate

Mr. Hernandez's prosecution did not occur in a vacuum. Federal agents initiated their sting operation while Mr. Hernandez was a candidate for Hidalgo County Sheriff, an office tied to law enforcement. The timing and the nature of the operation suggest a calculated effort to undermine his political career through targeting and framing.

The weaponization of federal resources in this manner threatens the foundation of our democracy. Federal law enforcement, tasked with impartial administration of justice, must not engage in activities aimed at discrediting or neutralizing political adversaries: See *Wayte v. United States*, 470 U.S. 589, 608 (1985) (prosecutorial discretion cannot be exceeded to unfairly target an individual). The fact that the operation was entirely manufactured further demonstrates bad faith and selective enforcement.

In this case of Mr. Hernandez, federal agents and informants orchestrated a fictitious drug trafficking scheme designed to frame and implicate Mr. Hernandez. The operation was carefully constructed, leaving no opportunity for legitimate criminal intent on his part, as agents dictated every aspect of the alleged offense. This demonstrates a deliberate effort to frame Mr. Hernandez rather than detect actual criminal activity.

Reverse sting operations, while constitutionally permissible under limited circumstances, become constitutionally suspect when used to target specific individuals or to fabricate criminal involvement. The Fifth Amendment demands that criminal laws focus on punishing actual misconduct, not on targeting individuals through manipulative government schemes. See *Jacobson v. United States*, 503 U.S. 540, 548 (1992) (condemning government actions designed to manufacture criminal intent in defendants).

2. Selective Targeting and Framing: Misuse of Federal Authority and Disproportionate Focus on a Political Candidate

The reverse sting operation targeted Mr. Hernandez during

his political campaign for Hidalgo County Sheriff. Timing, as well as the level of resources deployed, raises credible concerns that federal agencies pursued Mr. Hernandez not based on concrete suspicion but on political expediency.

Selective targeting in politically charged context undermines the appearance and reality of justice. See *Wayte v. United States*, 470 U.S. 589, 608 (1985). Circumstantial evidence suggests that Mr. Hernandez became the focus of this operation because of his candidacy rather than the legitimate law enforcement objectives. Such misuse of power threatens fundamental democratic principles.

VIII. Conclusion

The hybrid theory violates due process by failing to provide adequate notice of the conduct it criminalizes. By merging aiding and abetting with attempt, the government created a charge untethered to statutory or common law definitions, leaving defendants without a clear guidance on how to conform their conduct to the law. (*Kolender v. Lawson*, 461 U.S. 352 (1983)).

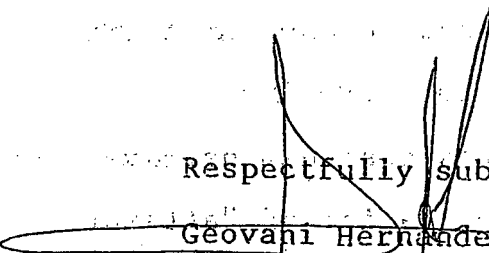
Mr. Hernandez's case demonstrate equal protection concerns. The inconsistent application of "attempt to aid and abet" across jurisdictions create a disparate impact on defendants based solely on venue. The doctrine of lenity, which requires ambiguous statutes to be construed in favor of defendants further supports invalidating this hybrid charge (*United States v. Santos*, 553 U.S. 507 (2008)).

The judicially fabricated "attempt to aid and abet" theory under which Mr. Hernandez was charged, convicted, and sentenced violates core constitutional principles by eroding due process

protections, contravening statutory clarity, undermining fair notice. This Court should not allow prosecutorial overreach to supersede the clear legislative intent of Congress or the structural safeguards of our constitution.

Mr. Hernandez requests an evidentiary hearing and oral argument to ensure a full record is developed concerning the statutory and constitutional challenges raised herein. Mr. Hernandez requests that the mandate be recalled to prevent injustice. This Court must intervene to uphold its fairness and integrity by preventing this injustice.

Respectfully submitted,


Geovani Hernandez, Pro se.

REG. NO. 29389 479

FCC Forrest City-LOW

P.O. BOX 9000

Forrest City, AR. 72336

January 17, 2025

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 14, 2025

Lyle W. Cayce
Clerk

No. 19-40655

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. 7:17-CR-1352-1

UNPUBLISHED ORDER

Before DAVIS, STEWART, and DENNIS, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellant's motion to recall the mandate is
DENIED.

"APPENDIX F"

In the United States Court of Appeals
for the Fifth Circuit

United States of America
Plaintiff-Appellee,

Case No.
19-40655

v.

Geovani Hernandez
Defendant-Appellant, Pro Se

Motion for Rehearing of
Order Denying Motion to Recall Mandate

Comes now, Geovani Hernandez, Defendant-Appellant, and respectfully moves this Honorable Court for rehearing of its denial of his Motion to Recall the Mandate, and in support thereof states as follows:-----

I. Introduction

This Court's denial of Mr. Hernandez's motion to recall the mandate leaves in place a conviction obtained in violation of fundamental principles of criminal liability. The district court's handling of aiding and abetting liability was legally erroneous, structurally defective, and constitutionally impermissible.

At trial, the district court expressly omitted aiding and abetting jury instructions, yet Mr. Hernandez was later sentenced under that very theory. This contradiction renders the conviction and sentence invalid as a matter of law.

II. Statement of Facts

Mr. Hernandez was charged with attempting to aid and abet possession with intent to distribute cocaine, an offense that does not exist as a recognized crime in federal law. Aiding and abetting under 18 U.S.C. § 2 requires a completed crime and a defendant's active participation in its commission. Yet, in this case, there was no completed crime.

The government's own evidence at trial affirmatively established that Hernandez never actually or constructively possessed the cocaine nor did he attempt to aid and abet possession of it. The government agent, Antonio Pérez IV, admitted at trial that Hernandez never had access to the cocaine and that the drugs remained entirely under law enforcement control throughout the operation.

Instead, the government's theory was that Hernandez's alleged scouting for a future drug load somehow constituted aiding and abetting possession with intent to distribute cocaine. Yet, Hernandez never possessed, controlled, or facilitated any actual possession of narcotics. Every aspect of the purported crime was orchestrated by the government alone, leaving a legal and factual void in the offense itself.

Judge Crane himself recognized the flawed application of aiding and abetting liability and decided to omit those jury instructions, stating:

"Let's just omit it. The evidence doesn't support this anyway. 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 facts, given that this was an undercover operation. All right. So, I've convinced myself just to omit this whole section on aiding and abetting." (United States v. Hernández, No. 7:17-CR-1352 (S.D. Tex.), Trial Transcript, Day 4, Doc. 123, P. 46, lines 5-11).

Despite this, after the verdict, Judge Crane contradicted himself, declaring:

"Okay. So, I am going to remand you to the custody of the U.S. Marshal. And the reason for that is you've been convicted of a crime, aiding and abetting of a drug trafficking offense." (United States v. Hernandez, No. 7:17-CR-1352 (S.D. Tex.), Trial Transcript, Day 4, Doc. 123, P. 110, lines 4-11).

This contradiction is constitutionally untenable and undermines the integrity of the conviction.

III. Argument

A. Aiding and Abetting Liability Requires Involvement in Every Element of the Offense.

It is well established that aiding and abetting liability under 18 U.S.C. § 2 requires the defendant to be involved in every element of the completed offense. See *United States v. Scott*, 892 F. 3d 791, 793 (5th Cir. 2018) (noting that an aider and abettor must facilitate every necessary element of the offense, not just one aspect of it).

The government's own admission at trial negates this requirement. Hernandez was never involved in any possession of cocaine actual or constructive. At most, the government alleged that he scouted for distribution, but participation in the distribution aspect alone is legally insufficient for a conviction of aiding and abetting possession with intent to distribute cocaine.

The Fifth Circuit has expressly rejected convictions where a defendant is tied only to distribution and not possession. See *United States v. Jackson*, 700 F. 2d 181, 185 (5th Cir. 1993) (holding that mere association with drug distribution does not establish aiding and abetting possession with intent to distribute).

Similarly, in *United States v. Fischel*, 686 F. 2d 1082, 1087 (5th Cir. 1982), this Court emphasized that aiding and abetting possession requires proof that the defendant assisted in both possession and intent to distribute.

-Hernandez had no connection to possession. The cocaine never left government control.

-At most, he could be accused of facilitating distribution but that does not satisfy aiding and abetting possession.

B. They Jury was Denied the Opportunity to Acquit on Aiding and Abetting.

By removing the aiding and abetting instructions, Judge Crane ensured the jury never had the opportunity to properly assess whether the evidence supported that theory. Yet, he later sentenced Hernandez as if the jury had convicted on it.

This is a structural defect. The Supreme Court has held that depriving a jury of an acquittal pathway constitutes reversible error. See *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (failure to properly instruct the jury on essential elements violates due process).

If the judge had left the aiding and abetting instructions, he knew the jury would have acquitted. His own statement confirms this. The court cannot preemptively remove an acquittal pathway, then later impose a conviction under that same theory.

IV. Conclusion

This case is a textbook example of a structural error requiring vacatur. The jury was never allowed to consider aiding and abetting, yet the district court imposed a sentence based on that theory.

Moreover, the government's own admission that Hernandez never possessed or attempted to possess cocaine only underscores why Judge Crane knew Hernandez would have been acquitted if the jury had been properly instructed.

Fundamental fairness, due process, and the integrity of this Court require that Mr. Hernandez's conviction be reconsidered. He cannot be convicted of a crime

the jury was never instructed on.

For these reasons, Mr. Hernandez respectfully requests that this Court grant rehearing, vacate his conviction, and recall the mandate to correct this miscarriage of justice.

Respectfully submitted,

Geovani Hernandez
#29339-479
FCC Forrest City Low
P.O. Box 9000
Forrest City, AR 72336

CERTIFICATE OF SERVICE

I certify, under the penalty of perjury, that the foregoing Motion for Rehearing of Order Denying Motion to Recall Mandate was placed in the prison's internal mail system, postage pre-paid, for service upon this court via U.S. mail on this 24th day of February, 2025.

Geovani Hernandez
Defendant-Appellant
#29339-479
FCC Forrest City Low
P.O. Box 9000
Forrest City, AR 72336

**United States Court of Appeals
for the Fifth Circuit**

United States Court of Appeals
Fifth Circuit

FILED

April 16, 2025

Lyle W. Cayce
Clerk

No. 19-40655

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. 7:17-CR-1352-1

UNPUBLISHED ORDER

Before DAVIS, STEWART, and DENNIS, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellant's motion for leave to file an out of time motion for reconsideration is GRANTED.

This panel previously DENIED the motion to recall the mandate. The panel has considered Appellant's motion for reconsideration.

IT IS FURTHER ORDERED that the motion is DENIED.

"APPENDIX H"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Appeal No. 19-40655

GEOVANI HERNANDEZ,
DEFENDANT-APPELLANT,

MOTION FOR REHEARING ON DENIAL OF MOTION
TO RECALL MANDATE

I. INTRODUCTION

Pursuant to the Federal Rules of Appellate Procedure, Geovani Hernandez respectfully moves this Court to grant rehearing on its denial of his motion to recall the mandate. Mr. Hernandez's case presents significant, unresolved constitutional and statutory issues concerning the novel theory of "attempt to aid and abet" liability. This theory distorts aiding and abetting's derivative nature by unlawfully merging it with attempt, transforming 18 U.S.C. § 2 into an inchoate offense contrary to law.

This one-sentence denial foreclosed substantive consideration of significant statutory, constitutional, and evidentiary issues that not only jeopardize Mr. Hernandez's right to a fair trial but also undermine core principles of aiding and abetting liability in the Fifth Circuit and beyond.

This case raises urgent questions concerning statutory overreach, constitutional due process, and evidentiary standards in the context of the government's use of a hybrid "attempt to aid and abet" theory. These issues remain unresolved despite substantial constitutional significance and broader implications for Fifth Circuit precedent.

The procedural background of this case underscores these points. Following direct appeal denial, Magistrate Judge Hacker analyzed sufficiency arguments during § 2255 proceedings and inadvertently highlighted critical evidentiary deficiencies related to the possession element of the offense. Despite his ultimate conclusion favoring the government, his analysis reflects unaddressed deficiencies within the conviction. Judge Randy Crane's comments during trial proceeding further reveal how the omitted aiding and abetting jury instructions prejudice Mr. Hernandez's defense, preventing a fair trial on legally sound grounds.

The one-sentence denial of the motion to recall the mandate underscores a troubling pattern. Mr. Hernandez's constitutional and statutory arguments have not been fully analyzed by this Court despite presenting questions warranting review under controlling Fifth Circuit and Supreme Court precedent. This motion provides an opportunity to engage with critical issues left unaddressed, which include:

- 1- The derivative nature of aiding and abetting liability, which presupposes completion of the substantive offense.

- 2- The evidentiary deficiencies in establishing Hernandez's participation in the substantive possession aspect of the offense;
- 3- The conflation of distinct aiding and abetting principles concerning possession and distribution, compounded by the improper application of attempt liability; and
- 4- The significant risk of undermining legal clarity and fair notice by endorsing a theory unsupported by statutory or precedential authority.
- 5- The improper conflation of aiding and abetting principles, in relation to possession and distribution, contrary to Fishel and similar cases;
- 6- The misapplication of attempt liability to aid and abet possession, failing to satisfy intent and participation requirements; and
- 7- The consequences of endorsing a hybrid charge unsupported by statutory or precedential authority.

Notably, precedent such as *United States v. Fischel*, 686 F.2d 1082 (5th Cir. 1982), clarifies the distinct requirements for aiding and abetting possession under 21 U.S.C. §§ 841 and 846. It affirms that aiding and abetting statutory liability is not only derivative but requires active and intentional participation in the specific criminal venture. These principles were misapplied in Mr. Hernandez's trial and subsequent proceedings, culminating in an unsupported hybrid charge and a sufficiency analysis at odds with binding authority.

At the heart of his case lies the government's reliance on a hybrid, "attempt to aid and abet," under 18 U.S.C. § 2 that is fundamentally incompatible with long-established legal principles governing criminal liability. This theory distorts aiding and abetting, a derivative liability doctrine requiring proof of a completed offense, by merging it with attempt, an inchoate offense criminalizing conduct short of completion. This conflation resulted in a conviction

unsupported by statute, precedent, or evidence.

The issues here are even more pressing given the procedural history of this case. The Fifth Circuit's affirmance on direct appeal and the denial of the motion to recall mandate relied on findings inconsistent with its own precedents, including *United States v. Scott*, 48 F.3d 1389 (5th Cir. 1995), and *United States v. Jackson*, 986 F.2d 256 (5th Cir. 1993). Subsequent analysis by Magistrate Judge Hacker during the 2255 proceedings revealed the evidentiary insufficiencies underpinning the government's case, even as Hacker concluded in favor of the government. While his findings ostensibly defended the conviction, his explanations inadvertently exposed critical deficiencies in meeting the possession element of the offense, a gap that proves fatal to the government's theory.

This motion respectfully urges the Court to rehear this case, addressing the following issues furtherly:

- 1- The statutory constitutional invalidity of the hybrid "attempt to aid and abet" theory;
- 2- The insufficiency of evidence supporting Mr. Hernandez's conviction, particularly regarding the possession element;
- 3- The significant prejudice arising from the omission of aiding and abetting jury instructions, a decision highlighted by Judge Crane's comments about its likely impact on the jury; and
- 4- The broader implications of this Court's treatment of these issues for ensuring doctrinal consistency, due process, and respect for the legislative framework governing criminal liability.

II. LEGAL BACKGROUND AND CONTROLLING PRINCIPLES

1. The Derivative Nature of Aiding and Abetting

The foundation of aiding and abetting liability under

18 U.S.C. § 2 is that it attaches only to a completed substantive offense. It is not an inchoate offense. See Jackson, 986 F.2d at 257; Scott, 48 F.3d at 1393. This Court has repeatedly affirmed that to convict someone of aiding and abetting, the prosecution must establish:

- 1- The substantive offense was committed;
- 2- The defendant associated with the offense;
- 3- The defendant participated in the offense as something he wished to bring about; and
- 4- The defendant took affirmative action to further the offense (Scott, 48 F.3d at 1393; United States v. Ledezma, 26 F.3d 636 (5th Cir. 1994)).

The evidentiary bar is purposefully to ensure a clear distinction between preparatory conduct and active complicity. Critically, aiding and abetting requires directly linking the defendant to the substantive offense, in this case, the possession of cocaine. The arresting agent and the prosecution conceded that Mr. Hernandez never had actual (physical) or constructive possession of cocaine nor any other illegal drugs. The jury was never told that Hernandez was attempting to possess any drugs, nor that Mr. Hernandez instructed anyone to possess, nor facilitated the possession of any drugs. Mr. Hernandez had no control of the alleged cocaine that was in the possession of law enforcement agents and incentivized Mexican illegal aliens serving as criminal informants, as the case was solely a fabrication of federal agents.

Aiding and abetting liability, under 18 U.S.C. § 2, attaches only to completed offenses and requires the prosecution to prove that

the defendant intentionally associated with and facilitated the underlying crime. In Mr. Hernandez's case, the government never committed any crime. The Fifth Circuit in *Fischel* affirmed that aiding and abetting the possession involves facilitating or otherwise participating in the principal offender's acquisition or control of the drugs. In Mr. Hernandez's case, there is not a principal offender. "Aiding and abetting possession ... can be established where a defendant facilitates or encourages the act of possession or exercise control over the contraband." (*Fischel*, 686 F.2d at 1097). In Hernandez's case the above principles are absent because the alleged cocaine was a fabrication of federal agents who had possession and control of the alleged cocaine during the entire sting operation, which only involved the government only.

This standard underscores the principle that aiding and abetting is herently derivative and cannot be separated from the substantive offense it attaches to. Therefore, the hybrid theory of "attempt to aid and abet" fundamentally disrupts the statutory framework by merging inchoate and derivative liabilities inappropriately. The case of *United States v. Fischel* highlighted that aiding and abetting possession necessitates conduct enabling or controlling contraband acquisition, whereas aiding distribution relates to transferring narcotics to others (*Fischel*, 686 F.2d 1082, 1087 88 (5th Cir. 1982)). These distinct requirements reinforce the derivative, non-inchoate nature of aiding and abetting. Crucially, an aiding and abetting crime is not an inchoate crime and cannot exist independently of the completed crime. There is no substantive crime committed in Mr. Hernandez's case, therefore Mr. Hernandez's conviction cannot be sustained.

III. DISTINCTIONS BETWEEN AIDING POSSESSION AND DISTRIBUTION

Fischel also highlighted the distinct evidentiary thresholds for possession versus aiding and abetting distribution. In contrast to aiding possession, where involvement is often tied to the acquisition or physical handling of drugs, aiding distribution focuses on facilitation of the transfer to others. For example, facilitating possession might involve advising on where or how to obtain drugs, whereas distribution involves transferring narcotics to third parties. These allegations are not claimed nor alleged by the prosecution in Hernandez's case either.

The government's theory against Mr. Hernandez improperly conflated these principles and elements by alleging that his scouting activity facilitated both possession and distribution, without any evidence tying him to the possession component as defined in Fischel. This failure to delineate between possession and distribution eroded the sufficiency of evidence for aiding liability under § 2.

IV. ATTEMPT AND ITS DIVERGENT FRAMEWORK

Attempt liability, by contrast, is forward-looking and allows for prosecution based on incomplete conduct. To sustain a conviction, the prosecution must prove:

- 1- Specific intent to commit the entire substantive offense; and
- 2- A substantial step toward completion that strongly corroborates the defendant's intent. (United States v. Williams, 553 U.S. 285 (2008).; Jackson, 986 F.2d at 259).

This frame necessarily involves different standards of intent, evidence, and nexus between the defendant's actions and the offense. The conflation of attempt with aiding and abetting disrupts these distinctions, creating a hybrid theory unsupported by Congressional intent or judicial precedent. This Court should not allow an injustice and should provide a proper judicial review in Mr. Hernandez's case. The unconstitutionality is obvious and clear and needs to be addressed by this Court.

V. EVIDENTIARY FAILURES IN MR. HERNANDEZ'S CASE

In Judge Hacker's sufficiency of analysis of the § 2255 proceedings, the magistrate judge identified a lack of evidence establishing Mr. Hernandez's intent or participation concerning possession. No trial testimony demonstrated nor proved that Mr. Hernandez knew where the drugs were located, nor did it establish any act by Mr. Hernandez that assisted or controlled possession. Instead, his conduct was presented as "scouting" or clearing the area for a presumed load vehicle, which itself was controlled by law enforcement. In fact, there are no audios of any illegal drugs or illegal transactions. The prosecution gave meaning of guilt to completely legal conversations.

Under Scott and the distinctions in the aiding and abetting doctrine highlighted in related precedent, even evidence of vague participation cannot substitute for the clear proof required to establish liability. The absence of specific intent or involvement in the offense undermines the government's case, particularly when the government merges aiding and abetting liabilities attempt's

reduced evidentiary threshold. The conviction of Mr. Hernandez under these circumstances cannot be sustained. This Court must ensure that the scales of justice are balanced and that prosecutors do not violate due process and constitutional guarantees. Congress has not authorized combining these distinct doctrines into a hybrid liability theory. By applying such a theory to Mr. Hernandez's case, the government improperly diminished its burden of proof while distorting legal precedent and willfully disregarded and ignored statutory law.

VI. LEGAL ARGUMENTS AND LEGAL ISSUES

A. The Derivative Nature of Aiding and Abetting Precludes the Hybrid Theory

The prosecution's reliance on "attempt to aid and abet" liability improperly applied attempt standards to aiding and abetting, shifting the evidentiary burden from proving Mr. Hernandez's association with possession to mere speculative intent. Under Fischel and this Court's consistent precedent, aiding and abetting liability cannot exist independently of a completed offense.

Attempt liability focuses on intent and substantial steps, while aiding liability derives its validity from substantive offenses. Conflating the two undermines statutory clarity and imposes conflicting legal requirements on defendants, as occurred in Mr. Hernandez's case.

B. Flawed Hybrid Theory and Its Incompatibility with § 2

The government's charge of "attempting to aid and abet"

possession misapplies § 2. As Judge Hacker noted in Civ. Doc. 108, the evidence at most suggest Hernandez's conduct facilitated distribution but could not connect him to the possession element, a fatal defect since aiding possession requires affirmative acts showing control over or assistance with the contraband.

In Hernandez's case, the government's renders Fischel's principles meaningless by relying on speculative ties to possession. Under *Ortega Reyna*, "convictions cannot be based on speculation but rest on evidence establishing all offense elements beyond a reasonable doubt." (*Ortega Reyna*, 148 F.3d 540, 543 (5th Cir. 1998)).

C. The Hybrid's Theory's Deficiencies and Statutory Incompatibility

The government's use of "attempt to aid and abet" liability represents a profound misinterpretation of § 2. By conflating these doctrines, prosecutors lowered the burden of proof, shifting the inquiry from whether Hernandez affirmatively associated with and participated in the possession of narcotics to whether his actions showed mere preparatory intent. In Hernandez's case, the government conceded that Hernandez never had any constructive or actual possession of any cocaine. The government also testified that Hernandez did not know the location of the drugs and did not know who had them (the government had the drugs at all time because they checked them out from their evidence custodian). Nobody ever had any possession of any drugs nor any one tried to transfer them.

The Fifth Circuit has explicitly rejected such distortion in prior cases:

1- In Jackson, the Court underscored that aiding and abetting is "an alternative theory of liability, not a substitute for proof of the substantive offense."

2- In Scott, the Court clarified that evidence of mere proximity to criminal conduct is insufficient without proof of intent and meaningful facilitation.

The hybrid theory employed against Mr. Hernandez conflicts with these rulings, introducing an expansive and amorphous liability standard that endangers the due process protections governing criminal prosecutions.

D. Misapplication of Factual Theories for Possession and Distribution

The government argued that Mr. Hernandez's alleged scouting activity served dual purposes: aiding the distribution of narcotics while simultaneously assisting in their possession. However, this dual-purpose theory contravenes Fischel's principle that aiding and abetting possession must involve conduct clearly directed at acquiring or maintaining control of the drugs.

Even when viewing the evidence most favorable to the government, there was no proof Mr. Hernandez knew the location of the drugs, exercised control over them, or facilitated their possession. As Judge Hacker acknowledged, the evidence relied on speculative connections between Hernandez's conduct and the government's (principal) actions. This failure to establish the requisite association with the possession highlights the prosecution's legal and evidentiary significant errors.

E. Misapplication of "Attempt" Standard to Aiding Liability

The hybrid "attempt to aid and abet" theory misapplies attempt's framework to aiding and abetting liability in a manner unsupported by statute. Attempt requires proof of intent for the entire underlying offense and a substantial step toward its completion. By applying attempt liability to aiding and abetting, the government improperly reduced the elements it was required to prove, transforming statutory requirements for possession into mere speculation about Mr. Hernandez's intent.

F. Insufficiency of Evidence Supporting Mr. Hernandez's Conviction

Even under the flawed hybrid theory, the evidence in Mr. Hernandez's case was insufficient, as previously claimed in the initial direct appeal motion, to meet the requisite elements of aiding and abetting possession with intent to distribute. At best, the government's evidence suggested that Mr. Hernandez scouted locations to facilitate drug transportation, a claim unsupported by concrete ties to possession.

Judge Hacker's analysis during § 2255 proceedings, though ultimately ruling in favor of the government, exposed this deficiency. He found no evidence directly connecting Hernandez to the act of possession, stating only that the alleged scouting "could be construed as an attempt to facilitate distribution." This reason alone requires the intervention of this Court. This merits judicial review. However, this stops short of satisfying possession, the core element underpinning the charged offense. As Fischel emphasizes, aiding and abetting possession requires intentional facilitation of obtaining or maintaining contraband, not generalized logistical support.

Under the Fifth Circuit precedent, speculative or attenuated inferences cannot satisfy the sufficient requirements. In the United States v. Ortega Reyna, the Court held:

"Convictions cannot be based on speculation. There must be evidence beyond a reasonable doubt that establishes each element of the offense," (Ortega Reyna, 148 F.3d 540, 543 (5th Cir. 1998).

Here, the prosecution presented no evidence showing Hernandez knew the location of the drugs, handle them or took any action facilitating their possession. Even viewing the evidence in the light most favorable to the government, the possession element was unproven, as presented during the initial motion during the direct appeal, where Mr. Hernandez presented that the arresting agent and the prosecution testified that Hernandez never had constructive or physical (actual) possession of any cocaine nor any other illegal drugs. This fact was overlooked by this Court. This Honorable Court must intervene and balance the scales of justice at this time.

G. Conflation of Distinct Theories of Liability

Possession and distribution are separate offense under U.S.C. § 841, each requiring unique proof elements for aiding and abetting liability. This Court's analysis in Scott underscores the distinct obligations prosecutors face when seeking to prove participation in versus facilitation of distribution. The case law demonstrates that facilitating possession requires evidence of involvement in acquiring or maintaining control over the drugs distinct from facilitating

distribution, which centers on transferring drugs to another party.

The government improperly conflated these two theories in Mr. Hernandez's case. By urging that his alleged "scouting" facilitated distribution, the prosecution presumed an inferred link to possession, a conclusion unsupported by evidence. Even if the jury accepted the government's evidence as true, it could only establish attenuated involvement in logistics rather than any affirmative act tied to possession, as defined by Scott. Therefore, the significant errors of the misapplication of the law in Mr. Hernandez's case are obvious, deserving and warranting the immediate intervention of this Court, as this brief fully reinforces and highlights the claims made in the initial direct appeal briefs and the motion to recall the mandate. The insufficiency of evidence demonstrated and presented in Mr. Hernandez direct appeal briefs, motion to recall the mandate and herein is overwhelming.

H. Distinctions from Precedent: Why This case Demands Review

Mr. Hernandez's case raises issues of statutory misapplication and procedural error not presented in prior aiding and abetting decisions. Unlike Jackson, where the Court addressed sufficient evidence of association, Mr. Hernandez's case relied on vague inferences rather than specific acts tied to possession. In fact, the arresting agent testified that Mr. Hernandez never had any actual (physical) or constructive possession of any cocaine during the entire government operation. In fact, the agents checked out the cocaine from their evidence custodian and returned it back after their alleged targeting against Mr. Hernandez. In other words, the agents are the only ones who had possession of illegal drugs.

Similarly, Scott cautioned against conflating preparatory conduct with aiding and abetting liability precisely what occurred here in Mr. Hernandez's case, especially when it was never alleged that Mr. Hernandez attempted to possess or attempt to have control of the alleged cocaine.

These unresolved discrepancies necessitate judicial review and clarification, both to protect Mr. Hernandez's right and to prevent misapplication of aiding and abetting principles in future cases. This constitutional issue is clear but courts refuse to address the prosecutorial overreach and misconduct of prosecutors in the case of Mr. Hernandez.

The Fifth Circuit's earlier rulings in Jackson and Scott addressed principles that were overlooked or misapplied in Mr. Hernandez's prosecution:

- 1- Jackson: The defendant's actions must unequivocally associate them with the commission of the substantive offense. Mere circumstantial evidence cannot suffice if it does not establish intent and participation with certainty. This principle was sidestepped by the government's hybrid theory.
- 2- Scott: The Court warned against using vague conduct or associative inferences to sustain convictions for aiding and abetting possession. The distinction between aiding and abetting distribution was blurred entirely in Mr. Hernandez's trial, in violation of Scott, and this Court failed to properly review and analyze Mr. Hernandez's insufficient evidence claim at direct appeal. Mr. Hernandez's conviction cannot be sustained according to the Fifth Circuit's precedent and statutory law.

These foundational cases of the Fifth Circuit, Jackson and Scott, directly oppose the prosecution's and trial court's approach in Hernandez's case. Failure to adhere to them compromises the consistency of this Court's precedent, denying clarity to defendants, facing hybrid liability charges in the future.

Fischel emphasized that aiding and abetting possession cannot be established through attenuated or speculative connections. Instead, the evidence must demonstrate affirmative steps that substantially facilitate the acquisition or control of narcotics. In Mr. Hernandez's case, the prosecution hypothesized that his scouting served as a logistical "all-clear," but this claims conflates the preparatory intent necessary for aiding distribution with the actus reus required to sustain aiding possession, especially when the government testified that Mr. Hernandez never had any actual (physical) nor constructive possession as claimed during the initial direct appeal filing. Furthermore, the government never alleged to the jury members that Mr. Hernandez attempted to possess the alleged cocaine in possession of government agents. In fact, the government could not show any drug related audio recorded conversations either.

This theory not only stretched the evidence but also allowed the jury to infer liability beyond what reasonable constructions of the record could support. As the Fifth Circuit has long held, sufficiency claims in post-trial setting must rest on clear and reasonable interpretation of facts, not speculative inferences (United States v. Ortega Reyna, 148 F.3d 540, 543 (5th Cir. 1998)). Here, the government effectively conflated two separate theories to backfill evidentiary gaps, bypassing the requirement under Fischel.

VII. PREJUDICE FROM THE OMISSION OF AIDING AND ABETTING INSTRUCTIONS

The omission of aiding and abetting instructions from the jury charge exacerbated these deficiencies, depriving the jury of a proper framework to assess Hernandez's guilt. The trial judge, Judge Randy Crane, himself acknowledged the importance of such instructions, stating during trial:

"Frankly, I think if I give [instructions], they're going to acquit him."

This candid admission underscores the prejudice resulting from the omission. Without clear guidance on the legal standards for aiding and abetting, the jury was left to navigate an improperly expanded theory of liability without understanding the substantive elements it required.

The Supreme Court has repeatedly warned against omitting essential jury instructions, emphasizing their role in ensuring fair trials. In *Sullivan v. Louisiana*, 508 U.S. 275, 280 81 (1993), the Court recognized that jury instructions must "correctly convey the essential elements" of the offense, as failure to do so renders the trial fundamentally unfair.

The omitted instruction compounded the government's evidentiary failures, as it prevented the jury from properly assessing whether Hernandez's conduct met the requisite standards for aiding possession or distribution. The government and agents and prosecutors in Mr. Hernandez's case, during trial, exonerated Mr. Hernandez

from any actual or constructive possession of the alleged cocaine. The government further declared that Mr. Hernandez never attempted to possess it, nor knew the location of any illegal drugs. It was also conceded by the government that Mr. Hernandez did not know who had drugs. This Court of Appeals acknowledged that Mr. Hernandez never had any actual or constructive possession of any illegal drugs, but still affirmed the conviction disregarding its own precedent, legal standards, procedural legal steps of law, and statutory law.

Judge Randy Crane's commentary during trial reinforces the prejudice stemming from the omitted aiding and abetting instructions. Judge Crane knew that the prosecutors and agents did not have a case against Mr. Hernandez. Judge Randy Crane decided to incline the scales of justice toward the prosecution and removed all aiding and abetting instructions in order to facilitate the conviction for prosecutors.

This remark, previously presented at Page 17, underscores how proper instructions could have enabled the jury to evaluate the core deficiency: whether Hernandez participated in or controlled possession with specific intent. The omission deprived the jury of a vital legal framework, violating the sixth Amendment's guarantee of a fair trial (Sullivan v. Louisiana, 508 U.S. 275, 281 (1993)).

VIII. BROADER IMPLICATIONS OF ADDRESSING THESE DEFICIENCIES

Endorsing the hybrid theory and overlooking the procedural flaws in this case of Mr. Hernandez creates long-term risks,

including doctrinal uncertainty and diminished fairness in the application of aiding and abetting law. Resolving these issues ensures future defendants' constitutional rights while affirming the integrity of this Court's precedent.

If this Court declines to address these issues, it risks endorsing doctrinal confusion and judicial inconsistency. The unchecked application of hybrid liability theories, combined with diluted evidentiary standards, creates dangerous precedent for future cases. Allowing speculative inferences to sustain convictions not only violates due process but also diminishes the legitimacy of the judicial system.

Resolving these issues would not only ensure justice for Mr. Hernandez but also reaffirms this Court's commitment to maintaining the integrity of criminal law and protecting defendants from arbitrary or unsupported charges.

IX. CONSTITUTIONAL AND PROCEDURAL IMPLICATIONS ARISING FROM

MR. HERNANDEZ'S CASE

The hybrid theory of "attempt to aid and abet" liability impermissibly shifts aiding and abetting into the realm of inchoate crimes, creating uncertainty for defendants regarding what conduct is criminal. By removing the essential requirements of a completed offense, the prosecution effectively legislated from the courtroom, transforming § 2 into a statute it was never intended to be. This denies defendants adequate notice under the Due Process Clause, as articulated in *Kolender v. Lawson*, 461 U.S. 352 (1983).

Congress, not the judiciary, defines criminal conduct. By endorsing a hybrid theory unsupported by statutory language or Congressional intent, this Court risks undermining the constitutional separation of powers. As the Supreme Court observed in *United States v. Bass*, 404 U.S. 336, 348 (1971), court must resist expansive interpretations that stretch criminal statutes beyond their plain meaning. Here, the prosecution's theory and the jury instructions improperly extended § 2 without clear legislative authorization, infringing constitutional safeguards.

XI. WEAPONIZATION OF FEDERAL AUTHORITY

1. Selective Targeting of a Political Candidate

Mr. Hernandez's prosecution did not occur in a vacuum. Federal agents initiated their sting operation while Hernandez was a candidate for Hidalgo County Sheriff. The timing and the nature of the operation suggest a calculated effort to undermine his political career through targeting and framing.

The weaponization of the federal resources in this manner threatens the foundation of our democracy. Federal law enforcement, tasked with impartial administration of justice, must not engage in activities aimed at discrediting or neutralizing political adversaries. See *Wayte v. United States*, 470 U.S. 589, 608 (1985) (prosecutorial discretion cannot be exceeded to unfairly target an individual). The fact that the operation was entirely manufactured further demonstrates bad faith and selective enforcement.

In this case of Mr. Hernandez, federal agents orchestrated

a fictitious drug trafficking scheme designed to frame and implicate Mr. Hernandez. The operation was carefully constructed, leaving no opportunity for legitimate criminal intent on his part, as agents dictated every aspect of the alleged offense. This demonstrates a deliberate effort to frame Mr. Hernandez rather than detect actual criminal activity.

Reverse sting operations, while constitutionally permissible under limited circumstances, become constitutionally suspect when used to target specific individuals or to fabricate criminal involvement, such as in this case of Mr. Hernandez. The Fifth Amendment demands that criminal laws focus on punishing actual misconduct, not on targeting individuals through manipulative government schemes. See *Jacobson v. United States*, 503 U.S. 540, 548 (1992) (condemning government actions designed to manufacture criminal intent in defendants).

2. Selective Targeting and Framing: Misuse of Federal Authority and Disproportionate Focus on a Political Candidate

The reverse sting operation targeted Mr. Hernandez during his political campaign for Hidalgo County Sheriff. Timing, as well as the level of resources deployed, raises credible concerns that federal agents pursued Mr. Hernandez not based on concrete suspicion but on political expediency.

Selective targeting in politically charged context undermines the appearance and reality of justice. See *Wayte v. United States*, 470 U.S. 589, 608 (1985). Circumstantial evidence revealed in Mr. Hernandez's case suggests that Mr. Hernandez became the focus of this

operation because of his candidacy rather than the legitimate law enforcement objectives. Such misuse and abuse of power threatens fundamental democratic principles. The circumstances of this case further prove Mr. Hernandez's innocence.

XI. CONCLUSION

Judge Hacker's analysis, while aimed at affirming the conviction, inadvertently revealed significant evidentiary deficiencies. His findings admitted that Mr. Hernandez's alleged scouting activities "might be interpreted as facilitating distribution." However, Hacker failed to explain how Hernandez's actions tied to possession, a necessary element underpinning the charge of possession with intent to distribute.

Jackson emphasized that aiding and abetting cannot rely on evidence disconnected from the substantive offense, observing that:

"Association with a crime requires more than proximity or speculative connection. It demands a nexus between the defendant's actions and the crime itself."

Hacker's conclusions implicitly conceded that no such nexus existed between Hernandez's conduct and possession. Yet, despite this clear gap in the evidentiary record, the magistrate upheld the government's theory without substantively addressing this critical failure. The same related failure was presented to this Court during the direct appeal, but was ignored.

Under the sufficiency standard established in Scott and Reyna, the government was required to prove that Mr. Hernandez affirmatively associated himself with and participated in the possession. Hernandez's trial record demonstrates otherwise. Agents testified Mr. Hernandez lacked knowledge of the drugs location or the load vehicle's identity, facts that contradicts claims Mr. Hernandez facilitated or controlled possession. Without such knowledge or conduct, Mr. Hernandez could not have intended to facilitate possession as required by § 2.

In Fischel, aiding possession liability was found only where a defendant knowingly provided assistance directly enabling possession or exercise control over the contraband. Hernandez's alleged conduct is purely logistical and detached from the substance falls short of this standard. As the arresting government agents said, Mr. Hernandez never had any actual nor constructive possession of cocaine, therefore Mr. Hernandez's conviction must fall according to constitutional law, statutory law, and common sense.

Adding inchoate liability via attempt yields no difference, as the lacking factual evidence is also insufficient to show that Hernandez acted with the specific intent to commit the underlying crime of aiding and abetting possession with the intent to distribute cocaine because Hernandez had no nexus to the distinct aspect of possession. However, that is not how the hybrid-theory was utilized in Hernandez's case, and his conviction was allowed under facts less than what constitutes the crime and more aligned with conspiracy; Hernandez cannot be guilty of conspiracy as a matter of law.

Hernandez was exclusively convicted upon the omission of all aiding and abetting instructions from the charge, even though the aiding and abetting elements are necessary to prove the crime. Trial Judge Randy Crane stated on the record that were the jury given the aiding and abetting instructions, they would acquit Hernandez.

Hernandez deserved to be acquitted due to the evidence, the facts, and the legal framework, but was convicted upon misconstruing all three. This Honorable Court, in the fair administration of justice, should not lie silent in complicity, but instead grant Hernandez the outcome that common sense suggests he deserved from the beginning. Should the scales of justice hold any meaning to the Honorable Court, Hernandez calls upon this Court to remove the unjust thumb held against him, rehear this matter, recall the mandate, and allow the fight for a clean and fair trial by all means.

XII. RELIEF REQUESTED

For the foregoing reasons, Mr. Hernandez requests this Court to:

- 1- Grant rehearing on the denial of the motion to recall the mandate, allowing reconsideration of substantive issues raised by the hybrid theory of "attempt to aid and abet" liability.
- 2- Issue a reasoned opinion addressing unresolved questions concerning the statutory and constitutional validity of the hybrid theory.

- 3- Address the constitutional issue of convicting Mr. Hernandez under 18 U.S.C. § 2 Aiding and Abetting without instructing the jury on the statutory elements of § 2.
- 4- Address the issue of the insufficiency review standard applied in Mr. Hernandez, which was in contravention of this Court's own precedent and statutory law.
- 5- Address all significant constitutional errors committed by the trial Judge, Randy Crane, and the intentional omission of the aiding and abetting instruction to facilitate the conviction.
- 6- Address all constitutional matters and significant fatal induced errors, willfully executed by the trial court and the prosecutors.
- 7- Address any other issue presented in the direct appeal initial motion, motion to recall the mandate and herein.
- 8- Vacate the mandate and remand for reconsideration, consistent with applicable precedent from Fischel, Scott, Jackson and any other available binding authority.

Mr. Hernandez's case exemplifies the dangers of judicial overreach and prosecutorial distortion in construing criminal liability. This motion offers the Court an opportunity to clarify key principles of aiding and abetting law, ensuring consistent adherence to constitutional protections and legislative intent. Mr. Hernandez asks for justice and demands that he be free from this unlawful imprisonment so he can reunite with his family.

Respectfully submitted,

Geovani Hernandez, Pro se.

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January 27, 2025

CERTIFICATE OF SERVICE

I, Geovani Hernandez, certify that the foregoing motion for rehearing on the denial of motion to recall mandate was serviced upon this Court by placing this document into FCI Forrest City Low's internal mailing system with first-class postage pre-paid for delivery via U.S. Mail on this 27th day of January, 2025.

Respectfully submitted,


Geovani Hernandez

On this day of: January 27, 2025

Geovani Hernandez

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