No. 25-6505

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH C. POINTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

FROM THE SIXTH CIRCUIT COURT OF APPEALS

Mr. Kenneth C. Pointer # 46291-039

FCI-Fort Dix / P.O. Box 2000

Joint Base MDL, NJ. 08640

QUESTION(S) PRESENTED

QUESTON NUMBER ONE:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon Pointer's ineffectiveness claim as it relates to failing to conduct adequate legal research; failure to thoroughly review Indictment; and failure to file a pre-trial Motion to Dismiss Fatally Defective Superseding Indictment, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution.

QUESTION NUMBER TWO:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon Pointer's ineffectiveness claim as it relates by his ex-trial counsel failing to object to a determination regarding unanimous jury verdict, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution ?

QUESTION NUMBER THREE:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon Pointer's trial stage error ineffectiveness claim, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution ?

QUESTION NUMBER FOUR:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon sentencing phase ineffectiveness claim, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution ?

QUESTION NUMBER FIVE:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon his appellate ineffectiveness claim, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution ?

LIST OF PARTIES

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

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

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

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

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

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

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

[ ] is unpublished.

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was May 9, 2025.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 07/11/2025

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

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

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

The date in which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

PAGE NUMBER

STATEMENT OF THE CASE

On March 18, 2024, Petitioner Pointer filed his 2255 Motion to Vacate and Affidavit (Doc. # 1). The Government filed their Response Brief opposing relief being granted on July 15, 2024 (Doc. # 18). On August 13, 2024, Petitioner Pointer filed his 2255 Reply Brief to conclude briefing schedule (Doc. # 21). On September 12, 2024, Mr. Pointer submitted a Motion to Alter or Amend a Judgment (Doc. # 24), and the district court his Rule 59 (e) Motion on September 19, 2024 (Doc. # 25). On October 28, 2024, timely Notice of Appeal was filed (Doc. # 26), and on May 09, 2025, the Sixth Circuit Court of Appeals denied Petitioner Pointer's request for a Certificate of Appealability and issued an 8-page Denial of COA Opinion and on July 11, 2025, the Sixth Circuit Court of Appeals denied Panel Rehearing or Rehearing En Banc in the case at bar.

Petitioner Pointer asserts that he now petitions this Honorable U.S. Supreme Court to GRANT his Pro Se Petition for a Writ of Certiorari, thus, issuing a Certificate of Appealability as to Questions One, Two, Three, Four, and Five as this Supreme Court deems warranted in the case herein.

REASONS FOR GRANTING THE PETITION

Petitioner Pointer, acknowledges that a review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition

for a writ of certiorari will be granted by this court only for compelling reasons, see Supreme Court Rule 10.

In the instant case, Petitioner Pointer respectfully requests that this Court **GRANT** his pro se Petition for a Writ of Certiorari as to Questions Number One, Two, Three, Four, and Five as relevant to question # 1, did the district court abuse its discretion by failing to conduct an evidentiary hearing regarding his pre-trial ineffectiveness claim and the Sixth Circuit's affirmance of the claim is debatable or wrong among jurists of reason; question # 2, did the district court abuse its discretion by failing to conduct an evidentiary hearing regarding his ex-trial counsel's failure to object to a determination regarding unanimous jury verdict and the Sixth Circuit's affirmance of the claim is debatable or wrong among jurists of reason; question # 3, did the district court abuse its discretion by failing to conduct a prompt evidentiary hearing regarding trial stage error ineffectiveness claim and the Sixth Circuit's affirmance of the claim is debatable or wrong among jurists of reason; question # 4, did the district court abuse its discretion by failing to conduct an evidentiary hearing regarding sentencing phase ineffectiveness claim and the Sixth Circuit's affirmance of the claim is debatable or wrong among jurists of reason; and question # 5, did the district court abuse its discretion by failing to conduct a prompt evidentiary hearing based upon his

appellate ineffectiveness claim and the Sixth Circuit's affirmance of the claim is debatable or wrong among jurists of reason.

Consistent with 28 U.S.C. 2253 (c) (2), and U.S. Supreme Court precedents in **Slack** and **Miller-El,** thus, Kenneth C. Pointer is entitled to issuance of Certificate of Appealability as to Questions 1, 2, 3, 4, and 5 in the matter herein.

QUESTION NUMBER ONE:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon Pointer's ineffectiveness claim as it relates failing to conduct adequate legal research; failure to thoroughly review Indictment; and failure to file a pre-trial Motion to Dismiss Fatally Defective Superseding Indictment, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution.

Question Number One Is Debatable Or Wrong Among Jurists Of Reason

In the instant case, Petitioner Pointer, states that the district court denied Ground One by holding in relevant part as follows:

"As an initial matter, Defendant does not explain, and the Court does not discern, how **Apprendi** applies to his argument. In **Apprendi,** the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty beyond a reasonable doubt." 530

U.S. at 490. The inclusion of aiding and abetting in the Superseding Indictment did not subject Defendant to any enhanced penalty beyond the prescribed statutory maximum. Defendant's reliance on **Apprendi,** therefore, is misplaced."

"In any event, Defendant's argument lack merit. The Sixth Circuit has held that "aiding and abetting is embodied in every federal indictment, whether specifically charged or not." United States v. Floyd, 46 F. App'x 835, 836 (6th Cir. 2002). Moreover, while an indictment "must inform the defendant of the crime with which he or she is charged," the indictment "need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States, in order to support a jury verdict based upon a finding of either." United States v. McGee, 529 F.3d 691, 695 (6th Cir. 2008) (quoting United States v. Lester, 363 F.2d 68, 72 (6th Cir. 1966)). Furthermore, "[i]t [is] not necessary that the indictment name the principals who committed the offense. Their names are not essential elements of the offense." See United States v. Harris, 523 F.2d 172, 174 (6th Cir. 1975)."

"In light of the foregoing authority, Defendant's argument that the Superseding Indictment was fatally defective wholly lack merit. Accordingly, Defendant is not entitled to relief with respect to ground I."

See Appendix D.

In the instant case, Petitioner Pointer, argues that the U.S. Supreme Court has held that: "An indictment that tracks the language of the relevant statute is sufficient, as long as it also provides a statement of facts and circumstances that give notice of the offense to the accused." Russell v. United States, 369 U.S. 749, 765 (1962). The Superseding Indictment in this case failed to meet this standard. As it relates to Counts 1, 3, and 5, Aiding and Abetting Distribution and PWID, because it fails to provide fair notice of the essential elements of the charged offenses, that is, notice sufficient to enable them to prepare a defense. United States v. Jordan, 582 F.3d 1239, 1245-46 (11th Cir. 2009). Although the district court relied upon Sixth Circuit precedents, however, those cases are distinguishable as **McGee** and the Sixth Circuit's unpublished Opinion in **Floyd,** thus, holds no precedential value. See **McGee,** 529 F.3d 691, 695 (6th Cir. 2007) (the defendant was charged **as a principal** with possession of cocaine with intent to distribute. The Sixth Circuit held that it was not error to allow the jury to convict the defendant on the alternative "aiding and abetting" theory of criminal liability because that theory is "embedded in federal indictments." Id. at 696.). **McGee** stands for the unremarkable proposition that a defendant who is on actual notice that he is charged as a principal is implicitly on notice that he may be convicted of the

alternative aiding and abetting theory of liability. As the result of Mr. Pointer was not charged **as a principal** within Counts 1, 3, and 5, and in fact, no one was charged **as a principal** as to those counts as the law **only** permits a controlled substances distributor (whom is not charged in Counts 1, 3, and 5), to be charged with aiding and abetting the recipient with "possessing controlled substance with intent to distribute" them. Because Counts 1, 3, and 5, fails to properly allege the elements of an offense against a **principal** it follows that Mr. Pointer, thus, cannot be charged as an aider and abettor of that crime. See United States v. Kilpatrick, Case No. 2:10-cr-20403-NGE-MKM, ECF No. 128, PageID.989 (E.D. Mich., June 18, 2012) (The law permits a bribe giver to be charged with aiding and abetting a public official's acceptance of an illegal bribe, in the same way that the law permits a controlled substances distributor to be charged with aiding and abetting the recipient with "possessing controlled substances with intent to distribute" them. **So long as the charge properly alleges the elements of an offense against a principal (here, Kwame Kilpatrick), an aider and abettor of that crime can also be charged with the crime.)**. See Appendix D. See **McGee,** 529 F.3d 691, 695-96 (6th Cir. 2008) (a defendant charged as a **principal** may be convicted based on the uncharged theory of aiding and abetting as long as the indictment provided notice of the underlying substantive offense.). It is also worth

pointing out that the Sixth Circuit held that: "Before a conviction for aiding and abetting can be upheld, **it is essential that the jury find all essential elements of the underlying crime were committed by someone.**" United States v. Horton, 847 F.3d 313, 322 (6th Cir. 1988). Petitioner Pointer, argues that his Count 1, 3, and 5, of his Superseding Indictment is fatally defective since it failed to place him on **NOTICE** of the principal or charged the principal in violation of his Fifth and Sixth Amendment rights of the U.S. Constitution. Mr. Pointer is entitled to relief as to Question Number One consistent with the notice requirement of Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

Based on the law and facts presented jurists of reason could find it debatable or wrong that the district court's assessment of Question Number One violated his Sixth Amendment constitutional rights and the district court abused its discretion failing to conduct a prompt Evidentiary Hearing in the case herein. See **Slack,** 529 U.S. 473, 484 (2000).

QUESTION NUMBER TWO:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon Pointer's ineffectiveness claim as it relates by his ex-trial counsel failing to object to a determination regarding

unanimous jury verdict, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution ?

Question Number Two Is Debatable Or Wrong Among Jurists Of Reason

In the instant case, Petitioner Pointer, states that the district court denied Ground Two by holding in relevant part as follows:

"As his second ground for relief, Petitioner contends that counsel was ineffective for not objecting to the supplemental jury instructions given to the jury. (ECF No. 1, PageID.7.) Specifically, Defendant asserts that these instructions allowed the jury "to convict as if two separate crimes exist as to Counts 1, 3, and 5." (Id.) Essentially, Defendant believes that the instructions allowed the jury to either convict him of distribution/ possession with intent to distribute or aiding and abetting distribution/ possession with intent to distribute. (Id.). Accordingly, to Defendant, "there is no way of knowing which crime" the jury convicted him of. (Id.)

Sixth Circuit authority forecloses Defendant's claim. "Since the criminal liability for principals and aiders and abettors is identical, see 18 U.S.C. Sec. 2., there is no requirement that a jury unanimously find each was either a principal or aider and abettor." United States v. Perry, 401 Fed. Appx. 56, 62 (6th Cir. 2010); see also United States v. Vander Zwagg, 467 Fed. Appx. 402, 408 (6th Cir. 2012) (noting that

"district courts are 'not required to give a special "unanimity instruction" for aiding and abetting charges" (quoting United States v. Holt, 108 Fed. Appx. 325, 327 (6th Cir. 2004)). It would have been futile for counsel to argue otherwise. See Ludwig, 162 F.3d at 459. Defendant, therefore, is not entitled to relief with respect to ground II. "

In the instant case, Petitioner Pointer, contends that regarding Count 1, Distribution of Cocaine and Aiding and Abetting Distribution of Cocaine; Count 3, Possession with Intent to Distribute Controlled Substances and Aiding and Abetting Possession with Intent to Distribute Controlled Substances; and Count 5, Possession with Intent to Distribute Cocaine Base and Aiding and Abetting Possession with Intent to Distribute Cocaine Base, see Appendix D, however, the Supplemental Jury Instructions given to the Jury, see Appendix E, and Jury Verdict Form, see Appendix F, in which allowed the Jury to convict as if two separate crimes exist as to Count 1, 3, and 5, to commit the crime of **"distribution of cocaine OR aiding and abetting distribution of cocaine"** as to Count 1; to commit the crime of **"possession with intent to distribute controlled substances" OR "aiding and abetting possession with intent to distribute controlled substances"** as to Count 3; and to commit the crime of **"possession with intent to distribute cocaine base OR aiding and abetting**

possession with intent to distribute cocaine base" as to Count 5. There is no way of knowing which crime the Jury **"unanimously"** agreed upon or did some juries believe that the Government proved that Pointer was guilty of **"Distribution of Cocaine" and other juries believe he was guilty of "Aiding and Abetting Distribution of Cocaine"** as charged within Count 1; **"PWID Controlled Substances" or "Aiding and Abetting PWID Controlled Substances"** as charged within Count 3; and **"PWID Cocaine Base" or "Aiding and Abetting PWID Cocaine Base"** as charged within Count 5, in which violates his Sixth Amendment rights of the U.S. Constitution. See **Kakos,** 483 F.3d 441, 444-445 (6th Cir. 2007) (a verdict rendered by a less-than-unanimous jury violates a defendant's Sixth Amendment [rights]). Both sister Circuit Court of Appeals have overturned convictions after a Jury Trial based a unanimous verdict regarding alternative theories. See United States v. Gipson, 553 F.2d 453, 457-459 (5th Cir. 1977) (The Fifth Circuit held in **Gipson,** that the right if a defendant to a unanimous verdict was violated where the jury was permitted to convict even though there may have been significant disagreement among the jurors [regarding the alternative theories] about what the defendant did. REVERSED the conviction.); and United States v. Fawley, 137 F.3d 458, 472 (7th Cir. 1998) ("Finally, we hold that the trial court denied Fawley a fair trial by violating

his due process rights in giving an ambiguous and/ or confusing jury instruction. As stated by the Supreme Court in **Andres,** the defendant had a right to a unanimous verdict, and that right was neglected here. In sum, we hold that the trial court committed reversible error in giving a jury instruction that was misleading, ineffective, and denied the defendant his due process rights. Although we agree with the vast majority of the trial judge's rulings, we are forced to disagree with his instruction dealing with the requirement that the jury reach a unanimous verdict, and order a reversal and remand for a new trial."). It should be noted in both the Fifth Circuit's Ruling in **Gipson** and the Seventh Circuit's Ruling in **Fawley** both Circuit Court of Appeals relied upon the U.S. Supreme Court Ruling in **Andres** to overturn the criminal conviction. See Andres v. United States, 333 U.S. 740, 748, 68 S. Ct. 880, 92 L. Ed. 1055 (1948) (the U.S. Supreme Court held that "unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply... A verdict embodies in a single finding the conclusions by the jury upon **all the questions submitted to it."**). The district court relied upon the unpublished opinions of **Perry; VanderZwaag; and Holt** to deny relief as to Ground Two, but these Sixth Circuit Rulings hold no precedential value instead the district court was bound to follow established U.S. Supreme Court

precedents (in which was relied upon by Mr. Pointer within his Reply Brief), and both sister Circuit Court of Appeals have published Opinions in which renders the district court's decision to deny relief as to Ground Two and the Sixth Circuit's affirmance of such denial decision debatable or wrong among jurists of reason, thus, a Certificate of Appealability should issue as to Question Number Two, in the case herein.

It follows that a prompt Evidentiary Hearing was warranted and the district court's failure to hold a hearing constituted an abuse of discretion in the case herein. See Schriro v. Landrigan, 550 U.S. 465, 474 (2007); and United States v. Rivas-Lopez, 678 F.3d 353, 358-59 (5th Cir. 2012).

A Certificate of Appealability should as to Question Number Two, as it is debatable among jurists of reason of a denial of his Sixth Amendment constitutional rights and whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing as to Question Number Two. See **Slack,** 529 U.S. 473, 484 (2000).

QUESTION NUMBER THREE:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon Pointer's trial stage error ineffectiveness

claim, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution ?

Question Number Three Is Debatable Or Wrong Among Jurists Of Reason

In the instant case, Petitioner Pointer states that the district court denied the merits of Ground Three by holding that:

"Here, Defendant takes issue with two separate statements made during trial. Detective Sergeant Les Rochefort of the Michigan State Police testified during Defendant's trial. At the time of Defendant's arrest, Detective Sergeant Rochefort was a detective trooper assigned to the Tri-County Metro Narcotics Task Force. See Trial Tr. II, United States v. Pointer, No. 1:19-cr-291 (W.D. Mich.) (ECF No. 127, PageID. 1452.).

In his affidavit Lucas Dillon asserts that "[t]here were no Confrontation Clause issues with the way [Defendant] phrases it." The confidential informant testimony was not used to prove the truth of the matter asserted, it was offered to explain **how and why** [Defendant] was arrested, and not to prove the truth of the tip." (ECF No. 16, PageID.113, Para.20.) This Court agrees. "A statement is testimonial if a reasonable person in the declarant's position would have anticipated the use of the statement in a criminal proceeding." United States v. Boyd, 640 F.3d 657, 665 (6th Cir. 2011) (citing United

States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004)); see also Bullcoming v. New Mexico, 564 U.S. 647, 659 n. 6 (2011) ("To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.'") (quoting Davis, 547 U.S. at 822). Here, there is no indication that when the confidential informant told Detective Sergeant Rochefort that Defendant was the one driving the Cadillac that the informant anticipated the use of that statement in a criminal proceeding. Furthermore, as explained by attorney Dillon, the testimony was given to explain Defendant's subsequent arrest. Because the admission of this testimony did not violate the Confrontation Clause, counsel cannot be ineffective for failing to raise a meritless argument. See Ludwig, 162 F.3d at 459. Defendant, therefore, is not entitled to relief with respect to this portion of ground III.

Although Petitioner Pointer argued in the district court that the admission of the Detective Sergeant Rochefort's testimony violated the Confrontation Clause because it was offered to prove truth of matter and to identify Kenneth C. Pointer, however, the district court should have given such argument a liberal construction as Attorney Dillion hinted to within his Affidavit ("there were no Confrontation Clause issues **with the way [Defendant] phrases it"**), thus, it appears an Confrontation Clause violation occurred by the admission of

hearsay testimony given by an informant but was testified to by Detective Sergeant Rochefort. See United States v. Davis, 571 F.2d 1354 (5th Cir. 1978) (Government cannot use hearsay-based testimony by agent as a ploy to avoid calling gun manufacturer who would be subject to cross-examination); Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177 (2004) (Prior testimonial statement of witness not called violates confrontation clause unless witness unavailable and opposing party had chance to cross-examine.); and United States v. Cromer, 389 F.3d 662, 670-71 (6th Cir. 2004) (Confrontation Clause violated by admission of testimonial statements of confidential informant because no prior opportunity to cross-examine).

Also Mr. Pointer brings to this Honorable U.S. Supreme Court's attention that two Confrontation Clause violations occurred within the Trial Transcripts at ECF No. 127, PageID.1507, line 1-4; and ECF No. 127, PageID.1517, line 9-14, thus, his ex-trial counsel failed to object to this constitutional violation in which occurred multiple times during the course of his Jury Trial in which undermined the Jury Verdict and deprived of his constitutional right to a fair trial in violation of his Sixth Amendment Rights of the U.S. Constitution.

As to the third trial error raised by Mr. Pointer regarding his ex-trial counsel's failure to file a Rule 29 Judgment of Acquittal, however, the district court denied relief by holding in relevant part

as follows:

"Defendant contends that counsel should have filed a Rule 29 motion "as to Count Two due to there being no audio or video from [the] confidential informant and the fact that as relating to Counts 1, 3 and 5, there was no evidence" presented "consistent with Sixth Circuit precedents that the jury find that all essentially elements of the underlying crime were committed by someone else when no one else was charged as [Defendant] has no co-defendants." (ECF No. 1, PageID.12-13.)

"Essentially, Defendant contends that there was insufficient evidence because for an aiding and abetting theory to apply, more than one person must be charged in the indictment. This argument, however, lacks merit. Aiders and abettors may be convicted even "when the principal [i]s unidentified, and even when he was acquitted." See United States v. Bryan, 483 F.2d 88, 93-94 (3d Cir. 1973). For counsel to argue otherwise in a Rule 29 motion would have been futile. See Ludwig, 162 F.2d at 459. Moreover, after reviewing the record, the Court is satisfied that the government presented sufficient evidence to support Defendant's guilt on each count set forth in the Superseding Indictment. Defendant, therefore, is not entitled to relief with respect to this portion of ground III.

Contrary to the district court's decision there was insufficient

evidence to prove beyond a reasonable doubt that as it relates to Count 2, Distribution of Cocaine Base due to there being no audio or video from confidential informant, thus, as the result of direct evidence was provided from the confidential informant there was insufficient evidence to convict as to Counts 1, 3, and 5, as the Government did not prove Pointer had the proper mens rea. See United States v. Hunt, 129 F.3d 739 (5th Cir. 1998) (7.998 grams of crack cocaine, without other evidence, was not enough to support the presumption that it was for distribution); United States v. Brown, 151 F.3d 476 (Government did not prove that employee had the proper mens rea to know she was aiding and abetting the crime of making false statements to the government.); United States v. Williams, 985 F.2d 749 (5th Cir. 1993) (the mental state of the principal alone is insufficient to inculpate an aider and abettor.); United States v. Powell, 806 F.2d 1340 (9th Cir. 1986) (The defendant could not be convicted on the theory of aiding and abetting in absence of evidence that someone committed the crime as a principal.); and **Horton,** 847 F.2d 313, 322 (6th Cir. 1988) (Before a conviction for aiding and abetting can be upheld, it is essential that the jury find that all essential elements of the underlying crime were committed by someone.) (emphasis added).

It follows that his ex-trial counsel waived claim for his appeal

by failing to preserve for appeal by filing a Rule 29 Judgment of Acquittal in which amounts to ineffective assistance of counsel. See Hawkins v. Lynaugh, 862 F.2d 482 (5th Cir. 1988); Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989); and Hollines v. Estelle, 569 F. Supp. 146 (W.D. Tex., 1983).

An abuse of discretion occurred by the district court failing to address the merits of all of his trial stage ineffectiveness claims and failing to conduct an Evidentiary Hearing as to Question Number Three, see United States v. Rivas-Lopez, 678 F.3d 353, 358-59 (5th Cir. 2012). A Certificate of Appealability should issue as to Question Number Three as it is debatable among jurists of reason whether his Sixth Amendment constitutional rights were violated in the case herein. See **Slack,** 529 U.S. 473, 484 (2000).

QUESTION NUMBER FOUR:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's affirmance of that decision based upon sentencing phase ineffectiveness claim, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution ?

Question Number Four Is Debatable Or Wrong Among Jurists Of Reason

In the instant case, Petitioner Pointer, asserts that the district court denied relief as to Ground Four sentencing phase ineffectiveness by holding in relevant part as follows:

"Notably, Defendant, through attorney Michael Bartish, waived his right to a jury determination of his prior serious drug felony convictions. See Waiver, id. (ECF No. 52). By signing that waiver, Defendant agreed that he was "forever giv[ing] up [his] right to challenge the facts and elements [he was] admitting [ther]in." Id. PageID.620. Defendant agreed "not to challenge them at trial, on direct appeal, in a collateral attack, or in any other proceeding." Id. Defendant "fully and freely admit[ted]" to having two prior convictions for serious drug felonies. Id. He also understood that he would face enhanced statutory penalties as set forth above. Id. PageID.621."

"Given that waiver, Defendant cannot now contend that counsel was ineffective for failing to challenge the Section 851 enhancement at sentencing. Moreover, as the government asserts, the mandatory minimums set forth in the Section 851 information were ultimately not relevant to Defendant's sentence. Defendant's sentencing guidelines called for imprisonment from 360 months to life. See PSR, id. (ECF No. 133). As noted above, Defendant was sentenced to 360 months, the very bottom of that guidelines range and well above

the mandatory minimum set forth above. Because there is no indication that the Court sentenced Defendant pursuant to the mandatory minimums, counsel was not deficient for failing to challenge the enhanced penalties. See Perry v. United States, No. 94-1500, 1995 WL 149087, at *2 (6th Cir. Apr. 4, 1995) (rejecting ineffective assistance claim premised upon a similar argument because the sentence defendant "received exceeded the mandatory minimum that was prescribed in the amended statute" and so the mandatory minimum was "not relevant" to the defendant's case). Defendant, therefore, is not entitled to relief with respect to this assertion of ineffective assistance."

Petitioner Pointer, states that his ex-sentencing phase counsel provided him with sentencing phase ineffectiveness by erroneously advising him to waive jury determination of his prior serious drug felony conviction and failing to object to statutory enhancement in which impacted his mandatory term of supervised release by increasing from **3 years to 6 years based upon statutory enhancement as to Count 1, Distribution of Cocaine in violation of 21 U.S.C. 841 (b) (1) (C); and Counts 2, 4, and 5, Distribution increased the mandatory term of supervised release in violation of 21 U.S.C. 841 (b) (1) (B) (iii), from 4 years to 8 years.** An erroneous increase in the mandatory term of supervised release constitutes prejudice, see Morales v. United States,

2014 U.S. Dist. LEXIS 177663, 2014 WL 7369512, at *20 (D. Conn., Dec. 29, 2014); Brewer v. United States, 551 Fed. Appx. 560 (11th Cir. 2014); and United States v. Gulley, 722 F.3d 901, 911 (7th Cir. 2013) (The Seventh Circuit held that a procedural error was rendered, thus, affected Gulley's term of supervised release and the Seventh Circuit VACATED Gulley's term of prison and supervised release and remand for resentencing using the correct Guidelines range). A prescribed mandatory term of supervised release when erroneous (as is here), thus, it is substantively unreasonable penalty and must be set aside in the case herein. See Gall v. United States, 552 U.S. 38, 51 (2007) (The U.S. Supreme Court has held that a substantively unreasonable penalty is illegal and must be set aside). Furthermore, the erroneous statutory enhancement impacted his correct Sentencing Guideline Range as absent the statutory enhancement it would have lowered his Offense Level for Chapter Four Career Offender Enhancement under USSG 4B1.1, from Offense Level **37 to 34, in which yielded a new "advisory" Guideline Range of 262-327 months of imprisonment.** See United States v. Knox, 496 Fed. Appx. 649, 654 (7th Cir. 2012); and USSG 4B1.1 (b) (2) Offense Statutory Maximum (2) 25 years or more.....**34**

Contrary to the district court's decision actual prejudice exists from his ex-sentencing phase lawyer's erroneous advisement to enter waive jury determination of serious drug felonies and failing to object

to statutory enhancement in the case at bar.

The district court denied relief as to sentencing phase ineffectiveness regarding his challenge to his Career Offender under USSG 4B1.1, as argued that Minnesota 3rd Degree Sale of Cocaine and Michigan Delivery/ Manufacture Cocaine Less Than 50 Grams "no longer" qualify as federal controlled substance offenses. Although the second claim challenging Career Offender is foreclosed by Sixth and Eighth Circuit precedents, however, in light of the Ninth Circuit and recent U.S. Supreme Court Ruling requires a fresh look in the situation herein. United States v. Holliday, 853 Fed. Appx. 53, 55 (9th Cir. 2021) (the Ninth Circuit held that the defendant's prior conviction for selling cocaine in violation of a Montana statute was not a controlled substance offense under the Career Offender guidelines because Montana's definition of cocaine is broader than the federal counterpart, which excludes ioflupane, while the Montana statute did not. REVERSED and REMANDED for resentencing); and **Brown,** 602 U.S. ___, 144 S. Ct. 1195, 1210, 218 L. Ed. 2d 583 (2024) (the Supreme Court held "a state drug conviction counts as an ACCA predicate if it involved a drug on the federal schedules at the time of that offense.") (emphasis added). In light of the U.S. Supreme Court's recent Ruling in **Brown,** thus, at the time of Mr. Pointer's prior state Michigan convictions in 2006 and 2009, however, federal law excluded stereoisomers and

derivatives of cocaine as to the federal definition of "cocaine" in which renders it broader than the federal definition in the matter herein.

The district court's ruling is debatable or wrong among jurists of reason in which issuance of a Certificate of Appealability in the case herein.

The district court denied point (3) three of his sentencing phase ineffective assistance of counsel claim regarding the PSR's use of non-Shepard's documents relied upon to support use of prior convictions used to enhance his federal sentence for Career Offender Status under USSG 4B1.1. As the PSR clearly reflects that the U.S. Probation Officer Abby Channell relied upon as to the Minnesota 3rd Degree Sales, at page 16, para. # 67, a Duluth Police Department Report; Controlled Substance Delivery/ Manufacture, at page 19, para. # 70, relied upon a MDOC presentence report; and Delivery/ Manufacture, at page 19-20, para. # 71, relied upon a MDOC presentence report, thus, the use of non-Shepard documents to a divisible statutes violates the letter and spirit of the U.S. Supreme Court's Ruling in Shepard v. United States, 544 U.S. 13 (2005); United States v. Wynn, 579 F.3d 567, 575-77 (6th Cir. 2009); and United States v. Gardner, 649 F.3d 437, 443-445 (6th Cir. 2011).

The district court's decision and the Sixth Circuit's affirmance was wrong or debatable in which warrants a Certificate of Appealability to

issue.

The district court and the Sixth Circuit affirmed the district court's rejection Petitioner Pointer's claim that his sentencing phase lawyer provided him with ineffectiveness by failing to request a downward variance for the harsh confinement through COVID-19 pandemic during his pre-trial stage. As Circuit Judge Gibbons affirmed the lower court's decision by relying upon his former attorney's affidavit that Pointer's conditions of confinement did not warrant a downward variance. **Pointer,** 2025 U.S. App. LEXIS 11332, at *11-12 (6th Cir. 2025).

Although Mr. Pointer did not specify and describe his pre-trial conditions were harsh through COVID-19 pandemic, however, within his Memorandum of Law he did in states as follows:

(5) His ex-lawyer failure to request a "downward variance" due to harsh pre-trial confinement through COVID-19 pandemic in which other federal courts across the country were granting. During the COVID-19 pandemic the Government were actually recommending to federal judges that criminal defendants receive "downward variance" based upon the COVID-19 pandemic and the harsh conditions of confinement. See United States v. Estrada, 2021 U.S. Dist. LEXIS 80602, 2021 WL 1626309 (S.D. Cal., Apr. 27, 2021) (the court departed from the Guideline range of 46-57 months and imposed a non-guideline sentence of 24 months in part due to

conditions of confinement were particularly harsh during the pandemic).

Taken Mr. Pointer's factual allegations as true as required by U.S. Supreme Court precedents Kennth C. Pointer was in fact entitled to a prompt evidentiary hearing as to whether counsel provided Pointer with sentencing phase ineffective assistance of counsel by failing to request a "downward variance" due to his harsh pre-trial confinement through COVID-19 pandemic. See Schriro v. Landrigan, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief").

The district court took his former attorney's affidavit as true but Attorney Dillon had no personal knowledge of the conditions at Newaygo County Jail as he has never been confined there, however, instead the district court taken Kenneth C. Pointer's factual allegations as true that his pre-trial confinement was harsh through COVID-19 pandemic, thus, at minimum the district court should have ordered Pointer to explain specifically what his harsh conditions consistent of or simply conducted an prompt evidentiary hearing to fully develop his sentencing phase ineffectiveness claim. This action by the district court constituted an abuse of discretion. See Harris v.

Nelson, 394 U.S. 286, 292 (1969) (There is no higher duty of a court, under constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, the power of inquiry on federal habeas corpus is plenary, and petitioners in habeas corpus proceedings are entitled to a full opportunity for presentation of the relevant facts).

To create a clear record Mr. Pointer will describe his pre-trial harsh conditions to this Honorable U.S. Supreme Court just as he did within his Motion for Panel Rehearing or Rehearing En Banc to the Sixth Circuit Court of Appeals in which is as follows:

While housed at Newaygo County Jail during Pointer's pre-trial detention he was confined in an eight-man cell block for 24 hours a day, thus, afforded recreation time to the gym once a week for 30 minutes in which is the equivalency to being confined in quarantine and he lacked access to rehabilitative services while in custody and adequate medical care when he believed he contracted COVID-19 Virus.

See United States v. Dones, 2021 U.S. Dist. LEXIS 243953, at *11 (D. Conn., 2021) (Even when he was not subject to quarantine, Mr. Dones was not allowed out of his cell for more than sixty minutes per day. (Id.) What is more, he reports receiving no drug rehabilitation counseling, no vocational training, no English language

instruction- no programming or training whatsoever- since the pandemic began. (Id. at 13) These conditions of confinement are extraordinary and are practically a form of solitary confinement. See, e.g., Sherrod, 2021 U.S. Dist. LEXIS 147643, 2021 WL 3473236, at *3.); and United States v. Estrada, No. 3:19-cr-05058, Doc. # 44 and 51 (S.D. CA., Dec. 4, 2020) (the Government recommended 37 months in custody, which included a downward variance because of the COVID-19 pandemic. (ECF No. 44). The Court departed further downward, sentencing Mr. Estrada to 24 months in custody, in part, because the conditions of confinement were particularly harsh during the pandemic. (ECF No. 51). Mr. Estrada came through the Andrade Port of Entry with 15.25 Kilograms of methamphetamine hidden in his car. The harsh pre-trial confinement appear to be that he was under lockdown conditions due to the COVID-19 pandemic; lack of programs; and could not receive a single visit from his family).

Regarding the fact that Mr. Pointer's ineffectiveness claim that his ex-lawyer did in fact raise and request a downward variance based upon the 2016 U.S. Sentencing Commission Report Career Offenders, however, although his ex-lawyer presented such request he did not quote the Martin case to show the district court that at least one other federal judge in the Western District of Michigan had

granted a significant downward variance in light of the 2016 Career Offender Report in which may have persuaded the district court to accept the downward variance request.

The district court failed to address the merits of point (6) six in which was properly raised within his 2255 Petition and Memorandum of Law but no findings of fact and conclusion of law was rendered by the district court.

(6) Failing to object within the PSR; within Sentencing Memorandum; during his Sentencing Hearing to the fact that his 2003 Third-Degree-Sale of Cocaine was over 15 years old and his 2009 Michigan Delivery/ Manufacture of Cocaine was over 10 years old, thus, fell outside the window to utilize to enhance his federal sentence under the Chapter Four Career Designation.

However, Mr. Pointer, states that consistent with the Eleventh Circuit Court of Appeals Ruling in Rhodes v. United States, 583 F.3d 1289, 1292 (11th Cir. 2009), a COA should issue and the 2255 Denial Opinion should be reversed and remanded with instructions to address the merits of Ground Four, Point (6) six ineffectiveness claim in the case herein. The Eleventh Circuit has noted that: "Policy considerations clearly favor the contemporaneous consideration of allegations of constitutional violations grounded in the same factual basis: "a one-proceeding treatment of a petitioner's case enables a

more thorough review of his claims, thus enhancing the quality of the judicial product." Clisby v. Jones, 960 F.2d 925, 936-937 (11th Cir. 1992). The U.S. Supreme Court should **GRANT** Certificate of Appealability and Vacate and Remand in light of U.S. Supreme Court precedents. See Rose v. Lundy, 455 U.S. 509, 520 (1982) ("To the extent that the ['total exhaustion'] requirement reduces piecemeal litigation, both the courts and the prisoner should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.").

An abuse of discretion occurred by the district court failing to address the merits of all of his sentencing phase ineffectiveness claims and failing to conduct an Evidentiary Hearing as to Question Number Four, see United States v. Rivas-Lopez, 678 F.3d 353, 358-59 (5th Cir. 2012). A Certificate of Appealability should issue as to Question Number Four as it is debatable among jurists of reason whether his Sixth Amendment constitutional rights were violated in the case herein. See **Slack,** 529 U.S. 473, 484 (2000).

QUESTION NUMBER FIVE:

Whether the district court abused its discretion by failing to conduct a prompt Evidentiary Hearing and the Sixth Circuit's

affirmance of that decision based upon his appellate ineffectiveness claim, thus, did this violate his Sixth Amendment Rights of the U.S. Constitution ?

Question Number Five Is Debatable Or Wrong Among Jurists Of Reason

In the instant case, Petitioner Pointer, contends that the district court denied Ground Five by holding that as the result of all claims presented by Pointer are meritless, thus, his ex-appellate counsel could not have provided him with appellate ineffective assistance of counsel. But the district court failed to weigh whether the issues in which Pointer points out now were in fact stronger than the three issues raised by his ex-appellate counsel. See Smith v. Robbins, 528 U.S. 259, 289 (2000).

In fact, contrary to the district court's Denial Opinion and the Sixth Circuit's affirmance of the lower court denial decision as to Ground Five, however, Mr. Pointer presented several colorable and/ or non-frivolous claims as follows:

(1) Ground One, the legally insufficient Superseding Indictment as to Counts 1, 3, and 5, fails to properly allege and place Pointer on notice of an offense against a principal as to the aiding and abetting theory

(2) Pointer's Sixth Amendment Right to a less-than-unanimous jury

was violated after the Jury Trial based a unanimous verdict regarding alternative theories denying him a fair trial by violating due process rights in giving an ambiguous and/ or confusing jury instruction in which violates U.S. Supreme Court precedents in Andres v. United States, 333 U.S. 740, 748 (1948).

(3) Confrontation Clause violations by the admission of hearsay testimony given by an informant but was testified to by Detective Sergeant Rochefort in which violates U.S. Supreme Court precedents in Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

(4) Failing to raise that statutory enhancement was erroneous in light of the U.S. Supreme Court's Ruling in Shular v. United States, 589 U.S. 154, 140 S. Ct. 779 (2020).

(5) Failing to raise the PSR's non-Shepard approved documents in which violates Shepard v. United States, 544 U.S. 13 (2005); and United States v. Gardner, 649 F.3d 437, 443-445 (6th Cir. 2011).

(6) Failing to raise his prior conviction of his 2003 Third Degree-Sale of Cocaine was over fifteen years old and his 2009 Michigan Delivery/ Manufacture of Cocaine was over ten years old, thus, could not be utilized to enhance his Career Offender Designation. See United States v. Robertson, 260 F.3d 500, 509-512 (6th Cir. 2001)

(Vacating and remanding for resentencing hearing as the prior predicate Career Offender offense was outside the fifteen-year limit).

These claims should have been raised on his Direct Appeal proceedings, thus, the district court's decision is wrong or debatable a Certificate of Appealability should issue. The district court abused its discretion by failing to conduct an Evidentiary Hearing regarding his ex-appellate counsel ineffectiveness in which violated his Sixth Amendment Rights of the U.S. Constitution. See Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989). A certificate of appealability should issue regarding Question Number Five, as it is debatable among jurists of reason as to whether the district court's decision was wrong or incorrect. See **Slack,** 529 U.S. 473, 484 (2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth C. Foster

Date: 10/08/2025