No. 17-30011
[NO. 11-cr-05335-BHS, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC QUINN FRANKLIN,

Defendant-Appellant.

PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Appeal from the United States District Court
for the Western District of Washington at Tacoma
The Honorable Benjamin H. Settle
United States District Judge

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INTRODUCTION

The Armed Career Criminal Act (ACCA) defines, as a "serious drug offense," a state felony "*involving* the manufacture, distribution or possessing with intent to manufacture, or distribute, a controlled substance offense." 18 U.S.C. §924(e)(2)(A) (emphasis added). Rather than considering whether the elements of the relevant substantive state statute satisfy this statutory definition, the panel held that to qualify as a "serious drug offense," a state offense must be a categorical match to both a generic controlled substances offense and generic accomplice liability. The panel then found that the federal aiding and abetting law defines ACCA's generic accomplice liability standard. Although convicted as a principal, the panel held that Eric Quinn Franklin's prior Washington drug convictions are not ACCA predicates under this definition because the state's accomplice liability statute is overbroad, relying on *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017).

The consequences of this opinion are striking. No Washington drug offense will now qualify as an ACCA "serious drug offense" even though the state prohibits the precise conduct described in the statutory

definition. Additionally, the opinion's flawed logic implicates the question of whether any Washington convictions can still qualify as an ACCA "violent felony" or as predicate offenses for various Sentencing Guidelines purposes. That fact alone justifies en banc review.

Moreover, the *Franklin* panel's analysis of this ACCA definition fails to account for the plain meaning of the word "involving" in the definition text. That analysis stands in sharp contrast to the analysis of eight other circuits. Those circuits do not require a categorical match to some "generic" drug offense to satisfy this ACCA definition. Instead, those opinions conclude that use of the term "involving" signals congressional intent that the statute sweep broadly, and that the elements of a state drug offense must simply "involve," i.e., be related to, the conduct described in the definition to constitute a predicate. This difference provides a basis to grant en banc review. *See* Fed. R. App. P. 35(b)(a)(B).

The panel's analysis also deviates from the type of analysis applied to the elements or force clause of ACCA's "violent felony" definition, a definition which is similarly structured. *See* 18 U.S.C. §924(e)(2)(A). Like the relevant section of the "serious drug offense" definition, the

elements clause describes what a state felony must prohibit to qualify as an ACCA predicate. Under this clause, the sentencing court simply analyzes the elements of the state offense to determine if they satisfy this definition. A categorical match to a generic offense is required only for the enumerated offenses described in the second clause of the "violent felony" definition.

But even if the ACCA "serious drug offense" definition requires a categorical match to federal aiding and abetting liability as the panel announced, a review of Washington cases demonstrates that standard is met. As such, the panel's decision on this point is flawed, and en banc review should be granted because of the capacious reach of this opinion.

STATEMENT OF CASE

I. Franklin's Convictions and Subsequent Sentencings.

A jury convicted Franklin of five offenses: three drug-related crimes, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(C); possessing a firearm as an armed career criminal, in violation of 18 U.S.C. §§922(g)(1) and 924(e); and possession of a firearm in furtherance of drug

trafficking, in violation of 18 U.S.C. §924(c)(1)(A). CR_1, 148, 151.[1] Based on his prior Washington offenses, at sentencing, the district court concluded that the ACCA fifteen-year mandatory minimum imprisonment term applied, and that Franklin's Guidelines range was 360 to life. ER_102-105; PSR¶¶ 20-22. The court then varied downward and imposed a 240-month prison term. ER_121. This Court then affirmed Franklin's convictions but vacated his sentence, finding that a *Faretta* violation occurred at sentencing. The Court did "not reach the ACCA or other sentencing issues" raised. *United States v. Eric Quinn Franklin*, 650 F. App'x 391 (9th Cir. 2016).

At resentencing, Franklin argued that his Washington drug offenses "may be proved through accomplice liability" and then claimed his convictions were not ACCA predicates because the Washington accomplice liability statute was overbroad. ER_141-44. The district court rejected Franklin's argument and again imposed a 240-month sentence. ER_77-84.

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[1] "CR _" refers to the district court clerk's docket entries; "ER_" refers to Appellant's Excerpts of Record; and "PSR_" refers to the presentence report filed under seal.

II. The Present Appeal.

On appeal, Franklin reprised his claim that Washington's accomplice liability statute, RCW §9A.08.020, was not a categorical match to federal aiding and abetting liability. In response, the government argued that the Court's analysis must focus on "the statutory definition of the prior offense"; that a defendant's status as a principal or accomplice is not an element of the substantive offense; and that accomplice liability does not expand the statute defining the substantive crime. The government also argued that requiring a defendant to act "with knowledge that [his action] will promote or facilitate the commission of the crime" (the Washington standard) is tantamount to acting with intent to promote the crime (the federal standard), and therefore, that Washington accomplice liability satisfies the federal aiding and abetting liability elements described in *Rosemond v. United States*, 572 U.S. 65, 71 (2014).

Briefing was completed before this Court's decision in *Valdivia-Flores* holding that a Washington conviction for possession with intent to distribute heroin, in violation of RCW §69.50.401(1), did not constitute an "aggravated felony" under the Immigration and Nationality Act (INA),

8 U.S.C. §1101(a)(43)(B), because Washington's accomplice liability statute is broader than federal aiding and abetting liability. 876 F.3d at 1210. In the supplement brief permitted by the Court, the government argued that *Valdivia-Flores* focused only on the second part of the INA definition which, by its terms, requires a comparison between the state offense and a federal drug offense. In contrast, ACCA defines "serious drug offense" as a state offense "*involving* the manufacture, distribution or possessing with intent to manufacture, or distribute, a controlled substance offense ... ." 18 U.S.C. §924(e)(2)(A) (emphasis added). The government argued that the text of the ACCA definition is broader than the second part of the INA definition and therefore does not require the same equivalency between the state offense and a federal analog.

Citing cases from several other circuits, the government argued that the term "involving," generally means "related to or connected with," and that its use signaled congressional intent to require only a comparison between the elements of the substantive state statute and the conduct Congress described in the definition and not a categorical comparison to some generic offense. Finally, the government again

argued that proof sufficient to satisfy the elements of the Washington accomplice liability statute would satisfy federal law.

III. The Panel Opinion.

The panel rejected each of the government's arguments, concluding that to determine whether Franklin's offense qualified as an ACCA predicate, the elements of the statute must be compared to "the generic offense – i.e., the offense as commonly understood" to assess whether the elements are the same as, or narrower than, the generic offense. Op. 5. The panel concluded this analysis encompasses "accomplice liability as an element when comparing the reach of state crimes and generic crimes." *Id.* The opinion further stated that "[i]f a state's accomplice liability has 'something special' about it, and thus 'criminalizes conduct' that the comparable generic accomplice liability and the underlying crime, taken together, do not, there is no categorical match." Op. 6 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190-91 (2007)). Finding that "intentionally abetting" a crime (the federal standard) "involves a more culpable state of mind than knowingly doing so" (the Washington standard), the panel concluded that *Valdivia-Flores* controlled and held there is no "pertinent difference between the 'serious

drug offense' description in ACCA and the generic 'illicit trafficking' description in the INA." Op. 7-8.

The panel expressly rejected any suggestion that federal law did not provide "the generic crime of aiding and abetting a 'serious drug offense.'" Op. 8. The opinion acknowledged that to constitute an INA "aggravated felony," a state crime must either: (1) contain a drug trafficking element; or (2) address conduct that would be punishable as a federal drug felony. *See Rendon v. Mukasey*, 520 F.3d 967, 974 (9th Cir. 2008). However, because *Valdivia-Flores* was not limited to the second part of the definition, the panel concluded its holding also defines the generic drug offense contemplated for the first part. *Id.* at 9.

Further, the panel stated that even if it used treatises and a multi-jurisdictional survey to determine the generic offense, accomplice liability under Washington law would still be overbroad. Op. 10. As support, the opinion cited *Wharton's Criminal Law* and the Model Penal Code and noted that federal accomplice liability is consistent with the requirements imposed by most states. *Id.* Finally, citing the defense briefing, the panel asserted that Washington is one of only five states that require knowledge for accomplice liability. Op. 11.

The panel expressly rejected the argument that by use of the term "involving" Congress intended that any state felony addressing the "manufacturing, distributing or possessing with intent to manufacture or distribute" a controlled substance to constitute an ACCA predicate. Op. 12. The panel asserted that such an approach would "toss out all but the name of the categorical approach," an analysis that "at its core" requires "a comparison to the generic version of the crime." *Id.* Instead, the panel concluded that Supreme Court and Ninth Circuit cases direct that the term "involving" "connote[s] application of the normal categorical inquiry" requiring a comparison with a generic offense, and that "involving" does not equate to "relating to or connected with" or have a single uniform meaning. Op. 14-15. The panel then observed that ACCA's "violent felony" definition also uses the term "involves" regarding explosives ("involves the use of explosives") and courts have employed the standard categorical approach for this provision. Op. 15-16. The panel found there is no reason to apply a different analysis to the "serious drug offense" definition. Op. 16.

The panel dismissed as irrelevant the government's reliance on *United States v. Smith*, 775 F.3d 1262, 1266-68 (11th Cir. 2014), to

support a different analysis as irrelevant. *Smith* considered whether a violation of the Florida drug statute, Fla. Stat. §893.12(1) constituted an ACCA "serious drug offense." In an earlier decision, the Eleventh Circuit had held that, for the INA's "aggravated felony" definition, a federal analog supplied the generic drug offense, and that the Florida statute was overbroad because unlike federal law, it did not require knowledge of the illicit nature of the controlled substance at issue. *See Donavan v. United States Attorney General*, 735 F.3d 1275, 1278 (11th Cir. 2013). *Smith* refused to extend that analysis to the ACCA definition, holding instead that to qualify as a "serious drug offense," the relevant state felony need only "involve[] manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance. *Smith*, 775 F.3d at 1267. Although *Smith* did not address accomplice liability, its conclusion regarding the ACCA definition's broad scope includes aiding and abetting liability within its reach. *See Smith*, 775 F.3d at 1267 ("We need not search for the elements of 'generic' definitions of "serious drug offense" because th[is] term [is] defined by a federal statute."). Dismissing any suggestion that its holding diverged from *Smith,* the panel simply observed that its decision did not concern "mens

rea regarding the illegal nature of a controlled substance" and stated that its analysis regarding accomplice liability was required by *Duenas-Alvarez*. Op. 17.

ARGUMENT

I. Because *Franklin*'s Analysis of ACCA's "Serious Drug Offense" Definition Is Inconsistent with the Analysis Applied by Other Circuits, En Banc Review Is Warranted.

Franklin holds that to constitute a "serious drug offense" a state offense must be a categorical match to a generic controlled substances offense including generic accomplice liability, something the panel equates to federal aiding and abetting liability. The panel's constrained interpretation of the term "involving" and its analysis of when an offense meets the "serious drug offense" definition stands in sharp contrast to the broad approach taken by the Eleventh Circuit and seven other circuits construing ACCA's statutory text. En banc review is warranted to resolve those differences.

For example, like *Smith*, the First Circuit observed that by use of the term "involving" "Congress captured more offenses than just those that 'are in fact' the manufacture, distribution, or possession of, with intent to distribute, a controlled substance." *United States v.*

Whindleton, 797 F.3d 105, 109 (1st Cir. 2015). *Whindleton* holds that ACCA's "serious drug offense" definition includes both conspiracy and attempts to commit the described offenses, and also aiding and abetting the relevant crimes. *Id.* But rather than requiring a comparison to a federal analog or some generic offense, to be an ACCA predicate *Whindleton* requires only that a state offense bear a direct relationship to the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance. *Id.* at 110.

Similarly, the Third Circuit concluded that the term "involving" means "to relate closely or to 'connect closely.'" *See United States v. Gibbs*, 656 F.3d 180, 184 (3rd Cir. 2011). Like *Whindleton* and *Smith, Gibbs* holds that ACCA requires a sentencing court to review the elements of state offense to determine if the offense is "related to or connected with manufacturing, distributing, or possessing, with intent to manufacture or distribute, a controlled substance or if it is too remote or tangential." *Id.* at 186. *Gibbs* expressly rejected the claim that ACCA predicates must be a categorical match to the federal offenses identified in §924(e)(2)(A)(i). *Id.* at 185. *Gibbs* observes that if Congress had intended such a result it could have so stated. *Id.* And five other circuits

have reached similar conclusions. *See United States v. Bynum*, 669 F.3d 880, 885-87 (8th Cir. 2012) ("'involving' is an expansive term that requires only that the conviction be 'related to or connected with' drug manufacture, distribution, or possession, as opposed to including those acts as an element of the offense"); *United States v. Vickers*, 540 F. 3d 356, 365 (5th Cir. 2008) ("The expansiveness of the word 'involving' supports that Congress was bringing into the statute's reach those who intentionally enter the highly dangerous drug distribution world."); *United States v. Williams*, 488 F.3d 1004, 1009 (D.C. Cir. 2007) ("Congress did 'not speak in specifics' in defining 'serious drug offense' but instead included 'an entire class of state offenses "involving" certain activities'"); *United States v. King*, 325 F.3d 110,113 (2d Cir. 2003) ("The word 'involving' has expansive connotations, and we think it must be construed as extending the focus of §924(e) beyond the precise offenses of distributing, manufacturing, or possessing, and as encompassing as well offenses that are related to or connected with such conduct."); *United States v. Brandon*, 247 F.3d 186, 190 (4th Cir. 2001) ("[T]he word 'involving' itself suggests that the subsection should be read expansively.")

This analysis does not eliminate the categorical approach as the panel suggests. As the categorical approach requires, the focus of the analysis remains on the state statute and not the facts giving rise to the conviction. The question is whether the statutory elements prohibit the conduct that Congress has described in the definition, that is, manufacturing, distributing, or possession with intent to manufacture or distribute controlled substances.

This type of analysis is consistent with that employed to determine whether a state offense satisfies the elements or force clause in ACCA's "violent felony" definition. 18 U.S.C. §924(e)(2)(B)(i). Rather than a comparison to some generic offense, courts analyzing this provision determine whether the statute contains the elements described in the definition. *See, e.g., Johnson v. United States*, 559 U.S. 133 (2010). The same type of analysis should govern the "serious drug offense" definition.

Further, the discussion of accomplice liability in *Duenas-Alvarez* does not support the analysis *Franklin* requires. That opinion addressed whether a California theft offense that includes "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" of a motor vehicle constituted a qualifying theft

offense under the INA. 549 U.S. at 187. The Court held that California's inclusion of accomplice liability in the statutory text did not disqualify this statute, observing that every jurisdiction has eliminated the legal distinction between accomplice and principal in this circumstance. *Id.* at 188-89. *Duenas-Alvarez* does not address the ACCA definition at issue here, or otherwise direct that accomplice liability must always be considered as part of a categorical analysis. Indeed, nothing in *Duenas-Alvarez* suggests that courts must consider accomplice liability where, as here, the statute of conviction does not expressly include this liability theory as a statutory element.

Moreover, the cases cited in *Franklin* do not support its conclusions. *Kawashima v. Holder*, 565 U.S. 478 (2012), does not support the conclusion that the term "involving" demands a categorical inquiry. *Kawashima* addressed whether violations of 26 U.S.C. §§7206(1) and (2) "involve[] fraud and deceit" and thus are INA "aggravated felonies." To answer this question, the Court did state that the *Taylor* categorical approach required consideration of the statute of conviction rather than the specific facts of the crime. The Court then analyzed the statutory elements to determine whether they involved some form of fraud and

deceit. *Id.* at 483-44. But the Court did not then compare these crimes to the elements of some generic offense as the panel here surmised. Thus, *Kawashima* is consistent with, and supports, the analysis employed by other circuits and urged by the government.

The panel also cited *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003), which addressed whether a state extortion statute constituted a "racketeering activity" as defined in 18 U.S.C. §1961(1). The question was whether the state statute needed to be identical to extortion as defined in the Hobbs Act. To answer this question, *Scheidler* analyzed the statute's definitional language to determine what comparison was required. Thus, *Scheidler* too suggests that the relevant comparison depends on the text of the definition.

The panel also cited *United States v. Mayer*, 560 F.3d 948, 958-61 (9th Cir. 2009), but nothing in *Mayer* specifically addresses the term "involving." *Mayer* discusses *United States v. Fish*, 368 F.3d 1200 (9th Cir. 2004), a case addressing the term "use of an explosive" as contained in the career offender Guideline. *Id.* at 1204. But *Fish* does not hold that the term "involving" signals a limited scope. Rather, the

opinion addresses whether possession of an explosive could constitute "use."

Finally, the panel suggested the analysis employed by other circuits conflicts with *Mellouni v. Lynch*, 135 S. Ct. 1980 (2015). *Mellouni* considered whether a Kansas misdemeanor conviction for conduct involving "use or possess with intent to use any drug paraphernalia to ... store [or] conceal ... a controlled substance" was an offense for which removal was authorized under the INA. That statute authorizes the removal of an alien "convicted of a violation of ... any law or regulation of a State ... relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. §1227(a)(2)(B)(i). Because Kansas law includes substances not regulated under 21 U.S.C. §802 and the Kansas statute did not require proof of the particular substance involved, the Court concluded the petitioner's removal was not authorized. This outcome too was based on the INA's text which expressly requires the offense relate to a substance controlled under federal law. In contrast, the "serious drug offense" definition demands the broader analysis employed by the other circuits and not *Franklin*'s crabbed analysis. Where Congress

intends an offense to be a categorical match to a federal analog, it expressly so states. *See, e.g.,* 18 U.S.C. §924(c)(2).

Moreover, even if the panel's analysis is adopted, Franklin's prior convictions qualify. Reliance on accomplice liability still requires the prosecution to satisfy the elements of the relevant substantive offense. *Cf.* RCW §9A.08.020(3)(a). Here, Franklin's prior convictions involve cocaine, a controlled substance under 21 U.S.C. §802, and an element that must be proven under Washington law. *See State v. Goodman*, 83 P.3d 410, 415-16 (Wash. 2004). And a Washington conviction for controlled substance delivery satisfies any generic offense that equates to distribution under federal law. *See State v. DeVries*, 72 P.3d 748, 751-52 (Wash. 2003); *States v. Campbell*, 759 P.2d 750, 752 n.1 (Wash. Ct. App. 1990).

More importantly, as the dissent in *Valdivia-Flores* observed, a defendant's status as a principal or accomplice is not an element of the substantive offense charged. *Valdivia-Flores,* 876 F.3d at 1212 (Rawlinson, J. dissenting). Indeed, this Court has held "[a]iding and abetting is not a separate and distinct offense from the underlying substantive crime, but is a different theory of liability for the same

offense." *United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005). Thus, regardless of whether "involving" is narrowly construed, Franklin's convictions qualify.

II. Washington's Accomplice Liability Standard Equates to Federal Aiding and Abetting Liability.

Even if a categorical match to federal aiding and abetting is required, the Washington statute meets that standard, and the contrary holdings of *Franklin* and *Valdivia-Flores* should be reconsidered.

Federal accomplice liability is broad. The Supreme Court has observed that "[a]s at common law, a person is liable under §2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond,* 572 U.S. at 71. The "act" requirement is "minimal," and "[i]n proscribing aiding and abetting, Congress used language that 'comprehends all assistance by words, acts, encouragement, support, or presence.'" *Id.* at 73 (citation omitted). The "intent requirement [is] satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id.* at 77. Indeed, in *Duenas-Alvarez*, the Court rejected the argument that the California theft statute was overboard

merely because it applied both to crimes a defendant intends and crimes that "naturally and probably" result from his intended conduct. 549 U.S. at 190. The Court observed that "many States and the Federal Government apply some form or variation of that doctrine, or permit jury inferences of intent in circumstances similar to this in which California has applied the doctrine." *Id.* at 191.

The Washington statute provides that "[a] person is an accomplice ... if ... [w]ith knowledge that it will promote or facilitate the commission of the crime, he ... solicits, commands, encourages, or requests such other person to commit it; or aids or agrees to aid such other person in planning or committing it." RCW §9A.08.020(3)(a)(i)–(ii). To be sure, the statute uses the term knowledge not intent, but §2 also does not use intent. *See* Addendum 2.

What the Washington statute requires is proof that a defendant knew his actions would "promote or facilitate the commission of crime" and that the defendant either "solicit[ed], command[ed], encourage[d], or request[ed]" another person to commit the crime or "aid[ed] or agree[d] to aid such other person in planning or committing [the crime]." It is

difficult to conceive of circumstances where those elements are satisfied and a defendant did not intend that the crime occur.

More importantly, Washington Supreme Court cases confirm there is no real difference between the "intent to facilitate standard" articulated in *Rosemond,* and the knowing standard in the Washington statute. Like federal law, mere presence is insufficient to convict a defendant as an accomplice. *State v. Roberts*, 908 P.2d 892, 899-900 (Wash. Ct. App. 1996). Rather, the Washington Supreme Court has held that to be an accomplice, a person must "act[] with knowledge that his or her conduct *will promote* the specific crime charged." *State v. Farnsworth*, 374 P.3d 1152 (Wash. 2016) (emphasis added). *See also State v. Cronin*, 14 P.3d 752, 757-58 (Wash. 2000). Acting with knowledge that one's actions "will promote" a crime is simply another way of stating a defendant must act with the intent of promoting or facilitating the crime.

Moreover, the Washington Supreme Court has stated that RCW §9A.08.020(3)(a) is derived from §2.06(3)(a) of the Model Penal Code. *State v. Roberts*, 14 P.3d 713, 735–36 (2000), *as amended on denial of reconsideration*. *Roberts* holds that the Washington legislature

intended liability under its statute requires an accomplice to "have the purpose to promote or facilitate *the particular conduct that forms the basis for the charge*," and that "he will not be liable for conduct that does not fall within this purpose." *Id.* at 510-11 (emphasis added). This is a categorical match to the federal standard.

Franklin's holding regarding the scope of Washington's accomplice liability statute is based on *Valdivia-Flores*. Instead of the Washington Supreme Court cases cited above, *Valdivia-Flores* considered the Washington code's separate definition of "knowing," and concluded it would not satisfy "specific intent" to commit a crime. *Valdivia-Flores*, 876 F.3d at 1207. The opinion cites *Garcia*, 400 F.3d at 819 as requiring "specific intent" for "aiding and abetting" liability. *Id.* But *Garcia* actually holds "an aider and abettor's intent regarding the substantive offense is the same intent required for convictions as a principal," *Garcia*, 400 F.3d at 819, a standard consistent with that later articulated in *Rosemond*. Thus, *Valdivia-Flores*'s erroneous construction of Washington accomplice liability and its significant consequences also supports en banc review.

CONCLUSION

For the reasons set forth above, en banc review is warranted.

Dated this 29th day of October, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that, pursuant to Circuit Rule 35-4 and 40-1, the attached the Petition for Rehearing with Suggestion for Rehearing En Banc is proportionately spaced, has a typeface of Century Schoolbook of 14 points and contains 4,193 words, less than the 4,200 allowed.

Dated this 29th day of October, 2018.

s/Helen J. Brunner
HELEN J. BRUNNER
First Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2018, I electronically filed the foregoing Petition for Panel Rehearing with Suggestion for Rehearing En Banc of the United States with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 29th day of October, 2018.

/s/ Elisa G. Skinner
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ERIC QUINN FRANKLIN, *Defendant-Appellant.*	No. 17-30011 D.C. No. 3:11-cr-05335-BHS-1 OPINION

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted May 14, 2018
Seattle, Washington

Filed September 13, 2018

Before: Marsha S. Berzon, Stephanie Dawn Thacker,* and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Berzon

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* The Honorable Stephanie Dawn Thacker, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

SUMMARY**

Criminal Law

Vacating a sentence for being a felon in possession of a firearm and remanding for resentencing, the panel held that Washington's accomplice liability statute renders its drug trafficking law broader than generic federal drug trafficking laws under the Armed Career Criminal Act, and Washington's drug trafficking law is thus not categorically a "serious drug offense" under the ACCA.

COUNSEL

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** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

BERZON, Circuit Judge:

We consider whether Washington's broad accomplice liability statute renders an offense under its drug trafficking law categorically broader than a "serious drug offense," as that term is defined in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(A).

I.

In September 2013, a jury convicted Eric Franklin of being a felon in possession of a firearm, 18 U.S.C. § 922(g), and committing several drug trafficking crimes. Franklin appealed his convictions and sentence. This court affirmed Franklin's convictions but remanded for resentencing, holding that the district court had not given Franklin an adequate self-representation advisory under *Faretta v. California*, 422 U.S. 806 (1975).

The district court resentenced Franklin to fifteen years' imprisonment on the felon-in-possession offense.[1] The court calculated that sentence as the statutory minimum under the ACCA. It reasoned that Franklin had "three previous convictions . . . for a . . . serious drug offense," 18 U.S.C. § 924(e)(1), because he was convicted in Washington state court of three counts of unlawful delivery of a controlled

[1] The district court also imposed a five-year sentence as to his remaining convictions. Franklin has not challenged that sentence on appeal.

substance, Wash. Rev. Code § 69.50.401.[2] Franklin timely appealed.

II.

We start—and end—with Franklin's claim that Washington accomplice liability is a mismatch for the accomplice liability incorporated into the ACCA.

A.

The ACCA imposes a fifteen-year mandatory minimum sentence on individuals convicted of being felons in possession of a firearm who have three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). A "serious drug offense" is

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term

[2] In pertinent part, that statute provides that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." Wash. Rev. Code § 69.50.401(1).

> of imprisonment of ten years or more is prescribed by law . . . .

18 U.S.C. § 924(e)(2)(A).

Federal courts conduct a categorical inquiry into whether a prior state conviction qualifies as an ACCA predicate under § 924(e). *Mathis v. United States*, 136 S. Ct. 2243, 2247–48 (2016); *Taylor v. United States*, 495 U.S. 575, 600 (1990). Under that approach, "A prior conviction qualifies as an ACCA predicate only if, after comparing the elements of the statute forming the basis of the defendant's conviction with the elements of the generic crime—i.e., the offense as commonly understood[—]the statute's elements are the same as, or narrower than, those of the generic offense." *United States v. Jones*, 877 F.3d 884, 887 (9th Cir. 2017) (internal alterations and quotation marks omitted). If the elements of the state crime are broader than those of the generic crime, there is no categorical match and, absent application of the modified categorical approach,[3] the state crime cannot serve as a predicate conviction under the ACCA. *See United States v. Strickland*, 860 F.3d 1224, 1226–27 (9th Cir. 2017).

Under the categorical approach, we consider accomplice liability as an element when comparing the reach of state crimes and generic crimes. As the Supreme Court explained in *Gonzalez v. Duenas-Alvarez*, "one who aids or abets a [crime] falls, like a principal, within the scope of th[e] generic definition" of that crime. 549 U.S. 183, 189 (2007). To take theft as an example, "the criminal activities of . . .

[3] No party argues that the statutes before us are divisible, so we do not address the modified categorical approach. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1038–39 (9th Cir. 2017) (en banc).

aiders and abetters of a generic theft must themselves fall within the scope of the term 'theft' in the federal statute." *Id.* at 190. If a state's accomplice liability has "something special" about it, and thus "criminalizes conduct" that the comparable generic accomplice liability and the underlying crime, taken together, do not, there is no categorical match. *Id.* at 191 (emphasis omitted).

B.

We recently considered, in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), whether Washington's accomplice liability statute renders its drug trafficking law categorically broader than a federal drug trafficking equivalent. *Valdivia-Flores* held that the Washington accomplice liability law was too broad, and thus that a conviction under Wash. Rev. Code § 69.50.401 does not categorically constitute an "illicit trafficking" offense and is not an "aggravated felony" under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(43)(B).[4] *Valdivia-Flores*, 876 F.3d at 1210.

To give shape to what constituted aiding and abetting "illicit trafficking" under the INA, *Valdivia-Flores* looked to federal criminal law. *Id.* at 1207. Specifically, it adopted the federal aiding and abetting standard, which requires the government to prove an accomplice has "*specific intent* to facilitate the commission of a crime by someone else." *Id.* (quoting *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir.

[4] As relevant here, "[t]he term 'aggravated felony' means . . . illicit trafficking in a controlled substance (as defined in [21 U.S.C. § 802]), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B).

2005)). Washington law, by contrast, requires only that the government prove a person "[w]ith *knowledge* that it will promote or facilitate the commission of the crime, . . . solicits, commands, encourages, or requests [the principal] to commit it; or aids or agrees to aid [the principal] in planning or committing it." Wash. Rev. Code § 9A.08.020(3)(a)(i)–(ii) (emphasis added).

Specific intent and knowledge are distinct in this context. "*Intentionally* abetting the commission of a crime involves a more culpable state of mind than *knowingly* doing so, and it is unlikely that Congress intended the generic 'drug trafficking' listed in the INA to reach the less culpable conduct that the Washington statute criminalize[s]." *United States v. Verduzco-Rangel*, 884 F.3d 918, 923 n.3 (9th Cir. 2018). So, *Validivia-Flores* held, "[b]ecause the Washington statute *does* criminalize conduct that would not constitute a drug offense under federal law—due to the distinct aiding and abetting definitions—it is overbroad." 876 F.3d at 1209 n.3.

Valdivia-Flores cuts our path here. In that case, we reiterated that accomplice liability is woven into the fabric of all generic crimes. *Id.* at 1207. We looked to federal criminal law's concept of accomplice liability—including the required intent mens rea—to sketch the contours of a generic drug trafficking crime. *Id.* And we held that it is possible to violate the Washington statute as an accomplice with knowledge but not intent concerning the perpetrator's criminal activity. *Id.*

Franklin maintains that the same conclusion follows with regard to whether the *same* Washington statute at issue in *Valdivia-Flores* is a categorical match for the ACCA "serious drug offense," *i.e.*, "an offense under State law, involving

manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A). So our question is: Is there any pertinent difference between the "serious drug offense" description in the ACCA and the generic "illicit trafficking" described in the statute analyzed in *Valdivia-Flores* that yields a different result here on the categorical match issue?

The government puts forth a variety of arguments as to why *Valdivia-Flores* does not control Franklin's case. None is persuasive.

C.

The government first contends we should not look to federal law to define the generic crime of aiding and abetting a "serious drug offense." It maintains that *Valdivia-Flores* took its definition of accomplice liability from federal law only because the generic crime as defined in the INA arose out of a federal criminal statute, and that, here, a "serious drug offense" arises only out of state law.

Valdivia-Flores was not so limited. It relied on federal law to supply accomplice liability elements for the entire "aggravated felony" definition at issue—a definition that refers both to federal drug crimes and to state law drug crimes that constitute "illicit trafficking." *See* 8 U.S.C. § 1101(a)(43)(B) (defining a drug trafficking aggravated felony as "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), *including* a drug trafficking crime (as defined in section 924(c) of Title 18)" (emphasis added)); *see also Verduzco-Rangel*, 884 F.3d at 921 (describing the "two possible routes for a state drug felony to qualify as a drug trafficking aggravated felony").

Nowhere did *Valdivia-Flores* suggest that its holding was limited to one portion of this definition. Rather, *Valdivia-Flores* held repeatedly and without limitation that the Washington drug trafficking statute "does not qualify as an aggravated felony under the categorical approach." 876 F.3d at 1210; *see also id.* at 1203, 1206, 1209.

Moreover, under the established methodology for applying the categorical approach to recidivism statutes, analogous federal law is always at least one aspect of the inquiry into the meaning of the description of a state offense in a federal statute. Here, that description is "serious drug offense," which, as *Duenas-Alvarez* held, and *Valdivia-Flores* reiterated, necessarily includes both principal and accomplice liability. So, as is usual, *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1084–85 (9th Cir. 2015), we look to a variety of sources—including federal statutes and case law, as well as treatises and any majority state law approach—to determine the generic federal crime, here, the federal definition of accomplice liability.[5]

In fact, when applying the categorical approach, we have recently looked principally to federal criminal law to supply definitions of generic inchoate crimes in both the Sentencing Guidelines and the INA, although those statutes themselves do not refer to specific federal crimes. *United States v. Brown*, 879 F.3d 1043, 1047–50 (9th Cir. 2018), for example, looked to federal conspiracy law to interpret the Sentencing Guidelines' generic definition of a "controlled substance

[5] "Generic federal crime" has become the term used in this context for what is essentially a task of statutory interpretation—*i.e.*, the task of deciding what the federal statute means when it uses certain language to describe a prior offense. That is how we use the term here.

offense"[6]; after doing so, *Brown* concluded that Washington's drug conspiracy law was broader than federal conspiracy law. And, of course, *Valdivia-Flores* took the same approach. In fact, the government has itself suggested that the panel look to federal criminal law to define *other* portions of the "serious drug offense" statute here at issue. So we need not, and do not, avert our eyes from federal accomplice liability when defining the scope of the ACCA's generic accomplice liability.

Further, if we were to look to other sources as well to supply a generic aiding and abetting definition for "serious drug offenses," we would reach the same result as did *Valdivia-Flores* when considering only federal law. Like the federal definition incorporated in *Valdivia-Flores*, general principles of accomplice liability establish that "[a] person is an 'accomplice' of another in committing a crime if, with the *intent* to promote or facilitate the commission of the crime," he commits certain acts; "a person's . . . knowledge that a crime is being committed or is about to be committed, without more, does not make him an accomplice." 1 Wharton's Criminal Law § 38 (15th ed.) (emphasis added). The Model Penal Code is similar: "A person is an accomplice . . . if . . . with the *purpose* of promoting or facilitating the commission of the offense, he" commits certain acts. § 2.06(3) (emphasis added).

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[6] "The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).

Federal law also comports with most other state definitions of accomplice liability. Franklin's brief calculates, with supporting documentation, that "Washington is one of at most five jurisdictions that requires only a mens rea of knowledge for accomplice liability." The government has not disputed this summary nor provided any conflicting information.

So, if we *also* look outside federal law to define generic aiding and abetting liability for purposes of the ACCA, we reach the same result as under *Valdivia-Flores*'s narrower, federal-law-centered, approach.

D.

The government's second argument as to why the Washington accomplice liability standard is not a categorical match for the INA's "illicit trafficking," but is for the ACCA's "serious drug offense," is that, if we look to the text of the ACCA's "serious drug offense" definition, we'll discover that we need not incorporate accomplice liabilities into our categorical approach at all.[7] Not so.

[7] The government first developed this set of arguments in its supplemental briefing, following the issuance of *Valdivia-Flores*, not in its primary answering brief. Franklin maintains the arguments are therefore forfeited. We decline to find forfeiture. The government's categorical approach arguments largely arise out of the consequences of *Valdivia-Flores*, issued after the government submitted its answering brief. *See Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1583 (9th Cir. 1994). In any event, Franklin had a full opportunity to respond to the government's arguments in his supplemental brief. *See Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 996 n.5 (9th Cir. 2007) (because arguably waived "issues [were] purely legal and were fully briefed by [the opposing party] . . . we exercise[d] our discretion to consider the[] arguments).

The government makes two textual arguments, one with vast implications for application of the categorical approach to a wide range of statutes, and one somewhat narrower. Most broadly, the government suggests that, because the ACCA defines a "serious drug offense" as "an offense *under State law,* involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. § 924(e)(2)(A) (emphasis added), we need not define a generic crime *at all*. Instead, the government maintains, we simply look to see if the state law includes the words "manufacturing, distributing, or possessing," and, if so, we are finished.

To apply this expansive version of the government's theory would be to toss out all but the name of the categorical approach. At its core, the categorical approach is the comparison of the defendant's crime of conviction to a generic version of that crime—that is, a version that contains all of the ingredients Congress has identified, to which we give content using our full panoply of statutory interpretation resources. By so doing—"[b]y focusing on the legal question of what a conviction *necessarily* established[—]the categorical approach ordinarily works to promote efficiency, fairness, and predictability." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015); *see Taylor*, 495 U.S. at 590–92.

Put more simply, "[t]his categorical approach requires courts to choose the right category." *Chambers v. United States*, 555 U.S. 122, 126 (2009), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). No matter how a statute is drafted, courts have applied the categorical approach to *some* generic—that is, *some* consistent and identifiable—criminal offense, with a definition and elements and limits. And, as *Duenas-Alvarez*

explained, "one who aids or abets a [crime] falls, like a principal, within the scope of th[e] generic definition" of a crime. 549 U.S. at 189. The government's words-only approach to inclusion of state laws in federal recidivism statutes is therefore dead on arrival.

The government's less ambitious textual argument starts from the observation that, under the ACCA, a "serious drug offense" can be either an offense defined under federal law, or, as relevant here, "an offense under State law *involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . ." 18 U.S.C. § 924(e)(2)(A) (emphasis added). Focusing on the state law prong's use of the word "involving," the government notes that the statute at issue in *Valdivia-Flores* does not use the term "involving," and argues that that word here obviates any need for comparison to generic aiding and abetting liability. Instead, the government maintains, the elements of Franklin's state crime need only be examined to determine whether they "relate to or connect with" any act included as a "serious drug offense" (again, manufacturing, distributing, or possessing). On this understanding, according to the government, no inquiry is needed into whether the aiding and abetting version of the state crime categorically matches the generic crime of aiding and abetting the enumerated drug offenses.

This attempt to escape the result reached in *Valdivia-Flores* also does not work. We begin by observing that, as a linguistic matter, "involving" does not equate to "relating to or connecting with." "Relating to" is a "broad" and "indeterminate" term, *Mellouli*, 135 S. Ct. at 1990, that means that one thing "stands in some relation, bears upon, or is associated with" another, *United States v. Sullivan*, 797 F.3d

623, 638 (9th Cir. 2015) (quoting *United States v. Sinerius*, 504 F.3d 737, 743 (9th Cir. 2007)). "Involving" does not have a single, uniform meaning, but it usually signifies something narrower than "relating to." Specifically, "involving" often connotes "includ[ing] (something) as a necessary part or result." New Oxford American Dictionary 915 (3d ed. 2010).

This narrower meaning of the word "involving" is the one used in Supreme Court cases and our cases to connote application of the normal categorical inquiry—which, as we reaffirmed in *Valdivia-Flores*, requires a comparison of accomplice liabilities. For example, the Supreme Court has held that offenses that "involve fraud or deceit [are] offenses with elements that necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, 565 U.S. 478, 484 (2012) (internal quotation marks and alteration omitted). Therefore, *Kawashima* held, "[t]o determine whether the Kawashimas' offenses 'involv[e] fraud or deceit' . . . we employ a categorical approach." *Id.* at 483 (citing *Duenas-Alvarez*, 549 U.S. at 186).

The Supreme Court used a similar approach earlier. In interpreting the Racketeer Influenced and Corrupt Organizations Act's predicate offense provision, the Court held that the phrase any "act or threat *involving* . . . extortion, . . . which is chargeable under State law," 18 U.S.C. § 1961(1) (emphasis added), encompasses only state crimes "capable of being generically classified as extortionate." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003). According to *Scheidler*, the only crime that "involv[es] extortion" is generic extortion; the word "involving" does nothing to broaden the scope of that generic crime. *See id.* at 409–10.

Another example: In *Sullivan*, the defendant's state convictions "relate[d] to sexual abuse" because they criminalized conduct similar to the most important elements of sexual abuse. 797 F.3d at 641. But the convictions "involve[d] a minor or ward" because the conduct specifically included acts against a minor or ward. *Id.* at 640.[8]

Notably, the ACCA uses the term "involve" to describe both the "serious drug offense" *and* "violent felony" predicates. *See* 18 U.S.C. § 924(e)(2). Just as a "serious drug offense" can be "an offense under State law, *involving*" certain elements, a "violent felony" can be any crime that "*involves* use of explosives." 18 U.S.C. §§ 924(e)(2)(A), (e)(2)(B) (emphasis added). We have applied the standard categorical approach—not the broader, looser one envisioned by the government—to the ACCA's violent felony predicate, including its "involves use of explosives" predicate. *See United States v. Mayer*, 560 F.3d 948, 958–61 (9th Cir. 2009) (describing the categorical approach's application to the explosives prong of the definition of a violent felony). Thus a crime "involves use of explosives" where it actually constitutes the use of explosives; a crime *somewhat like* the use of explosives, or a crime *relating to* the use of explosives, does not necessarily "involve[] use of explosives."

There is no reason we would apply one interpretation of the word "involves" to "serious drug offenses" and a different

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[8] As noted, *Sullivan* interpreted a federal recidivist statute, the meaning of which hinged on the broader term "relating to"—whether "the specific state offenses at issue [t]here . . . [were] categorically offenses '*relating to*'" the defined federal generic sexual abuse offenses. 797 F.3d at 640. Here, again, we are concerned with the narrower term "involving," which, unlike "relating to" in the categorical approach context, connotes a narrower application.

interpretation of the word to "violent felonies," as both predicate crimes are located in the same section of the ACCA. "Generally, identical words used in different parts of the same statute are presumed to have the same meaning." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (quotation marks and alterations omitted). That principle holds particularly true when, as here, the word "involve" is used in the *same* section of the same statute. *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1216–17 (2018) (plurality opinion) (explaining that the Supreme Court "'had good reasons' for originally adopting the categorical approach, based partly on ACCA's text (which, by the way, uses the word 'involves' identically [to a provision of the INA])" (quoting *Johnson*, 135 S. Ct. at 2562)).[9]

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[9] The government cites several decisions of other circuits that, in interpreting this statute, equate the two terms "involving" and "relating to." *See United States v. Mulkern*, 854 F.3d 87, 90 (1st Cir. 2017); *United States v. Bynum*, 669 F.3d 880, 886 (8th Cir. 2012); *United States v. Vickers*, 540 F.3d 356, 365 (5th Cir. 2008); *but see Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008) (in the context of the INA, "[i]f Congress wanted a one-to-one correspondence between the state laws and the federal [generic crime], it would have used a word like 'involving' instead of 'relating to'"). We note that the cases holding that a "serious drug offense" constitutes any act to "intentionally enter the highly dangerous drug distribution world," *Bynum*, 669 F.3d at 886 (internal quotation marks omitted), may conflict with *Mellouli*'s rejection of a similar approach under the INA. *Mellouli* rejected the Eighth Circuit's holding that the term "relating to" in the INA incorporated any state crime "involving the drug trade in general." 135 S. Ct. at 1989.

In any event, those decisions do not address how the term "involving" affects the accomplice liability implied into the "serious drug offense" definition, no matter how broadly that generic crime is otherwise interpreted because of the "involving" predicate. So none addresses the issue before us or conflicts with the result we reach.

So, when we compare a state crime with a federal predicate "involving" certain crimes (here, certain drug-trafficking crimes), we do so categorically. That means we give content to the listed crimes—including their implied, inchoate aiding and abetting version—and determine whether elements of the state crime, *including* the inchoate versions, match the elements of the federal crime. *Valdivia-Flores* engaged in exactly that approach in determining what an "illicit trafficking" crime entails as a generic matter. Nothing about the ACCA's definition of a "serious drug offense," including its use of the word "involving," requires us to deviate from it.

E.

To address a final government contention: Our holding today creates no conflict with the Eleventh Circuit's interpretation of a "serious drug offense" in *United States v. Smith*, 775 F.3d 1262, 1266–68 (11th Cir. 2014). *Smith* held that, unlike the INA's definition of a drug trafficking aggravated felony, "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied" in the ACCA's definition of a "serious drug offense." *Id.* at 1267.

Whether or not we agree with *Smith*'s interpretation of the ACCA is of no relevance here. In Franklin's case, we are concerned not with mens rea as to the illegal nature of a controlled substance, but instead with aiding and abetting a "serious drug offense," whatever drug is at issue. Our concern as to accomplice liability, distinct from the issue in *Smith*, is required by the Supreme Court under *Duenas-Alvarez*, 549 U.S. at 189–91, and, for the reasons surveyed, governed by *Valdivia-Flores*.

III.

In sum, neither the categorical approach, nor *Valdivia-Flores*'s conclusion concerning Washington's broader-than-generic accomplice liability, lose force as they cross from one statute to another. A conviction under Washington's accomplice liability statute renders its drug trafficking law broader than generic federal drug trafficking laws under the INA and, as we hold now, under the ACCA. Washington's drug trafficking law is thus not categorically a "serious drug offense" under the ACCA.

Because Franklin's three convictions under Washington law could not constitute "serious drug offenses," he was not subject to the ACCA's fifteen-year mandatory minimum sentence, 18 U.S.C. § 924(e). We thus vacate Franklin's sentence for being a felon in possession of a firearm and remand to the district court for resentencing as to that conviction.

VACATED and REMANDED.

Addendum

Title 18, United States Code, Section 924(c)(2)

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

Title 18, United States Code, Section 924(e)(2)

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Title 8, United States Code, Section 1101(a)(43)

(a) As used in this chapter--

* * *

(43) The term "aggravated felony" means--

* * *

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

* * *

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at3 least one year;

Washington Revised Code § 9A.08.020

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or

(b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He or she is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

(4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.

Washington Revised Code § 69.50.401

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

(3) The production, manufacture, processing, packaging, delivery, distribution, sale, or possession of marijuana in compliance with the terms set forth in RCW 69.50.360, 69.50.363, or 69.50.366 shall not constitute a violation of this section, this chapter, or any other provision of Washington state law.

(4) The fines in this section apply to adult offenders only.