No. 19-6355

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IN THE SUPREME COURT OF THE UNITED STATES

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ERIC MACK, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals violated petitioner's rights under the Due Process Clause of the Fifth Amendment by giving precedential weight to a previously published decision of that court denying an application for leave to file a second-or-successive motion under 28 U.S.C. 2255.

ADDITIONAL RELATED PROCEEDING

United States District Court (M.D. Ala.):

United States v. Harris, No. 13-cr-72 (Dec. 12, 2014)

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## OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is available at 2019 WL 2725846. The order of the district court denying petitioner's certificate of appealability (Pet. App. B1-B2) is unreported. The opinion of the district court denying relief under 28 U.S.C. 2255 is not published in the Federal Supplement but is available at 2019 WL 187871.

## JURISDICTION

The judgment of the court of appeals was entered on May 22, 2019. On August 15, 2019, Justice Thomas extended the time within

which to file a petition for a writ of certiorari to and including October 19, 2019, and the petition was filed on October 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Alabama, petitioner was convicted of brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). 13-cr-72 Judgment 1. The district court sentenced petitioner to 96 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. Petitioner subsequently moved to vacate his sentence under 28 U.S.C. 2255. The district court denied that motion, 2019 WL 187871, and denied a certificate of appealability (COA), Pet. App. B1-B2. The court of appeals also denied a COA. Id. at A1-A2.

1. In October 2012, police officers responded to a call reporting a robbery at a Liberty gas station in Montgomery, Alabama. Presentence Investigation Report (PSR) ¶ 6, 10. A store employee told the officers that two African-American males had entered the gas station's store with handguns, demanded money, and left with money from the register. PSR ¶ 6. Witnesses said that one suspect appeared to have accidentally shot himself in the leg or foot as he fled, and a spent .40 caliber shell casing was recovered from the scene. Ibid. The business's video surveillance system recorded the robbery as described by the employee and other witnesses. Ibid.

During their investigation, officers found petitioner in the vicinity of the gas station. PSR ¶ 7. Petitioner identified himself as a witness and reported that he and a friend had seen someone run through a ditch wearing a hoodie. Ibid. He also told officers that he had heard a gunshot and thought someone had been shooting at his car. Ibid.

Shortly afterward, police responded to a call about a person who had been shot and found a juvenile African-American male, N.G., with a gunshot wound to his knee. PSR ¶ 8. N.G. provided inconsistent stories about his injuries. Ibid. Two days later, police spoke with N.G.'s girlfriend, who said that N.G. had told her via text message that he had been shot while robbing the gas station with petitioner. PSR ¶ 9.

Later that day, N.G. confessed to the robbery, explained that robbing the gas station had been petitioner's decision, and admitted that he had carried out the robbery with petitioner and two others who had remained in a car outside. PSR ¶¶ 10-11. N.G. related that petitioner had given him a .40 caliber handgun, that petitioner had carried a .32 caliber handgun, and that both had entered the gas station with their weapons. PSR ¶ 10. N.G. described how petitioner had demanded the clerk open the register and petitioner and N.G. had both taken money from it. PSR ¶ 11. And N.G. explained that when he and petitioner fled in opposite directions, he accidently shot himself in the knee as he tried to put his gun in his waistband. Ibid.

The next day, petitioner was taken into custody and confessed to the robbery. PSR ¶ 13. Petitioner told police that N.G. had decided to rob the store as part of a gang initiation; described what he and N.G. had worn during the robbery; and stated that he had carried a revolver while N.G. had carried a .40 caliber handgun. Ibid. Petitioner explained that he and N.G. had entered the gas station with their faces covered, demanded money, and then emptied the money from the register before fleeing. Ibid. He said that he had heard a shot when he left but did not know who was shooting. Ibid. Petitioner further explained that he had driven back to the gas station shortly after the robbery to check on N.G., removed his sweatshirt, and was then interviewed as a witness. Ibid. And petitioner identified himself and N.G. in a surveillance photograph taken during the robbery. Ibid.

2. A federal grand jury charged petitioner with conspiring to use and carry firearms during and in relation to a crime of violence, in violation of 18 U.S.C. 924(o) and 2; robbery and aiding and abetting robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2; and brandishing a firearm during and in relation to a crime of violence (the Hobbs Act robbery), in violation of 924(c)(1)(A)(ii) and 2. 13-cr-72 Indictment 1-3. Petitioner entered into a plea agreement in which he agreed to plead guilty to the Section 924(c) brandishing count and the government agreed to dismiss the remaining counts. 13-cr-72 Plea Agreement 2-3. Although the district court rejected the plea agreement,

13-cr-72 Order (Aug. 19, 2014), petitioner proceeded to plead guilty to the Section 924(c) count without a plea agreement. 13-cr-72 Sent. Tr. 2-3; see 13-cr-72 Order (Sept. 8, 2014). The government orally moved to dismiss the remaining two counts, and the court granted that motion. 13-cr-72 Sent. Tr. 17.

The district court sentenced petitioner to 96 months of imprisonment, to be followed by five years of supervised release. 13-cr-72 Judgment 2-3. Petitioner did not appeal.

3. In 2016, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he contended that his Section 924(c) conviction should be vacated because it was not based on a valid predicate "crime of violence." D. Ct. Doc. 1, at 1-2 (June 24, 2016) (2255 Mot.). Section 924(c)(3) defines a "'crime of violence'" as a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B).

Petitioner's motion asserted, without explanation, that his conviction under Section 924(c) was based on the classification of aiding and abetting Hobbs Act robbery as a crime of violence under Section 924(c)(3)(B). See 2255 Mot. 1. Petitioner further argued that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551

(2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 135 S. Ct. at 2557. See 2255 Mot. 1-2.

A magistrate judge recommended denying the motion. D. Ct. Doc. 18, at 2 (Aug. 8, 2018). The magistrate judge explained that, although the Eleventh Circuit had not at that time addressed whether Section 924(c)(3)(B)'s definition of a "crime of violence" was unconstitutionally vague in light of Johnson, the court of appeals had determined that Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A)'s alternative definition of the term, including where a conviction for that offense is premised on an aiding-and-abetting theory of liability. Id. at 4-5 (citing In re Saint Fleur, 824 F.3d 1337, 1340-1341 (11th Cir. 2016); In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016)).

Petitioner objected to the magistrate judge's recommendation. D. Ct. Doc. 26 (Sept. 21, 2018). He argued that aiding and abetting Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A) because it does not necessarily require the use, attempted use, or threatened use of physical force. Id. at 12-13. Petitioner acknowledged that the Eleventh Circuit had rejected that argument in Saint Fleur and Colon, but he argued that it was "inappropriate" to treat those decisions as binding precedent because they were issued in the context of the denial of leave to file second-or-successive Section 2255 motions. Id. at 14.

The district court adopted the magistrate judge's recommendations. 2019 WL 187871. The court explained that "the Eleventh Circuit has determined that aiding and abetting a Hobbs Act robbery is a crime of violence under [Section] 924(c)(3)(A)'s [definition of that term]." Id. at *1; see ibid. (citing Saint Fleur and Colon, supra). And the court rejected petitioner's argument that Saint Fleur and Colon were not binding precedent, noting that after petitioner had filed his objections to the magistrate judge's recommendation, the Eleventh Circuit had explicitly determined that those decisions were binding precedent. Id. at *2 (citing United States v. St. Hubert, 909 F.3d 335, 345 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019) (No. 18-8025), and petition for cert. pending, No. 19-5267 (filed July 18, 2019). The court accordingly dismissed petitioner's Section 2255 case with prejudice, Pet. App. C1-C2, and denied petitioner's request for a COA, id. at B1-B2.

4. Petitioner, through counsel, filed a 33-page application for a COA in the court of appeals. See C.A. Appl. for COA 1-33. Petitioner argued, as relevant here, that a COA should issue on his claim that aiding and abetting a Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A). Id. at 6-25. Petitioner acknowledged the court of appeals' contrary decisions in Saint Fleur and Colon, id. at 18-19, but again argued that those decisions should be not applied to cases involving initial (rather than successive) Section 2255 motions, id. at 19-24. Petitioner

also asserted -- in two sentences -- that "[a]pplying published panel orders [that deny applications for leave to file successive Section 2255 motions] as binding precedent in initial § 2255 proceedings is unsound, unfair, and unconstitutional," and that doing so here would deprive petitioner of "his right to due process, fundamental fairness, and meaningful review of the claims presented in his § 2255 motion." Id. at 24. Petitioner did not cite any procedural-due-process authority or otherwise support his assertion with analysis of the Due Process Clause. See ibid.

The court of appeals denied a COA. Pet. App. A1-A2. The court determined that petitioner had failed to "make 'a substantial showing of the denial of a constitutional right,'" as necessary to warrant a COA, citing its binding precedent making clear that aiding and abetting Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A). Id. at A2 (quoting 28 U.S.C. 2253(c)(2); citing St. Hubert and Colon, supra). The court did not explicitly address petitioner's assertion that procedural due process principles precluded applying those precedents. See ibid.

ARGUMENT

Petitioner contends (Pet. 5-17) that the court of appeals violated his right to procedural due process when it relied on its prior published opinions in In re Colon, 826 F.3d 1301 (11th Cir. 2016), and In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), in rejecting his contention that aiding and abetting Hobbs Act robbery is not a crime of violence under 18 U.S.C. 924(c)(3)(A). According

to petitioner, the Due Process Clause barred the court of appeals from assigning precedential weight to Colon and Saint Fleur because those decisions arose in the context of the denial of applications for leave to file second-or-successive motions for postconviction relief under 28 U.S.C. 2255, in which the court employs streamlined procedures. Petitioner, however, stated his constitutional claim in only a cursory manner below, and the court of appeals did not address it, which is a sufficient reason for this Court to deny review. Petitioner's constitutional claim also lacks merit, and petitioner has identified no court of appeals that would hold otherwise. This Court has repeatedly denied petitions for writs of certiorari challenging the practice of affording precedential weight to published decisions that deny applications for leave to file a second-or-successive Section 2255 motion.[1] In addition,

[1] See, e.g., Cottman v. United States, 139 S. Ct. 1253 (2019) (No. 17-7563); Torres v. United States, 138 S. Ct. 1173 (2018) (No. 17-7514); Vasquez v. United States, 138 S. Ct. 286 (2017) (No. 17-5734); Golden v. United States, 138 S. Ct. 197 (2017) (No. 17-5050); Lee v. United States, 137 S. Ct. 2222 (2017) (No. 16-8776); Eubanks v. United States, 137 S. Ct. 2203 (2017) (No. 16-8893). The Court has also recently denied a petition for a writ of certiorari contending that a three-judge panel of the court of appeals violated the Due Process Clause by concluding that it was bound to adhere to circuit precedent that the petitioner in that case contended was wrongly decided. See Jackson v. United States, 138 S. Ct. 1326 (2018) (No. 17-6914). The pending petitions for writs of certiorari in St. Hubert v. United States, No. 19-5267 (filed July 18, 2019); Robinson v. United States, No. 19-5451 (filed Aug. 2, 2019); Hanna v. United States, No. 19-7131 (filed Dec. 23, 2019); Boston v. United States, No. 19-7148 (filed Dec. 30, 2019); Valdes Gonzalez v. United States, No. 18-7575 (filed Jan. 18, 2019), present the same due process question that petitioner presents in his petition.

this case would be a poor vehicle for reviewing the question petitioner presents because the court of appeals has correctly decided the underlying issue in petitioner's case by recognizing that aiding and abetting Hobbs Act robbery is a "crime of violence" under 18 U.S.C. 924(c)(3)(A). No further review is warranted.

1. Petitioner contends (Pet. 6-17) that the Due Process Clause precluded the court of appeals from treating Colon and Saint Fleur as binding precedent in his case. But petitioner did not adequately present such a procedural due process claim in the court of appeals, and the court of appeals did not address it. This Court is one "of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and ordinarily does not address issues that were not passed upon in the court of appeals, ibid. That general rule should apply here; a challenge to procedures employed by the court of appeals is precisely the kind of claim that should be addressed by that court in the first instance.

Petitioner failed to present any developed procedural due process argument in the court of appeals. Petitioner mentioned due process only briefly in passing in his 33-page court of appeals filing, without any citation to relevant due-process authority or any supporting analysis of relevant due process requirements. See pp. 7-8, supra. Petitioner thus never presented any meaningful due process argument below, much less one that sought to rely on Mathews v. Eldridge, 424 U.S. 319 (1976), in this criminal context. Cf. Pet. 8-16 (making Mathews-based argument). Federal courts

generally "refuse to take cognizance of arguments that are made in passing without proper development." Johnson v. Williams, 568 U.S. 289, 299 (2013). And the court of appeals here appropriately declined to discuss petitioner's unelaborated constitutional assertion. In light of petitioner's appellate forfeiture, this Court's review to consider petitioner's due process contentions in the first instance would be unwarranted.

Petitioner relies (Pet. 9-12, 15-17) primarily on dissenting and concurring opinions from Eleventh Circuit judges suggesting changes in the procedures of their court. Cf. United States v. St. Hubert, 918 F.3d 1174, 1174 (11th Cir. 2019) (per curiam order denying en banc rehearing), petition for cert. pending, No. 19-5267 (filed July 18, 2019). Those decisions reflect ongoing debate in that court of appeals about how it should handle second-and-successive petitions for postconviction review. Compare id. at 1190-1192 (Jordan, J., concurring in the denial of rehearing en banc) (suggesting changes in circuit procedures); id. at 1197-1199 (Wilson, J., joined by Martin and J. Pryor, JJ., and joined in relevant part by Rosenbaum, J., dissenting from the denial of rehearing en banc) (same), with id. at 1174-1183 (Tjoflat, J., joined by E. Carnes, C.J., and W. Pryor, Newsom, and Branch, JJ., concurring in the denial of rehearing en banc) (defending circuit procedures); id. at 1183-1190 (W. Pryor, J., respecting the denial of rehearing en banc) (same). But significantly, none of the opinions informing that discussion has addressed the possible

application of the Due Process Clause. See id. at 1174-1213. Given the court of appeals' active internal debate about the proper treatment of its published orders on applications for leave to file second-or-successive Section 2255 motions, that court should be the one to decide in the first instance whether or to what extent due-process principles should affect its approach in a case in which a procedural due process claim is properly presented to it for adjudication. Petitioner, however, never properly presented such a claim.

2. In any event, petitioner's due process claim lacks merit. Petitioner's objection to the court of appeals' reliance on its decisions in Colon and Saint Fleur stems from his criticism of that court's streamlined procedures for deciding whether to grant applications for leave to file second-or-successive Section 2255 motions. As this Court has recognized, however, "[t]he courts of appeals have significant authority to fashion rules to govern their own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993); see Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (observing that courts of appeals may "vary considerably" in their procedural rules). Under Federal Rule of Appellate Procedure 47, the courts of appeals may adopt differing local rules and internal operating procedures so long as those rules and procedures are consistent with applicable federal law, and "may regulate practice in a particular case in any manner

consistent with federal law, [the Federal Rules of Appellate Procedure], and local rules of the circuit." Fed. R. App. P. 47(b).

Petitioner argues (Pet. 6-16) that affording precedential weight to opinions such as Colon and Saint Fleur violates the Due Process Clause where those opinions were issued in earlier cases that (unlike petitioner's case) involved the Eleventh Circuit's streamlined procedures for applications to file second or successive Section 2255 motions. In Medina v. California, 505 U.S. 437 (1992), however, this Court explained that "[i]n the field of criminal law, * * * the Due Process Clause has limited operation" "beyond the specific guarantees enumerated in the Bill of Rights." Id. at 443 (brackets and internal quotation marks omitted). Only criminal procedural rules that "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" deprive a defendant of due process. Id. at 446 (citing Patterson v. New York, 432 U.S. 197, 202 (1977)).

Petitioner's due process claim does not satisfy that exacting standard. This Court has held that, in some circumstances, it violates the Due Process Clause to treat a judgment in earlier litigation as binding on nonparties as a matter of claim or issue preclusion. See Taylor v. Sturgell, 553 U.S. 880, 896-898 (2008). But in doing so, the Court has distinguished the application of those preclusion doctrines (which may raise due process concerns) from the application of ordinary principles of "stare decisis" (which does not). Id. at 903; see South Cent. Bell Tel. Co. v.

Alabama, 526 U.S. 160, 167-168 (1999). So long as a defendant follows the proper procedures, he has the right to appeal his otherwise final sentence under 18 U.S.C. 3742 and have the court of appeals consider any claim that his sentence is inconsistent with applicable law. But under well-established principles of stare decisis, the applicable law for district courts and three-judge panels includes circuit precedent. And just as a court of appeals does not violate due process by adhering to a decision of this Court, a district court or a three-judge panel does not violate due process by adhering to circuit precedent. A defendant who believes that the governing precedent was wrongly decided is free to challenge it before the en banc court of appeals[2] or this Court.

Petitioner does not cite or acknowledge Medina, much less attempt to meet the due process standard it articulates for criminal-law contexts. Instead, petitioner contends (Pet. 8) that this Court should consider his due process claim under the standard for addressing procedural due process challenges announced in Mathews v. Eldridge, supra, which devised a balancing test to determine whether a recipient of social-security benefits has a right to an evidentiary hearing before those benefits were

[2] Although the Eleventh Circuit's rules state that the denial of a COA may not be the subject of a petition for en banc rehearing, 11th Cir. R. 22-1(c), the court of appeals "may suspend the provisions of [that rule] and order proceedings in accordance with the court's direction." 11th Cir. I.O.P. 22.1 (emphasis omitted).

terminated. See Pet. 8-16. Mathews does not provide the appropriate framework for evaluating petitioner's due process claim, however, because petitioner challenges the court of appeals' procedures for deciding criminal cases, not an interference with property rights. See Nelson v. Colorado, 137 S. Ct. 1249, 1255 (2017) ("Medina provides the appropriate framework for assessing the validity of state procedural rules that are part of the criminal process.") (citation and internal quotation marks omitted); see also Medina, 505 U.S. at 443. Petitioner identifies no decision of this Court or of any other circuit that would support requiring a court of appeals, as a constitutional matter, to assign less or no precedential weight to published opinions issued by full panels of judges where streamlined procedures were used to resolve the case.

3. In any event, this case would be a poor vehicle to consider petitioner's due process claim because the court of appeals has correctly resolved the underlying substantive issue in petitioner's case by recognizing that aiding and abetting a Hobbs Act robbery qualifies as a predicate crime of violence under 18 U.S.C. 924(c)(3)(A).

Hobbs Act robbery requires the "unlawful taking or obtaining of personal property" from another "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. 1951(b)(1). For the reasons stated in the government's brief in opposition to the petition for

a writ of certiorari in Garcia v. United States, 138 S. Ct. 641 (2018) (No. 17-5704), Hobbs Act robbery qualifies as a crime of violence under Section 924(c) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). See Br. in Opp. at 7-10, Garcia, supra (No. 17-5704).[3] Every court of appeals to consider the issue has so held. See id. at 8. And this Court has recently and repeatedly denied petitions for writs of certiorari challenging the circuits' consensus on the application of Section 924(c)(3)(A) to Hobbs Act robbery.[4]

Because Hobbs Act robbery qualifies as a crime of violence under Section 924(c)(3)(A), aiding and abetting Hobbs Act robbery also qualifies as a crime of violence. When the government

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[3] We have served petitioner with a copy of the government's brief in opposition in Garcia, which is also available from the Court's online docket at https://www.supremecourt.gov/docket/docketfiles/html/public/17-5704.html.

[4] See, e.g., Hilario-Bello v. United States, 140 S. Ct. 473 (2019) (No. 19-5172); Apodaca v. United States, 140 S. Ct. 432 (2019) (No. 19-5956); Young v. United States; 140 S. Ct. 262 (2019) (No. 19-5061); Durham v. United States, 140 S. Ct. 259 (2019) (No. 19-5124); Munoz v. United States, 140 S. Ct. 182 (2019) (No. 18-9725); Lindsay v. United States, 140 S. Ct. 155 (2019) (No. 18-9064); Hill v. United States, 140 S. Ct. 54 (2019) (No. 18-8642); Greer v. United States, 139 S. Ct. 2667 (2019) (No. 18-8292); Rojas v. United States, 139 S. Ct. 1324 (2019) (No. 18-6914); Foster v. United States, 139 S. Ct. 789 (2019) (No. 18-5655); Desilien v. United States, 139 S. Ct. 413 (2018) (No. 17-9377); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Robinson v. United States, 138 S. Ct. 1986 (2018) (No. 17-6927); Chandler v. United States, 138 S. Ct. 1281 (2018) (No. 17-6415); Middleton v. United States, 138 S. Ct. 1280 (2018) (No. 17-6343); Jackson v. United States, 138 S. Ct. 977 (2018) (No. 17-6247); Garcia, 138 S. Ct. 641.

prosecutes a defendant based on aiding-and-abetting liability, the government must prove that either the defendant or one of his confederates committed each of the elements of the underlying offense and that the defendant was "punishable as a principal" for that offense because he took active and intentional steps to facilitate the crime. 18 U.S.C. 2(a); see Rosemond v. United States, 572 U.S. 65, 70-74 & n.6 (2014). If the substantive crime "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), a conviction for aiding and abetting that crime necessarily includes proof of that force element.

Every court of appeals to have considered the question has determined that aiding and abetting a crime that has an element of the use of force, within the meaning of Section 924(c)(3)(A) and similar provisions, itself qualifies as a crime of violence. See, e.g., Kidd v. United States, 929 F.3d 578, 581 (8th Cir. 2019) (per curiam) (aiding and abetting armed robbery involving controlled substances), cert. denied, 140 S. Ct. 894 (2020); United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018) (aiding and abetting Hobbs Act robbery), cert. denied, 139 S. Ct. 1208 (2019); United States v. Deiter, 890 F.3d 1203, 1214-1216 (10th Cir.) (aiding and abetting bank robbery), cert. denied, 139 S. Ct. 647 (2018); Colon, 826 F.3d at 1305 (aiding and abetting Hobbs Act robbery); United States v. McGill, 815 F.3d 846, 944 (D.C. Cir. 2016) (per curiam) (aiding and abetting murder), cert. denied, 138

S. Ct. 57, and 138 S. Ct. 58 (2017); cf. Ortiz-Magana v. Mukasey, 542 F.3d 653, 659 (9th Cir. 2008) ("[T]here is no material distinction between an aider and abettor and principals in any jurisdiction of the United States[.] * * * [A]iding and abetting [a crime of violence] is the functional equivalent of personally committing that offense."). This Court has recently and repeatedly denied review of that issue. See, e.g., Mojica v. United States, 140 S. Ct. 911 (2020) (No. 19-35); Kidd v. United States, 140 S. Ct. 894 (2020) (No. 19-6108); Deiter v. United States, 139 S. Ct. 647 (2018) (No. 18-6424); Ragland v. United States, 138 S. Ct. 1987 (2018) (No. 17-7248); Stephens v. United States, 138 S. Ct. 502 (2017) (No. 17-5186).

Accordingly, even if the court of appeals were foreclosed from affording binding precedential effect to its earlier published decisions determining that aiding and abetting Hobbs Act robbery qualifies as a "crime of violence" under Section 924(c)(3)(A), petitioner still could not demonstrate his entitlement to post-conviction relief. As the court of appeals correctly determined, "[r]easonable jurists would not debate the district court's denial" of petitioner's Section 2255 motion on the merits, and petitioner therefore was not entitled to a COA. Pet. App. A2.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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