No. _____

IN THE

Supreme Court of the United States

RYKEITH LEVATTE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

James T. Skuthan
Acting Federal Defender

Shehnoor Kaur Grewal, Counsel of Record
Research and Writing Attorney
Utah Bar No. 14662
Office of the Federal Defender
2075 W. First Street, Suite 300
Fort Myers, Florida 33901
Telephone: (239) 334-0397
E-mail: shehnoor_grewal@fd.org

QUESTION PRESENTED

Whether, categorically, aiding and abetting Hobbs Act robbery is a "violent felony" under the Armed Career Criminal Act's (ACCA) elements clause, 18 U.S.C. § 924(c).

LIST OF PARTIES

Petitioner, Rykeith Levatte, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Rykeith Levatte's sentence was enhanced under the Armed Career Criminal Act (ACCA) due to two convictions for aiding and abetting Hobbs Act robberies. He respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his 28 U.S.C. § 2255 motion on the issue of whether the enhancement of his sentence, based on convictions for aiding and abetting, is unconstitutional in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that imposing an increased sentence under the residual clause of the ACCA violated due process).

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Levatte's § 2255 motion to vacate in *Levatte* v. *United States*, 805 Fed. Appx. 658 (11th Cir. 2020) is provided in Appendix A-1. The district court order dismissing Mr. Levatte's § 2255 motion to vacate sentence, *Levatte* v. *United States*, Case No: 8:16-cv-01105-VMC-TBM (M.D. Fla. 834738 (M.D. Fla. Aug. 11, 2016), is provided in Appendix A-2.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Levatte's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under § 2255. The district court denied Mr. Levatte's § 2255 motion on August 11, 2016. *See* Appendix A-2. Mr. Levatte subsequently filed a notice of appeal and a motion for a certificate of appealability (COA) in the Eleventh Circuit, which was granted on June 6, 2017. The Eleventh Circuit Court of Appeals

affirmed the district court's denial of Mr. Levatte's § 2255 motion. *See* Appendix A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 924(c) provides in pertinent part:

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
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> (i) be sentenced to a term of imprisonment of not less than 5 years;
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> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years
>
> * * *
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that 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(e)(2)(B)(i) provides in pertinent part:

> **(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[.]

28 U.S.C. § 2244(b)(3) provides:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2253(c) provides in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On November 2011, Mr. Levatte entered a guilty plea to two counts of brandishing a firearm in furtherance of aiding and abetting two Hobbs Act robberies, in violation of 18 U.S.C. § 924(c) (Count Seven and Nine). On March 1, 2020, Mr. Levatte was sentenced to 84 months' imprisonment on Count Seven and 300 months' imprisonment on Count Nine (to run consecutively), followed by 60 months' supervised release on each count (to run concurrently). Mr. Levatte's sentence was later reduced under Federal Rule of Criminal Procedure 35 to a total of 327 months' imprisonment, followed by 60 months' supervised release on each count (to run concurrently).

After this Court's decision in *Johnson v. United States*, 135 S. Ct. 2251 (2015) (*Samuel Johnson*), Mr. Levatte moved to vacate his sentence under 28 U.S.C. § 2255, stating that, under *Johnson*, his § 924(c) convictions were imposed in violation of the Constitution's guarantee of due process. The district court denied Mr. Levatte's motion as untimely because *Johnson* did not apply to § 924(c). Mr. Levatte moved for reconsideration but the district court denied the motion and declined a certificate of appealability. Mr. Levatte filed a timely notice of appeal on December 22, 2016.

The Eleventh Circuit Court of Appeals granted Mr. Levatte a certificate of appealability on June 6, 2017 on one issue: whether Mr. Levatte's convictions under 18 U.S.C. § 924(c) predicated on convictions for aiding and abetting Hobbs Act robbery are unconstitutional in light of *Johnson*. The Eleventh Circuit Court of Appeals affirmed the district court's denial of Mr. Levatte's § 2255 motion.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO ADDRESS THE IMPORTANT QUESTION OF WHETHER THE ELEVENTH CIRCUIT'S CATEGORICAL FINDING THAT "AIDING AND ABETTING" HOBBS ACT ROBBERY QUALIFIES AS A PREDICATE OFFENSE FOR A SENTENCING ENHANCEMENT UNDER THE ARMED CAREER CRIMINAL ACT (ACCA) IS A LEGAL FALLACY AND NOT SUPPORTED BY THE ACCA'S TEXT, A FINDING WHICH EFFECTS A MULTITUDE OF CRIMINAL DEFENDANTS

A. Section 924(c)'s element clause requires a categorical analysis.

For an offense to qualify under the 18 U.S.C. § 924(e)(2)(B)(i) elements clause, it must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* Whether aiding and abetting an offense qualifies as a "violent felony" under the elements clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). A defendant "can be convicted as an aider and abettor [under 18 U.S.C. § 2] without proof that he participated in each and every element of the offense." *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014).

Indeed, "[t]he quantity of assistance [is] immaterial, so long as the accomplice did something to aid the crime." *Id.* (internal quotation marks and citation omitted; emphasis in original). An aider and abettor does not have to personally use, attempt to use, or threaten violent physical force to be convicted of aiding and abetting robbery. And under this categorical approach, if aiding and abetting Hobbs Act robbery may be committed without "the use, attempted use, or threatened use of

physical force," then that crime may not qualify as a "violent felony" or "crime of violence" under the elements clause.[1]

Being punishable for an offense under § 2 does not mean that a jury found, or that a defendant pleaded to, the elements of that offense, such that one can conclude he or she necessarily committed an offense that comes within §§ 924(c)(3)(A) or 924(e)(2)(B)(i). *Shepard v. United States*, 544 U.S. 13, 21 (2005). "A crime cannot categorically be a 'crime of violence' if the statute of conviction punishes any conduct not encompassed by the statutory definition of a 'crime of violence.'" *United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016).

Applying the categorical approach, the only relevant inquiry is whether the elements of §§ 924(c) are necessarily satisfied by the modicum of proof needed to satisfy the elements of aiding and abetting a robbery. *Cf. United States v. Baires-Reyes*, 191 F. Supp. 3d 1046, 1049-50 (N.D. Cal. 2016) (considering elements needed to prove conspiracy to commit Hobbs Act Robbery to find it not a crime of violence under § 924(c)(3)(A), applying the categorical approach); *United States v. Innie*, 7 F.3d 840, 850 (9th Cir. 1993) (considering elements needed to prove accessory liability under § 3, to determine if § 16(a)'s force elements are necessarily satisfied, under categorical approach).

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[1] The term "physical force" means "violent force," "force that is capable of causing physical pain or injury to another person." *See Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

B. The Eleventh's Circuit Approach Conflict's With the Categorical Approach.

In denying Mr. Levatte's § 2255 motion to vacate, the Eleventh Circuit erred by relying on the legal fallacy it created in *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016), that aiding and abetting convictions fall under § 924(c)(3)(A). *See Levatte*, 805 Fed Appx. at 659 (relying on *In re Colon*).

Citing 18 U.S.C. § 2's language that an aider and abettor "'is punishable as a principal,'" and a prior holding that "[u]nder § 2, the acts of the principal become those of the aider and abettor as a matter of law," which did not address 18 U.S.C. § 924(c)(3)'s elements clause, two of three judges in *Colon* concluded:

> [b]ecause an aider and abettor is *responsible* for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery *necessarily commits* all the elements of a principal Hobbs Act robbery. And because the substantive offense of Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," which this Court held to be the case in *In re Saint Fleur* [824 F.3d 1337 (2016)], then an aider and abettor of a Hobbs Act robbery necessarily commits a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Id. at 1305 (citing *United States v. Williams*, 334 F.3d 1228, 1232 (11th Cir. 2003)) (emphasis added).

But this reasoning conflicts with this Court's approach. As Judge Martin explains in *Colon*, "[a]s best I can tell (though we have not had any briefing on this question, and I have not had much time to think through the issue), a defendant can be convicted of aiding and abetting a robbery without ever using, attempting to use, or threatening to use force." *Colon*, 826 F.3d at 1306 (Martin, J., dissenting). After noting the *Williams* case cited by the *Colon* majority was not helpful to the instant

categorical inquiry, because it had addressed the distinct inquiry of whether a defendant who had committed Hobbs Act robbery as a principal had aided and abetted a co-defendant's use of force, Judge Martin explained why an aider or abettor to the robbery does not necessarily commit the crime-of-violence elements of § 924(c)(3)(A):

> It seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere. And even if Mr. Colon's contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to meet the "elements clause" definition. The law has long been clear that a defendant charged with aiding and abetting a crime is not required to aid and abet (let alone actually commit, attempt to commit, or threaten to commit) every element of the principal's crime. *See Rosemond*[, 572 U.S. at 74] ("As almost every court of appeals has held, a defendant can be convicted as an aider and abettor *without proof that he participated in each and every element* of the offense. In proscribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence—even if that aid relates to only one (or some) of a crime's phases or elements."…)

Colon, 826 F.3d at 1306–07.

Thus, Judge Martin identified the correct crux of the § 2 analysis when applying the categorical approach to a statute like § 924(c)(3): we do not ask how the defendant is punished or held responsible, but rather how that liability is established in the first place. Specifically, an aider or abettor may be convicted of a crime, *without committing all of that crime's elements*. *Id.* at 1306-07. And it is only the statutory elements of an offense which can make it a "crime of violence." *See Benally*, 843 F.3d 350 at 352. A conviction pursuant to § 2 inherently fails the distinct inquiry for

determining whether that conviction is a "violent felony," as the aider and abettor did not *necessarily* "use" force, as required in §§ 924(c)(3)(A) or 924(e)(2)(B)(i), or *commit* an offense with those elements. *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018). Judge Martin went on to favorably compare the aiding and abetting issue with post-*Johnson* decisions finding that conspiracy and attempt offenses do not satisfy the force/elements clause, and stated, "I am not willing to assume, as the majority does here, that aiding and abetting crimes meet the "elements clause" definition simply because an aider and abettor "is punishable as a principal." *Colon*, 826 F.3d at 1307–08 (quoting § 2(a)).

The relevant question is whether a defendant convicted of robbery as an aider and abettor has necessarily committed an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." §§ 924(c)(3)(A) and 924(e)(2)(B)(i); *see Davis*, 903 F.3d at 485; *see also Innie*, 7 F.3d at 850. Whether a defendant is *punishable* for that offense is not the inquiry. Nor should being deemed *responsible* for the offense equate to *commission* of an offense which contains more elements than that necessary to establish said responsibility.

Yet, the Eleventh Circuit's merely extended its fallacy in *Colon* to Mr. Levatte's aiding and abetting Hobbs Act robbery convictions, never considering the elements or the least culpable act, instead summarily holding that: "Because current binding precedent establishes that Levatte's predicate offenses qualify as crimes of violence

under the elements clause, his convictions under § 924(c) remain valid." *Levatte*, 805 Fed. Appx. at 660.

The binding *Colon* rationale, however, is wholly inconsistent with the required elements-based limitation of the ACCA in § 924(e)(2)(B)(i). As described by the concurrence in the *United States v. Boston*, 939 F.3d 1266 (11th Cir. 2019) decision:

> *Colon* takes a legal fiction—that one who aids and abets a robbery by, say, driving a getaway car, is deemed to have committed the robbery itself—and transforms it into a reality—that a getaway car driver actually committed a crime involving the element of force. That transformation isn't grounded in ACCA's text. ACCA uses the term "violent felony," the ordinary meaning of which "suggests a category of violent, *active* crimes." *Johnson v. United States*, 559 U.S. 133, 140, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010) (emphasis added) (internal quotation marks omitted). A person who merely aids and abets a crime by definition plays a less active role in the crime than the principal. And whereas ACCA expressly includes in its "violent felony" definition offenses that require attempted or threatened force (in addition to the actual use of force), it does not expressly include aiding or abetting a person who uses, attempts to use, or threatens to use force. In short, Congress could have written ACCA to explicitly encompass offenders who aid or abet violent acts, but it did not. . .
>
> A person who aids or abets another in committing armed robbery *may* use, attempt to use, or threaten to use physical force, or he may only be a getaway driver. Transforming that role in a crime into one that *necessarily* involves the use, attempted use, or threatened use of physical force contradicts ACCA's text.

Boston, 939 F.3d at 1273–74 (Jill Pryor, J., concurring) (footnote omitted). Additionally, the *Boston* concurrence stated that, "I believe *Colon*'s rule does not comport with ACCA's intent, written into the text of § 924, to punish more harshly offenders with a history of violent criminal conduct. *See* 18 U.S.C. § 924(a)(2), (e)(1). For these reasons, I believe that *Colon* was wrongly decided." *Boston*, 939 F.3d at 1274 (Jill Pryor, J., concurring) (footnote omitted).

Under the proper post-*Johnson*, *Davis*, and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), analysis, Mr. Levatte's aiding and abetting Hobbs Act robbery convictions do not qualify under § 924(c) and the Eleventh Circuit erred.

C. The Question Presented is Important and Worthy of this Court's Attention.

As explained, the Eleventh Circuit's approach to aiding and abetting liability is errant and insufficient, because it substitutes the categorical approach required to find a "crime of violence" under § 924(c)(3)(A) with a contextually-distinct conclusion that an aider or abettor is *punishable* or *responsible* for the acts of the substantive perpetrator.

This is an important issue for this Court to resolve as at least three other circuit courts have since adopted essentially identical analysis as the majority in *Colon* to hold that a § 2 offense could be a "violent felony" or "crime of violence" under similar elements clauses. *United States v. Richardson*, 906 F.3d 417, 421 (6th Cir. 2018), *vacated on other grounds by Richardson v. United States*, 18-7036, Order (June 17, 2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 104–05, 109–10 (1st Cir. 2018); *United States v. Deiter*, 890 F.3d 1203, 1215–16 (10th Cir. 2018). Additionally, the Eighth Circuit recently found no relief was provided by the Supreme Court in *United States v. Davis,* 139 S. Ct. 2319 (2019), to its defendant, by stating only that "we treat an aider and abettor no differently than a principal." *Kidd v. United States*, 929 F.3d 578, 581 (8th Cir. 2019), citing § 2. None of these cases expressly applied the categorical approach to consider whether the "least egregious conduct" required

to establish § 2 liability would also satisfy §§ 924(c)(3)(A) or 924(e)(2)(B)(i)'s elements clause. *See United States v. Gonzalez-Aparicio*, 663 F.3d 419, 425 (9th Cir. 2011).

Given the many criminal defendants effected by these Court's rationales, this Court should step in to address the Eleventh Circuit's and the other Circuit's approaches so as to align these Circuits with this Court's precedent in *Johnson*.

CONCLUSION

Mr. Levatte respectfully seeks this Court's review. For the foregoing reasons, the petition should be granted.

Respectfully submitted,

James T. Skuthan
Acting Federal Defender

/s/ Shehnoor Kaur Grewal
Shehnoor Kaur Grewal
Appellate Attorney
Utah Bar Number 14662
2075 W. First Street, Suite 300
Fort Myers, Florida 33908
Telephone (239) 334-0397
E-mail: shehnoor_grewal@fd.org