No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JEROME CAPELTON,
Petitioner

v.

UNITED STATES,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Samia Hossain
Federal Public Defender Office
51 Sleeper Street, 5th Floor
Boston, MA 02210
(617) 223-8061

QUESTION PRESENTED FOR REVIEW

1. Whether the First Circuit's application of the "realistic probability" standard in Mr. Capelton's case, where the elements of Massachusetts "joint venture" liability were facially broader than generic aiding and abetting, conflicts with its application by other circuits?

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Jerome Capelton,[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *United States v. Capelton*, 966 F.3d 1 (1st Cir. 2020), and is found at Pet.App. 1-23.[2] The order of resentencing from the United States District Court for the District of Massachusetts, and the transcript of the hearing in which the district court found Mr. Capelton to be a career offender, are not reported and are found at Pet.App. 24-72.

JURISDICTION

The Court of Appeals issued its judgment on July 16, 2020. This petition is being filed within ninety days of that judgment. Mr. Capelton invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT U.S. SENTENCING GUIDELINES PROVISIONS

The career offender guideline, U.S.S.G. §4B1.1,[3] states:

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[1] Mr. Capleton's true name is Anthony Coleman, although he was prosecuted under the name Jerome Capleton. Mr. Coleman is referred to as Mr. Capleton in this petition to avoid confusion.

[2] Pet.App. refers to the appendix to this petition.

[3] The applicable definitions are quoted from the 1998 sentencing guidelines in effect at the time of the offense conduct. The same definitions remain in place today.

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

That guideline, under U.S.S.G. §4B1.2, defines a "controlled substance offense" as follows:

> (b) 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.

Application Note 1 to the career offender guideline states that "'[c]rime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. §4B1.1, §4B1.2, comment. (n.1).

STATEMENT OF THE CASE

On September 26, 2001, Mr. Capelton was convicted, after trial, of conspiracy to distribute at least 50 grams of cocaine base, in violation of 21 U.S.C. §846, and three counts of distribution of at least 50 grams of cocaine base, in violation of 21 U.S.C. §841(a)(1). Pet.App. 3.

The district court deemed Mr. Capelton a career offender pursuant to U.S.S.G. §4B1.1, resulting in a guideline range of 360 months (30 years) to life. Pet.App. 3-4. The court decided Mr. Capelton's sentence during the mandatory guidelines era, *see*

United States v. Booker, 543 U.S. 220 (2005), and imposed upon him a sentence of 30 years in prison and 5 years of supervised release. Pet.App. 4.

On December 21, 2018, the First Step Act made provisions of the Fair Sentencing Act ("FSA") applicable to offenses committed prior to that law's effective date of August 3, 2010. The FSA had reduced the disparity between punishments for crack and powder cocaine offenses by reducing the crack to powder drug weight ratio from 100:1 to 18:1 and amending the drug weight elements of penalty provisions under 21 U.S.C. §841(b) to effectuate this change.

In light of the new law, on March 6, 2019, the United States Probation Office issued a memorandum supplementing Mr. Capelton's 2002 Presentence Report. Pet.App. 6. The memorandum stated that the First Step Act reduced the statutory maximum in Mr. Capelton's case and, accordingly, his guideline range as well. It also stated that he remained a career offender based on two prior Massachusetts convictions: (1) possession of a Class B substance with the intent to distribute, in violation of M.G.L. ch. 94C, §32A(a); and (2) distribution of a Class B substance, in violation of M.G.L. ch. 94C, §32A(b). Pet.App. 6. As a career offender, his guideline range was 262 to 327 months where it would otherwise be 168 to 210 months. Pet.App. 6.

On March 20, 2019, Mr. Capelton submitted an application for resentencing pursuant to the First Step Act, contending, *inter alia*, that the court should not find him to be a career offender and should resentence him under the lower guideline range.

Mr. Capelton argued that his two prior Massachusetts convictions did not qualify as "controlled substance offense[s]" under U.S.S.G. §4B1.1 because they implicitly included "joint venture" liability. At the time of his offenses, proof that a joint venturer shared the principal's intent to commit the crime was not an element of Massachusetts joint venture. *See Commonwealth v. Zanetti*, 454 Mass. 449, 467, 910 N.E.2d 869, 883 (2009), *abrogated on other grounds by Commonwealth v. Britt*, 465 Mass. 87, 97, 987 N.E.2d 558, 567 (2013). Generic aiding and abetting, implicated under Application Note 1 to the career offender guideline, requires shared intent. *See United States v. Franklin*, 904 F.3d 793, 799 (9th Cir. 2018), *cert dismissed*, 139 S. Ct. 2690 (2019) , *abrogated on other grounds by Shular v. United States*, 140 S. Ct. 779, 784 (2020). Under Massachusetts joint venture law in effect at the time of Mr. Capelton's convictions, mere knowledge of the principal's intent was sufficient. Accordingly, he argued, the state offenses were overbroad and did not fit the definition of a "controlled substance offense" under the career offender guideline. Pet.App. 6-7. Mr. Capelton had already served 19 years in prison and sought a time-served sentence. Pet.App. 7.

The district court held a hearing on June 5, 2019. Pet.App. 25-72. It found him eligible for resentencing under the First Step Act, but again found him to be a career offender. It stated Mr. Capelton's reasoning that "joint venture" liability was overbroad was "plausible," but ultimately, "imaginative but unsound." Pet.App. 58. The court remarked that there was no "realistic probability that any jury would find an individual guilty of either of [the two Massachusetts drug offenses] without finding

beyond a reasonable doubt that there [was] an intent to commit that crime." Pet.App. 58. The court resentenced Mr. Capelton to 252 months in prison and four years of supervised release. Pet.App. 24.

On July 17, 2020, the First Circuit issued an opinion affirming the district court's ruling without oral argument. It concluded, "Capelton has not shown . . . that there is 'a realistic probability' that Massachusetts would have applied its drug statute at issue here to conduct that fell outside the generic definition of aiding and abetting[.]" Pet.App. 3. (citing *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)).

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Incorrect Application of the Categorical Approach Conflicts with Its Application in Other Circuits and Has Broad Implications for Defendants with Prior Massachusetts Convictions.

The First Circuit incorrectly applied the categorical approach, which has significant implications for defendants with prior Massachusetts convictions.

In *Moncrieffe v. Holder*, this Court stated that for a state offense to be overbroad under the categorical approach, there must be a "realistic probability" that the state statute would be applied to conduct that falls outside the generic offense:

> [O]ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply "legal imagination" to the state offense; there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime."

Moncrieffe, 569 U.S. at 191 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The First Circuit cited *Moncrieffe* in stating that Mr. Capelton had not established a realistic probability that at the time of his prior offenses, a defendant

could be convicted in Massachusetts under a theory of joint venture absent proof of shared intent. *See* Pet.App. 15, 46-47, 49, 58. The court ignored, however, arguments raised by Mr. Capelton pointing to cases where shared intent was not a stated element required for conviction. Such a scenario, therefore, was not simply an exercise of "legal imagination." The First Circuit failed to apply the categorical approach with proper focus on the stated elements of joint venture that existed at the time of Mr. Capelton's prior convictions. In doing so, it applied the realistic probability standard where the elements are facially overbroad – an approach the court has rejected in other contexts, and one that has been rejected by the majority of circuits. Furthermore, the First Circuit's conclusion that Massachusetts joint venture did require shared intent, despite allowing for conviction on the basis of knowledge alone, diverges from other circuits' analysis of analogous state provisions.

Proper comparison of the elements of Massachusetts joint venture with the requirements of generic aiding and abetting liability, which includes the element of shared intent, leads to the conclusion that Mr. Capelton's convictions do not fit the definition of a "controlled substance offense" under U.S.S.G. §4B1.1, and therefore, he is not a career offender.

A. The Elements of Massachusetts Joint Venture Liability Are Broader Than Generic Aiding and Abetting Liability.

This Court applies the categorical approach when analyzing whether a prior offense falls within the career offender guideline. The analysis involves a "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [a] generic [crime], while ignoring the particular facts of the case." *Mathis v. United*

States, 136 S. Ct. 2243, 2248 (2016).[4] "'Elements' are the 'constituent parts' of a crime's legal definition – the things the 'prosecution must prove to sustain a conviction.'" *Id.* (quoting Black's Law Dictionary 634 (10th ed. 2014)). "[I]f the crime of conviction covers any more conduct than the generic offense," it does not fit the definition of a career offender predicate, "even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." *See id.* In evaluating a prior offense for career offender purposes, a court must determine the elements of the generic form of that offense and compare it to the elements of the offense of conviction. *See, e.g.*, *United States v. Bennett*, 469 F.3d 46, 48-49 (1st Cir. 2006), *cert denied*, 549 U.S. 1312 (2007).

The analysis is modified in a "narrow range of cases" where a statute includes alternative elements of offenses. *See Taylor v. United States*, 495 U.S. 575, 602 (1990). Where a statute consists of such alternatives, it is "divisible." *See id.* An example would be "a burglary statute (otherwise conforming to the generic crime)

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[4] In *Shular*, the Court determined that to meet the definition of a "serious drug offense" under the Armed Career Criminal Act, a state offense must match only the "conduct" specified in that provision, and not the elements of a generic offense. *See Shular*, 140 S. Ct. at 784-87. The Court's determination rested on the statutory language of the relevant ACCA provision, which defines a "serious drug offense" as "an offense under State law, *involving* the manufacturing, distributing, or possessing with intent to manufacturing or distribute, a controlled substance[.]" 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). The Court stated that the term "'involv[es]' suggests that the descriptive terms immediately following the word 'involving' identify conduct." *Shular*, 140 S. Ct. at 785 (internal citation omitted). By contrast, the enumerated-offense clause of the ACCA's "violent felony" definition refers to a crime that "*is* burglary, arson, or extortion," 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added), and therefore, "requires a generic-offense analysis." *Shular*, 140 S. Ct. at 785. Because the career offender guideline and Application Note 1 do not define conduct, but instead, offenses, the approach of *Shular* does not apply to Mr. Capelton's case.

that prohibits 'entry of an automobile as well as a building.'" *Descamps v. United States*, 570 U.S. 254, 261 (2013) (quoting *Taylor*, 495 U.S. at 602). In such a case, the court would apply the "modified categorical approach" and look beyond the statutory elements to "the charging paper and jury instructions." *Taylor*, 495 U.S. at 602. Doing so would assist the court in determining whether the charge at issue involved, for example, entry into the building, which would meet the generic definition of burglary, or entry into an automobile, which would not. *See also Shepard v. United States*, 544 U.S. 13, 26 (2005).

The categorical approach is the proper framework for Mr. Capelton's case. The modified categorical approach does not apply because joint venture liability is indivisible from the substantive offenses at issue. *See Duenas-Alvarez*, 549 U.S. at 189 ("Indeed, every jurisdiction – all States and the Federal Government – has expressly abrogated the distinction among principals and aiders and abettors[.]" (internal quotation marks and citation omitted)). Massachusetts law did not require an indictment to charge joint venture for the jury to convict on such a theory. *See, e.g.*, *Commonwealth v. Basey*, 82 Mass. App. Ct. 278, 281, 972 N.E.2d 59, 61 (2012) (affirming joint venture conviction where it was not charged in the indictment), *denying review*, 436 Mass. 1107, 974 N.E.2d 643 (2012); *Zanetti*, 454 Mass. at 449, 910 N.E.2d at 871 ("The defendant was indicted on a charge of murder in the first degree, and at a jury trial, the Commonwealth proceeded against him on the theory of deliberate premeditation based on both principal and joint venture liability."). Along the same lines, Massachusetts law, both at the time of Mr. Capelton's prior

offenses and currently, does not require a jury to be unanimous as to whether a defendant is a principal or an accomplice. *See Commonwealth v. Santos*, 440 Mass. 281, 290, 797 N.E.2d 1191, 1189 (2003) ("We have also rejected the argument that the jury must be unanimous as to whether guilt is based on liability as a principal or as a joint venturer." (citing cases)), *abrogated on other grounds by Commonwealth v. Anderson*, 461 Mass. 616, 633, 963 N.E.2d 704, 718 (2012). As a result, joint venture liability is indivisible from the drug offenses Mr. Capelton was convicted of committing.

To determine whether Mr. Capelton's prior Massachusetts convictions qualify as predicates for the career offender guideline, a court begins with U.S.S.G. §4B1.1,[5] which states:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

A "controlled substance offense" predicate is defined by U.S.S.G. §4B1.2(b):

> (b) 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.

[5] The applicable definitions are quoted from the 1998 sentencing guidelines in effect at the time of the offense conduct. The same definitions remain in place today.

Significantly, Application Note 1 to the guideline states that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. §4B1.1, §4B1.2, comment. (n.1). By virtue of the application note, aiding and abetting a "controlled substance offense" is encompassed by the definition of that term. *See United States v. Benítez-Beltrán*, 892 F.3d 462, 467 n.4 (1st Cir. 2018).

Focusing on the aiding and abetting aspect of the offense, generic "aiding and abetting" requires a shared intent with the principal; knowledge alone does not meet the definition. *See Franklin*, 904 F.3d at 799 ("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." (internal quotation marks, alternations, and citation omitted)). This distinction is well-established under federal law. *See, e.g.*, *United States v. Rosalez*, 711 F.3d 1194, 1205 (10th Cir. 2013) (for an aiding and abetting conviction under 18 U.S.C. §2, "[t]here must be some showing of intent to further the criminal venture. Mere presence at a crime scene or knowledge alone that a crime is being committed is insufficient." (internal citations and quotation marks omitted)); *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1149-50 (1st Cir. 1995) ("Mere association with the principal, or mere presence at the scene of a crime, even when combined with knowledge that a crime will be committed, is not sufficient to establish aiding and abetting liability."); *Snyder v. United States*,

448 F.2d 716, 718 (8th Cir. 1971) ("Mere association between the principal and those accused of aiding and abetting is not sufficient to establish guilt; nor is mere presence at the scene and knowledge that a crime was to be committed sufficient to establish aiding and abetting." (internal citations omitted)).

The central inquiry, therefore, is whether the "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[.]" *Franklin*, 904 F.3d at 797 (internal quotation marks and citation omitted). If so, "there is no categorical match." *Id.*

Mr. Capelton's conviction for possession of a Class B substance with intent to distribute[6] and distribution of a Class B substance[7] implicitly included joint venture

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[6] Any person who knowingly or intentionally manufactures, distributes, dispenses or possesses with intent to manufacture, distribute, or dispense a controlled substance in Class B of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment.

M.G.L. ch. 94C, § 32A(a).

[7] Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense a controlled substance as defined by section thirty-one of this chapter under this or any other prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than three nor more than ten years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of three years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

liability. At the time of these offenses, a defendant could be convicted under a theory of joint venture where he was:

> (1) present at the scene of the crime,
> (2) with knowledge that another intends to commit the crime *or* with intent to commit a crime, and
> (3) by agreement is willing and available to help the other if necessary.

Commonwealth v. Bianco, 388 Mass. 358, 366, 446 N.E.2d 1041, 1047 (1983) (emphasis added), *abrogated on other grounds by Commonwealth v. Rodriguez*, 467 Mass. 461, 486, 931 N.E.2d 20, 42 (2010).

In 2009, the Massachusetts Supreme Judicial Court recognized that the articulation of the elements of joint venture liability in *Bianco* was flawed and a source of confusion. The SJC stated it would "now adopt the language of aiding and abetting rather than joint venture for use in trials that commence after the issuance of the rescript in this case." *Zanetti*, 454 Mass. at 467, 910 N.E.2d at 883. This shift newly required courts to:

> (1) instruct the jury that the defendant is guilty if the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, alone or with others, *with the intent required for that offense*;
>
> (2) continue to permit the trial judge to furnish the jury with a general verdict even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice; and
>
> (3) on conviction, examine whether the evidence is sufficient to permit a rational juror to conclude beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, *with the intent required* to commit the crime.

Id. at 466-67, 910 N.E.2d at 883 (emphasis added).

M.G.L. ch. 94C, § 32A(b).

Massachusetts joint venture liability at the time of Mr. Capelton's offenses was broader than generic aiding and abetting, and therefore, the offenses do not fit the definition of a "controlled substance offense." The Commonwealth could prove the *mens rea* element of joint venture by proving that the defendant had "knowledge that another intend[ed] to commit the crime." *Bianco*, 388 Mass. at 366, 446 N.E.2d at 1047. Generic aiding and abetting, by contrast, requires the defendant to have specific "intent to promote or facilitate the commission of the crime." *Franklin*, 904 F.3d at 799. Because knowledge requires less proof of a lesser degree of culpability than shared intent, Mr. Capelton's prior convictions are overbroad.

Knowledge and intent are separate concepts. This is evident in the *Bianco* definition of joint venture liability, which list the elements as distinct from one another:

> (2) with knowledge that another intends to commit the crime *or* with intent to commit a crime

Bianco, 388 Mass. at 363, 446 N.E.2d at 1047 (emphasis supplied).

Massachusetts law at the time recognized that knowledge required less than intent in the context of inchoate offenses. *See, e.g.*, *Commonwealth v. Camerano*, 42 Mass. App. Ct. 363, 366, 677 N.E.2d 678, 681 (1997) ("Intent is a requisite mental state for conspiracy, not *mere* knowledge or acquiescence." (emphasis supplied; citing cases)), *denying review*, 425 Mass. 1101, 680 N.E.2d 101 (1997).

Federal law lays out the same distinction. A defendant has specific intent "if he consciously desires that result . . . while he is said to act knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire

may be as to that result." *United States v. Bailey*, 444 U.S. 394, 404 (1980); *see also United States v. Davis*, 717 F.3d 28, 31 (1st Cir. 2013) (affirming jury instruction: "One has to show even more than simple knowledge that somebody else was going to commit a crime. . . . For you to find the defendant guilty under an aiding and abetting theory, you would have to find that he intended that a false return be filed[.]").

Therefore, comparing the elements of Massachusetts joint venture liability with generic aiding and abetting, it is evident that the state had a more inclusive *mens rea* requirement when Mr. Capelton was convicted of the two drug offenses at issue. Because the Massachusetts offenses were broader than the generic definition, they cannot be considered "controlled substance offense" predicates under U.S.S.G. §4B1.2.

B. The Courts of Appeal Are Divided on the Proper Application of the "Reasonable Probability" Test, and the First Circuit Followed the Minority View in Mr. Capelton's Case.

The Ninth Circuit applied this analysis correctly in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), and in *Franklin*. In both cases, the court considered convictions based on the Washington drug trafficking statute, Wash. Rev. Code §69.50.401, which implicitly included aiding and abetting. Under the Washington aiding and abetting statute in effect at the time of conviction:

> A person is an accomplice . . . in the commission of a crime if . . . [w]ith *knowledge* that it will promote or facilitate the commission of a 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.

Wash. Rev. Code. §9A.08.020(3)(a)(i)-(ii) (1997) (emphasis added). Comparing the knowledge elements with the shared intent requirement of generic aiding and abetting, the Ninth Circuit concluded that "[u]nder a straightforward application of the categorical approach, Washington's drug trafficking statute is overbroad compared to its federal analogue[.]" *Valdivia-Flores*, 876 F.3d at 1209; *see also Franklin*, 904 F.3d at 803 ("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.").

Significantly, in both cases, the Ninth Circuit's analysis ended there. The comparison of knowledge and shared intent was sufficient to conclude that Washington aiding and abetting is overbroad; there was no need to apply the reasonable probability standard. The First Circuit's approach is therefore in conflict with the Ninth Circuit's because instead of a straightforward comparison of the elements of joint venture with generic aiding and abetting, it speculated about the type of conduct that could realistically fall within the two standards.

There is a circuit split on the question of correct application of the realistic probability standard that calls for this Court's intervention. The majority of circuits agree that where the elements speak for themselves, it is unnecessary and improper to evaluate "realistic probability." *See, e.g.*, *Cabeda v. Attorney Gen. of the United States*, 971 F.3d 165, 176 (3d Cir. 2020) ("once we conclude that the textual breadth of a statute is more expansive than the federal generic crime because the mens rea elements are different, a petitioner need not show that there is a realistic chance that

the statute will actually be applied in an overly broad manner."); *United States v. Cantu*, 964 F.3d 924, 935-36 (10th Cir. 2020) (compared to the Fifth Circuit, "*this* court does not apply the realistic-probability test when the statute on its face proscribes the relevant conduct."); *Williams v. Barr*, 960 F.3d 68, 70 (2d Cir. 2020) ("the realistic probability test has no bearing here, where the text of the state statute gives it a broader reach than the federal definition."); *Gordon v. Barr*, 965 F.3d 252, 261 (4th Cir. 2020) ("we conclude that the *Moncrieffe* dictum does not require a petitioner to 'find a case' in which the state successfully prosecuted a defendant for the overbroad conduct when, as here, the language of a statute unambiguously is broader than the federal offense under comparison."); *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (realistic probability standard inapplicable "when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition").

The Fifth Circuit, however, has determined that "without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc), *cert denied*, 138 S. Ct. 501 (2017). The First Circuit applied this minority view of the reasonable probability standard to Mr. Capelton's case, despite previously adopting the majority view:

> [T]hat sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to a case like this. The state crime at issue clearly does not apply more broadly than the federally defined offense. Nothing in

> *Duenas-Alvarez*, therefore, indicates that this state law crime may be treated as if it is narrower than it plainly is. Nor are we aware of any circuit court case, whether from this circuit or from any other, that supports the BIA's surprising view that, in applying the categorical approach, state law crimes should not be given their plain meaning.

Swaby v. Yates, 847 F.3d 62, 66 (1st Cir. 2017) (citing cases).

In Mr. Capelton's case, the First Circuit did exactly what it had previously admonished against – in applying the categorical approach, it went beyond the plain meaning of the state law offense, as made plain by the *Bianco* definition. The First Circuit's rejection of Mr. Capelton's argument, on reasoning inconsistent with most courts of appeal and its own precedent, calls for this Court's guidance.

C. The First Circuit Ignored Post-*Bianco*, Pre-*Zanetti* Cases that Show that Shared Intent Was Not a Requirement for a Joint Venture Conviction.

The First Circuit assumed without deciding that joint venture was indivisible from Mr. Capelton's substantive offenses, that generic aiding and abetting requires shared intent, and that a knowledge *mens rea* does not meet that higher standard. Pet.App. 13-14. Despite the clear disparity between knowledge and shared intent, the First Circuit applied the reasonable probability standard. In doing so, it failed to recognize, despite case law to showing the contrary, that a Massachusetts joint venture conviction did not require proof of shared intent.

The court focused on "the series of cases decided between *Bianco* and *Zanetti*" that in its view, "tend to support the Government's position that the Commonwealth had to prove shared intent in the wake of *Bianco*. *See* Pet.App. 21-22 (citing cases). In addition to delving into case law where the elements of joint venture were facially overbroad, the flaw in the court's analysis is that it did not grapple with any of the

nuance that Mr. Capelton presented, namely, that some of the cited cases did not state that shared intent is an element of joint venture.

Several of the cited cases upheld jury instructions relying on the bifurcated *mens rea* element of *Bianco*, or applied that element in weighing the sufficiency of the evidence. While the First Circuit cited language from these cases that suggest an acknowledgment of shared intent in *dicta*, *see* Pet.App. 21-22, the stated *elements* rested on the option of shared intent or knowledge. Because the "minimum conduct" criminalized by the law on joint venture was still knowledge, there was a "realistic probability" that one could be convicted of joint venture without sharing the intent of the principal – the courts were not requiring shared intent, but instead stating that knowledge would be sufficient. *See Commonwealth v. Clemente*, 452 Mass. 295, 333, 893 N.E.2d 19, 50-51 (2008) (jury instructions relying on *Bianco* elements "adequately set forth the Commonwealth's burden regarding intent because it required that the Commonwealth prove that Damian *knew of the assailant or assailants' criminal intentions*, and that by agreement he was willing and available to help the assailant or assailants, if necessary." (emphasis added)); *Commonwealth v. Brooks*, 422 Mass. 574, 576, 664 N.E.2d 801, 804 (1996) ("there must be evidence that the defendant was: '(1) present . . . (2) with knowledge that another intends to commit the crime *or* with intent to commit a crime" (citing, *inter alia*, *Bianco*, 388 Mass. at 366, 466 N.E.2d at 1047; emphasis added)); *Commonwealth v. Cunningham*, 405 Mass. 646, 659, 543 N.E.2d 12, 15 (1989) ("The intent requirement is whether each defendant was present at the scene of the crime and was acting 'with knowledge that another intends to

commit the crime *or* with intent to commit a crime.'" (quoting *Bianco*, 388 Mass. at 366, 466 N.E.2d at 1047; emphasis added)). While the SJC replaced the "or" with "and" in *Commonwealth v. Hernandez*, 439 Mass. 688, 694, 790 N.E.2d 1083, 1087 (2003), suggesting that shared intent was required, the other cases cited above demonstrate that one could be convicted absent that showing and demonstrate the courts' confusion before *Zanetti*'s clarification of the law.

The First Circuit cited out of context *Commonwealth v. Blake*, 428 Mass. 57, 63-65, 696 N.E.2d 929, 933-34 (1998), which held that the evidence sufficiently demonstrated the defendant "shared" his co-defendant's intent. Pet.App. 22. The court failed to recognize that the premise of the defendant's appeal was "there was insufficient evidence that he knew of *or* shared [his co-defendant's] intent to kill or grievously to injure the victims." *Blake*, 429 Mass. at 63, 696 N.E.2d at 934. Finding sufficient evidence of the higher *mens rea*, the court did not discuss whether the lesser *mens rea* would have sufficed.

The First Circuit also misapplied the law surrounding joint venture in murder cases, which expressly included shared intent as an *additional* element. For example, it cited *Commonwealth v. Semedo*, 422 Mass. 716, 720, 665 N.E.2d 638, 641 (1996), which focused on the heightened mental state necessary to support a finding of malice aforethought for a murder conviction. The court isolated the following statement from the case: joint venture requires proof "that the defendant shared with the principal the mental state required for the crime of murder." Pet.App. 20 (citing *Semedo*, 422 Mass. at 719, 665 N.E.2d at 641). The full quotation undercuts the court's suggestion:

> To sustain a conviction of murder in the first degree by joint venture, the Commonwealth must prove beyond a reasonable doubt that the defendant was present at the scene of the crime, with knowledge that another intended to commit a crime, and by agreement was willing and available to help the other if necessary. *Additionally*, the Commonwealth must show that the defendant shared with the principal the mental state required for the crime of murder.

Semedo, 422 Mass. at 719, 665 N.E.2d at 641 (emphasis added); *see also Commonwealth v. Cannon*, 449 Mass. 462, 468, 869 N.E.2d 594, 600 (2007).

The language from *Semedo* mirrors that found in *Zanetti*, which itself was a murder case. After the *Zanetti* court set forth the requirements for joint venture, stating knowledge and intent in the disjunctive,[8] it added:

> The Commonwealth *also* needed to prove the defendant shared the mental state or intent for deliberately premeditated murder, which is malice, and in particular, an intent to kill. *In addition*, the Commonwealth needed to prove deliberate premeditation, "that the defendant's decision to kill was the product of 'cool reflection.'"

Zanetti, 454 Mass. at 455, 910 N.E.2d at 875 (citations omitted; emphasis added).

The court's conclusion that *Bianco* itself did not require shared intent relies on *dicta*. *See* Pet.App. 18. The *Bianco* court primarily focused on the absence of evidence of causation to support manslaughter convictions. *See Bianco*, 388 Mass. at 363-64, 446 N.E.2d at 1045. The court cited the *Bianco* court's statement that, had the prosecution sought to affirm those convictions on a theory not presented at trial or on appeal, "there was insufficient evidence that [the defendants] shared the mental state

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[8] *Zanetti* cited *Commonwealth v. Green*, 420 Mass. 771, 779, 652 N.E.2d 572, 578 (1995), quoting *Commonwealth v. Longo*, 402 Mass. 482, 486, 524 N.E.2d 67, 70 (1988), for this formulation. *Longo*, in turn, cited *Bianco.*

required of joint venturers[.]" *Id.* at 364, 446 N.E.2d at 1045.[9] *See* Pet.App. 18. But it ignored the affirmance of joint venture assault and battery convictions based on "the presence of each defendant at the scene of the crime, his knowledge of what was taking place, and his willingness to participate." *Id.* at 367, 446 N.E.2d at 1047.

The First Circuit's error in stating there was no "realistic probability" that one could be convicted without a finding of shared intent does not comport with the cases it cites – many of which rested on the bifurcated *mens rea* element of *Bianco*.

D. The Massachusetts Supreme Judicial Court's Decision to Abandon the "Confusi[ng]" Elements of Joint Venture Underscores that There Was a "Realistic Probability" that One Could Be Convicted Absent a Finding of Shared Intent.

In *Zanetti*, the SJC recognized that the *Bianco* definition had been "a source of confusion to jurors and judges":

> The *Bianco* decision's formulation of the joint venture test has become the standard definition of joint venture, recited repeatedly in appellate decisions and also in jury instructions used by many trial judges. This standard definition of joint venture liability has proven to be a source of confusion to jurors and judges.

Zanetti, 454 Mass. at 463, 910 N.E.2d at 880-81. As a result, the court issued model jury instructions that clearly and specifically included an element of shared intent:

> The Commonwealth must also prove beyond a reasonable doubt that, at the time the defendant knowingly participated in the commission of the crime charged [identify the crime charged if needed to avoid confusion], he [she] had or shared the intent required for that crime.

Id. at 470, 910 N.E.2d at 885.

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[9] In addition to being *dicta*, the discussion does not define the "mental state required for joint venture." Presumably, it is the mental state in *Bianco*'s three-part joint venture definition – a *mens rea* of knowledge *or* intent.

The elements of joint venture as listed in *Bianco*, which became the oft-applied standard during the period Mr. Capelton was convicted, do not list shared intent as a requirement separate from knowledge – the *mens rea* requirement was satisfied by proof of either:

> (2) with knowledge that another intends to commit the crime *or* with intent to commit a crime

Bianco, 388 Mass. at 363, 446 N.E.2d at 1047 (emphasis supplied). Had the *Bianco* standard clearly expressed a shared intent requirement, there would have been no need for the SJC to adopt streamlined jury instructions in *Zanetti*. If mere knowledge of another's intent to commit a crime, along with a willingness to assist that person, were equivalent to shared intent, there would have been no reason for the *Bianco* court to also include "with intent to commit a crime" in the second element.

The First Circuit's flawed conclusion that Massachusetts courts did require proof of shared intent at the time of Mr. Capelton's convictions is not supported by the law and calls for this Court's review.

E. The First Circuit's Conclusion that a Knowledge *Mens Rea* Does Not Contradict a Specific Intent Requirement Conflicts with Other Circuits' Analyses of Similar State Provisions.

As discussed in Section B, *supra*, the Ninth Circuit determined that where the Washington aiding and abetting statute required only a knowledge *mens rea* for conviction, it did not meet the generic standard, which requires specific intent. *See Valdivia-Flores*, 876 F.3d at 1209; *Franklin*, 904 F.3d at 803. The Fifth and Sixth Circuits have made similar determination regarding analogous legal provisions in Louisiana and Michigan. By deciding that Massachusetts joint venture was sufficient

to meet the generic standard, despite knowledge facially being the only requirement, the First Circuit split from these other circuits.

In *Robertson v. Cain*, 324 F.3d 297 (5th Cir. 2003), the petitioner and his two co-defendants had been convicted as principals of first degree murder in Louisiana state court. Under Louisiana law, the prosecution had to prove that each defendant had a specific intent to kill. *Id.* at 303. The court found that the trial court failed to articulate this standard where it instructed the jury as follows:

> All persons *knowing* the unlawful intent of the person committing the crime who are present and consented to thereto in aiding and abetting either by furnishing the weapons of the attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense to secure the safety or the concealment of the offender, are principals and are equal offenders and are subject to the same punishment.

Id. at 303 (emphasis added). The Fifth Circuit concluded that "the jury instruction relieved the state of the burden of proving [the defendant's] specific intent to kill." *Id.*

The same rationale applies to Mr. Capelton's case. Where the *Bianco* elements allowed for conviction on the basis of knowledge alone, Massachusetts joint venture did not require specific intent.

More similarly, in *Parham v. Warren*, 490 F. App'x 686 (6th Cir. 2012), the Sixth Circuit considered Michigan Supreme Court's three-part test for aiding and abetting liability:

> (1) The crime charged was committed by the defendant or some other person;
> (2) The defendant performed acts or gave encouragement that assisted the commission of the crime; and
> (3) The defendant intended the commission of the crime *or had knowledge that the principal intended its commission* at the time that the defendant gave aid and encouragement.

Id. at 690 (emphasis partially supplied; quoting *People v. Moore*, 470 Mich. 56, 68, 679 N.W.2d 41, 49 (2004)). The defendant argued that Michigan courts had not held that a knowledge *mens rea* was sufficient to convict for first-degree murder. *Id.* at 691. In his murder trial, however, the trial court instructed on the *mens rea* requirement, "intent to kill was premeditated; that is, thought out beforehand," and the elements of aiding and abetting, stating "the Defendant must have intended the commission of the crime alleged <u>or</u> *must have known that the other person intended its commission at the time of giving the assistance.*" *Id.* at 688 (emphasis partially added). The magistrate judge determined that "Michigan's aiding and abetting instruction was unconstitutional when applied to specific-intent crimes because an instruction allowing the jury to convict [the defendant] upon finding intent *or* knowledge 'is incompatible with the mental state needed to prove first degree premeditated murder,' which is only intent." *Id.* at 691. The Sixth Circuit recognized the "troubling nature of this issue," but determined that the conflict need not be resolved because other portions of the jury instruction provided a sufficient explanation of the "intent" *mens rea*. *Id.*

The First Circuit was presented with a nearly identical question: Can a bifurcated *mens rea* element, which states that knowledge is sufficient, amount to a requirement for specific intent? The answer to that question is no, as the magistrate judge recognized, and to which the Sixth Circuit offered some support. The First Circuit's analysis interprets away the word "or" in the second *Bianco* element. The

Sixth Circuit was correct to recognize its plain meaning, and that it made the difference between the existence and non-existence of a specific intent requirement.

Because the First Circuit's analysis of Massachusetts joint venture law deviated from the approach of the Fifth, Sixth, and Ninth Circuits, this Court should grant certiorari to resolve this conflict among the circuits.

CONCLUSION

For the foregoing reasons, Mr. Capelton asks the Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, determine that the court below erred in affirming the denial of his request for a finding that he is not a career offender, and remand the case for further proceedings.

Respectfully Submitted,

Samia Hossain

Federal Public Defender Office
51 Sleeper Street, 5th Floor
Boston, MA 02210
(617) 223-8061

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