No. 20-6415

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

LARRY ANTONIO BURLEIGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully Submitted,

/s/ Larry An Burleigh

Larry Antonio Burleigh
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QUESTION PRESENTED

Whether Petitioner is entitled to a certificate of appealability to appeal the denial of his motion to vacate his firearm convictions and mandatory sentences under 28 U.S.C. §2255, when this Court's intervening precedent establishes that Petitioner's convictions and sentences were arguably imposed in violation of the Due Process Clause, such that jurists of reason could disagree with the lower courts resolution of this constitutional claim or debate whether the petition should have been resolved in a different manner.

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BRIEF FOR PETITIONER

PETITION FOR WRIT OF CERTIORARI

Petitioner Larry Antonio Burleigh, proceeding pro-se, petitions this Honorable Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, and remand for further proceedings because the lower court erred in denying his request for a COA.

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I. OPINION BELOW

After initially granting Petitioner Burleigh permission to file a second and succesive collateral challenge to his two convictions and sentences under §924(c), the Fourth Circuit Court of Appeal issued a subsequent unpublished opinion on May 18, 2020, affirming the district court's order denying Burleigh's §2255 and declining to issue him a COA. See United States v. Burleigh, 805 Fed. Appx. 214 (4th Cir. 2020), Appendix (App.) A. The prior opinions in Petitioner's case are set forth below as reported by the lower courts and are attached to this petition as part of the Appendix.

II. JURISDICTION

The judgement of the court of appeals denying Burleigh's motion for a COA was entered in an unpublished opinion on May 18, 2020. While usually a petition for writ of certiorari must be filed within 90 days of that date, due to Covid-19 this Court has extended the filing deadline up to 150 days. See March 19, 2020 (SCOTUS order list: 589 U.S.) Submitted on or before October 15, 2020, this petition is timely filed with the Court. Jurisdiction to review the judgement of the court of appeals is conferred upon this Court by 28 U.S.C. §1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner Berleigh refers the Court to the following constitutional and statutory provisions:

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb: nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

18 U.S.C. §2 Definition of aiding and abetting.

The federal aiding and abetting statute, 18 U.S.C. §2 provides that (a) "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, punishable as a principal," or (b) "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. §2119(1) Definition of carjacking.

The federal carjacking statute provides that "[w]hoever, with the intent to cause death or serious bodily injury takes a motor vehicle that has been transported, shipped, or received in interstate commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so shall...be fined under this title or imprisoned not more than 15 years or both."

18 U.S.C. §924(c) Definition of §924(c).

The federal criminal statute, 18 U.S.C. §924(c), prohibits "us[ing] or carr[ying]" a firearm "during and in relation to any crime of violence or drug trafficking crime."

(c)(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 to 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.

IV. STATEMENT OF THE CASE

In 2011, Burleigh pleaded guilty to one count of aiding and abetting carjacking in violation of 18 U.S.C. §§2119 and 2, and two counts of aiding and abetting possession of a firearm in violation of 18 U.S.C. §§2 and 924(c). Based on the district court's determination that aiding and abetting an arguble crime of violence (COV), is itself a COV within the meaning of the force clause under §924(c)(3)(A), Burleigh was sentenced to consecutive mandatory minimum terms of 120 months in prison on the first of these §924(c)'s and 300 months imprisonment on the second §924(c). The Fourth Circuit Appeals affirmed. See United States v. Burleigh, 467 Fed. App'x 163 (4th Cir. 2012).

In 2013, Burleigh filed a motion to vacate set aside or correct his sentences under 28 U.S.C. §2255(a). The district court denied the motion and declined to issue Burleigh a certificate of appealability. The court of appeals affirmed that judgement. See United States v. Burleigh, 610 Fed. App'x 272 (4th Cir. 2015).

In 2016, Burleigh sought and received permission from the court of appeals to file a successive collateral challenge to his §924(c) convictions under 28 U.S.C. §2255(h)(2), based on Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)(Johnson II). See Appendix D.

Burleigh then filed another motion to vacate, set aside or correct his sentences under §2255(f)(3) to the district court. There, Burleigh pointedly argued that in the light of Johnson II his firearm convictions and sentences violate the Due Process Clause because aiding and abetting a crime of violence (COV) only ever qualified a COV under the now-invalid residual clause of §924(c). The district court denied the motion and a COA, holding it was untimely and without merit. See Appendix C.

Undaunted, Burleigh filed a motion to reconsider his §2255 under Rule 59(e). In the interim, this Court determined that Johnson II applied with equal force to the residual clause of §924(c)(3)(B). Still, the district court denied the motion for reconsideration, affirming its initial judgment that his claim is without merit but discontinuing any contention concerning timeliness. See Appendix B. As relevant here, Burleigh then sought for a certificate of appealability from the court of appeals. The Fourth Circuit denied his COA application, holding that jurist of reason could not dispute the district court's ruling that Burleigh's predicate offense is a crime of violence, because an aider and abettor is guilty as a principal and necessarily commits all of the elements of the completed substantive offense. See Appendix A.

V. STATEMENT OF THE FACTS

1. Offense Conduct.

After a long night of drinking and taking street drugs, in the wee hours of December 3, 2010, several masked assailants one of whom possessed a short barreled shotgun, carjacked a victim and robbed him of the proceeds from several subsequent ATM withdrawals. Shortly thereafter, Burleigh and a confederate were spotted and arrested while joy-riding in the stolen vehicle.

On February 22, 2011, a federal grand jury in the Eastern District of Virginia returned a multi-count indictment which, as relevant here, charged Burleigh and a co-defendant with the following: Count 3, aiding and abetting carjacking in violation of 18 U.S.C. §§2119 and 2; Count 4, aiding and abetting possession of a short-barreled shotgun in furtherance of a crime of violence (to wit; the COV charged in Count 3) in violation of 18 U.S.C. §§924(c) and 2; Count 5, aiding and abetting Hobbs Act robbery in violation of 18 U.S.C. §§1951(a) and 2; Count 6, aiding and abetting possession of a short-barrelled shotgun in furtherance of a crime of violence (to wit; the COV charged in Count 5) in violation of 18 U.S.C. §§924(c) and 2. See 3:11-cr-00049-HEH-2 (Dkt. No. 21)

2. Guilty Plea & Sentencing.

On March 22, 2011, Burleigh pleaded guilty to aiding and abetting Counts 3, 4, and 6. Pursuant to the written plea agreement the Government agreed to dismiss any other remaining charges, including Count 5, which was the predicate Hobbs Act robbery Count 6. During the change of plea colloquy, the district court did not elaborate on the meaning of aiding and abetting a crime of violence such as carjacking, but clearly accepted Burleigh's plea on that basis. As stated by senior Judge Henry E. Hudson, "I find that your competent and capable of entering a plea of guilty, and I'll therefore accept your plea of guilty, and find you guilty of carjacking as contained in Count 3; of possession of a firearm in furtherance of the crime of carjacking as contained in Count 4; and possession of a firearm in furtherance of the crime of robbery as contained in Count 6." Dkt. No.32, at 23 (Change of Plea Hearing).

On June 20, 2011, the district court sentenced Burleigh to 125 months on Count 3. Then, after determining that aiding and abetting carjacking

is a crime of violence the court sentenced Burleigh to mandatory minimum sentences of 120 months on Count 4, and 300 months on Count 6, with all three sentences to be served consecutively. Dkt. No.46. Burleigh filed a timely notice of appeal. Dkt. No.48. On direct appeal, Burleigh argued that his guilty plea was insufficient to support his convictions and sentences. On February 23, 2012, the court of appeals affirmed denying his appeal on procedural grounds. Dkt. No.70.

3. Collateral Review Proceedings.

A. Initial §2255

On February 13, 2013, Burleigh filed his initial motion to vacate, set aside or correct his sentence under §28 U.S.C. §§2255 (Dkt. No.76). Shortly thereafter the Supreme Court held that facts triggering a mandatory minimum sentence are "elements" of the crime that must be submitted to the jury or admitted by the defendant. See Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Recognizing its import, Burleigh filed a supplemental motion arguing that because he did not admit to possessing a short barrel shotgun or that his firearm offenses were second and subsequent within the meaning of §924(c), his mandatory minimum sentences violated the Sixth Amendment as interpreted in Alleyne. Dkt. No.80. The district court denied Burleigh's §2255 without reaching the merits of his Alleyne claim, and also denied him a COA. Dkt. No.97. On September 1, 2015, the Court of appeals affirmed that conclusion. United states v. Burleigh, 613 Fed. App'x 272 (4th Cir. 2015).

B. Subsequent §2255 in Controversy.

As relevant here, on June 26, 2015, as his initial §2255 worked its way through the lower courts, this Court issued its landmark decision in

Johnson v. United States, 135 S. Ct. 2551 (2015)(Johnson II). Based on Johnson II, in May 2016, Burleigh petitioned the court of appeal for permission to file a second and successive collateral challenge to his §924(c) convictions and sentences under 28 U.S.C. §2255(h)(2), which the Fourth Circuit granted. USCA No. 16-9278; See Appendix D. On June 27, 2016, Burleigh filed a motion under §2255(f)(3) to the district court. There, Petitioner argued that his firearm convictions and sentences were imposed in derogation of the Due Process Clause, because aiding and abetting carjacking only qualified as crime of violence under the now-invalid residual clause of §924(c)(3)(B). Dkt. No. 113.

On August 1, 2016, the Governement filed a motion to dismiss Burleigh's §2255, on the grounds that it was untimely because this Court had not yet extended Johnson II to §924(c). Dkt. No.117. After responding to the Governement's motion in opposition, Burleigh's case was informally placed in abeyance (i.e. without a court order) as a number of Fourth Circuit and Supreme Court cases were considered and decided. See e.g. Sessions v. Dimaya, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018); United States V. Simms, 914 F.3d 229 (4th Cir. 2019)

Inspite of those rulings, on April 15, 2019, the district court denied Burleigh's §2255. United States v. Burleigh, 2019 U.S. Dist. LEXIS 64549 (E. D. Va. Apr. 15, 2019). See Appendix C. There, the court held that (1) until the Supreme Court extends Johnson II to the residual clause of §924(c), "Burleigh's §2255 is untimely," (Id. at p.5), and (2) was "without merit" because contrary to his contention "Burleigh is punishable as a principal for his offense and he is fully liable for these complete offenses." Id. at p.8, n.7 (citing In Re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016)(Holding "conviction for aiding a Hobbs Act robbery qualifies as a 'crime of violence' under the §924(c)(3)(A) use-of-force clause.").

Burleigh then filed a timely motion to reconsider his §2255(f)(3) under Rule 59(e). Dkt.No.125. While that motion was pending this Court held that in the light of Johnson II the residual clause of §924(c)(3)(B) was unconstitutionally vague. See United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). On October 16, 2019, the district court denied the motion for reconsideration again holding that "Burleigh's claim lacked merit", but no longer contending his §2255 was untimely. United States v. Burleigh, 2019 U.S. Dist. LEXIS 179689 (E. D. Va. Oct. 16, 2019). See Appendix B. On December 15, 2019, Burleigh filed a timely notice of appeal. Dkt. No.133.

On January 15, 2020, Burleigh filed a motion seeking issuance of a COA from the court of appeals. There, he pointedly argued that the district court's merits ruling is debatable because as noted by this Court "'[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense.'" Rosemond v. United States, 572 U.S. 65, 73, 134 S. Ct. 1240, L. Ed. 2d 248 (2014). If so, then contrary to the district court's conclusion, under 18 U.S.C. §2 Burleigh can be convicted of aiding and abetting carjacking without proof he commited every element of the completed offense. Without seeking the Government's viewpoint on that issue, the court of appeals decline to issue Burleigh a COA after deciding a jurist of reason could not debate the correctness of the district court's merits ruling. United States v. Burleigh, 805 Fed App'x 214 (4th Cir. 2020). See Appendix A.

VI. SUMMARY ARGUMENT FOR GRANTING THE WRIT

Petitioner Burleigh, respectfully submits that the court of appeals erred in declining to issue a COA on his Johnson-related claim because the district court's merits ruling is debatable to a jurists of reason

and therefore meets the standard for obtaining a COA. As discussed below, the district court's merits ruling is incorrect and thus debatable for two critical reasons.

First, context is important. That is, the way in which the court arrives at a particular conclusion. Here, the district court's conclusion that an **aider and abettor is guilty as a principal** erroneously conflates the question of liability with the requisite categorical analysis, the latter of which limits the court inquiry to the statutory elements of the offense as opposed to Burleigh's actual conduct concerning guilt. Second, because the inchoate (i.e. incomplete) nature of 18 U.S.C. §2 permits the government to convict Burleigh of carjacking without proof that he committed each element of §2119, it is demonstrably incorrect to hold (as the district court did here) that being punishable as a principal renders Petitioner "fully liable for those completed offenses" Dkt. No.124, at p.8 (Judgement denying Burleigh's §2255). Because a jurists of reason could debate that Burleigh's motion should have been resolved in a different manner, this Court should grant the petition for certiorari, vacate the court of appeals judgement, and remand the case for further proceedings consistent with the position expressed in this brief.

VII. ARGUMENTS AMPLIFYING REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN DENYING BURLEIGH A COA BASED ON THIS COURT'S INTERVENING DECISION IN JOHNSON II BECAUSE AIDING AND ABETTING CARJACKING IS AN INCHOATE CRIME THAT ONLY EVER QUALIFIED AS A CRIME OF VIOLENCE WITHIN THE MEANING OF THE RESIDUAL CLAUSE UNDER §924(c)(3)(B).

A. Standard for Obtaining a COA.

A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. See 28 U.S.C. 2253-

(c)(1)(B). To obtain such a certificate such a certificate, the prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). That standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1545, 146 L. Ed. 2d 542 (2000). Obtaining a certificate of appealability "does not require showing that the appeal would succeed," and a court of appeals should not decline the application... merely because it believes the applicant will not demonstrate an entitlement to relief." Miller-El v. Cockrell, 537 U.S. 322, 337, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

The decision under review here is a panel's order in which the court of appeals denied Burleigh a certificate of appealability. Under the standard described above, that order determined not only that Burleigh had failed to show any entitlement to relief but also that reasonable jurists would consider that conclusion to be beyond all debate. See Slack, 529 U.S. at 484. The narrow question here is whether the court of appeals erred in making that determination. That narrow question, however, implicates a broader legal issue: Whether aiding and abetting carjacking is a crime of violence within the meaning of the force clause under §924(c)-(3)(A). If not, then a reasonable jurists could at least debate whether Burleigh was entitled to a COA because after Johnson II this inchoate compound crime no longer qualifies as a categorical crime of violence within the meaning of §924(c).

B. Burleigh's Claim Meets The Standard for a COA.

The inchoate crime of aiding and abetting carjacking is not a categorical crime of violence because it does not contain an element requir-

ing proof of force. In Davis, this Court determined that Johnson II applied with equal force to the residual clause of §924(c)(3)(B), which it struck as "unconstitutionally vague." 139 S. Ct. at 2236. In doing so, the Court reaffirmed its use of the "categorical approach" and rejected the government's proffered "case specific" method "that would look to the 'defendant's actual conduct' in the predicate offense" Ibid. Post-Davis, for an offense to qualify as a "crime of violence", it must satisfy §924(c)'s elements or force clause using the categorical approach, meaning the least-serious way of committing the charged offense, viewed in the abstract and not as actually committed, must have "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). Critically, this definition requires "as an element" the attempted or threatened use of physical force, not the attempt or intent to commit the crime itself.

1. The Categorical Approach.

To determine whether aiding and abetting carjacking is a "crime of violence" under §924(c)'s force clause, the Court must apply the "framework known as the categorical approach", which "assesses whether a crime is a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occassion." Johnson II, 135 S. Ct. at 2557 (quoting Begay v. United States, 553 U.S. 137, 141, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008)). Under the categorical approach, a court "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts criminalized, and then determined whether even those acts," Moncrieffe v. Holder, 569 U.S. 184, 191, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013)(quoting Johnson v. United States, 559 U.S. 133, S. Ct. 1265, 176 L.Ed. 2d 1 (2010)

(Johnson I), qualify as a predicate offense under the relevant sentencing enhancement statute.

The sentencing enhancement at issue here is of course §924(c), which criminalizes using or carrying a firearm in relation to a "crime of violence" and imposes mandatory minimum sentences that must run consecutive to any other sentence. In the absence of the now-stricken residual clause, for an offense to qualify as a "crime of violence", it must fit into the force clause of §924(c), meaning it must have "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).

Here, the felony offense to which the Court must apply the categorical approach is aiding and abetting carjacking under 18 U.S.C. §§2119 and 2, as charged in the indictment. The Federal Carjacking Statute provides that

> [W]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or recieved in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so shall...be fined under this title or imprisoned not more than 15 years or both.

18 U.S.C. §2119(1). But application of the categorical approach is complicated in this case for two critical reasons. First, the offense charged, aiding and abetting carjacking is an inchoate offense, which by definition means **incomplete**. To determine whether an inchoate offense qualifies as a crime of violence under §924(c)'s force clause, "two sets elements are at issue: the elements of [the inchoate crime] and the elements of the underlying...offense". United States v. Dinkins, 928 F.3d 349, 358 (4th Cir. 2019)(considering whether the common law inchoate offense of accessory before the fact of armed robbery qualified as a violent felony under ACCA's force clause). See also James v. United States,

550 U.S. 192, 202-03, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007)(noting the inchoate nature of the Florida's attempted burglary statute required analysis of the elements concerning both attempts "overt act" requirement and also those defining the substantive offense, such that the "pivotal question...is whether overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein, is 'conduct that presents a serious potential risk of physical injury to another[,]' 18 U.S.C. §924(e)(2)(B)(ii)"), overruled on other grounds, Johnson II.

The second complication stems from the highly fact bound nature of the federal aiding and abetting statute itself, which rests in significant part on the theory of accomplice liability. As noted above, the federal aiding and abetting statute provides that

> Whoever "aids, abets, counsels, commands, induces or procures" the commission of a federal offense "is punishable as a principal."

18 U.S.C. §2. The elements of aiding and abetting a federal offense are relatively straightforword: a person is liable under Section 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission. See 2 W. Lafave, Substantive Criminal Law §13.2, p.337 (2003)(an accomplice is liable as a principal when he gives "assistance or encouragement...with the intent thereby to promote or facilitate commission of the crime"), Hicks v. United States, 150 U.S. 442, 449, 14 S. Ct. 144, 37 L. Ed. 1137 (1893)(an accomplice is liable when his acts of assistance are done "with the intention of encouraging and abetting " the crime).

Importantly, neither of those statutory concerns--either an affirmative act or intent--require as an element the use, attempted use, or threaten-

ed use of physical force within the meaning of §924(c)(3)(A). With respect to the affirmative act, a person's involement in the crime could be not only partial but also minimal. Today, as at common law "the quantity [of assistance was] immaterial," so long as the accomplice did "something" to aid the crime. R. Desty, A Compendium of American Criminal Law §37a, p.106 (1882). As to the second element of Section 2, intent, which is often refered to as a defendant's mens rea, is a well known concept in the context of criminal law that simply means a state of mind. And because a defendant's state of mind is ultimately intangible the intent element of aiding and abetting can be satisfied without the use of any force or physical force at all; indeed, in the context of a defendant's state of mind, the use of force is an impossibility.

Without belaboring this point, the plain language of 18 U.S.C. §2 shows that aiding and abetting carjacking can be committed by an affirmative act of providing an accomplice with words of encouragement and/or instructions intended to facilitate the taking of a motor vehicle, which does not involve the use, attempted use, or threatened use of physical force. In proscribing aiding and abetting, Congress used language that "comprehends all assistance rendered by words, acts, encouragement, support, or presence," Reves v. Ernst & Young, 507 U.S. 170, 178, 113 S. Ct. 1163, 122 L.Ed. 2d 525 (1993)-even if that aid relates to only one (or some) of a crime's phases or elements. See e.g. Rice v. Paladin, 128 F.3d 233, 242 (4th Cir. 1997)(holding that defendant was guilty of aiding and abetting based on its marketing of a publication "intended to attract and assist criminals and would-be criminal who desire information and instructions on how to commit crimes.")

Therefore, because aiding and abetting carjacking can be committed by providing an accomplice with words of encouragement or instructions

intended to facilitate the commission of some part of the substantive crime, the minimal conduct necessary to commit this inchoate crime does not qualify as a predicate offense within the meaning of §924(c)(3)(A).

C. The Court Of Appeals Contrary Conclusion Is Debatable Amongst Reasonable Jurists.

In denying Burleigh a COA, the Fourth Circuit necessarily held that a jurist of reason could not dispute that the district court's merits ruling was correct. The Court of Appeals parsimonious decision was based solely on its conclusion, rooted in the District court's factfinding, that aiding and abetting carjacking is a "crime of violence" because under 18 U.S.C. §2, "Burleigh is punishable as a principal for his offenses and he is fully liable for these completed offenses." Dkt. No.124 (citing In Re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016)(concluding "conviction for aiding and abetting a Hobbs Act robbery qualifies as a 'crime of violence' under the §924(c)(3)(A) use-of-force clause"). See also United States v. Garcia-Ortiz, 904 F.3d 102 (1st Cir. 2018), United States v. Deiter, 890 F.3d 1203 (10th Cir. 2018).

The district court in this case, as well as the First & Tenth Circuit adopted the reasoning set forth in In Re Colon. In that case, the Eleventh Circuit reasoned as follows:

> Because 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 robbery "has an element the use, attempted use , threatened use of physical force against the person or property of another,"...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."

In Re Colon, 826 F.3d at 1305. Where the In Re Colon panel went wrong was in concluding that when the substantive offense qualifies as a crime of violence under §924(c)'s force clause, merely aiding and abetting that offense is also a COV. It is beyond debate that an aider and abettor may be punished in the same fashion as the principal. But that, however, is not the appropiate lens through which to consider whether **aiding and abeting** carjacking (or any COV for that matter) may qualify as a predicate crime of violence under §924(c)'s force clause. Instead, this Court has made clear that under the categorical approach a court is to focus solely on the elements of the crime of conviction to determine if such crime has as an element the use, attempted use, or threatened use of physical force against the person or property of another. See Mathis v. United States, 136 S. Ct. 2243, 195 L. Ed 2d 604 (2016).

Contrary to the lower court conclusion, for an individual charged with aiding and abetting under 18 U.S.C. §2, the Government need not prove, let alone allege, that the defendant committed each or all of the elements of the underlying offense. Rather, the Government need only prove that defendant: "counsels, commands, induces or procures" the commission of a federal offense. Rosemond, 572 U.S. 65, 70 ("§2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete it commission,").

In accordance with Section 2 as interpreted by this Court's precedents, it is clear that a defendant may be found guilty of aiding and abetting without having personally carried out the underlying crime. Indeed, in this case Burleigh's guilty plea was accepted without stipulation that he personally committed the crime or merely became involved in this offense after the carjacking and/or robberies had already occur-

red. Thus, accepting his guilty plea at face value it cannot be categorically true that his admission to aiding and abetting the substantive offense "has as an element the use, attempted use, or threatened use of of physical force against the person or property of another[.]". §924(c)-(3)(A).

Rather than focusing on the elements of the charged offense (i.e. aiding and abetting carjacking), the Fourth Circuit's denial of Burleigh's application for a COA essentially conflates the elements of Section 2 with its concomitant punishment provision by collasping the distinction between acts constituting the underlying offense and acts constituting aiding and abetting that offense...and then leaps to the untenable conclusion that as an aider and abettor of this carjacking Burleigh "[i]s fully liable for th[is] completed offens[e]." Dkt. No.124, at 7.(the district court's denial of Burleigh's §2255). The Fourth Circuit's reasoning in this regard squarely contradicts this Court's verticle precedent in Rosemond, which noted that almost every court of appeal 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." Id. at 73 (citing United States v. Sigalow, 812 F.3d 783, 785 (2nd Cir. 1987).

Similarly, the Fourth Circuit holds that "to be convicted of aiding and abetting, 'participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result.'" United States v. Arrington, 719 F.2d 701, 705 (4th Cir. 1983)(quoting United States v. Hathaway, 534 F.3d 386, 399 (1st Cir.). Therein lies the primary fault of Fourth's Circuit's reasoning, whose conclusion that aiding and abetting carjacking categorically constitutes a crime of violence within the meaning of the force clause fails to consider and/or faithfully apply the categorical approach.

Indeed, as the dissent emphasized in In Re Colon, "I am aware of no precedent deciding the question of whether aiding and abetting a crime meets the "element clause" definition." In Re Colon, 826 F.3d 1301, 1306 (11th Cir. 2016)(J. Martin, dissenting). The dissent went on to note that:

> "[t]he definition requires a crime that 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). As best I can tell...a defendant can be convicted aiding and abetting a robbery without ever using, attempting to use, or threatening to use force.[] :
>
> 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 [defendant's] contribution in his case involved force, this use of force was not necessarily an element of the crime, as is 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 73 ("As almost every court of appeals has held, that a defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense.

Id. at 1306-07 (J. Martin, dissenting). The dissent goes on to make the point that if Johnson II does apply to apply to invalidate the residual clause of §924(c), "it is at least unclear [i.e., debatable] whether aiding and abetting a robbery 'has an element the use, attempted use, or threatened use of physical force.'" Id. at 1307.

To date, each of the circuit courts (including the Fourth Circuit) to have considered the issue of whether aiding and abetting a crime of violence categorically constitutes a COV, have done so based solely on an analysis of accomplice liability. However, because the theory of accomplice liability focus on culpability/guilt (i.e., what the defendant

has done to deserve blame) rather than on the elements essential to conviction, the analysis undertaken by the lower courts rests on a material fallacy that impermissibly allows for the consideration of conduct related facts beyond the scope of the inquiry mandated by the categorical approach. So while undoubtedly true, that under the theory of accomplice liability an aider and abettor is guilty as the principal of the underlying offense, it is not true, that to be convicted of this inchoate crime the Government was required to prove that the aider and abettor actually committed each element of the completed offense.

Even if the court of appeals is ultimately right, that because an aider and abettor is guilty as a principal Burleigh's liability for this completed offense is a crime of violence because the underlying offense of substantive carjacking is itself a COV...that ruling is arguable enough, that a "reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." Slack, 529 U.S. at 337.

For all these reasons, the district court's decision was certainly "debatable". The court of appeals' resolution of this case in an unreasoned order denying a COA compounded the error. Under the standard for a COA, this case should have gone to a merits panel of the Fourth Circuit for a closer review. Unless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down turning the circumscribed COA standard of review into a rubber stamp, especially for pro-se litigants. This Court has periodically had to remind the lower not to unduly restrict the pathway to appellate review, See e.g., Tharpe v. Sellers, 583 U.S. ____, 138 S. Ct. 545, 199 L. Ed. 2d 424 (2018), Buck, 542 U.S. 274, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004), and it should do so here.

VIII. CONCLUSION

Petitioner Burleigh respectfully submits that the court of appeals erred in declining to issue him a COA to allow him to appeal his Johnson claim that these mandatory minimum sentences were imposed in error. Accordingly, this Court should grant the petition, vacate the court of appeals' judgement, and remand the case for further proceedings consistent with the position expressed in this brief. Alternatively, Burleigh ask the Court to grant the petition for certiorari to resolve whether a conviction for an inchoate crime is itself a crime of violence within the meaning of §924(c)(3)(A).

Executed on this 15th day of October 2020. Respectfully Submitted

/s/ Larry Burleigh

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IX. CERTIFICATE OF SERVICE

I, Larry Antonio Burleigh, HEREBY CERTIFY, that a true and correct copy of the foregoing instrument has been mailed postage prepaid on this 15th day of October 2020, to the Office of Solicitor General at the Department of Justice, Washington, D.C. 20530-0001

/s/ Larry An Burleigh

Larry Antonio Burleigh