No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

YURI CHACHANKO and CHUOI DICH SAM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Question Presented

Whether the Defendants' convictions for violating 18 U.S.C. § 924(c)(1)(A) must be vacated because Hobbs Act robbery based on an aiding and abetting theory of liability is not a qualifying predicate crime of violence.

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The Petitioners, Yuri Chachanko and Chuoi Dich Sam, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The District Court's orders denying Petitioners' 28 U.S.C. § 2255 motions are unpublished. They are reproduced in the Appendix. (App., *infra*, 1a-18a, 1b-18b). The Court of Appeals' unpublished order affirming the District Court's order is also reproduced in the appendix. (App., *infra*, 1c-4c).

Jurisdiction

The Ninth Circuit's order affirming the denial of Petitioners' 28 U.S.C. § 2255 motions was filed on March 15, 2022. (App., *infra*, 1c-4c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 924(c)(1)(A)(ii) of Title 18 of the United States Code provides, in pertinent part:

> . . . any person who, during and in relation to a crime of violence or drug trafficking crime . . . 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 . . . if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years . . .

The term "crime of violence is defined at 18 U.S.C. § 924(c)(3) as any felony that:

> (A) has as an element, the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) 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.

The aiding and abetting statute, 18 U.S.C. § 2, provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle.
>
> (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 principle.

Statement

1. In July of 2004, Petitioners robbed the Winner's Circle Bar and Casino in Billings, Montana, and the New Atlas Bar in Columbus, Montana. During both robberies, the men used firearms and zip ties to subdue the patrons and employees of the bars.

2. After they were arrested, Petitioners were charged in a nine count Indictment with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 (count one), Hobbs Act robbery in connection with the robbery of the Winner's Circle Bar in violation of 18 U.S.C. §§ 1951 and 2 (count two), use of a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c)(1) (count three), possession of a stolen firearm in violation of 18 U.S.C. § 922(j) (counts four and five), and felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (counts six through nine).

3. Petitioners eventually pled guilty to counts one, two, and three of the Indictment. In pleading guilty to count two, Petitioners acknowledged that they "forcibly took money from the Winner's Circle at gunpoint or did aid and abet the same, in violation of Title 18 U.S.C. §§ 1951 and 2." In pleading guilty to count three, they admitted that "during and in relation to a crime of violence . . . to wit, a violation of 18 U.S.C. § 1951 as charged in count two of [the] Indictment, [they] knowingly used and carried a firearm . . . or did aid and abet the same, all in violation of Title 18 U.S.C. §§ 924(c)(1) and 2."

4. The district court sentenced Petitioner Chachanko to a concurrent term of 135 months imprisonment on counts one and two, and 84 months on count three, with the term of imprisonment to run consecutively with the sentence imposed on counts one and two, for a total net sentence of 219 months. Following release from imprisonment, Chachanko was ordered to

serve five years of supervised release. Chachanko appealed his sentences. On April 18, 2007, the Ninth Circuit issued an unpublished memorandum opinion affirming the district court's judgment. *United States v. Chachanko*, 2007 WL 1182478 (9th Cir. 2007)(unpublished).

5. The district court sentenced Petitioner Sam to a concurrent term of 137 months imprisonment on counts one and two, and 84 months on count three, with the term of imprisonment to run consecutively with the sentence imposed on counts one and two, for a total net sentence of 221 months. Following release from imprisonment, Sam was ordered to serve five years of supervised release. Sam appealed his sentences, but the Ninth Circuit affirmed in an unpublished memorandum opinion. *United States v. Sam*, 2007 WL 1182478 (9th Cir. 2007).

6. The Petitioners filed 28 U.S.C. § 2255 motions in June of 2016. In their motions, they argued that they were entitled to relief because, in light of *Johnson v. United States*, 576 U.S. 591 (2015), and *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), aff'd, *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (2018), their predicate offenses could no longer qualify as a "crime of violence" under § 924(c)(3). As a result, their convictions and sentences under 18 U.S.C. §924(c) were illegal and unconstitutional. After ordering the Government to file a response, the district court denied the Defendants' motions. In doing so, it determined that the offense of Hobbs Act robbery categorically qualifies as a crime of violence under § 924(c)(3)(A)'s force clause – a provision unaffected by the decisions in *Johnson* and *Dimaya*.

7. Petitioners filed a timely appeal, and the Ninth Circuit granted a certificate of appealability with respect to the following issue: whether Petitioners' convictions for violating 18 U.S.C. § 924(c) must be vacated because Hobbs Act robbery based on an aiding and abetting theory of liability is not a qualifying predicate crime of violence.

8. Following briefing, the Ninth Circuit affirmed the district court's order denying Petitioners' § 2255 motions. In doing so, it held:

> Defendants-appellants' contention that aiding and abetting Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3)(A) is foreclosed by our precedent. *See Young v. United States*, 22 F.4th 1115, 1122-23 (9th Cir. 2022)(explaining that there is "no distinction between aiding-and-abetting liability and liability as a principle under federal law[,]" and holding that "aiding and abetting a crime of violence, such as armed bank robbery, is also a crime of violence"). Because Hobbs Act robbery is a crime of violence, *see United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020), and aiding and abetting a crime of violence is also a crime of violence, *see Young*, 22 F.4th at 1122-23, we affirm the district courts' denials of defendant-appellants' § 2255 motions.

(App., *infra*, 1b-4b).

Reasons for Granting the Writ

Following its decisions in *Johnson* and *Dimaya,* this Court ruled, in *United States v. Davis,* 139 S.Ct. (2017), that the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. Thus, in order to qualify as a crime of violence that can support a conviction under § 924(c), the government must prove that the offense necessarily involved the use, attempted use or threatened use of physical force. Contrary to the Ninth Circuit's decision, aiding and abetting Hobbs Act robbery does not necessarily require the use of force. A person can be found guilty of aiding and abetting a robbery if he merely encourages or assists the principal by, for example, lending him some equipment or giving him a ride. Therefore, aiding and abetting Hobbs Act robbery does not, as a categorical matter, require the use of force.

The Petitioners were convicted of using a firearm in violation of 18 U.S.C. § 924(c). In both cases, the predicate supporting their § 924(c) convictions was aiding and abetting Hobbs Act robbery. Because aiding and abetting a robbery does not necessarily require the use of force, the

Petitioners' § 924(c) convictions should be vacated. This Court should grant certiorari and reverse the Ninth Circuit's order denying Petitioners' 28 U.S.C. § 2255 motions.

Whether the Defendants' convictions for violating 18 U.S.C. § 924(c)(1)(A) must be vacated because Hobbs Act robbery based on an aiding and abetting theory of liability is not a qualifying predicate crime of violence.

18 U.S.C. § 924(c)(1)(A) provides for a separate, consecutive sentence if any person uses or carries a firearm "during and in relation to" or possesses a firearm "in furtherance of" a crime of violence. Section 924(c)(3) defines the term "crime of violence" as a felony that:

> (A) has as an element, the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) 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.

See, 18 U.S.C. § 924(c)(3).

Courts often refer to the first clause of § 924(c)(3) as the "force" or "elements" clause and to the second clause as the "residual clause." In *United States v. Davis*, ___ U.S. ___, 139 S.Ct. 1626 (2017), this Court invalidated § 924(c)(3)(B)'s residual clause as unconstitutionally vague because it exposed defendants to long prison sentences without providing a "reliable way to determine which offenses qualify as crimes of violence." *Davis*, 139 S.Ct. at 2324. *Davis* vacated a § 924(c) conviction that was based on a conspiracy to commit Hobbs Act robbery. *Id.* at 2336.

In light of *Davis*, the offense of aiding and abetting Hobbs Act robbery can only qualify as a crime of violence if it necessarily involves the use, attempted use, or threatened use of physical force as required by § 924(c)(3)'s force clause. In order to determine whether an offense qualifies as a crime of violence under § 924(c)(3)'s force clause, courts must apply the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990). The categorical approach requires courts

to "look to the elements of the offense rather than the particular facts underlying the defendant's own [case]." In identifying the elements of a statute, courts consider the language of the statute and judicial opinions interpreting it. *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 853 (9th Cir. 2013).

Because the categorical approach is concerned only with what conduct the offense necessarily involves, a court "must presume that the [offense] rest[s] upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder,* 569 U.S. 184, 190-91 (2013). If the elements of the offense "criminalize a broader swath of conduct" than the conduct covered by the generic federal definition, the offense cannot qualify as a crime of violence, even if the particular facts underlying the defendant's own case might satisfy that definition. "[E]ven the least egregious conduct the statute [of conviction] covers must qualify." *United States v. Gonzales-Aparicio*, 663 F.3d 419, 425 (9th Cir. 2011).

To qualify as a crime of violence under § 924(c)(3)(A)'s force clause, an offense must require proof, as a necessary element, that the defendant used, attempted to use, or threatened to use physical force. *Johnson(Curtis) v. United States,* 559 U.S. 133 (2010). Force, in this context, refers to "violent force – that is, force capable of causing physical pain or injury to another person." *Id.* at 140.

The question in this case is whether aiding and abetting Hobbs Act robbery can support a conviction under § 924(c) for using a firearm in furtherance of a crime of violence. The Hobbs Act provides as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any

> person or property in furtherance of a plan or purpose to do anything in violation of this section shall [be fined or imprisoned].

See, 18 U.S.C. § 1951(a).

The term robbery is defined at 18 U.S.C. § 1951(b)(1) as:

> [T]he unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

The aiding and abetting statute provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle.
>
> (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 principle.

See, 18 U.S.C. § 2.

Taking these statutes together, a conviction for aiding and abetting Hobbs Act robbery requires proof of the following: (1) that someone other than the defendant committed Hobbs Act robbery; (2) that the defendant aided, counseled, commanded, induced or procured that person with respect to at least one element of Hobbs Act robbery; (3) that the defendant acted with the intent to facilitate Hobbs Act robbery; and (4) that the defendant acted before the crime was completed. *See*, Ninth Circuit Pattern Jury Instruction 5.1 (2021).

To prove aiding and abetting under 18 U.S.C. § 2, the prosecution only needs to prove that the defendant committed an act in furtherance of the offense with the intent to facilitate its commission. *United States v. Rosemond*, 572 U.S. 65, 72 (2014). "The quantity [of assistance is] immaterial," so long as the accomplice did "something" to aid the crime." *Rosemond*, 572 U.S. at 73 (citing, A Compendium of American Criminal Law § 37(a), p. 106 (1882) (emphasis added).

And, as the *Rosemond* court noted, "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." Section 2 uses language that "comprehends all assistance rendered by words, acts, encouragement, support or presence." *Id.* Thus, it is 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 principle somewhere.

In re Colon, 826 F.3d 1301, 1306 (11th Cir. 2016)(Martin, J. dissenting).

Force, in short, is not a necessary element of 18 U.S.C. § 2. Because the Government does not have to prove that a defendant used, threatened, or attempted to use force against the person or property of another, aiding and abetting Hobbs Act robbery cannot qualify as a crime of violence under §924(c)(3)(A)'s force clause.

The Ninth Circuit has determined that Hobbs Act robbery is a crime of violence for purposes of § 924(c)(3)(A). *United States v. Dominguez*, 954 F.3d 1251, (9th Cir. 2020). More recently – and contrary to the analysis above -- it has opined that aiding and abetting bank robbery meets § 924(c)(3)(A)'s definition of crime of violence. *United States v. Henry*, 984 F.3d 1343, 1355-56 (9th Cir. 2021). In coming to this conclusion, the *Henry* court joined the First, Third, Sixth, Tenth, and Eleventh Circuits, which have all held that aiding and abetting Hobbs Act robbery is a crime of violence.[1] *Id.* at 1356. In coming to this conclusion, these courts relied upon

[1] *See*, *United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *United States v. McKelvey*, 773 F. App'x 74, 75 (3rd Cir. 2019); *United States v. Richardson*, 948 F.3d 733, 742 (6th Cir. 2020); *United States v. Deiter*, 890 F.3d 1203 (10th Cir. 2018); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016).

the legal theory that one who aids and abets a crime is punishable as a principal. As the Eleventh Circuit explained in *Colon*:

> 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 Act robbery "has as an element the use, attempted use, or 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."

Colon, 826 F.3d at 1305 (citation omitted)(quoting § 924(c)(3)(A)).

In *Henry*, the Ninth Circuit adopted this analysis in full, holding that "[d]efendants found guilty of armed bank robbery under either a *Pinkerton*[2] or aiding-and-abetting theory are treated as if they committed the offense as principals."

The problem with the analysis of *Henry* and the cases upon which it relies is that it conflicts with the categorical approach demanded by *Taylor* and its progeny. The rationale employed by these cases conflicts with the categorical approach because it substitutes the elements-based inquiry required to find a crime of violence under § 924(c)(3)(A) with a conceptually distinct conclusion that an aider or abettor is *punishable* for the acts of a principal as a matter of law.

To say that an aider/abettor is *punishable* as a principal is not commensurate with the elements based test articulated in *Taylor*. *See*, *Mathis v. United States*, 136 S.Ct. 2243, 2248-49 (2016)(explaining how to identify the elements of a prior conviction). An aider/abettor may, as a legal matter, be vicariously liable for the violent acts of the principal. But there is nothing in the law that requires proof that he participated in his principal's violent activity.

[2] *Pinkerton v. United States*, 328 U.S. 640 (1946)

"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." *Rosemond*, 572 U.S. at 73. Indeed, if the elements of aiding and abetting were identical to the principal offense, no one would need to be charged as an aider and abettor. In short, it does not inevitably follow, from the fact that an aider/abettor is punished as a principal, that aiding and abetting a crime of violence always, and categorically, has the elements that satisfy § 924(c)(3)(A)'s force clause. *Mathis*, 136 S.Ct. at 2248-49; *see also, Shepard v. United States*, 544 U.S. 13 (2005).

Conclusion

The Petitioners, Yuri Chachanko and Chuoi Dich Sam, respectfully request that this Court grant this petition for certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

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