No. 20-

IN THE

SUPREME COURT OF THE UNITED STATES

PHILLIP SHIEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

*W*hether aiding and abetting a Hobbs Act robbery is a "crime of violence" under the elements clause, 18 U.S.C. § 924(c)(3)(A), following this Court's decision in *United States v. Taylor*, which established that an attempted Hobbs Act robbery fails to align with it. Relatedly, whether the categorical approach for determining whether an offense meets the elemental requirements of § 924(c)(3)(A) should be applied to aiding-and-abetting offenses.

RELATED PROCEEDINGS

1. United States District Court (Nev.):

United States v. Trayvale Harrison, 2:18-cr-00144-JAD-EJY (closed)

United States v. Randall Burge, 2:18-cr-00144-JAD-EJY (closed)

United States v. Ianthe Rowland, 2:18-cr-00144-JAD-EJY (closed)

United States v. Shantae Williams, 2:18-cr-00144-JAD-EJY (pending trial)

2. United States Court of Appeals (9th Cir.):

None.

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Phillip Shiel respectfully petitions for a writ of certiorari to examine whether aiding and abetting a Hobbs Act robbery is categorically a crime of violence under 18 U.S.C. § 924(c)(3)(A).

OPINIONS BELOW

The Ninth Circuit's Opinion, Appendix A, is a final order.

JURISDICTION

The Ninth Circuit entered its final order on March 30, 2022. No petition for rehearing or rehearing en banc was requested. This Court has jurisdiction under 28 U.S.C. § 1254(1). This Petition is timely filed. Supreme Court Rule 13.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924 provides in pertinent part:

*** * * * ***

(c)(1)(A) Except to the extent that a greater min-imum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

*** * * * ***

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 1951 provides in pertinent part:

(a) 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 at-tempts 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 under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the 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.

*** * * * ***

18 U.S.C. § 2(a) provides:

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

28 U.S.C. § 2253(c)(2) provides, in pertinent part:

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

Other pertinent statutory provisions are reproduced in the appendix to this brief.

STATEMENT

This case poses a question of important, constitutional significance: whether aiding and abetting a Hobbs Act robbery, in violation of 18 U.S.C. § § 1951 and 2, fails to squarely fall within the elements of 18 U.S.C. § 924(c)(3)(A). If so, the enhanced, consecutive punishment stacked onto the substantive robbery conviction by § 924(c)(3)(A) is prohibited by the Fifth Amendment of the United States Constitution. The Ninth Circuit was wrong to hold that Mr. Shiel failed to raise and demonstrate a constitutional violation. Mr. Shiel's 924(c)(1)(A) conviction must be vacated.

Phillip Shiel sought an order granting him a certificate of appealability (COA). (*United States v. Shiel*, No. 21-15519, Dk. 9).[1] He asserted his conviction

[1] "ECF No. __" refers to the electronically docketed filing in 2:18-cr-00144-JAD-EJY. Similarly, any reference to electronic filings with the Ninth Circuit Court of Appeals in Case No. 21-15519 are referenced by "DKEntry __."

under 18 U.S.C. § 924(c)(1)(A) was unconstitutional because the predicate act of aiding and abetting Hobbs Act robbery is not a qualifying crime of violence under § 924(c)(3)(A), in that it encompasses nonviolent conduct.[2] As such, the elements of §§ 1951 and 2, of which he was convicted, do not align with the elements of § 924(c)(3)(A) as they must under the categorical analysis long established by this Court to satisfy Due Process. All lower courts have held that aiding and abetting a robbery qualifies as a crime of violence, many of which shunned a categorical approach and instead applied the same analysis that had been used for determining that an attempted offense qualified as a crime of violence. [3] As this Court's decision in *United States v. Taylor*, No. 20-1459, 596 U.S. ___(2022), makes clear, these courts have gotten it wrong. The categorical approach is the proper inquiry to apply

[2] Mr. Shiel challenged under separate theories that Hobbs Act robbery and aiding and abetting Hobbs Act robbery, both failing to qualify as crimes of violence. However, he was charged and convicted in the conjunctive, so his conviction was thus predicated on aiding and abetting Hobbs Act robbery. Here, he submits that aiding and abetting Hobbs Act robbery renders his conviction fatal after *Taylor*, as explained *infra*.

[3] *United States v. Major*, No. 17-16764, 2022 WL 1714290, at *1 (9th Cir. May 27, 2022); *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 principal under federal law[,]" and holding that "aiding and abetting a crime of violence, such as armed bank robbery, is also a crime of violence"); *United States v. Henry*, 984 F.3d 1343, 1355-56 (9th Cir. 2021) (rejecting argument that § 924(c) conviction was invalid if predicate offense was based on Pinkerton liability); *see also United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018) (finding, with no categorical analysis, that aiding and abetting Hobbs Act robbery is a § 924(c) crime of violence because aiders and abettors are punishable as principals), *cert. denied*, 139 S. Ct. 1208 (2019); *United States v. McCoy*, 995 F.3d 32, 57-8 (2d Cir. 2021) (same); *United States v. McKelvey*, 773 F. App'x 74, 75 (3d Cir. 2019) (same); *United States v. Ali*, 991 F.3d 561, 573-74 (4th Cir. 2021) (same); *United States v. Richardson*, 948 F.3d 733, 741–42 (6th Cir. 2020) (same), *cert. denied*, 141 S. Ct. 344 (2020); *United States v. Brown*, 973 F.3d 667, 697 (7th Cir. 2020) (same*), cert. denied*, 141 S. Ct. 1253 (2021); *Kidd v. United States*, 929 F.3d 578, 581 (8th Cir. 2019) (same), *cert. denied*, 140 S. Ct. 894 (2020); *United States v. Deiter*, 890 F.3d 1203, 1214-16 (10th Cir. 2018) (finding aiding and abetting bank robbery qualifies as an ACCA violent felony because the defendant must intend to commit the underlying offense, declining to apply categorical analysis to aiding and abetting's elements), *cert. denied*, 139 S. Ct. 647 (2018); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (denying application for successor motion to vacate, noting aiding and abetting Hobbs Act robbery is a § 924(c) crime of violence without applying categorical analysis).

to an aiding-and-abetting offense, just as it is the proper inquiry for an attempted offense. Like an attempted Hobbs Act robbery, courts must examine the elements of §§ 1951 and 2 categorically. In *Taylor*, this Court held that attempted Hobbs Act robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A). The reason: in applying the required categorical approach, courts examine whether the crime requires the government to prove beyond a reasonable doubt the use, attempted use, or threatened use of force. *Taylor*, 596 U.S. at ____(slip op. at 3). For an attempt, the "intention" to see the crime accomplished does nothing more than just that – intend for it to be accomplished. *Id*.

Aiding, abetting, or counseling the crime befalls the same result. The forbidden conduct does not require a defendant to commit the crime; rather, to aid, abet or counsel it by taking an affirmative act in furtherance of that offense and with the intent of facilitating its commission. *Rosemond v. United States*, 572 U.S. 65, 73 (2014). This is not "use, attempted use or threatened use." And certainly, while the agitator or cheerleader or helper may be punished for the underlying Hobbs Act robbery offense as the principal, it invites not the enhancement of a mandatory consecutive sentence under § 924(c) because, by its elements, aiding and abetting fails to establish that a defendant did anything more than facilitate the underlying offense, not participate in every element of the offense. "The elements clause does not ask whether the defendant committed a crime of violence or attempted to commit one. It asks whether the defendant *did* commit a crime of violence." *Taylor* at 7. (emphasis in original).

The categorical analysis is appropriate, notwithstanding the rule that an aider and abettor is generally punishable as a principal. 18 U.S.C. § 2 cannot be so overreaching as to allow aider and abettors to be treated as principals for purposes of determining whether the offense was a qualified predicate offense under § 924(c).

Or, put differently, an aider and abettor cannot be sentenced under 924(c) receive a heightened punishment when the aider and abettor did not engage in physical force as required by statute, but only participated, in some undefined way, in furthering the crime and wishing it accomplished.

This Petition thus presents compelling reasons to grant it. *See* Supreme Court Rule 10.

PROCEEDINGS BELOW

On September 8, 2017, a complaint was filed against Mr. Shiel, charging him and others with a string of armed robberies. (ECF No. 1). Mr. Shiel, then 24 years old, had his Initial Appearance on September 11, 2017, at which time he was remanded to custody. (ECF. No. 6). A federal grand jury returned an eleven-count indictment on May 8, 2018 (ECF No.51). The indictment charged Mr. Shiel in seven of the counts: conspiracy to interfere with commerce by robbery, in violation of 18 U.S.C. § 1951 (Count 1); interference with commerce by robbery and aiding and abetting, in violation of 18 U.S.C. §§ 1951 and 2 (Counts 2, 4, 6 and 8); brandishing a firearm and aiding and abetting, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2 (Counts 5, 7 and 9); and attempted interference with commerce

by robbery and aiding and abetting, in violation of 18 U.S.C. § 1951 and 2 (Count 10). (ECF No. 51).

Mr. Shiel pled guilty to Counts 1, 4, 6 and 7 on April 16, 2019. (ECF No. 134). Count 6, interference with commerce (Hobbs Robbery) and aiding and abetting, and Count 7, brandishing a firearm in furtherance of Count 6, concerned conduct arising from a robbery on August 14, 2017. (ECF No. 51 at 4). The other counts to which Mr. Shiel pleaded guilty were not yoked with a brandishing count, as were Counts 6 and 7. The Plea Agreement specifically referenced aiding and abetting conduct in Count 6. (ECF 135 at 2, 4 "(or knowingly aided and abetted the same)"). In the factual basis of the Plea Agreement, the reference to all of the conduct was limited to the conduct of "conspirators," in robbing the Garda armor truck company [sic], with no other conduct specific as to Mr. Shiel. (*Id*. at 6). As a part of his plea agreement, Mr. Shiel waived his right to appeal. (ECF 135 at 3).

On July 23, 2019, the district court sentenced Mr. Shiel to 54 months for counts of concurrent imprisonment on Counts 1, 4, and 6, and a mandatory consecutive sentence of 84 months imprisonment on Count 7, for a total of 138 months. (ECF No. 158, Appendix (App.) 12-20). The district court imposed a period of three years supervised release on Counts 1, 4, and 6, and five years on Count 7, to run concurrently for a total term of five years. (ECF No. 158). Mr. Shiel did not file a direct appeal of his conviction and sentence, which would have been due on August 6, 2019.

On February 3, 2020, Mr. Shiel, filed (pro se) a Motion for Sentence Reduction Pursuant to *United States. v. Davis*, 139 S.Ct. 2319 (2019). ECF No. 194. The Supreme Court had decided *Davis* on June 24, 2019. This Court nullified the residual clause of § 924(c) as unconstitutionally vague, in violation of the Due Process Clause. Mr. Shiel petitioned for relief from his 18 U.S.C. § 924(c) conviction and sentence pursuant to 28 U.S.C. § 2255 because, after *Davis*, he argued that neither Hobbs Robbery under 18 U.S.C. § 1951 nor aiding and abetting it are qualifying crimes of violence under the remaining clause, the elements or force clause of § 924(c), because the conduct reaches that which is not "violent," as defined in § 924(c)(3)(A).

The district court rejected Mr. Shiel's arguments in a written order on January 22, 2021. (ECF No. 276, App. 2-11). The court further denied Mr. Shiel a certificate of appealability. Id. The court held that it was bound by this Court's decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), which held that *attempted* Hobbs Act Robbery is a crime of violence under the force or elements clause, 18 U.S.C. § 924(c)(3)(A), just like the substantive offense of 18 U.S.C. § 1951. The district court further found that Mr. Shiel procedurally defaulted his claim for relief because *Davis* had been decided a month before his sentencing, and there was "abundant" caselaw in the circuit that should have put him on notice that he should preserve the issue. (ECF No. 276 at 3 – 6). Therefore, he could not show cause to excuse his default or prejudice. (*Id.*). The district court rejected Mr. Shiel's jurisdictional defect argument, which would have circumvented procedural default

review, holding that *United States v. Chavez-Diaz*, 949 F.3d 1202, 1208 (9th Cir. 2020), foreclosed it. (ECF No. 276 at 4). There was no dispute by the government that *Davis* is retroactive under *Teague v. Lane*, 489 U.S. 288 (1989), so the district court assumed it. (See ECF No. 276 at 2 n10). Furthermore, the district court found that Mr. Shiel had not waived his right to request relief under *Davis* because a plea agreement cannot be used to enforce an illegal sentence. (See ECF No. 276 at 3, citing *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016).

Mr. Shiel timely filed his notice of appeal on March 23, 2021, within 60 days of the district court's January 22, 2021, judgment denying relief. See Fed. R. App. P. 4(a)(1)(B). In an unpublished, one-page order, the Ninth Circuit denied his request, finding that his underlying 28 U.S.C. § 2255 motion "failed to state any federal constitutional claims debatable among jurists of reason." Appendix A.

REASONS FOR GRANTING THE PETITION

A. Aiding and Abetting a Hobbs robbery fails to align with the elements for a crime of violence under 18 U.S.C. § 924(c)(3)(A).

Under § 924(c)(3), "crime of violence" is defined as a felony "(A) ha[ving] as an element the use, attempted use, or threatened use of physical force against another," (known as the force clause or the elements clause), 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" (known as the residual clause). The Supreme Court in *Davis* held that § 924(c)(3)(B), the residual clause, was unconstitutionally vague. 588 U.S. at __,139 S.Ct. at 2325-

2336. The underlying crime therefore must satisfy the elements clause—and aiding and abetting a Hobbs Act robbery does not.

Aiding and abetting requires two elements: "a person is liable under 2 if (and only if) he (1) takes and affirmative act in furtherance of that offense, (2) with the intent of facilitating the offenses commission." *Rosemond*, 134 S.Ct. at 1245.[4] These elements, of course, are remarkably similar to the elements that this Court found insufficient to satisfy 924(c)(3)(A) in *Taylor* (to convict for attempted Hobbs Act

[4] The Ninth Circuit model instructions, after the *Rosemond* decision, provide:

4.1 Aiding and Abetting (18 U.S.C. § 2(a))

A defendant may be found guilty of [specify crime charged], even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To "aid and abet" means intentionally to help someone else commit a crime. To prove a defendant guilty of [specify crime charged] by aiding and abetting, the government must prove each of the following beyond a reasonable doubt:

First, someone else committed [specify crime charged];

Second, the defendant aided, counseled, commanded, induced, or procured that person with respect to at least one element of [specify crime charged];

Third, the defendant acted with the intent to facilitate [specify crime charged]; and

Fourth, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit [specify crime charged].

A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime [and having acquired that knowledge when the defendant still had a realistic opportunity to withdraw from the crime].

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

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robbery, the government must prove that the defendant intended to complete the offense and the defendant completed a "substantial step" toward that end).

Courts have determined that aiding and abetting is merely a theory of liability and not a separate offense. *See, e.g., Young v. United States*, 22 F.4th 1115, 1122 (9th Cir. 2022) (collecting cases). But holding an aider and abettor liable for the predicate offense is not the same as determining whether the elements of aiding and abetting the offense categorically align with the elements of § 924(c)(3)(A) for the purpose of stacking on another five or seven or ten or twenty-five years in prison, consecutive to the substantive offense. See § 924(c)(3)(A).

If aiding and abetting a Hobbs Act robbery can be treated as a "crime of violence" under the elements clause of § 924(c), a prosecutor has no limitation to the amount of time heaped on, based solely on a defendant's facilitation, in some way, of a robbery in which a gun was used by another. If Congress had intended on including accomplice liability under § 924(c)(3)(A), Congress would have said so in the elements defining that crime. But Congress did not say so. Congress's specific instructions in § 924(c)(3)(A), rather than its more general statement about aider-and-abettor liability in 18 U.S.C. § 2, control this issue. "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). "To eliminate

the contradiction, the specific provision is construed as an exception to the general one." *Id*. Here, 18 U.S.C. § 2 contains a general statement about aider and abettor liability. That contradicts 924(c)(2)(A)'s specific instructions about what elements must be present for an offense to be treated as a "crime of violence."

The reasoning of *Taylor*, requiring courts to apply a categorical inquiry should apply to aiding and abetting Hobbs robbery. As recently affirmed by this Court in *Borden v. United*, 593 U.S. ___, ___(2021), (slip op., at 2), "similarly worded statutes" require "similarly categorical inquiries." *Taylor*, 596 U.S. __, __(slip op. at 4) (citing *Davis*, 588 U.S., at __(slip op., at 10); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)). And, as noted above, there are striking similarities between the elements required to prove aiding-and-abetting a Hobbs Act robbery and the elements required to prove attempted Hobbs Act robbery.

The categorical inquiry is not a new concept, but "by-now-familiar method, applicable in several statutory contexts." *Borden*, 593 U.S. __(2021) (slip op., at 2) (citing *Stokeling v. United States*, 586 U.S. ___, ___(2019) (slip op., at 13), _____). The elements clause of 18 U.S.C. § 924(c)(3)(A) expressly provides that a predicate offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). As such, for § 924(c) to attach to the predicate offense, the elements of that predicate offense necessarily require a defendant to use or threaten to use or attempt to use violent physical force capable of causing physical pain or injury to another person. *See Stokeling*, 139 S. Ct. at 554 (citing *Johnson v. United States*, 559 U.S. 133, 140

(2010)). Additionally, the conduct must include intentional use of force, not recklessness or negligence. *See Borden,* 593 U.S. __, slip op. at 2*; Leocal*, 543 U.S. at 9. A determination of whether a crime falls under 924(c) requires a categorical approach, meaning that an examining court can only look to the elements defining the statutes, the essential elements. *Davis*, 139 S. Ct. at 2326-36. It is not dialectical exercise in which a square peg is measured by a round hole. The essential elements of aiding and abetting Hobbs Act robbery do not align with the essential elements defining a "crime of violence" under § 924(c)(3)(A).

If the statute of conviction criminalizes both conduct involving intentional, violent force and conduct that does not, the statute of conviction is overbroad and does not categorically constitute a crime of violence. *See Mathis v. United States*, 579 U.S. 500, 602 (2016). Aiding and abetting Hobbs Act robbery cannot qualify as a "crime of violence" under §924(c)'s elements clause because it does not categorically require the intentional, attempted, or threatened use of violent force.

Taylor reaffirmed the well-established rule that courts shall apply a categorical analysis that looks to the statutory elements of a given offense and not to the conduct of a defendant. *Taylor*, 596 U.S. __, (slip op. at 3) (in applying the categorical approach a court is precluded from inquiring about how a defendant may have committed a crime). Before *Taylor*, this Court held repeatedly that courts shall apply categorical analysis to the statutory elements, not the particular facts of a petitioner's offense. *Davis*, 139 S. Ct. at 2328-36 (discussing case law, legislative history, and statutory construction); *see also Borden,* 593 U.S. ____at ___(slip op. at

2) ("the facts of a given case are irrelevant."); *Mathis*, 500 U.S. at 602-603. Courts must "disregard[] the means by which the defendant committed his crime, and look[] only to that offense's elements." *Davis*, 139 S. Ct. at 2256; *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("Because we examine what the [] conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized[.]") (internal citations omitted). Now, *Taylor* instructs, again, lower courts to apply a categorical approach to the underlying crime in determining whether it meets the elements of 18 U.S.C. § 924(c)(3)(A). Here, applying the categorical approach to aiding and abetting a Hobbs Act robbery in violation of 18 U.S.C. §§1951 and 2 makes clear that this crime cannot be a valid predicate offense.

There is no reason this well-established rule should not apply to aiding and abetting offenses: "To determine whether a federal felony qualifies as a crime of violence, 18 U.S.C. § 924(c)(3)(A) doesn't ask whether the crime is *sometimes* or even *usually* associated with communicated threats of force (or for that matter, with the actual or attempted use of force). It asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force." *Taylor*, 596 U.S. ___, slip op. at 11. (emphasis in original).

To establish guilt for aiding and abetting a federal offense under 18 U.S.C. § 2, a person need only facilitate commission of the offense—the defendant need not participate in every element of the offense. *Rosemond*, 572 U.S. at 73. An aider and abettor thus is not required to "use," threaten to "use," or attempt to "use" force. The

government can hence establish guilt for the crime by merely demonstrating the facilitation of the crime, and without proving that the defendant used force, threatened to use force, or attempted to use force. Facilitating is not doing.

To be sure, in multi-defendant Hobbs Act cases, the government frequently charges all defendants with both § 1951 and § 2. This means that applying the categorical approach in such cases will preclude any of those defendants' convictions—even those who did use physical force—from being used as a predicate offense under 924(c)(3)(A). But this is nonetheless the proper result, and the result required by both the categorical approach and the Constitution. In determining whether a given conviction is a valid predicate offense, "[t]he only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Taylor*, Slip Opn. at 3. Section 2 does not. If the government wishes to treat principal actors' convictions as crimes of violence, it must charge them accordingly. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Patterson, N.J.*, 578 U.S. 266, 272 (2016).

Indeed, the very language of the aiding and abetting statute, 18 U.S.C. § 2, includes a spectrum of conduct – like loaning a car or serving as lookout or egging on the robbery. Thus, when analyzed categorically, it is obvious that an aiding and abetting conviction lacks the necessary elements (use, attempt to use, or threaten violent physical force) to be a predicate offense under 924(c)(3)(A). In aiding-and-

abetting cases, it is sufficient for the prosecution to prove the defendant participated in a criminal scheme "knowing its extent and character." *Rosemond*, 572 U.S. at 77 (citing *United States v. Easter*, 66 F.3d 1018, 1024 (9th Cir. 1995)). 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. "The quantity of assistance [is] immaterial, so long as the accomplice did something to aid the crime." *Id*. This renders aiding and abetting overbroad such that it cannot qualify as a § 924(c) crime of violence. The premise behind aiding and abetting liability is to punish the confederates, those who helped out with the commission of the crime. But helpers, accomplices, aiders and abettors, whatever their role may be, are not required by statute to engage in conduct that qualifies as a "crime of violence" for the purpose of imposing an additional punishment under § 924(c)(1)(A).

While several circuits, including the Ninth Circuit, have declined to distinguish aiders and abettors from principals in crime-of-violence inquiries, there is some disagreement about this point. In *Colon*, for example, the Eleventh Circuit considered whether aiding and abetting Hobbs Act robbery qualified under § 924(c)'s elements clause, in a case denying permission to file a successor § 2255 petition. *In re Colon*, 826 F.3d at 1305. Citing § 2's language that an aider and abettor "is punishable as a principal," two judges concluded that an aider and abettor of Hobbs Act robbery necessarily commits a crime meeting the force clause. *Id*. at 1305. But *Colon* contains a compelling dissent correctly identifying the panel's flawed categorical analysis of 18 U.S.C. § 2. *Id*. at 1306- 07 (Martin, J.,

dissenting). That is, the categorical analysis does not instruct courts to query how a defendant is punished, but rather to determine the essential elements of liability. *Id.*

Plainly, the elements of aiding and abetting Hobbs Act robbery do not align with the elements of 18 U.S.C. § 924(c)(3)(A), which requires "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See Taylor*, 596 U.S. ___, slip op. at 12).[5] Because there is no alignment, due process was violated and Mr. Shiel's conviction and sentence cannot stand.

B. The lower court was wrong to deny a COA.

The Ninth Circuit should have granted a Certificate of Appealability because, as discussed above, Mr. Shiel's conviction and sentence were illegal. Mr. Shiel raised an eminently debatable claim concerning a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *see Welch v. United States*, 136 S.Ct. 1257, 1263 (2016) (citation omitted). This inquiry "is not coextensive with a merits analysis," and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, 137 S. Ct 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). The petitioner need only make "a preliminary showing that his claim was debatable," notwithstanding that "'every

[5] The *Taylor* Court did not examine a completed Hobbs Act robbery, only attempted robbery, which it held as failing to satisfy the element clause. Prior to *Taylor*, in *Borden*, a plurality declined to consider accomplice liability for aiding and abetting or inchoate crimes, like conspiracy and attempt, in determining that "reckless" conduct did not satisfy the elements clause of the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B)(i). 593 U.S. ___(2021) (slip op. 5 fn. 3). While Mr. Shiel attacked his conviction under two theories: that neither Hobbs Act robbery nor aiding and abetting meets the elements of 18 U.S.C. § 924(c)(3)(A), because his charge and conviction were for aiding and abetting Hobbs Act robbery, a finding that aiding and abetting fails the elements test dooms his conviction entirely.

jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.'" *Id.* at 775 (quoting *Miller-El*, 537 U.S. at 338). "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." *Welch*, 136 S. Ct. at 1263. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller- El v. Cockrell*, 537 U.S. 322, 336-37 (2003). A petitioner need not prove "some jurists would grant the [§ 2255 motion]" and "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. Any doubt about the propriety of granting a COA must be resolved in the petitioner's favor. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (en banc).

Mr. Shiel submits that he raised a debatable claim warranting full consideration because it rested upon the denial of a constitutionally protected right. Based on this Court's directions for applying a categorical analysis in determining whether a predicate offense meets the definition of "crime of violence," most recently presented in *Taylor*, Mr. Shiel asserts that he has demonstrated a constitutional violation and his conviction and sentence must be vacated.

CONCLUSION

Based on the foregoing, Mr. Shiel requests that this Court grant his petition

for certiorari or alternatively remand his case to the Ninth Circuit with instructions to grant his motion for a COA with instructions to examine the merits of his cause in light of *Taylor*.

Respectfully submitted,

KATHLEEN BLISS LAW, PLLC

s/s Kathleen Bliss

Counsel for Phillip Shiel

CERTIFICATE OF COMPLIANCE

No. 20-

PHILLIP SHIEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 5323 words in total, in compliance with Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 28, 2022, in Henderson, Nevada.

Dated: June 28, 2022.

By: /s/ Kathleen Bliss
Kathleen Bliss
Counsel for Petitioner Phillip Shiel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petition for a Writ of Certiorari with the Clerk of the Court for the United States Supreme Court on June 28, 2022 and served, by first-class mail, postage prepaid, said Petition to the Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543.

I further certify that a copy of the Petition for Writ of Certiorari and its Appendix was served by first-class mail, postage prepaid, on:

Elizabeth Olson White, Esquire, Assistant U.S. Attorney
USRE - Office of the US Attorney-Reno
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Reno, NV 89501

Elizabeth Prelogar
Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 28, 2022, in Henderson, Nevada.

Dated: June 28, 2022

By: /s/ Kathleen Bliss
Kathleen Bliss
Counsel for Petitioner Phillip Shiel