No.

# In The Supreme Court Of The United States

Herbert Johnson,

*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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Dated: October 13, 2023

## Questions Presented for Review

I. For convictions and sentences to stand, they must not violate the Constitution. Challenges to illegal 18 U.S.C. § 924(c) convictions necessarily encompass illegal, mandatory, consecutive sentences. The first question presented is whether an illegal sentence exception to plea agreement waivers can coexist alongside a bar of illegal convictions when a sentence and conviction are bundled together by statute.

II. A guilty plea that includes an appellate waiver does not bar jurisdictional challenges on appeal. *Class v. United States*, 138 S. Ct. 798 (2018). The second question presented is whether a court can summarily enforce an appellate waiver to bar motions to vacate convictions and mandatory prison sentences under 18 U.S.C. § 924(c) for which the district court lacked jurisdiction to enter a judgment of conviction.

III. The Circuits have confused categorical analysis—which examines only statutory elements—with the contextually distinct rule that an aider and abettor is punishable for the acts of a principal. The third question presented is whether Circuits have failed to apply categorical analysis to aiding and abetting's distinct elements, which do not meet the requirements of 18 U.S.C. § 924(c)(3)(A)'s force clause.

## Related Proceedings

*United States v. Herbert Johnson*, No. 20-17302 (9th Cir.)

*United States v. Herbert Johnson*, No. 2:14-cr-304-JCM (VCF) (D. Nev.)

## Table of Contents

## Table of Authorities

**Federal Constitution** **Page(s)**



**Federal Cases**

**Federal Statutes**

**Court Rules**



**Secondary Sources**

## Petition for Certiorari

Herbert Johnson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## Opinions Below

The Ninth Circuit's decision is not published in the Federal Reporter, but reprinted at *United States v. Johnson*, No. 20-17302, 2023 WL 4578787 (9th Cir. July 18, 2023) (unpublished). Appx A.

The order of the district court is unreported, but reprinted at *United States v. Johnson*, No. 2:14-cr-304-JCM (VCF), 2020 WL 5764461 (D. Nev. Sept. 25, 2020) (unpublished). Appx C.

## Jurisdiction

The Ninth Circuit entered its final order affirming the denial of Petitioner's motion to vacate on July 18, 2023. Appx A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Sup. Ct. R. 13.1.

## Constitutional and Statutory Provisions Involved

1. U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. Title 18, Section 924(c), of the United States Code states, in relevant part:

(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.

3. Title 18, Section 2, of the United States Code, provides:

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

(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.

4. Hobbs Act robbery, 18 U.S.C. § 1951, provides in relevant 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 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 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.

## Statement of the Case

Petitioner Herbert Johnson was sentenced to over 14 years in federal prison in 2015. Seven years of the term consists of an unconstitutional, consecutive, and mandatory sentence imposed for using a firearm during a crime of violence under 18 U.S.C. § 924(c).

### I. Petitioner Johnson is sentenced to a mandatory minimum sentence under 18 U.S.C. § 924(c).

Las Vegas police officers arrested Johnson in August 2013 following a string of six robberies by two men. Presentence Report (PSR) ¶¶ 6-29.

At plea, the district court described the robberies as "run-of-the-mill robberies," questioning the government's decision to pursue federal charges. ER-106–07. Before accepting Johnson's guilty plea, this Court ordered a competency evaluation based on a diagnosis of "Mild Intellectual Disability (former Mild Mental Retardation)" finding Johnson comprehends at a 2.8 grade level. ER-41. The evaluation found Johnson competent to plead guilty. ER-115.

Just 23 years old, Johnson pled guilty in a written plea agreement to six counts of Aiding and Abetting Hobbs Act robbery (Counts One, Two, Three, Four, Five, and Six) and one count of brandishing a firearm during and in relation to a crime of violence. The predicate for the § 924(c) charge was Count Five—Aiding and Abetting Hobbs Act robbery. 1-ER-144–45.[1]

[1] Johnson's co-defendant, Quincy Stephens, was similarly charged under a separate case number, *United States v. Stephens*, No. 2:13-cr-00351-LDG-VCF (D. Nev.), and also pled guilty.

Johnson's plea agreement contained a partial appellate waiver preserving the right to appeal any upward departure or variance from the sentencing guideline range and "knowingly and expressly" waiving: "the right to appeal any other aspect of the conviction or sentence" and "all collateral challenges, including any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel." Appx E:29a–30a.

The district court sentenced Johnson to concurrent 87-month sentences on Counts 1-6, and a mandatory consecutive 84-month sentence on Count 7, for a total 171-months (14 years) of imprisonment. ER-82. When imposing sentence, the court recognized Johnson has "much potential" and his sentencing was a "sad" and "tragic" day. ER-82. Johnson did not pursue a direct appeal.

Two years after his federal sentencing, the Ninth Circuit held that defendants could not raise post-conviction § 2255 challenges § 924(c) sentences under *Johnson v. United States*, 576 U.S. 591 (2015). *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018).

As a result of additional, unrelated state convictions, Johnson remains in the custody of Nevada Department of Corrections completing a state sentence. He becomes eligible for state parole in October 2036—when he will be 44 years old. If Johnson receives parole, he will then serve his 14-year federal sentence.

## II. Petitioner Johnson moves to vacate the § 924(c) conviction and sentence under this Court's *Davis* decision.

Three years after Johnson's sentencing, this Court held that imposing a mandatory minimum sentence under 18 U.S.C. § 924(c)(3)(B) violates the Constitution's guarantee of due process. *United States v. Davis*, 139 S. Ct. 2319 (2019). Now able to challenge his sentence for the first time, Petitioner Johnson timely sought relief within a year of *Davis*, moving to vacate the 18 U.S.C. § 924(c) conviction under 28 U.S.C. § 2255 in the District of Nevada. Dkt. 51.

Johnson argued the § 924(c) conviction and sentence must be vacated because the predicate offenses no longer qualified as a crime of violence after *Davis*. Dkt. 51. Johnson challenged the § 924(c) conviction and attendant mandatory sentence under *Davis* on due process, fundamental miscarriage of justice, and jurisdictional grounds, and argued his plea agreement's appellate waiver did not waive his right to collaterally attack his illegal, unconstitutional conviction and sentence. Dkt. 51, pp.6–7, 19.

The government opposed, arguing that: (1) Petitioner's claims were procedurally defaulted by failing to raise the claim on direct appeal; (2) Petitioner's claims were foreclosed by precedent finding the predicate qualifies as a crime of violence; and (3) Petitioner's claims were barred by the appellate waiver in the plea agreement. ECF 53.

Johnson replied to all arguments. Dkt. 54. His reply specifically explained that Ninth Circuit precedent, *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir.

2016), precluded enforcing the collateral challenge waivers when the challenge is to the legality of the sentence, which includes unconstitutional sentences. Dkt. 54, p.8.

Without a hearing, the district court denied the motion to vacate. Appx C:5a–7a. In its denial order, the district court did not address the residual clause of 18 U.S.C. § 924(c)(3)(B). Instead, the court found Johnson's claims procedurally defaulted for not raising the *Davis* challenge—a case decided in 2019—on direct appeal in 2016. Appx C:5a–6a. The denial order did not address the plea agreement's appellate waiver. The district court denied a certificate of appealability ("COA"). ER-8.

### III. Petitioner Johnson appeals to the Ninth Circuit, which affirms based on summary application of the collateral challenge waiver.

Johnson timely appealed, requesting a COA. The Ninth Circuit granted a COA for two issues: "[1] whether the district court properly determined that appellant's claim is procedurally defaulted and, if not, [2] whether appellant is entitled to relief on the merits." Appx B:3a.

After the opening and answering briefs were filed, the Ninth Circuit issued *United States v. Goodall*, 21 F.4th 555, 558 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2666 (2022), holding a defendant's appellate waiver barred his direct appeal challenge to a § 924(c) conviction that rested on conspiracy and its attendant mandatory prison sentence. In *Goodall*, the Ninth Circuit held the appeal was barred by the plea agreement's appellate waiver of "the right to appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture." *Id.* at 559–62. The *Goodall* panel reasoned the "illegal" sentence exception to enforcing

appellate waivers did not apply because the panel viewed the defendant as challenging only his conviction. *Id.* at 562–65. But *Goodall* declined to consider—and therefore left open—whether the miscarriage of justice exception to enforcing a waiver would apply in this context. *Id.* at 565 n.6.

Johnson's reply brief addressed why *Goodall* did not apply to his motion to vacate. Johnson specifically argued that (1) his § 2255 motion to vacate, unlike the direct appeal in *Goodall*, falls outside the scope of the appellate waiver because 28 U.S.C. § 2255 specifically applies to motions by federal prisoners to vacate illegal *sentences,* a recognized exception to appellate waivers; (2) enforcing the waiver would cause a miscarriage of justice, which unlike *Goodall*, Johnson sufficiently as an exception to the appellate waiver below; and (3) jurisdictional challenges cannot be waived.

The Ninth Circuit affirmed denial of Johnson's motion to vacate, due to *Goodall* and the appellate waiver in the plea agreement. App. A:1a. The Ninth Circuit found: Johnson challenged an illegal conviction, not an illegal sentence; the miscarriage-of-justice exception to waivers was not raised in district court; and the district court had jurisdiction to enter judgment even if the indictment did not charge a crime against the United States. App. A:1a.

Johnson now seeks this Court's review to clarify 28 U.S.C. § 2255 and appellate waiver exceptions.

## Reasons for Granting the Petition

### I. By mandating enforcement of appellate waivers in cases with illegal unconstitutional convictions and sentences, the Ninth Circuit precludes judicial enforcement of *Davis* relief.

"No appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). For convictions and sentences to stand, they must not violate the constitution. In *Davis*, this Court held that increasing a defendant's sentence under the residual clause at § 924(c)(3)(B) violates due process of law. 139 S. Ct. at 2327; U.S. Const. amend. V.

Circuits agree that appellate waivers do not bar challenges to illegal, unconstitutional sentences. *See, e.g.,* T*orres,* 828 F.3d at 1124-25; *United States v. Thornsbury*, 670 F.3d 532, 539–40 (4th Cir. 2012); *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003). The same limitations for appellate waiver apply in the collateral review context. *Deroo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000) (finding appellate waiver of collateral challenge rights "are not absolute").

Challenges to illegal "sentences" encompass illegal convictions. Yet the Ninth Circuit's *Goodall* panel summarily concluded, post-*Davis,* that a defendant challenging his unconstitutional conviction and resulting mandatory sentence under § 924(c) was not a challenge to an illegal sentence—it only challenged an illegal conviction. *Goodall*, 21 F.4th at 558.

The critical issue here is that an illegal sentence exception to plea agreement waivers cannot exist alongside a bar of illegal convictions when a sentence and conviction are bundled together by statute.

The Ninth Circuit in *Goodall* took pains to clarify it did not overturn precedent that an appellate waiver does not bar collateral review of an illegal *sentence*. *Goodall*, 21 F.4th at 563–65 (discussing *Torres*, 828 F.3d at 1125); *see also United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (an appeal waiver will not apply if the sentence violates the law; a sentence is illegal if it violates the Constitution). And after *Goodall*, the Ninth Circuit reiterated that appellate waivers do not bar a challenge to an illegal sentence. *United States v. Wells*, 29 F.4th 580, 584, 586–87 (9th Cir. 2022) ("[A]n appeal waiver does not apply to an unlawful sentence, as the Constitution is the supreme law of the land."). *Goodall* acknowledged that an "illegal sentence is one 'not authorized by the judgment of conviction, . . . in excess of the permissible statutory penalty for the crime, or [that] is in violation of the Constitution.'" *Id.* . But illogically, the panel concluded an illegal sentence "does not include illegal convictions." *Id.* . The Ninth Circuit errantly made a distinction without difference.

A conviction for a § 924(c) offense that rests on the unconstitutional residual clause violates due process and thus is illegal. *Davis*, 139 S. Ct. at 2336. In *Davis*, this Court held that increasing a defendant's sentence under the residual clause at § 924(c)(3)(B) violates due process of law. 139 S. Ct. at 2327; U.S. Const. amend. V. Thus, the sentence, i.e., the "heightened criminal penalties" of § 924(c), are only authorized based on § 924(c)'s constitutional portion—the unconstitutional residual clause cannot authorize a court to impose sentence. *Id.* at 2324.

*Goodall* not only conflicts with this Court's precedent, but also with the statutory language of 28 U.S.C. § 2255. When a defendant files a § 2255 motion, he ultimately asserts "that the *sentence* was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255(a) (emphasis added); *see also Johnson v. United States*, 544 U.S. 295, 299 (2005) (discussing § 2255 limitations). *Goodall*, in contrast, was a direct appeal and thus did not involve correction of sentences under 28 U.S.C. § 2255. According to a leading treatise on the matter, a defendant's challenge to his *sentence* necessarily encompasses all "challenges to the legality of holding the petitioner in custody at all," including "typically the legality of the underlying *conviction*." Hertz & Liebman, *Federal Habeas Corpus Prac. & Proced.* § 9.1, n.31 (2020) (collecting cases) (emphasis added). Illegal convictions and illegal sentences are inextricably linked, at least when the statute of conviction requires the district court to impose a mandatory sentence upon conviction.

*Goodall* also precludes judicial enforcement of *Davis* relief by placing such power solely within the government's discretion. "[A] waived appellate claim can still go forward if the prosecution forfeits or waives the waiver." *Garza*, 139 S. Ct. at 44–45. Often, the government has selectively chosen not to enforce appellate waivers in collateral challenges to illegal § 924(c) convictions. *See, e.g.,* U*nited States v. Borden,* 16 F.4th 351 (2d Cir. 2021) (recognizing defendant waived right to appeal convictions, but government chose not to enforce waiver for § 924(c) conviction). Providing relief from unconstitutional convictions and sentences rests

with the federal courts—it is not subject to the inconsistent and arbitrary whims of a government prosecutor.

Mandating enforcement of appellate waivers to preclude relief from illegal, unconstitutional convictions and mandatory consecutive sentences diverges from this Court's precedent and from justice. This Court should grant review of this important federal question to bring the Ninth Circuit in line with this Court's precedent that general appellate waivers do not preclude challenges to illegal convictions and sentences.

## II. The Ninth Circuit defies this Court's precedent that holds jurisdictional claims are not subject to waiver.

At issue is whether a plea agreement's appellate waiver can bar a jurisdictional challenge to a conviction for a non-existent federal offense. The Ninth Circuit's holding below in *Goodall*, 21 F.4th at 563, that such challenges are inherently waived by a general appellate waiver, conflicts with this Court's holding in *Class v. United States*, 138 S. Ct. 798 (2018). Congress limits federal judicial jurisdiction by stating the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." 18 U.S.C. § 3231. Where the charged conduct is not a federal offense, a district court lacks jurisdiction. *Class* held that a defendant cannot inherently waive a constitutional challenge to the government's lack of jurisdiction to prosecute. 138 S. Ct. at 804.

Failing to state an offense rendered the government without the power to prosecute Johnson for the § 924(c) offense. Johnson raised a jurisdictional challenge under 28 U.S.C. § 2255 by arguing that his § 924(c) conviction and sentence are

illegal and unconstitutional because the predicate offense charged is not a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s force clause, and thus the government failed to charge a federal offense. Dkt. 51.

The "right that he asserts and that we accept today is the right not to be haled into court at all upon the felony charge." *Blackledge v. Perry*, 417 U.S. 21, 30 (1974); *Menna v. New York*, 423 U.S. 61, 62 (1975); *see also Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."); *Ex parte Siebold*, 100 U.S. 371, 376–77 (1879) (An offense created by an unconstitutional act is not a crime, and a conviction under it is "illegal and void, and cannot be a legal cause of imprisonment."). Without a lawful crime-of-violence predicate, Johnson could not be prosecuted, convicted, or sentenced for the § 924(c) count *at all*. This claim, "'judged on its face' based upon the existing record, would extinguish the government's power to 'constitutionally prosecute' the defendant if the claim were successful." *Class*, 138 S. Ct. at 806.

Under the Ninth Circuit's *Goodall* opinion, however, Johnson is barred from receiving the relief afforded by *Davis*, 139 S. Ct. 2319. This Court has rejected such a position. *Class* clarified that "where on the face of the record the court had no power to enter the conviction or impose the sentence" the challenge cannot be inherently waived. *Class*, 138 S. Ct. at 804. *Goodall* stands in defiance of this precedent.

*Class* reaffirmed the *Menna-Blackledge* doctrine by holding a written plea-agreement waiver cannot inherently waive the right to challenge "the Government's power to 'constitutionally prosecute' him." *Class*, 138 S. Ct. at 804–05 (citation omitted). Like *Class*, Johnson's constitutional claim for prosecution of a non-federal offense is not expressly waived in the appellate waiver:

> [Petitioner's] challenge does not in any way deny that he engaged in the conduct to which he admitted. Instead, like the defendants in *Blackledge* and *Menna*, he seeks to raise a claim which, "judged on its face" based upon the existing record, would extinguish the government's power to "constitutionally prosecute" the defendant if the claim were successful.

*Class*, 138 S. Ct. at 805 (citing *Blackledge v. Perry*, 417 U.S. 21 (1974); and *Menna v. New York*, 423 U.S. 61 (1975) (per curiam)). Under the *Menna-Blackledge* doctrine, "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the [government] may not constitutionally prosecute." *Class*, 138 S. Ct. at 803-04 (quoting *Menna*, 423 U.S. at 63). Thus, "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence" did not "expressly refer to a waiver of the appeal right" for claims the "court had no power to enter the conviction or impose the sentence." *Id.* at 807.

The Ninth Circuit's *Goodall* opinion also contradicts its own earlier precedent holding that "[c]laims that 'the applicable statute is unconstitutional or that the indictment fails to state an offense' are jurisdictional claims." *United States v. Montilla*, 870 F.2d 549, 552 (9th Cir. 1989), *amended at* 907 F.2d 115 (9th Cir. 1990). Other circuits agree an appeal waiver does not waive a jurisdictional defect. *See, e.g.,* M*cCoy v. United States,* 266 F.3d 1245, 1249 (11th Cir. 2001) ("Because

parties cannot by acquiescence or agreement confer jurisdiction on a federal court, a jurisdictional defect cannot be waived or procedurally defaulted . . . a judgment tainted by a jurisdictional defect must be reversed"); *see also United States v. St. Hubert*, 883 F.3d 1319, 1326 (11th Cir. 2018) (a district court lacks jurisdiction to accept a guilty plea to a "non-offense").

This Court should grant review to bring the Ninth Circuit's errant waiver law in line with this Court's precedent that jurisdictional claims cannot be waived.

## III. Petitioner Johnson is entitled to relief because aiding and abetting Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c).

This Court has not addressed whether aiding and abetting Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s force clause. The aiding and abetting statute provides: "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a).

For a predicate offense to qualify under § 924(c)'s force clause, the offense 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). This means the offense must necessarily require two elements: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) the use of force must be intentional and not merely

reckless or negligent, *Borden v. United States*, 141 S. Ct. 1817 (2021).[2] This Court explained that the "[categorical] approach is under-inclusive by design: It *expects* that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences." *Id.* at 1832 (emphasis in original).

Johnson acknowledges the Ninth Circuit's recent published opinion in *United States v. Eckford*, 77 F.4th 1228, 1235 (9th Cir. 2023), holding aiding and abetting Hobbs Act robbery qualifies as a § 924(c) crime of violence—joining its sister circuits.[3] The Circuits' analysis of this predicate is inaccurate, however, considering this Court's controlling precedent.

This Court previously addressed aiding and abetting a federal offense to clarify that a defendant need only facilitate commission of the offense—he need not

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[2] While *Borden* addressed the force clause in the Armed Career Criminal Act (ACCA) at 18 U.S.C. § 924(e)(2)(B)(i), the opinion equally applies to § 924(c). This Court interprets the § 924(c) force clause as materially similar to the ACCA's force clause. *Davis*, 139 S. Ct. at 2326–27.

[3] *See United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018) (finding, with no categorical analysis, 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, 57-58 (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.) (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); *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); *see also 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).

participate in every offense element. *Rosemond v. United States*, 572 U.S. 65, 73 (2014). Indeed, "[t]he quantity of assistance [is] immaterial, so long as the accomplice did *something* to aid the crime." *Id.* (cleaned up). And this Court recently held, "[t]he 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… ." *United States v. Taylor*, 142 S. Ct. 2015, 2022 (2022) (emphasis added). Thus, the courts must consider whether an aider and abettor—not the principal—is required to necessarily "use" force under its statutory elements.

Applying the categorical analysis to aiding and abetting reveals that an aiding and abetting conviction lacks the necessary use, attempt to use, or threat of violent physical force to be convicted. 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)). And 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.* (cleaned up). Thus, aiding and abetting is overbroad and does not qualify as a § 924(c) crime of violence.

Further, the elements for aiding and abetting Hobbs Act robbery do not require the necessary mens rea under the force clause—intent to use physical force to harm another. The only element of aiding and abetting that mentions mens rea

is the third element—intent to facilitate Hobbs Act robbery. *See* Ninth Circuit Manual of Model Criminal Jury Instructions, § 4.1 Aiding and Abetting (Sept. 2022). But this element does not render the offense a crime of violence. To satisfy the force clause, the statutory elements of the predicate offense must require intent to harm another—meaning there must be a "conscious object (not the mere recipient) of the force." *Borden*, 141 S. Ct. at 1826. The resulting harm is not dispositive, but whether the statute requires the defendant to specifically intend to harm another. *Id.* at 1831 n.8. It is insufficient under the elements clause for an offense to merely require intentional performance of an act. *Id.* at 1826.

*Borden* narrowed application of § 924(c)'s mandatory penalties by "demand[ing] that the perpetrator direct his action at, or target, another individual," consciously intending harm to another. *Borden*, 141 S. Ct. at 1825–27. Someone who does not intend a resulting harm from his conduct and does not "pay []sufficient attention to the potential application of force" therefore does "not use[] force 'against' another person in the targeted way that clause requires." *Id.* at 1827. *Borden*, therefore, limits the severe § 924(c) penalty to "the special danger" associated with a "small percentage of repeat offenders" who pose "uncommon danger"—not "ordinary offenders" who engage in dangerous and ill-advised conduct. *Id.* at 1822–23, 1830–31, 1834 (cleaned up). Thus, under *Borden*, the government cannot bootstrap intent to commit a crime to mean all acts of aiding and abetting include violent force.

Several scenarios illustrate aiding and abetting robbery without the use, attempted use, or threatened use of force. A defendant need not even be present during the substantive offense to be convicted of aiding and abetting. *Boston v. United States*, 939 F.3d 1266, 1272 (11th Cir. 2019) (Pryor, J., concurring). Indeed, "a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all," including: "lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere." In re Colon, 826 F.3d at 1306 (Martin, J., dissenting); *see also Boston*, 939 F.3d at 1272 (Pryor, J., concurring) (providing an example of serving as the getaway driver to principal). Aiding and abetting merely requires the defendant to aid or abet one element of Hobbs Act robbery, which does not encompass the use, attempted use, or threatened use of violent physical force against another person. Thus, aiding and abetting Hobbs Act robbery does not qualify under § 924(c)'s elements clause.

*Taylor* and *Borden* do not permit Petitioner's conviction under § 924(c) for a non-federal offense to be sustained. Petitioner asks this Court to grant review and clarify that aiding and abetting Hobbs Act robbery is overbroad and does not qualify as a predicate crime of violence under 18 U.S.C. § 924(c).

## IV. Petitioner Johnson raises an issue of exceptional importance this Court has not yet addressed, particularly given § 924(c)'s consecutive, mandatory minimum sentences.

The gravity of the erroneous Ninth Circuit opinion below is severe. But for the illegal, unconstitutional § 924(c) convictions and sentences, Johnson—and thousands like him—would not face mandatory consecutive terms of 7 years or

more. As one of the most draconian sentencing statutes, 18 U.S.C. § 924(c) imposes graduated, consecutive, mandatory minimum sentences ranging from five years to life imprisonment.[4]

Petitioner Johnson is just one of the thousands of defendants facing a consecutive mandatory minimum sentence for a § 924(c) conviction. According to the Sentencing Commission's latest statistics, approximately 20,500 individuals (14.7% of the federal prison population) are serving a § 924(c) mandatory sentence. U.S. Sent. Comm'n, *Quick Facts: Federal Offenders in Prison* (March 2023).[5] And in Fiscal Year 2022, another 2,700 individuals were convicted of a § 924(c) offense. U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses* (July 2023).[6]

Over 90% of all federal convictions involve a guilty plea. U.S. Sent. Comm'n, *Federal Offenders in Prison*. While this Court has addressed aspects of appellate waivers in plea agreements,[7] this Court has not yet addressed, post-*Johnson v. United States*, 576 U.S. 591 (2015), whether an appellate waiver can bar a

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[4] Petitioner's conviction under § 924(c) also resulted in a higher supervision term (5 years) than would have been imposed for Aiding and Abetting Hobbs Act robbery (3 years). *See* 18 U.S.C. § 1951(a); 18 U.S.C. § 3559(a) (felony classifications); 18 U.S.C. § 3583(b) (authorized terms of supervised release).

[5] Available at https://www.ussc.gov/research/quick-facts/federal-offenders-prison.

[6] Available at https://www.ussc.gov/research/quick-facts/section-924c-firearms.

[7] *See, e.g., Garza,* 139 S. Ct. 738 (presumption of prejudice from attorney's failure to file notice of appeal applies whether or not the defendant signed an appeal waiver); *Class*, 138 S. Ct. 798 (appellate waiver does not, by itself, bar a defendant from challenging the constitutionality of the statute of conviction on direct appeal).

challenge under 28 U.S.C. § 2255 to an illegal, unconstitutional 18 U.S.C. § 924(c) conviction and sentence.

Review is necessary to stop the erosion of habeas relief for illegal, unconstitutional convictions and sentences.

## Conclusion

An unconstitutional, illegal conviction and sentence cannot be waived, nor can a conviction and sentence that lack jurisdiction. Because the Ninth Circuit's holding below stands in contradiction to this Court's precedent, Johnson asks this Court to grant review.

**Dated**: October 13, 2023.

Respectfully submitted,
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