No. _____

IN THE
Supreme Court of the United States

SELBOURNE WAITE
Petitioner,

vs.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether aiding and abetting a Hobbs Act robbery, which may be completed without the use, attempted use, or threatened use of physical force, *see* 18 U.S.C. §§ 1951(a) and 2, falls outside the definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(A).

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PETITION FOR CERTIORARI

Petitioner Selbourne Waite respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

On May 31, 2023, the judgment of the United States Court of Appeals for the Second Circuit was filed in a Summary Order. *United States v. Waite*, (*Waite II*) No. 18-2651, 2023 WL 3730447, at *1 (2d Cir. May 31, 2023). The decision is attached as Exhibit A.

On July 12, 2023, Mr. Waite filed a petition for rehearing and suggestion for rehearing *en banc*. The Second Circuit denied his petition on August 17, 2023. That order is attached as Appendix B.

JURISDICTION

On May 31, 2023, a three-judge panel for the Second Circuit issued a decision in Petitioner's appeal. Subsequently, on August 17, 2023, the Second Circuit denied Mr. Waite's petition for rehearing and suggestion for rehearing *en banc*. [1] This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS

18 U.S.C. § 924 – Penalties [excerpted in relevant part]

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

[1] The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). The petition for rehearing in this case was denied on August 17, 2023, making the petition for writ of *certiorari* due on November 15, 2023. A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2.

(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 - Interference with commerce by threats or violence

(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.
(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place
outside such State; and all other commerce over which the United States has jurisdiction.
(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101– 115, 151–166 of Title 29 or sections 151–188 of Title 45.

I.

STATEMENT OF THE CASE

By way of background, on February 20, 2008, Mr. Waite and others were charged in a thirty-five-count superseding indictment. Mr. Waite was charged with two counts of Hobbs Act robbery, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1951 and 2; two counts of attempted Hobbs Act robbery, and aiding and abetting the same, in violation of 18 U.S.C. §§ 1951 and 2; and four counts of using a firearm in furtherance of those four so-called crimes of violence, all in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. *United States v. Waite,* ("*Waite I*"), 12 F.4th 204, 208 (2d Cir. 2021), *cert. granted, vacated, and remanded*, 142 S. Ct. 2864 (2022). In addition, Mr. Waite was charged with a narcotics conspiracy.

Mr. Waite was also charged with four crimes premised on the murder and attempted robbery of Bunny Campbell, a suspected narcotics dealer, as follows: (1) murder in aid of racketeering, in violation of 18 U.S.C. §§ 1959(a)(1) and 2; (2) attempted Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 and 2; (3) use of a firearm in furtherance of a crime of violence (the attempted Hobbs Act robbery), in violation of §§ 924(c)(1)(A) and 2; and (4) causing death with a firearm in the course of a § 924(c) offense, in violation of 18 U.S.C. §§ 924(j)(1) and 2.[2]

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2 The jury was instructed on aiding-and-abetting liability for all of the Hobbs Act robbery offenses and attempted Hobbs Act robbery offenses. The jury verdict form did not require the jury to specify whether Waite's § 924(c) convictions were predicated on an aiding-and-abetting theory or on Waite's direct liability for those offenses. *Waite*, 12 F.4th at 208.

Prior to trial, the parties attempted to reach a plea agreement. Pet. C.A. Br. 8. The government offered an agreement that would have created a maximum penalty of twenty-five years. *Id*. As part of that agreement, however, the government insisted that Mr. Waite admit to the murder of Bunny Campbell. *Id*. Had Mr. Waite admitted to Campbell's murder, his sentencing exposure would have been capped at twenty-five years with a guidelines' range of 108 to 135 months for Criminal History Category I. *Id*. Mr. Waite, however, was steadfast that he played no part and would not admit to a murder he did not commit. *Id.* As such, negotiations between the parties failed and the case proceeded to trial. *Id*.

At trial, Mr. Waite was acquitted of all charges that he attempted rob and murder Campbell. Yet, as his trial counsel shared in *Waite I*, "his convictions on all the § 924(c) counts rendered the acquittals at best Pyrrhic victories." Pet. C.A. Br. 9-10. This is because the jury found him guilty of four counts of using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. At the sentencing that followed, the district court "stacked" the § 924(c) convictions resulting in a mandatory minimum consecutive term of 105 years' imprisonment, 20 years' imprisonment for the narcotic conspiracy, and concurrent sentences of time served on the remaining RICO and Hobbs Act robbery counts. Waite, then thirty years old, was sentenced to die in prison serving 125 years. *Id*. at 59-60.

In calculating this sentence, the district court found that the Fair Sentencing Act of 2010, Pub. 111-220, 124 Stat. 2372 (2010) ("Fair Sentencing Act"), did not apply retroactively to Mr. Waite's underlying offense conduct, which was consistent with

Second Circuit precedent at the time. Accordingly, the district court determined that Waite's narcotics conspiracy conviction had a mandatory minimum sentence of 20 years instead of 10 years.

Waite appealed, and on August 24, 2016, the Second Circuit remanded his case for re-sentencing on the narcotics conspiracy conviction but affirmed his convictions and sentence in all other respects. The Second Circuit remanded for re-sentencing on the narcotics conspiracy count because this Court's decision in *Dorsey v. United States*, 567 U.S. 260 (2012), made clear that the Fair Sentencing Act applied retroactively. *See United States v. Lee*, 660 F. App'x 8, 22–23 (2d Cir. 2016).

On March 1, 2018, the district court resentenced Mr. Waite. Per *Dorsey*, the district court imposed a 10-year mandatory minimum term of imprisonment for the narcotics conspiracy conviction. But other than that change, the district court imposed the same sentence—including the mandatory minimum consecutive sentences of 105 years on the § 924(c) counts—that it had originally imposed in 2011. As such, Mr. Waite was sentenced to die in prison serving a total term of imprisonment of 115 years. *Waite I*, 12 F.4th at 208–09.

Mr. Waite appealed his case again. At that point, the undersigned was appointed to the appeal. Before the Second Circuit, Mr. Waite argued, in relevant part, that four of his § 924(c) convictions, attempted Hobbs Act robbery and aiding and abetting the completed Hobbs Act robbery, were invalid in light of this Court's decision in *United States v. Davis*, 139 S. Ct. 2319, (2019), because the predicate offenses do not constitute crimes of violence.

On August 31, 2021, the Second Court affirmed Waite's convictions and sentence in a published opinion. *Waite I*, 12 F.4th at 207. The panel in *Waite I* affirmed holding that that the four § 924(c) convictions were valid because the predicate offenses constituted crimes of violence. *Id*. As mentioned above, the predicate crimes of violence for the four 924(c) counts were two counts of attempted Hobbs Act robbery and two counts of Hobbs Act robbery based on both principal and aiding and abetting liability. *Id*.

Upon further review, this Court vacated the Second Circuit's judgment per *United States v. Taylor*, 142 S. Ct. 2015, 2020–21 (2022) (holding that attempted Hobbs Act robbery is not categorically a "crime of violence" under § 924(c)). Thereafter, the Second Circuit, by Summary Order dated May 31, 2023, vacated the attempted Hobbs Act robbery counts and remanded to the district court for the purpose of *de novo* re-sentencing. *Waite II*, 2023 WL 3730447, at *1 (2d Cir. May 31, 2023).

As is relevant to this petition, the Second Circuit did not vacate Waite's other two 924(c) convictions linked to aiding and abetting completed Hobbs Act robberies. Each of those counts charged Mr. Waite and named co-defendants with aiding and abetting a completed Hobbs Act robbery. As noted above, the jury was likewise charged on aiding and abetting liability for all of the Hobbs Act robbery offenses. In *Waite I*, Waite argued that both attempted Hobbs Act Robbery and the aiding and abetting actual Hobbs Act robbery counts. After *Taylor*, in *Waite II*, this Court held:

> We do not, however, vacate Waite's other section-924(c) convictions – Counts Twenty-Six and Twenty-Seven – which were

> each predicated on a completed Hobbs Act robbery. Although *Taylor* held that attempted Hobbs Act robbery does not qualify as a crime of violence, nothing in the Supreme Court's decision "undermines this Court's settled understanding that completed Hobbs Act robberies are categorically crimes of violence pursuant to section 924(c)(3)(A)." *McCoy II*, 58 F.4th [72,74 (2d Cir. 2023)]. Nor has *Taylor* disturbed our prior holding that aiding and abetting a Hobbs Act robbery – like committing a Hobbs Act robbery itself – is a proper predicate under section 924(c). *See United States v. McCoy* (*McCoy I*), 995 F.3d 32, 58 (2d Cir. 2021), *cert. granted, vacated, and remanded*, 142 S. Ct. 2863 (2022), *reinstated in part*, *McCoy II*, 58 F.4th 72; *see McCoy II*, 58 F.4th at 75 (expressly adopting the parts of *McCoy I* not contradicted by *Taylor*). We therefore affirm Waite's section-924(c) convictions on [the two aiding and abetting counts].

Waite II, 2023 WL 3730447 at *1.

This case presents a straightforward conflict between the Second Circuit and this Court regarding the definition of a crime of violence under the elements clause per *Taylor*. The Second Circuit's conclusion is at odds with the categorical approach and the holding in *Taylor* that if none of the elements of the crime in question "always require . . . the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force," it cannot be considered a crime of violence under the elements clause. *Taylor*, 142 S. Ct. at 2020.

Relatedly, this decision also conflicts with *Rosemond v. United States*, 572 U.S. 65, 71 (2014). *Rosemond* made clear that aiding and abetting requires the government to prove different elements than the substantive, underlying offense. The elements of aiding and abetting are: (1) taking an affirmative act in furtherance of the offense; (2) with the intent of facilitating the crime's commission. These elements do not require the use, attempted use, or threatened use of force.

Finally, the Second Circuit's decision failed to consider the rule of lenity despite grappling with the thorny issue of what constitutes a "crime of violence."

II.

ARGUMENT

A. This Court should grant certiorari because aiding and abetting a Hobbs Act robbery encompasses conduct that falls outside the definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(A).

As set forth above, while the attempted Hobbs Act robbery counts were vacated per *Taylor*, there are two counts of aiding and abetting Hobbs Act robbery in violation of 18 U.S.C. §§ 1951 and 2 and the aforementioned two counts of using a firearm in furtherance of those crimes of violence, all in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 that remain. *Waite II*, 2023 WL 3730447 at *1.

Relying on *McCoy*, *Waite I* and *II* incorrectly decided that aiding and abetting a completed Hobbs Act robbery constitutes a crime of violence. This Court has previously defined the elements of aiding and abetting under 18 U.S.C. § 2 as follows: "[A] person is liable under § 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." *Rosemond*, 572 U.S. at 71. Much like *Taylor*'s attempted Hobbs Act robbery, neither the intention to facilitate an offense nor an affirmative act in its furtherance requires proof of use, attempted use or threatened use of force. *Taylor*, 142 S. Ct. at 2020-21 (holding that the elements of intent and substantial step do "not require the government to prove that the defendant used, attempted to use, or even threatened to use force…"). A defendant's "intention" to

facilitate the completion of an offense is "just that," an intention, "no more." *Id*. at 2020.

Sentencing courts determine whether an offense constitutes a crime of violence using the "categorical approach." *Davis*, 139 S. Ct. at 2329. Under that approach, courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [a crime of violence], while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Id.* (quotation marks omitted). Consequently, an offense qualifies as a crime of violence only if, in light of the statutory elements of the offense, the use, attempted use, or threatened use of physical force "was necessarily found [by the jury] or admitted" by the defendant. *Id.* at 2249.

A straightforward application of the categorical approach demonstrates why aiding and abetting Hobbs Act robbery does not constitute a "crime of violence" under Section 924(c)'s elements clause. Under the categorical approach, aiding and abetting a Hobbs Act robbery, like a conspiracy Hobbs Act robbery or attempted Hobbs Act robbery, cannot qualify because it plainly allows a conviction premised on conduct that does not involve violent force. As was made clear by this Court in *Rosemond*:

> 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. In proscribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence—even if that aid relates to only one (or some) of a crime's phases or elements.

Rosemond, 572 at 73. Hence, even when a principal's crime involves an element of force, there is "no authority for demanding that an affirmative act go toward an element considered peculiarly significant; rather, ... courts have *never thought relevant the importance of the aid rendered*." *Id*. at 75 (emphasis added). In proscribing aiding and abetting under § 2, Congress used language that "comprehends all assistance rendered by words, acts, encouragement support, or presence." *Reves v. Ernst* & Young, 507 U.S. 170, 178 (1993). This is true even if that aid relates to only one, or some, of a crime's phases or elements. As such, a defendant could aid and abet a Hobbs Act robbery, or any other crime of violence, without ever using, attempting to use, or threatening to use any physical force at all. The aider and abettor's contribution to a crime could be as minimal as sharing some encouraging words.

Courts of Appeals have affirmed convictions for aiding and abetting crimes of violence in which defendants did not use, attempt to use, or threaten any physical force at all. For example, simply providing advice on how to commit a Hobbs Act robbery is sufficient evidence for a conviction under an aiding and abetting theory. *See United States v. Tibbs*, 685 F. App'x 456, 466 (6th Cir. 2017) (evidence was sufficient to support conviction for aiding and abetting a Hobbs Act robbery because Tibbs was present when the Vice Lords were planning the robbery, provided advice on how to commit the offense, and used some of the proceeds to pay for the principals' tattoos). "Active participation in the planning phase of an armed robbery constitutes intent to bring about the offense." *United States v. Gooch*, 850 F.3d 285, 288 (6th Cir.

2017). *See also*, *United States v. Frampton*, 382 F.3d 213, 217, 220 (2d Cir. 2004) (Frampton did not need to participate in a crime of violence himself to be held criminally liable on abetting and abetting theory if his actions willfully caused another to do so).

Even when a defendant's instruction to others is not to commit a crime of violence but others still did, a defendant can be held liable for having aided and abetted a crime of violence. *See United States v. Nicholson*, 716 F. App'x 400, 409 (6th Cir. 2017) (affirming conviction for assault in aid of racketeering because "a jury could conclude that Johnson's instruction 'facilitat[ed] the offense's commission'" even if Johnson's instructions to others were merely to steal certain items from the victim and instead, the victim was assaulted). As these examples demonstrate, such non-essential and/or preparatory conduct for a Hobbs Act robbery offense do not meet the much-narrower elements clause.

Moreover, the parallels between attempted Hobbs Act robbery and aiding and abetting Hobbs Act robbery are clear. In *Taylor,* this Court held that the two elements of attempted Hobbs Act robbery—an "inten[tion] to unlawfully take or obtain personal property by means of actual or threatened force" plus a "'substantial step' toward that end"—do "not require the government to prove that the defendant used, attempted to use, or even threatened to use force". *Taylor*, at 2020-21. Taking an affirmative action in aiding and abetting is like the substantial step element of attempt in *Taylor* because neither requires the defendant to have personally harmed or threatened to harm anyone. The intent to assist a crime in aiding and abetting is

also similar to the intent element in attempt—it is nothing more than a mental state. In other words, aiding and abetting a Hobbs Act robbery does not require the *defendant* to use, attempt to use, or threaten to use force.

This conclusion is also consistent with *Rosemond*. It is clear that the government need not establish any particular elements of the underlying offense to establish aiding and abetting. It need only establish the elements of aiding and abetting the crime. Aiding and abetting under § 2 does not require the government to prove, as an *element* of its case, the use, attempted use, or threatened use of force. Thus, under the categorical approach, which looks exclusively at the elements of the crime, aiding and abetting a Hobbs Act robbery is not a crime of violence.

Further, the contrary position in *McCoy I* and *Waite I* simply bypasses *Davis*' minimal conduct standard. *Waite I* reasoned, "…[In *McCoy I*,] we concluded that a § 924(c) conviction predicated on aiding and abetting a crime of violence is equivalent to one predicated on the commission of a crime of violence as a principal, so the defendants' § 924(c) convictions based on their guilt as aiders and abettors of Hobbs Act robbery and attempted robbery were not error. *Waite I*, 12 F.4th at 212. *McCoy I*, however, did not use the categorical approach in reaching this conclusion. Instead, it concluded that aiding and abetting a Hobbs Act robbery is a crime of violence merely by virtue of the fact that its underlying, principal offense is a crime of violence. Post *Taylor*, *McCoy II* and *Waite II* held the same. In other words, both *McCoy II*, and *Waite II* concluded that *Taylor* does not impact aiding and abetting liability because *someone* must commit the underlying crime, which itself is a crime of

violence. This is not in keeping with *Davis*' requirement that the minimal criminal conduct necessary for conviction under a particular statute is the benchmark for that determination. As set forth above, aiding and abetting a Hobbs Act robbery does not meet *Davis'* criteria and thus, does not constitute a crime of violence.

B. This Court should grant *certiorari* because the Second Circuit's decision conflicts with this Court's precedent requiring use of the rule of lenity when interpreting an ambiguous statute.

Waite also argued that the aiding and abetting issue conflicted with this Court's precedent requiring courts to use the rule of lenity when examining a statute lending itself to multiple contradictory interpretations. The Second Circuit in *Waite II*, relied on *McCoy I and II,* and in so doing failed to consider the rule of lenity despite grappling with how to interpret of what constitutes a "crime of violence."

This failure is significant because criminal statutes must give clear notice and warning of the conduct that will be punished. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). In the absence of sufficient clarity, this Court requires that any ambiguity must be interpreted in favor of the defendant per the rule of lenity. *United States v. Santos*, 553 U.S. 507, 514 (2008). The rule of lenity likewise "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The rule of lenity has particular importance when mandatory sentences are imposed for crimes in which they do not clearly apply. "[A] fair warning should be given to the world in language that the common world will understand, of what the

law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27, (1931); *see also Bass*, 404 U.S. at 348.

Waite II failed to consider the rule of lenity despite confronting the thorny question of what constitutes a "crime of violence." As noted by this Court in *Davis*:

> Employing the canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is "perhaps not much less old than" the task of statutory "construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). And much like the vagueness doctrine, it is founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Ibid.*; see *Lanier*, 520 U.S. at 265–266, and n. 5, 117 S.Ct. 1219. Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity. By contrast, using the avoidance canon instead to adopt a more expansive reading of a criminal statute would place these traditionally sympathetic doctrines at war with one another.

Davis, 139 S. Ct. at 2333 (2019). Had the Second Circuit considered the rule of lenity, it would have held that aiding and abetting a Hobbs Act robbery does not constitute a crime of violence due to the lack of clarity surrounding this issue.

III.

CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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