IN THE SUPREME COURT OF THE UNITED STATES

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ALBERTO R. GONZALES, :

ATTORNEY GENERAL, :

Petitioner :

v. : No. 05-1629

LUIS ALEXANDER DUENAS-ALVAREZ. :

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Washington, D.C.

Tuesday, December 5, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

DAN HIMMELFARB, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

CHRISTOPHER J. MEADE, ESQ., New York, N.Y.; on behalf of the Respondent

C O N T E N T S

P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in case 05-1629 Gonzales versus Duenas-Alvarez.

Mr. Himelfarb.

ORAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF PETITIONER

MR. HIMMELFARB: Mr. Chief Justice, and may it please the Court.

The Ninth Circuit held that the term theft offense, an aggravated felony under the Immigration and Nationality Act, does not include aiding and abetting. That holding is incorrect. Indeed, it is so clearly incorrect that even respondent does not defend it. Respondent's aiding and abetting argument is that his violation of the California vehicle theft statute is not a theft offense under the INA, not because the California statute covers aiding and abetting and the theft offense does not, as the Ninth Circuit held, but because the California statute covers a certain kind of aiding and abetting, so-called natural and probable consequences rule, and a theft offense does not.

That theory is slightly narrower than the Ninth Circuit's but it is mistaken for many of the same

reasons. One of the reasons that the Ninth Circuit's holding is mistaken is that it would drastically limit the number of aliens who could be treated as aggravated felons based on a conviction obtained in any jurisdiction, because no jurisdiction distinguishes between principals and aiders and abetters and it is ordinarily not possible to prove that an alien in a particular case was not convicted as an aider and abettor. Respondent's theory would have the same effect when a conviction was obtained in any jurisdiction that obtains the natural and probable consequences rule.

JUSTICE SOUTER: Will you help me out on one mechanical point? As you probably know from your brief, I don't come from a jurisdiction that uses this rule and I'm just not used to it. I had thought -- and I guess I'm wrong -- that if the natural and probable consequences theory were used to prove, let's say, ultimately the offense of assault, in what started out as a theft case, that there would have to be a separate charge of assault but that the theory of proof would be the natural and consequences extension of aiding and abetting so that there would at least be on the record a charge of assault.

And I take it that's not the case.

MR. HIMMELFARB: I -- I don't think it is.

I --

JUSTICE SOUTER: Otherwise, you wouldn't have this problem.

MR. HIMMELFARB: Well, it is the case that the aider and abettor has to intend to aid and abet what is sometimes called the target crime. It also has to be the case that the principal has to then go on to commit some other crime, a subsequent crime. The issue then arises whether the aider and abettor who intended to assist the target crime is held liable for the subsequent crime.

JUSTICE SOUTER: But in any case in my example of -- of theft, and the further offense under natural and probable consequences being assault, the only charge against the defendant who aided and abetted would be a charge of theft; is that correct?

MR. HIMMELFARB: It could be. It could be. But in the course of proving the aider and abettor guilty of the subsequent crime on this natural and probable consequences theory, there would have to be proof that bore upon the target crime to show what his intent was with respect to the target crime and also whether the subsequent crime was a foreseeable consequence of the initial crime.

JUSTICE SCALIA: I don't understand it. How

can he be convicted of -- of the consequential crime if he is never charged with the consequential crime? You charge him with the -- with the theft and convict him of assault?

MR. HIMMELFARB: No, Justice Scalia. He would have to be charged with the subsequent crime.

JUSTICE SCALIA: Okay, well I thought you -- I thought you answered --

JUSTICE SOUTER: Me too.

MR. HIMMELFARB: I didn't mean to say that. I meant to say he didn't have to be charged with the initial crime. In fact, even the principal wouldn't have to be charged with the initial crime or for that matter, any crime. The aider and abettor could be charged only with a consequent crime but in the course of proving that under the natural and probable consequences rule, there would have to be proof with respect to the target crime, because the elements of the natural and probable consequences rule depend upon what happened.

JUSTICE SCALIA: The theory being that anybody who intended to aid and abet a crime which naturally leads to another crime intended the other crime as well.

MR. HIMMELFARB: That's the basic principle.

JUSTICE GINSBURG: Mr. Himmelfarb, does the government urge that we consider the point that you're now arguing and the other points? You started out by saying everyone agrees that the rationale of the Ninth Circuit won't wash, but if we go beyond that, then we are deciding the question as a matter of first view instead of review.

Does the government urge that we dispose of those issues anyway, even though they were not disposed of by the Ninth Circuit?

MR. HIMMELFARB: We think that the aiding and betting argument that respondent raises is fairly included within the question presented and that it should be resolved. We don't think the other two issues are fairly included within the question presented.

We think that this issue is fairly presented within the -- fairly included within the question presented and should resolve --

JUSTICE GINSBURG: But it wasn't discussed by the Ninth Circuit, was it?

MR. HIMMELFARB: It wasn't, Justice Ginsburg, but it bears upon the question of what it means to say that an aggravated felony encompasses aiding and abetting. If the Court simply holds contrary to the Ninth Circuit's holding that aiding and abetting

is included in an aggravated felony, it will leave open a very important question which we think the Court should provide guidance to the lower courts on. It would leave open the question of whether that means that there is some general Federal immigration law definition of aiding and abetting with which the law of aiding and abetting in the jurisdiction of conviction would have to be compared in every single removal case, at least potentially, or rather as we would submit, that Congress intended to cover the entire range of aiding and abetting under whatever formulation was used in any jurisdiction at the time the aiding and abetting provision was added to the Immigration and Nationality Act.

JUSTICE SCALIA: And what about the remaining questions that were not decided by the Ninth Circuit?

MR. HIMMELFARB: Well, certainly the --

JUSTICE SCALIA: Do we remand for those or what?

MR. HIMMELFARB: Yes. It's open to -- it would be open to the Ninth Circuit. Assuming the Ninth Circuit were of the view that they were fairly raised in the Ninth Circuit, and also that they were fairly raised in the agency, it would be open to the Ninth Circuit to

resolve those questions in the first instance. Let me just add that --

JUSTICE GINSBURG: Why would it have to be raised in the Ninth Circuit? I thought this case was controlled by a prior decision of the Ninth Circuit. Therefore, there was nothing more that was needed to take care of this case.

MR. HIMMELFARB: That's true. The Ninth Circuit didn't pass upon any issue except the question whether aiding and abetting as a general matter is included in a theft offense. Relying on a prior decision, it held that it wasn't, and sent the case back to the Board of Immigration Appeals. But there, I think it would still be fair for the government to argue that a particular theory that may be raised here in defense of the judgment wasn't properly raised either in the Ninth Circuit by respondent, or before the agency, such that that claim was not properly exhausted.

JUSTICE SCALIA: Mr. Himelfarb, you point out these last two issues are not, and probably correctly, that they are not fairly included within the question presented. Well, that would be disabling if indeed it was the petitioner that is seeking to raise those two additional issues. But here it is the respondent; and we can certainly reach those issues if

we want to.

MR. HIMMELFARB: Of course. Of course.

JUSTICE SCALIA: The respondent can seek to uphold the judgment below on whatever grounds he wishes.

MR. HIMMELFARB: Of course.

JUSTICE SCALIA: So we can reach those other issues if we wish.

MR. HIMMELFARB: It's ultimately a matter of the Court's discretion. Our submission is that the wiser exercise of the Court's discretion would not -- would be not to address the issue, particularly the last issue raised in respondent's brief.

CHIEF JUSTICE ROBERTS: Well, the only thing that the Ninth Circuit held was that the definition of a theft offense in California is broader than the generic definition of theft. All of these arguments that are being discussed are ways in which that particular ruling is supported. I don't know why they wouldn't be considered subsumed under the Ninth Circuit's decision.

MR. HIMMELFARB: Well, Mr. Chief Justice, we don't read the Ninth Circuit's order that way. We think the Ninth Circuit simply reversed on the strength of its prior decision in Penuliar. And in Penuliar, the Ninth Circuit clearly held the reason this California statute was not a theft offense was that conviction under it is

possible under an aiding and betting liability theory. So insofar as the order relied on Penuliar, it was saying nothing more and nothing less than that respondent's conviction was not a theft offense because it is theoretically possible he was convicted as an aider and abettor and the definition of theft offense under the INA does not include aiding and abetting.

Now as I was saying, I think it's important for the Court to make clear what it means to say, that aiding and abetting is included in the aggravated felony definition. And this -- the type of argument that respondent raises here, I think is important to keep in mind, is not limited to the particular aspect of aiding and abetting law on which he relies.

There are a great many different formulations of the basic requirements of aiding and betting. Not only that they -- they vary not only from jurisdiction to jurisdiction but even within jurisdictions. So in the next case, you could imagine an alien or removal case arguing that because some other requirement of aiding and abetting law in the jurisdiction in which he was convicted is broader than the more typical formulation, that even though he was clearly convicted of, for example, murder, and even though the elements of murder in that jurisdiction

perfectly match up with the federal definition of murder in the immigration statute --

CHIEF JUSTICE ROBERTS: Counsel, you're ahead of me, and I'm still back on the last question, but I take it your rationale for not reaching these other grounds would also apply to your argument that whatever the categorical definition, that this defendant was convicted of an actual theft offense, looking at the charging documents. That wasn't a basis for the Ninth Circuit's decision either.

MR. HIMMELFARB: That's true, Mr. Chief Justice. Our main submission is that the Ninth Circuit relied on an issue of aiding and abetting. We petitioned on that question and the Court granted certiorari on that question.

The three grounds on which respondent relies on defense of the judgment, even though they all vary in some sense from the Ninth Circuit's ground, two of them simply have nothing to do with aiding and abetting. The first ground is an aiding and abetting argument. It's slightly different from the one, slightly narrower than the one on which the Ninth Circuit relied, but we think it's fairly included and we think the Court should address it. We think the Court should reject it for the reasons I am attempting to articulate now.

If you have a jurisdiction with a law of aiding and abetting that is broader, it can be characterized as broader in some sense than what might be thought to be the general notion of aiding and abetting, under the premise of respondent's theory, you could conceivably have this kind of argument in any removal case --

JUSTICE ALITO: What if a particular jurisdiction has an entirely novel and fundamentally different theory of aiding and abetting? Is it simply sufficient that it is labeled aiding and abetting?

MR. HIMMELFARB: Well, Justice Alito, we think it would be perfectly appropriate for the Court to leave open the question that if at some point in the future, some entirely novel radical far-reaching theory of aiding and abetting were adopted, that would not be sufficient. I don't think as the law currently stands there is any such theory in any jurisdiction; and I think that Congress should be presumed when it enacted the aggravated felony provision, to be covering the field of possibilities. But if at some point in the future some jurisdiction decided that, you know, somebody could be strictly liable --

JUSTICE STEVENS: Mr. Himmelfarb, what about accessory after the fact, do your comments apply to that

argument as well?

MR. HIMMELFARB: Well, we think that that's not fairly included within the question presented. We think that's just a -- accessory after the fact is a separate crime

JUSTICE STEVENS: Well, it may not be fairly included but as you've acknowledged, it is an argument asserted to defend the judgment.

MR. HIMMELFARB: That's right. We think that the Court could resolve that issue along the lines we've suggested in our reply brief. Respondent's basic submission on that point is that the term -- the phrase in the California statute, any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, that in that phrase the term accessory means accessory after the fact. An accessory after the fact is not included in the definition of the theft offense. Therefore, the California statute is broader than a theft offense. It's our submission that the Court can assume that he's right about that but still rule for the government on the accessory after the fact issue, because whatever the statute might say, he was charged as a principal. And the law is clear that somebody charged as a principal --

JUSTICE GINSBURG: How do we know that? I

was looking at, what is it, 13-A? How do we know that that charge is as a principal? In the appendix to the petition.

MR. HIMMELFARB: Well, Justice Ginsburg, it tracks the language of the statute up to the point where the statute uses the phrase I just read.

So it's principal language. It's theoretically possible that he was convicted as an aider and abettor because the law in California, as it is elsewhere, is that somebody charged as a principal can be convicted as an aider and abettor; but the law in California, as it is elsewhere, is that somebody charged as a principal cannot be convicted as an accessory after the fact. There is no language in the charging instrument to suggest that respondent was charged as an accessory after the fact.

JUSTICE SOUTER: But to accept your answer, we've got to look into a question of California pleading law which hasn't been passed on below.

MR. HIMMELFARB: Well, that's right. Respondent raises a number of arguments in response essentially to the argument I just made. We think they're all entirely insubstantial and could be rejected quite easily. But it may well be that the Court would think that the better course is not to address the

accessory after the fact issue.

JUSTICE SCALIA: Why wouldn't the better course be also not to decide the principal question you want us to decide on the broad ground that you want us to take, which is that if there are minor differences between what you might call the general law of aiding and abetting, it doesn't matter. Why wouldn't it be wiser to decide this on the simple ground that this kind of consequential liability is part of the general law of aiding and abetting, which you argue in your brief?

So that would be the narrower ground.

MR. HIMMELFARB: That would be narrower ground. That is certainly our fallback position and we would not be at all unhappy if the case were resolved on that ground.

JUSTICE GINSBURG: Even though that position has been widely criticized, I think. Is it the ALI Model Penal Code, which thinks it's a bad rule?

MR. HIMMELFARB: There has been some criticism of the rule, Justice Ginsburg, but it is applied in criminal cases in Federal courts; and whatever criticism there might be in the academic literature, even in some state decisions, we think it is just inconceivable that Congress would have intended that somebody could be convicted under this theory under

the Federal criminal law and be subject to the same criminal penalties as a principal, and yet under the federal immigration law could not be subject to the same immigration consequences as a principal. So whatever grounds there are for criticizing it, it is the law in most places. And most importantly, we think, it is the law in Federal courts.

Taking account of minor variations in formulation of aiding and abetting standards among jurisdictions would not only have the consequence of drastically limiting the number of aliens who could be found to be aggravated felons, because of the difficulty of establishing that someone was convicted as a principal rather than an aider and abettor. It would also complicate removal cases enormously, as I mentioned.

The premise of respondent's aiding and abetting theory would suggest that in any case, it would be necessary for the immigration judge, board of immigration appeals and the reviewing court, to engage not only in an analysis of whether the principal offense of conviction matches some Federal definition, which itself can be a quite complex enterprise, but having done that, it would then have to go on and compare the aiding and abetting law of the state of conviction with

some Federal aiding and abetting law.

JUSTICE SCALIA: In that former question as to whether California theft is general theft, do you propose the same rule? That even if California has some minor variations -- not just in aiding and abetting but in what constitutes theft -- minor variations from what the general national rule is, they should be disregarded? And if not, why not?

MR. HIMMELFARB: Well, we think that -- we don't, first of all.

And I think no court would say that and we certainly wouldn't. But there's a very important difference insofar as that type of comparison was concerned between on the one hand a principal offense and on the other hand aiding and abetting. The two important differences are if you have a general definition of the principal offense, whether it's a theft offense or burglary, any reasonable framework would contemplate that in a great many cases you would be able to tell whether the alien before the court was convicted of that offense, of the Federal definition of that offense, simply by looking at the State statute of conviction; and if it matches it, that's the end of the analysis. If it's broader, in most cases you'd be able to look at the charging instrument and see whether that

person was charged with something narrower than the whole range of conduct that's covered by the statute.

Under respondent's theory, if you were to apply that same approach to aiding and abetting you would never be able to look at the statute to see whether somebody was convicted under an aiding and abetting theory that matches the Federal definition because every statute includes aiding and abetting, so it's impossible to tell from the statute whether somebody was convicted as a principal or an aider and abettor.

Then if you look at the charging instrument, that won't suffice either because the law everywhere as far as I'm aware is that somebody charged as a principal can be convicted as an aider and abettor. So the only cases in which you'd be able to establish that somebody was not convicted as an aider and abettor are the unusual cases where there happens to be something in the files of the criminal case that will explain in some admissible fashion whether the defendant was convicted as a principal or an aider and abettor. That's the first important distinction. The second --

JUSTICE SCALIA: So you would limit your rule just to aiding and abetting and not to other minor variations, just minor variations in the aiding and

abetting definition?

MR. HIMMELFARB: That's right. I mean, our submission is that Congress's intent in enacting an aggravated felony provision that captures aiders and abettors was that minor variations in formulation wouldn't matter for the reasons I'm giving. So it's ultimately a matter of Congressional intent.

The second reason why this is important is because if you were to apply that rule to aiding and abetting you would be saying, in effect, that in any jurisdiction that applies a broader rule of aiding and abetting every single crime in the criminal code would not qualify for aggravated felony status, because an aiding and betting statute runs with the entirety of the criminal code and is a potential theory of liability for every substantive criminal offense. So that would mean that in those, those broader aiding and abetting jurisdictions, nothing could ever be an aggravated felony unless the government could somehow search through the criminal files and find something to prove that in fact the defendant was not convicted under an aiding and abetting theory.

JUSTICE GINSBURG: Mr. Himmelfarb, before your time runs out, there's something curious about this California statute. This one is in the Motor Vehicle

Code, and there's this offense in the Penal Code called car theft. Do you know what the difference between those two and what would move a prosecutor to charge under the Penal Code as opposed to the Vehicle Code?

MR. HIMMELFARB: Well, the theft offense that covers cars under than this one in California that I'm aware of, Justice Ginsburg, is just a grand theft statute, which is just general theft as applied to particular circumstances, one of which is the theft of a car.

JUSTICE GINSBURG: That's mentioned in what, 487(d)?

MR. HIMMELFARB: That's right. That's right. And as I understand it, that is essentially a larceny statute, which encompasses a common law larceny rule, which is that there has to be an intent to steal or, stated differently, that there has to be an intent to deprive the owner of the car, of the car permanently, whereas the California vehicle theft statute at issue here is a broader statute in that it doesn't require any intent to steal. It doesn't even require a taking. A driving is sufficient. So it would capture the receipt of stolen property. And it doesn't require an intent to deprive the owner of the car permanently. It would be sufficient if there was an intent to deprive the owner

of the car temporarily.

JUSTICE GINSBURG: It covers joyriding?

MR. HIMMELFARB: Well, it would cover -- it would cover what is colloquially known as joyriding if it fell within the terms of the statute. That is, if there was an intent to deprive the owner of the property. And on the subject of joyriding, let me --

JUSTICE GINSBURG: Temporarily.

MR. HIMMELFARB: At least temporarily.

Respondent makes much of the fact that on our reading of the statute, on our understanding, that a theft offense would cover the California vehicle theft statute here. That would mean that joyriding would be included. But I think it's critical to keep in mind that there are two very important limitations in the Federal definition of theft offense. The first is that, as interpreted by the Board of Immigration Appeals, it does require an intent to deprive the owner of property, and a great many unauthorized use of vehicle statutes in the State don't have that element. That's one important limitation.

The other is that many of these statutes are misdemeanor statutes, so somebody convicted of it would not be sentenced to more than a year in prison. By the terms of the theft offense provision of the aggravated

felony provision in the INA you have to be sentenced to at least a year in prison in order to be treated as an aggravated felon. So we think the vast majority of what is colloquially known as joyriding cases would not fall within this particular aggravated felony.

JUSTICE GINSBURG: But in California they would? Or is there a separate joyriding --

MR. HIMMELFARB: No. Joyriding in California would be prosecuted under this statute. But unless there was an intent to deprive, there could be no conviction, and unless the sentence was at least a year it would not be treated as an aggravated felony.

JUSTICE SCALIA: Is it the sentence given or the sentence prescribed for the crime?

MR. HIMMELFARB: The sentence given, Justice Scalia.

JUSTICE SCALIA: Given.

MR. HIMMELFARB: I'd like to reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Himmelfarb.

Mr. Meade.

ORAL ARGUMENT OF CHRISTOPHER J. MEADE

ON BEHALF OF RESPONDENT

MR. MEADE: Mr. Chief Justice, and may it

please the Court:

I would like to pick up on the point made by Justice Ginsburg. This case does not involve a conviction under California's car theft statute, which is Penal Code 487(d), which requires an intent to steal. Rather, it involves a conviction under California's Vehicle Code, which covers varied and less serious conduct including liability with or without the intent to steal and also expressly reaching accessories after the fact, which the Government concedes would make it broader than the generic definition of theft.

The question is whether a conviction under this statute is a theft offense and therefore an aggravated felony triggering the extremely serious consequences of automatic deportation from the United States, a permanent bar from the United States, and in the sentencing context a sentencing enhancement from 2 to 20 years for illegal reentry.

CHIEF JUSTICE ROBERTS: Your friend began his argument by saying you don't defend the decision of the Ninth Circuit below on aiding and abetting. Is that correct?

MR. MEADE: We do defend the judgment of the Ninth Circuit.

CHIEF JUSTICE ROBERTS: I know the judgment,

but you focused at least primarily on other grounds than the one on which the Ninth Circuit relied.

Is he correct that you concede that merely because the statute extends to aiders and abettors that is not sufficient to take it out of the categorical treatment?

MR. MEADE: As an abstract general matter divorced from the facts of this case and divorced from California law, we agree that aiding and abetting liability is part of a generic definition of any crime, including the theft offense here.

However, that's not what the Ninth Circuit stated in either this case or in Penuliar. In Penuliar the Ninth Circuit stressed the extremely broad nature of California's aiding and abetting liability. It cited a case, People v. Beeman, which refers to the specific natural and probable consequences doctrine under California law.

So the Ninth Circuit was talking about the broad sweep of aiding and abetting liability under California law.

JUSTICE SCALIA: Could I ask a factual question? I'm just curious. If the Government's statement of the facts here is correct, your client, a Peruvian, was convicted of burglary in 1992 and

convicted of possession of a firearm by a felon in 1994, and nonetheless was made a lawful permanent resident in 1998. How does that happen? Is that a mistake or -- how do we decide who's admitted as a lawful permanent resident?

MR. MEADE: I don't know the answer to the question except to state that those two, those convictions did happen in the years that you state and he did become a lawful permanent resident in 1998.

I believe it was through a waiver provision under the INA that that's how he became a lawful permanent resident.

JUSTICE SCALIA: He's not a joyrider anyway.

MR. MEADE: I would disagree with that. All we know in this case from the record is that he was not charged with 487(d) car theft, which requires an intent to steal. He was rather charged under a conviction which covers joyriding.

In my reading of the Government's brief, the Government doesn't contest that joyriding would put a statute outside the generic definition of theft offense. Even in the Government's presentation today, the Government suggested that in most States joyriding would be outside the generic definition of --

JUSTICE BREYER: So then the Ninth Circuit

was wrong in your opinion when it defined generic theft as the taking or exercising control over property without consent, with the intent to deprive the owner of rights and benefits, even if it is less than permanent or total? They're wrong in your opinion?

MR. MEADE: No, I don't think they're wrong.

JUSTICE BREYER: Well then, I don't see how you make --

MR. MEADE: Sure. I'd be happy to --

JUSTICE BREYER: Isn't that inconsistent with what you just said?

MR. MEADE: No.

JUSTICE BREYER: Why not?

MR. MEADE: No, it's not inconsistent. We don't take the position that a permanent deprivation is required, is required. A less than permanent is sufficient, as the Ninth Circuit stated in Corona-Sanchez. The Ninth Circuit has subsequently held that a joyriding offense is outside that definition because it includes a brief taking with an intent to return, and the last footnote of the Government's brief, note 8, cites that Ninth Circuit case.

JUSTICE BREYER: I don't understand how that could be right, though. I mean, when you joyride it's less than personal. In other words, their definition is

if you take somebody else's property for an hour that that isn't theft, but if you take it for a day it is?

MR. MEADE: The question has to do with how long of the taking. And at common law --

JUSTICE BREYER: They're trying to -- is there a common law, because they're trying to report -- is under the common law there a rule or any generic rule that says if you take somebody else's property for a couple of hours it is not theft, but if you take it for several hours or several days it is theft?

MR. MEADE: There is a generic rule on this, and there is a consensus among the vast majority of States. I point to both Professor LeFave as well as the Model Penal Code. And what these rules say -- and this is true in the vast majority of States, 42 States by our count -- is that if you take either permanently or for an unreasonable amount of time such that it would deprive the owner of the significant portion of the economic value, then that constitute a theft offense.

JUSTICE SCALIA: You shouldn't steal it for an unreasonable amount of time, just for a reasonable amount of time?

MR. MEADE: Excuse me.

JUSTICE SCALIA: I don't understand the concept of stealing something for a reasonable amount of

time.

MR. MEADE: Well, I mean, that goes to the exact point, Justice Scalia, because we're not -- the question is what is stealing. The question --

JUSTICE BREYER: You're saying that the rule is something is theft only if you take it long enough to deprive an owner of a significant portion of its value?

MR. MEADE: Or a reasonable time, or to place --

JUSTICE BREYER: No, no, no. Wait. I want to know where that comes from, because I would think I have a Volvo. It lasts for about 30 years, apparently. So I guess if you took my car for a year, that that then would not be a theft, or maybe it would be. Where is the source of the rule you just cited?

MR. MEADE: The source is the generic definition as applied in all of the States.

JUSTICE BREYER: No, no. I want a book. I want a book that will tell me that if they take my car for a month it isn't theft, but if they take it for a year it is. What book, or where do I look to verify that this is common law? I'm not denying what you're saying. I just want to know where to look.

MR. MEADE: Sure. Two sources. One would be Professor LeFave in his discussion of what the intent

required for the different theft offenses; and the second source would be the Model Penal Code when it sets forth the requisite mens rea for theft offenses.

CHIEF JUSTICE ROBERTS: That was the third reference to the Model Penal Code, so I have to ask. No one's enacted the Model Penal Code, have they?

MR. MEADE: No. But in Taylor and in Seidler this Court used the Model Penal Code as a shorthand for the generic definition of a certain crime. But we don't rely on the Model Penal Code.

CHIEF JUSTICE ROBERTS: Would you describe the Model Penal Code as closer to restatement or aspirational in terms of its reflection of the existence of general law?

MR. MEADE: I would say that the Model Penal Code is consistent with the majority view. On this question of intent to steal, as we set forth in our brief, 42 States hold what we say the law is, that an intent to steal -- a theft offense requires a mens rea more than taking with an intent to give back.

JUSTICE SCALIA: You assert, you assert it's consistent with the majority view on this issue, not on everything. What does it say about the death penalty?

MR. MEADE: I'm not sure what it says about the death penalty. On this issue.

CHIEF JUSTICE ROBERTS: Is that what joyriding is? That when you're done with your joy ride, you return the car where you picked it up? I thought they just abandoned it wherever you happen to be.

MR. MEADE: If you abandon the car wherever you happen to be that's not joy riding. That's covered by traditional larceny principles. In the, the case of State v. Davis from 1875 involves that exact principle. That is larceny in that case. But however, if someone takes a car, a teenager, a neighbor takes a car, drives it around the block, brings it back to the same place, that is joyriding. That is covered by 108.51.

CHIEF JUSTICE ROBERTS: What's the joy in that?

(Laughter.)

JUSTICE SCALIA: The joy apparently is you don't get convicted of theft.

(Laughter.)

MR. MEADE: But what we have here is statute that criminalized conduct less serious than car theft. This is -- 108.51 is the only statute in California that covers joyriding. There's a whole different provision that deals with car theft. In cases where that's the appropriate charge, prosecutors will charge the person with car theft and meet the burden of proof. Here we're

dealing with a less serious crime, a less serious statute and the question is whether this statute that require a very minimal mens rea, with or without intent to steal, is sufficient to lead to the very serious consequences of being an aggravated felony.

CHIEF JUSTICE ROBERTS: Do you understand that point to be what the Ninth Circuit relied on?

MR. MEADE: No. Absolutely not. The Ninth Circuit didn't rely on that. It was presented to the Ninth Circuit but the Ninth Circuit did not rely on that.

CHIEF JUSTICE ROBERTS: So if we decided on the question, the aiding and abetting question, they did decide this would available to you to argue on remand?

MR. MEADE: Uh, yes.

CHIEF JUSTICE ROBERTS: Because you presented it to the Ninth Circuit below.

MR. MEADE: Yes, it would.

I would like to also to address the question of accessory liability under California law.

108.51 expressly covers accessories. The Government concedes that if that term means accessory after the fact, then this statute is outside the generic definition of a theft offense. Under California law, accessory has only one meaning, and that one meaning is

accessory after the fact. On that ground alone, this statute is broader than a generic definition of theft offense and would provide a -- an alternate ground of affirmance in this case.

JUSTICE GINSBURG: Mr. Meade, the Government says that definition holds for penal code offenses, but it's not altogether clear that a definition in the penal code would carry over to the vehicle code.

MR. MEADE: I have two responses, Justice Ginsburg. First, there's a similar provision to 108.51 covering the taking or operating of an airplane. It is in the penal code. It is 499(b). It exactly mirrors the language of 108.51. So presumably the Government would agree that the definition of accessory under California law in the penal code would cover 499(b) for the same reasons it would cover under 108.51. Moreover, accessory under California law only has one meaning. In 1872 the California legislature passed the provision at issue, Section 32 and said accessory is defined to be accessory after the fact. At the same time, the legislature passed other provisions which also used accessory in that consistent way.

The California Supreme Court as early as 1898 stated that accessory means accessory after the fact and relatedly, accessory before the fact, the only

other plausible meaning of the term, has no meaning under California law.

So with all due respect to the Government, accessory in 108.51 means accessory after the fact and that alone makes a broad and generic definition of theft offense.

JUSTICE ALITO: So wouldn't it odd for this Court to decide that issue of California law?

MR. MEADE: I wouldn't think it would be odd, Justice Alito, because it is so clear. It has to do with a statutory term. It has to do with a statutory term that's defined under the California statute. Moreover, under a Taylor inquiry, Federal courts are often required to look at state law to figure out whether a particular provision is within or outside a generic definition of a crime.

JUSTICE SCALIA: Of course if you're right about this it would mean the statute is broader, but it would still be available to find out whether your client was in fact convicted as an accessory or as a principal.

MR. MEADE: That's correct, Your Honor.

JUSTICE SCALIA: Now is that -- is it possible? Or is that out of the question in this case?

MR. MEADE: I'm sorry. Is what possible?

JUSTICE SCALIA: Is it possible from

pleading documents, from the charge, to determine whether he was convicted as an accessory or not? And if it's clear that he wasn't, then we're just wasting our sometime in arguing this point, aren't we?

MR. MEADE: I disagree. Because as an initial matter, this case in our view is about the categorical approach. But as to your question about what these documents show, no, the documents in this case do show that he was an accessory after the fact or a principal, but the Government has failed to meet its burden one way or the other.

CHIEF JUSTICE ROBERTS: Well, they say you cannot be convicted as an accessory unless you are charged as such, and that the documents show he was charged as a principal.

MR. MEADE: We disagree with that characterization of the Government as we set forth in our brief. California law does not require someone to be charged with that specific -- level of specificity. And that's something we set forth in our brief. Moreover --

JUSTICE GINSBURG: Well how about how -- how the defendant was charged in this very case? Mr. Himelfarb thought that it was plain from that charge, that's on 13(a), that he was charged as a

principal. And you must take the view that this charge, this information was inadequate to identify him as principal.

MR. MEADE: This charge is ambiguous as to whether he was charged as a driver and taker, as the principal, or as an accessory after the fact.

JUSTICE SCALIA: No, no, no. It says, "who at the time and place last aforesaid did willfully and unlawfully drive or take a vehicle." I mean, he is -- he's charged with being the person who took the vehicle, not, not some subsequent accessory.

MR. MEADE: Well, this is a question of California law.

JUSTICE SCALIA: It is not a question of Cal -- it is a question of English.

MR. MEADE: No, I disagree, Your Honor. I mean, it's a question of California law what needs to be charged in a California charging document.

JUSTICE SCALIA: We're not saying about what needs to be charged. We're talking about what was charged. And it seems to me there's no question what was charged is that he did willfully and unlawfully drive or take a vehicle. There is no way you can consider that an accessory.

MR. MEADE: Well, I disagree. Because under

California law you need to charge generally under the statute, and the statute says drive or take. That's how he was charged. Moreover, though, under California law, the charging document does not necessarily control the conviction.

JUSTICE SOUTER: No, but you're -- you're saying then despite the fact that the, the indictment in this case said he willfully et cetera did this, it would be open to California to prove that in fact he didn't do any of those things, but was merely an accessory after the fact? That -- that's your position? That's what California pleading law allows?

MR. MEADE: Yes.

JUSTICE SOUTER: Okay.

JUSTICE STEVENS? Do you have any case on that?

MR. MEADE: Yes. People v West and People v Toro.

JUSTICE STEVENS: Both West and Toro.

MR. MEADE: Yes. W-e-s-t, and People v Toro. There's also the case of Sandoval which is also cited in our brief.

JUSTICE STEVENS: Does any of those cases squarely hold that he could be convicted of being an accessory after the fact on a general indictment like

this?

MR. MEADE: No, none of them do. They talk about the general principle under California law, about that a charging document does not necessarily control the ultimate conviction and sets forth the test that needs to be applied. But on this question --

CHIEF JUSTICE ROBERTS: Well, the Government -- it is not only that. The Government has authority going the other way. People versus Prado, "in the absence of a statute, an accessory after the fact must be indicted and convicted as such." If you look at this information, it's clear that he's not being indicted as an accessory after the fact.

MR. MEADE: Well, we think People v Prado supports our view which is a statute specifically that allows for accessory liability on its face. So, therefore, a person need not be charged under the different accessory statute.

However, to the extent this Court finds the charging documents or ultimate conviction ambiguous, which it sounds like some members of the Court may believe it is, this is a question of California law, as a first point; but moreover, the question here is whether the Government has met its burden under Taylor and Shepard. And under Taylor and Shepard the inquiry

is whether it can necessarily be shown that someone was convicted of a generic definition; and here, given the ambiguity under California law, it can't be said that --

JUSTICE BREYER: But what do we do about that? No, you have no interest in answering my question, but the question, it seems to me under the law, here is what I do -- and I'm a good deference lawyer, as you are. I simply look at the statute. And I imagine some very weird case that the statute could cover where the person wouldn't have the right intent or it wouldn't be theft or it would be some odd thing. There's no possibility in the world that applied to my client. But most charges are simply stated in the wording of the statute. And most judgments simply say guilty.

So I say "see, you see, it is theoretically possible." And now when you decide what really happened, Court, you're supposed to look only to the charging documents in the judgment; and you can't say it didn't. So the whole congressional scheme is basically put to the side.

Now what's the answer to that problem, insofar as you want to answer it?

MR. MEADE: Of course, I'd be happy to. I don't think it puts the whole scheme aside. Remember,

the Government gets two bites at the apple here. They get a first bite on the categoric approach where all they need to show is that all the elements are within the generic definition of the crime. We'd be dealing with a different case if the person was charged under the penal code which doesn't require -- which requires intent to steal and which does not cover accessories after the fact. So the Government gets a free pass on round one.

On round two, on the modified categorical approach as we're discussing here, the Government gets a second chance to -- based on actual documents in the record to establish whether there's enough there.

Here the Government relies on the charging document in an abstractive judgment, but the Government does not put in a plea colloquy, it does not put in plea allocution, it does not put in any other documents that would establish under Shepard that someone was necessarily convicted of the crime. So what -- the Government here is asking to be relieved of its burden of proof which it has in this case. I would like to note that on the --

JUSTICE SCALIA: But the charging document you acknowledge would suffice if it indeed is California law that in order to convict as an accessory you have to

charge as an accessory? You would acknowledge this?

MR. MEADE: Yes. I would acknowledge the charging document unto itself, but not taking into account the fact that the charging document and the conviction not match.

I would note, though, that the Court need not go to the modified categorical approach, and I would say should not. This is something that the board -- the agency has been able to deal with for 60 years or so, dealing with the actual documents, trying to figure out a whether particular charging document is or is not enough. In Shepard itself, which actually dealt with the question of which documents could or could not be considered, the Court did not go further and look at the next step and decide whether those particular documents did or did not meet the definition in that case.

I'd also like to note to the extent that this Court finds California charging law ambiguous or hard to understand, under the principle of Jett v Dallas Independent School District, the circuit courts are in a better position to consider a matter of California State law in the first instance.

So our accessory argument is that the Court should decide the categorical approach alone on the accessory after the fact ground and remand to the agency

for consideration under the modified approach.

I'd like to also stress that if the Court were to affirm on that ground it would be a very narrow holding. There's only two other statutes in California that expressly include accessories after the fact. California's car theft statute does not include accessories after the fact.

JUSTICE ALITO: In order to agree with you on the accessory point, though, don't we have to decide two disputed issues of California law? Whether accessory here in this statute means accessory after the fact, and whether if somebody is charged under that statute as an accessory, that has to be alleged specifically in the indictment, or whether it is just sufficient to charge the person with the offense.

MR. MEADE: The Court would only need to decide that first question, not the second question. The first question is what is the meaning of accessory under California law. That is sufficiently clear in our view that the Court need not send it back to the Court of Appeals. The second question under the modified approach is outside the core of what this case is about, and we suggest that that should be remanded to the Ninth Circuit or the agency.

CHIEF JUSTICE ROBERTS: Has anyone ever been

prosecuted as an accessory after the fact to joyriding?

MR. MEADE: I do not know one way or the other, Your Honor. But I also note that we don't know whether anyone has been prosecuted under 108.51 on that ground, we also do not know whether someone has been prosecuted under Section 32, which is the accessory after the fact provision, or more generally on that ground.

CHIEF JUSTICE ROBERTS: But if no one has ever been prosecuted as an accessory after the fact for joyriding, we'd really have to go out on a limb to construe this charging document which charges him as a principal as actually meaning to charge him as an accessory after the fact, wouldn't we?

MR. MEADE: Not necessarily, because what we have is a statutory provision that clearly covers accessories after the fact. We do not have an example of someone who was charged under 108.51, but there are many reasons why that may not show up, partly because the charging documents don't need to so provide, in our view. So figuring out who was and who was not an accessory after the fact or a principal under 108.51 is not so easy to distill.

JUSTICE BREYER: Have you been able to think of any examples where a person could have been,

convicted of this statute, under the statute would he actually have been some kind of accessory to another person committing another crime, and the natural and probable consequence was that that other person would violate this statute?

MR. MEADE: So --

JUSTICE BREYER: Have you been able to think of one?

MR. MEADE: Sure. So you're switching to the natural and probable consequences?

JUSTICE BREYER: Yes, I am.

MR. MEADE: Yes, and I thank you for that question. Someone who, say, could aid and abet, or have the intent to aid and abet purchasing alcohol for a minor, a natural and probable consequence of that could be joyriding.

I would also like to -- turning to the question of the natural and probable consequences doctrine, the government is incorrect when it states that the majority view accepts the natural and probable consequences.

JUSTICE ALITO: Are there cases that hold that the natural and probably consequences of purchasing alcohol for a minor could be joyriding?

MR. MEADE: We have not found a case on

that. However --

JUSTICE ALITO: Or anything else that somebody might do after getting intoxicated?

JUSTICE SCALIA: Partying maybe I would understand. I don't know about joyriding.

MR. MEADE: The natural and probable consequences theory cuts across a wide variety of crimes, as the government points out. So it would also cover the different provisions under the INA such as burglary, theft, and other provisions as well. The government, though, is incorrect in stating that the natural and probable consequences is a majority view. Even in its brief, the government only sets forth 22 states that it says apply that analysis.

Those 22 states that the government cites, many of them do not support the proposition that it is a majority view or even applied in those states. For example, just to give a couple of examples, the government cites Missouri as a state that applies the natural and probable consequences doctrine. However in Missouri, in the very case cited by the government, People v. Evans, the court rejects the use of the natural and probable consequences doctrine and says, "The use of the natural and probable consequences doctrine was error as a matter of law."

The same is true -- and that's on the same page the government cites. The same is true with respect to Maryland, where the same footnote that the government cites rejects the natural and probable consequences doctrine in favor of a narrower theory. It's also true in Idaho, Louisiana, Georgia and Texas, also do not apply the natural and probable consequences doctrine.

So what, the government here is seeking to hold someone guilty of a theft offense as an aggravated felony without the requisite mens rea, and something that's a minority view of the states.

Just to put this into context, under the natural and probable consequences doctrine, it's as if California passed a statute saying that in some cases someone can be guilty of burglary without the mens rea of burglary, or saying that one can be guilty of theft without the mens rea of theft.

CHIEF JUSTICE ROBERTS: Your argument isn't limited to theft offenses, correct? That would cut across all of these areas in which the federal law refers, in which a Taylor analysis would apply?

MR. MEADE: Yes, it would. So it would not necessarily apply to the non-Taylor provisions such as the one --

CHIEF JUSTICE ROBERTS: It would mean we could not rely on the categorical approach in almost any of those cases?

MR. MEADE: As -- on the first step, yes.

CHIEF JUSTICE ROBERTS: Yeah, the categorical approach.

MR. MEADE: It does mean that, Your Honor.

JUSTICE BREYER: Well then, what's an example of where you're held guilty on the ground that you aided and abetted natural and probable -- somebody did X and the natural and probable consequence was Y. Because after all, you are properly held guilty when you do an act and a known consequence is Y. So what's an example of that?

MR. MEADE: Sure. I'd be happy to give a number of examples.

JUSTICE BREYER: One would be good enough. The best one.

MR. MEADE: If you intend to aid and abet robbery, you intend to aid and abet robbery, you can be held liable for an unintended rape of another. If you aid and abet --

JUSTICE BREYER: That's a known and probable consequence? That's a probable consequence?

MR. MEADE: Yes.

JUSTICE BREYER: Well then, maybe the problem is that they don't define natural and probable consequence properly.

MR. MEADE: Well, this is how it's applied under California law. To give another example --

JUSTICE SCALIA: Wait a minute. That's a real case?

MR. MEADE: That's a real case, and I'll give you the cite. People v. Banks, 2002 Westlaw 192, 720. There's another case cited in our brief, aid and abet robbery, natural probable consequence, sex offenses, that's the People v. Nguyen case. Another example, a person who has the intention to aid and abet battery, beating someone up, can be held guilty for an unintended robbery.

And to show how stark this is, this is in California, it's broader than even the common law.

JUSTICE SCALIA: It sounds like the doctrine of unnatural improbable consequences.

(Laughter.)

JUSTICE BREYER: You're asking us to say that not only do the states have to have the same rule, but they have to interpret the rule the same way. This would make the application of the categorical approach impossible. You'd have to look not only to the

expression of the rule of law by the state courts, but to its application by the state courts in every jurisdiction. I mean, that just makes the whole enterprise infeasible, it seems to me.

MR. MEADE: What the Taylor analysis looks to is what's in the heartland of a certain crime, and here what's in the heartland of aiding and abetting. And what we have here is an aberrant doctrine of California law that is outside the mainstream.

JUSTICE SCALIA: Let me tell you, what's aberrant is the California interpretation of the standard doctrine that is used in many states, which is you intend the natural and probable consequences of what you do. And if California has, some California courts have come up with weird notions of that, I don't know that that destroys the uniformity among the states.

MR. MEADE: Just to briefly respond?

CHIEF JUSTICE ROBERTS: Yes, sir.

MR. MEADE: The rule that you state is that one intends the natural and probable consequences of one's own acts. We do not dispute this rule. The question is as applied to aiding and abetting liability, and California is one of a handful of states that applies the natural and probable consequences doctrine to aiding and abetting liability, which has the novel

and aberrant consequences of holding people liable even if they don't have the requisite mens rea for the offense.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Meade.

Mr. Himelfarb, you have four minutes remaining.

REBUTTAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF PETITIONER

JUSTICE KENNEDY: Would it be completely inconsistent with Taylor versus United States for us to say that when there is a novel or an unusual theory of potential liability such as proposed by the respondent, which would exonerate him from application of this statute, that he has the burden to show that that's what happened?

MR. HIMMELFARB: Well, we think --

JUSTICE KENNEDY: Would Taylor allow us to do that sort of burden shifting?

MR. HIMMELFARB: Well ultimately, Justice Kennedy, we don't think that Taylor controls on the question of what Congress's intent was under the INA. Ultimately Taylor was a question about Congress's intent in enacting the Armed Career Criminal Act, and every aspect of that decision was tied in some way to

Congress's intent there.

We think Congress's intent in enacting the aggravated felony provision of the INA has to be that it didn't intend that you would have these highly arcane comparisons of some general definition of aiding and abetting, which either would or wouldn't include the infinite variety of formulations of aiding and abetting.

JUSTICE KENNEDY: And so your general rule to accomplish your objective would be?

MR. HIMMELFARB: It's the one I suggested when I was up here earlier, which is a holding by this Court that Congress intended to include aiding and abetting liability in the aggravated felony provision, and intended to cover whatever formulations were extant in 1988 when the provision was enacted. The Court can leave open the possibility that if in some future case, some jurisdiction were to enact an extraordinarily far reaching theretofore unheard of formulation, for example, anybody who intentionally insists -- assists -- without regard to whether the person even knew about the principles of criminal conduct, could be held liable as an aider and abettor. In that circumstance, it might well be the case that a state, by adopting such a far reaching theory of aiding and abetting, would in effect forfeit the right to have any of the subsequent

provisions in its criminal code treated as aggravated felonies unless the government in the immigration case could somehow prove that the alien wasn't convicted as an aider and abettor.

JUSTICE SOUTER: I think that, the problem I guess that I have with your argument, is that the theory of Taylor and as carried forward in Shepard was that there was a concept of a generic offense. And when aiding and abetting liability is extended in the natural and probable consequences theory, we face the fact that regardless of what the actual count is, even on your count, there isn't even a majority of states that do it. And I have difficulty seeing how that can, therefore, form an element of a generic offense when it is -- or a generic concept of the offense -- when it is a minority view.

MR. HIMMELFARB: Well, even under our fallback position, Justice Souter, under which you would have to come up with some general definition of aiding and abetting and then make a comparison with the law of aiding and abetting in the jurisdiction of conviction. And even if it's, you know, 20-20 or 18-18 among the states on this particular wrinkle in the law of aiding and abetting, we think it is frankly dispositive in this case, that it is the Federal rule, and my friend

Mr. Meade has not disputed that.

We think it's just inconceivable that Congress would have intended that in a Federal criminal case if you're charged with murder, you can be convicted under a natural and probable consequences theory such that you could conceivably spend life in prison the same way a principal would, and yet you would not be subject to the same immigration consequences as somebody convicted of the principal offense of murder, and indeed, that you wouldn't even be able -- the government wouldn't be able to --

JUSTICE SOUTER: Why didn't we simply take the closest Federal definition as being the touchstone?

MR. HIMMELFARB: Well, I -- in Taylor?

JUSTICE SOUTER: Yes.

MR. HIMMELFARB: I think that one of the problems in Taylor was that there really is no Federal definition of burglary. That's part of it. The other part of it is to some extent, the Court did rely on the Federal definition in Taylor. The original version, the original version of the office statute defined burglary, and it defined it in a generic way which was broader than the common law rule.

JUSTICE SOUTER: Was Taylor an immigration case?

MR. HIMMELFARB: No, it wasn't. It was a criminal case.

JUSTICE SOUTER: So you are in effect, you would say that the rule should be, or the modified Taylor rule for application here should be that it's either got to fall within the concept of the Federal offense, or in default of there being a comparable Federal offense, a generic offense defined by reference to state practice?

MR. HIMMELFARB: May I answer the question?

CHIEF JUSTICE ROBERTS: Certainly.

MR. HIMMELFARB: Our primary submission is that in the context of aiding and abetting, there shouldn't be any generic definition beyond what the states apply, whatever the formulation. Our fallback position is essentially what you just described, and we think we should prevail under it because we think we have the Federal rule. We think we have the majority rule in the states. And we have the common law rule as well.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Himmelfarb. The case is submitted.

(Whereupon, at 11:08 a.m., the case in the above-entitled matter was submitted.)

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