No. 05-1629

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting the commission of the offense.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Statutes and regulations: Page

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 176 Fed. Appx. 820. The decisions of the Board of Immigration Appeals (Pet. App. 3a) and the immigration judge (Pet. App. 4a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2006. The petition for a writ of certiorari was filed on June 22, 2006, and was granted on September 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

2. Section 10851(a) of the California Vehicle Code provides, in pertinent part, as follows:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense.

Cal. Veh. Code § 10851(a) (West 2000).

STATEMENT

1. Under Section 237(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1227(a) (2000 & Supp. IV 2004), several classes of aliens are subject to removal from the United States, including those who have been convicted of certain categories of offenses after admission, 8 U.S.C. 1227(a)(2). Aggravated felonies comprise one such category. 8 U.S.C. 1227(a)(2)(A)(iii). The INA includes a long list of offenses that qualify as an aggravated felony, 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), one of which is "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G).

In deciding whether a particular offense constitutes a "theft offense" under the INA, courts have applied the same two-step test that this Court established in *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990), for deciding whether an offense is a "burglary" under the Armed Career Criminal Act of 1984 (ACCA), Pub. L. No. 98-473, Tit. II, ch. XVIII, 98 Stat. 2185 (repealed 1986), 18 U.S.C. App. 1202 (recodified at 18 U.S.C. 924(e) (2000 & Supp. IV 2004)).[1] See, *e.g.*, *Soliman* v. *Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Abimbola* v. *Ashcroft*, 378 F.3d 173, 176-177 (2d Cir. 2004), cert. denied, 126 S. Ct. 734 (2005); *Huerta-Guevara* v. *Ashcroft*, 321 F.3d 883, 886-888 (9th Cir. 2003); *Hernandez-Mancilla* v. *INS*, 246 F.3d 1002, 1009 (7th Cir. 2001). Under the first step of the test, courts employ a "categorical" approach, comparing the statute under which the defendant was convicted with the "generic" definition of "theft offense" to determine whether all conduct covered by the statute falls within the generic definition. If it does, the defendant has been convicted of a theft offense. If the statute covers both conduct that falls within the generic definition and conduct that does not, courts move to the second step, where they employ a "modified categorical" approach and review certain documents in the record of the criminal case, such as the charging instrument and judgment, to determine whether the particular offense of which the defendant was convicted satisfies the generic definition.

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[1] Under the ACCA, defendants convicted of certain firearms offenses are subject to a mandatory minimum prison term of 15 years if they have three previous convictions for a "serious drug offense" or "violent felony." 18 U.S.C. 924(e)(1) (2000 & Supp. IV 2004). The definition of "violent felony" includes "burglary." 18 U.S.C. 924(e)(2)(B)(ii).

2. Respondent is a native and citizen of Peru. In 1992, he was convicted in the Superior Court of California of burglary, and, in 1994, he was convicted in the same court of possession of a firearm by a felon. Despite those convictions, respondent became a lawful permanent resident in 1998. Pet. App. 6a-7a, 14a.

In 2002, respondent was charged in the Superior Court of California with unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a) (West 2000). The information alleged that respondent willfully and unlawfully drove or took a 1992 Honda Accord without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the charge and was sentenced to three years of imprisonment. Pet. App. 7a-8a, 11a-13a.

3. In February 2004, the Department of Homeland Security initiated removal proceedings against respondent. He was charged with removability under Section 237(a)(2)(A)(i) of the INA, 8 U.S.C. 1227(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude, and under Section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony—in particular, a theft offense for which the term of imprisonment is at least one year, 8 U.S.C. 1101(a)(43)(G). Both charges were based on respondent's 2002 conviction. Pet. App. 4a-5a, 9a.

The immigration judge (IJ) ruled that the California offense of unlawful driving or taking of a vehicle was not a crime involving moral turpitude but was a theft offense, and thus an aggravated felony. The IJ accordingly found that respondent was removable from the United States and ordered him removed to Peru. Pet. App. 9a-10a.

The Board of Immigration Appeals (BIA) dismissed respondent's appeal. Pet. App. 3a. Adopting the decision of the IJ, the BIA held that "respondent's conviction for auto theft constitutes an aggravated felony." *Ibid.*

4. While respondent's petition for review was pending in the Ninth Circuit, that court decided *Penuliar* v. *Ashcroft*, 395 F.3d 1037 (2005), amended, 435 F.3d 961 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006).

In *Penuliar*, the Ninth Circuit held that a violation of California Vehicle Code § 10851(a) is not a "theft offense" under 8 U.S.C. 1101(a)(43)(G) as a "categorical" matter. 395 F.3d at 1044-1045. The Ninth Circuit explained that it had held in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), that a violation of California's general-theft statute, Cal. Penal Code § 484(a) (West Supp. 2006), is not categorically a "theft offense," in part because "a defendant can be convicted of the substantive offense for aiding and abetting a theft," and that it had "applied this same reasoning" in *Martinez-Perez* v. *Ashcroft*, 393 F.3d 1018 (9th Cir. 2004), withdrawn and superseded, 417 F.3d 1022 (9th Cir. 2005), which held that a violation of California's grand-theft statute, Cal. Penal Code § 487(c) (West Supp. 2006), is not categorically a "theft offense." 395 F.3d at 1044. The court found that a violation of California's vehicle-theft statute is not categorically a "theft offense" for "the same reason." *Ibid.* In particular, the Ninth Circuit reasoned that Section 10851(a) can be violated if the defendant is "a party or an accessory to or an accomplice in" the unauthorized taking of the vehicle and that such conduct does not necessarily entail the taking of property or the exercise of control over prop-

erty, which the court considered an essential element of the generic definition of "theft offense." *Ibid.*

In *Penuliar*, the Ninth Circuit also held that the Section 10851(a) convictions at issue in that case were not for a "theft offense" under the "modified categorical" approach. 395 F.3d at 1045-1046. Although the charges to which Penuliar pleaded guilty described him as a principal, the court deemed that fact insufficient to establish that he had been convicted of a generic "theft offense," because a defendant in California may be convicted as an aider and abettor even when an aiding-and-abetting theory is not recited in the charging instrument. *Ibid.*

The government petitioned for rehearing en banc in *Penuliar*, arguing that the generic definition of "theft offense" includes aiding and abetting. The Ninth Circuit denied the petition and issued an amended opinion. *Penuliar* v. *Gonzales*, 435 F.3d 961 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006). The amended opinion was identical in substance to the initial opinion except that it included a footnote rejecting the contention raised in the rehearing petition, *id.* at 970 n.6, on the ground that the Ninth Circuit had already held in *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (2005), that the generic definition of "theft offense" excludes aiding and abetting.

5. After the amended opinion in *Penuliar* was issued, the court of appeals granted respondent's petition for review in this case. Pet. App. 1a-2a. The court explained that the IJ had found that respondent's conviction for unlawful driving or taking of a vehicle "categorically met the definition of a theft offense" and that the court had "recently held" in *Penuliar* that "a violation of section 10851(a) does *not* categorically qualify as a

"theft offense" because that section is broader than the generic definition." *Id.* at 2a (emphasis added). The court therefore "remand[ed] th[e] petition to the [BIA] for further proceedings in light of *Penuliar*." *Ibid.*

SUMMARY OF ARGUMENT

Respondent was convicted of a "theft offense," and thus an aggravated felony, under the INA, 8 U.S.C. 1101(a)(43)(G).

A. The "generic" definition of "theft offense" is the sense in which the term is used in the criminal codes of most States. See *Taylor* v. *United States*, 495 U.S. 575, 589, 598 (1990). In the criminal codes of *all* States, as well as in the United States Code, the definition of *every* substantive offense includes aiding and abetting, because aiders and abettors are treated as principals. Consistent with that uniformly held view, courts outside the Ninth Circuit have correctly held that aiding and abetting is included in the definition of other predicate offenses: "arson" and "burglary," under the ACCA; "crime of violence," under the bail statute; and "illicit trafficking in a controlled substance" and "an offense that involves fraud or deceit," under the INA. So, too, aiding and abetting is included in the definition of "theft offense."

The INA's definition of "aggravated felony" confirms that aiding and abetting a specified offense constitutes an aggravated felony in the absence of an express exception. The definition includes alien smuggling and certain types of passport fraud, but excludes first offenses in those categories if the alien committed the offense "for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent" to violate the immigration laws. 8 U.S.C. 1101(a)(43)(N) and (P). If aiding

and abetting an aggravated felony were not itself an aggravated felony, those limited exceptions would be unnecessary.

The Ninth Circuit's contrary rule is flawed in a number of respects. Most fundamentally, it ignores the fact that, under the law of every jurisdiction, a person who aids and abets an offense has *committed* that offense, and is *guilty* of it. The Ninth Circuit's rule is based, instead, on the "arcane distinctions" of the common law, *Taylor*, 495 U.S. at 593, which are meant to play no role in formulating the "generic" definition of an offense. Adoption of the Ninth Circuit's rule would also have consequences that Congress could not have intended. One is that those who aid and abet the commission of a federal offense would be subject to the same criminal penalties as a principal but not to the same immigration consequences. Another is that, because a violation of a theft statute would never be a "theft offense" under the Ninth Circuit's "categorical" holding and would only rarely be one under its "modified categorical" holding, just a small fraction of those convicted of violating a theft statute in any jurisdiction would be deemed to have committed a "theft offense."

There is no evidence that Congress intended to depart from the uniformly held view that aiders and abettors are to be treated as principals. In particular, the fact that the INA's definition of "aggravated felony" explicitly includes attempt and conspiracy but not aiding and abetting, 8 U.S.C. 1101(a)(43)(U), does not mean that Congress intended to exclude aiding and abetting from the definition. There was good reason to include attempt and conspiracy but not aiding and abetting. Unlike aiding and abetting, attempt and conspiracy are distinct from the underlying offense, and thus would not

constitute an aggravated felony unless Congress explicitly so provided.

B. In *Penuliar* v. *Gonzales*, 435 F.3d 961 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006), on which the decision below relied, the Ninth Circuit understood the California vehicle-theft statute to reach both principals and aiders and abettors, and held that a violation of that statute was not "categorically" a "theft offense" based on its view that a "theft offense" does not include aiding and abetting. Because that view is mistaken, the Ninth Circuit's judgment should be reversed.

In addition to "party" and "accomplice," the vehicle-theft statute uses the term "accessory." Cal. Veh. Code § 10851(a) (West 2000). In Section 32 of the California Penal Code, an "accessory" is an accessory after the fact. If an "accessory" in Section 10851(a) of the Vehicle Code is also an accessory after the fact, a violation of that statute is not a "theft offense" as a "categorical" matter, because an accessory after the fact, unlike an aider and abettor, is not treated as a principal. It is not clear that Section 10851(a) reaches accessories after the fact. But even if it does, respondent was still convicted of a "theft offense" under the "modified categorical" approach, because he was charged as a principal, and a defendant charged as a principal can be convicted as an aider and abettor but not as an accessory after the fact.

ARGUMENT

RESPONDENT WAS CONVICTED OF A "THEFT OFFENSE," AND THUS AN AGGRAVATED FELONY, UNDER THE IMMIGRATION AND NATIONALITY ACT

Like the definition of any criminal offense, the generic definition of "theft offense" in the INA, 8 U.S.C.

1101(a)(43)(G), covers both those who actually commit the offense and those who aid and abet its commission. The information to which respondent pleaded guilty, which charged him with vehicle theft in violation of California Vehicle Code § 10851(a) (West 2000), encompassed those two theories of liability, and encompassed no theory of liability that is not covered by the generic definition. It follows that respondent was convicted of a "theft offense," and thus an aggravated felony, under the INA.

A. The Generic Definition Of "Theft Offense" Includes Aiding And Abetting

As this Court made clear in *Taylor* v. *United States*, 495 U.S. 575 (1990), the "generic" definition of an offense—in that case "burglary," in this case "theft offense"—is the "sense in which the term is now used in the criminal codes of most States." *Id.* at 598; accord *id.* at 589 (generic definition "correspond[s] to the definitions of [the offense] in a majority of the States' criminal codes"); see *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc) (recognizing this principle in determining generic definition of "theft offense"); *In re V-Z-S-*, 22 I. & N. Dec. 1338, 1345 (B.I.A. 2000) (en banc) (relying on state statutes in determining generic definition of "theft offense"). In the criminal codes of *all* States, as well as in the criminal title of the United States Code, the definition of "theft offense"—and, indeed, of every substantive criminal offense—includes aiding and abetting. That is because the acts of an aider and abettor are deemed to be those of a principal as a matter of law, such that a defendant who aids and abets the commission of an offense is guilty of that offense. The Ninth Circuit therefore erred in hold-

ing that "aiding and abetting liability is [not] included in the generic definition of a 'theft offense'" as that term is used in the INA. *Penuliar* v. *Gonzales*, 435 F.3d 961, 970 n.6 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006).[2]

1. In every jurisdiction, aiding and abetting is not separate and distinct from the underlying offense

At common law, "the subject of principals and accessories was riddled with 'intricate' distinctions." *Standefer* v. *United States*, 447 U.S. 10, 15 (1980) (quoting 2 James Fitzjames Stephen, *A History of the Criminal Law of England* 231 (1883)). In felony cases, parties to a crime were divided into four categories: (1) "principals in the first degree," who actually committed the crime; (2) "principals in the second degree," who were present at the scene of the crime and aided and abetted its commission; (3) "accessories before the fact," who aided and abetted the crime but were not present at the scene; and (4) "accessories after the fact," who rendered assistance after the crime was completed. *Ibid.*; see, *e.g.*, 4 William Blackstone, *Commentaries* *34-40.

By the early twentieth century, a number of jurisdictions had "abolishe[d] the distinction between principals

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[2] The generic definition applied by the Ninth Circuit is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Penuliar*, 435 F.3d at 969 (quoting *Huerta-Guevara* v. *Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003), in turn quoting *Corona-Sanchez*, 291 F.3d at 1205). Other courts of appeals apply the same definition, and the BIA applies a similar one. See *Abimbola* v. *Ashcroft*, 378 F.3d 173, 176 (2d Cir. 2004) (citing cases), cert. denied, 126 S. Ct. 734 (2005). Except insofar as the Ninth Circuit excludes aiding and abetting, we do not challenge its general formulation of the definition.

and accessories and ma[de] them all principals." *Hammer* v. *United States*, 271 U.S. 620, 628 (1926); see *Standefer*, 447 U.S. at 16-19 (discussing statutes). By the middle of that century, long before the term "aggravated felony" first appeared in Section 101(a) of the INA, see Pub. L. No. 100-690, Tit. VII, Subtit. J, § 7342, 102 Stat. 4469-4470, it was "well engrained in the law" that one who aids and abets the commission of an act "is as responsible for that act as if he committed it directly." *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949) (quoting jury instruction). And by the beginning of *this* century, "[a]ll [S]tates," as well as the federal government, had "expressly abrogated the distinction between principals and accessories before the fact." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.1(e), at 333 (2d ed. 2003) (LaFave); see *id.* § 13.1(e), at 333 n.75.[3]

As the Ninth Circuit has recognized elsewhere, the effect of the modern statutes is that "[a]iding and abetting is not a separate and distinct offense from the underlying substantive crime, but is a different theory of liability for the same offense." *United States* v. *Garcia*, 400 F.3d 816, 820, cert. denied, 126 S. Ct. 839 (2005). Thus, under the pertinent federal criminal statute,

[3] The crime of accessory *after* the fact has survived the abolition of the common-law categories. While what used to be called principals in the second degree and accessories before the fact are now considered aiders and abettors, and thus are treated the same as what were formerly principals in the first degree, accessories after the fact are not treated as principals and are deemed to have committed an offense distinct from the underlying crime—namely, giving aid after the offense has been committed, with knowledge that it has been committed, for the purpose of hindering the offender's apprehension, conviction, or punishment. See, *e.g.*, 18 U.S.C. 3; Cal. Penal Code § 32 (West 1999). See generally 2 LaFave § 13.1, at 326-327; *id.* § 13.6(a), at 400-402, 404.

which is now nearly a century old, see *Standefer*, 447 U.S. at 18, whoever "commits an offense against the United States," or "aids, abets, counsels, commands, induces or procures its commission," or "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." 18 U.S.C. 2.[4] So, too, under the California statute, which is *more* than a century old, see *People* v. *Nguyen*, 26 Cal. Rptr. 2d 323, 329 (Ct. App. 1993), "[a]ll persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals." Cal. Penal Code § 31 (West 1999); accord Cal. Penal Code § 971 (West 1985) (abrogating distinctions among principal in the first degree, principal in the second degree, and accessory before the fact, and providing that "all persons concerned in the commission of a crime" shall be "prosecuted, tried and punished as principals").

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[4] Under the original version of the federal statute, it was even clearer that aiding and abetting is not separate and distinct from the underlying offense. That version provided that "[w]hoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, *is* a principal." Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 (emphasis added). Congress replaced the phrase "is a principal" with the phrase "is punishable as a principal," see Act of Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717, for a very specific reason: to make clear that a person who is not a member of the class at which a statute is directed—for example, federal employees—can aid and abet a crime committed by a person who is. See *Standefer*, 447 U.S. at 18 n.11. The amended statute therefore reflects the very same "congressional intent to treat accessories before the fact as principals" that its predecessor did. *Ibid.*

The other 49 States, as well as the District of Columbia, have similar statutes, which are reproduced, along with the federal and California statutes, in an appendix to this brief. App., *infra*, 1a-15a. Some of those statutes, like their federal and California counterparts, provide that an aider and abettor is a principal, or at least is treated as one.[5] Some provide that an aider and abettor is "guilty" of the principal offense,[6] while others provide that an aider and abettor is "criminally liable," or "criminally responsible," for the offense.[7] Still others

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[5] See D.C. Code § 22-1805 (2001); Fla. Stat. Ann. § 777.011 (West 2005); Idaho Code Ann. § 19-1430 (2004); Iowa Code Ann. § 703.1 (West 2003); La. Rev. Stat. Ann. § 14:24 (1997); Md. Code Ann., Crim. Proc. § 4-204(b) (LexisNexis 2001 & Supp. 2005); Mass. Ann. Laws ch. 274, § 2 (LexisNexis 1992); Mich. Comp. Laws Ann. § 767.39 (West 2000); Miss. Code Ann. § 97-1-3 (West 2005); Neb. Rev. Stat. Ann. § 28-206 (LexisNexis 2003); Nev. Rev. Stat. Ann. § 195.020 (LexisNexis 2006); N.C. Gen. Stat. § 14-5.2 (2005); Ohio Rev. Code Ann. §§ 2923.03(A), 2923.03(F) (LexisNexis 2006); Okla Stat. Ann. tit. 21, § 172 (West 2002); R.I. Gen. Laws § 11-1-3 (2002); S.C. Code Ann. § 16-1-40 (2003); S.D. Codified Laws §§ 22-3-3, 22–3-3.1 (2005); Vt. Stat. Ann. tit. 13, §§ 3-4 (1998); Va. Code Ann. § 18.2-18 (2004); W. Va. Code Ann. § 61-11-6 (LexisNexis 2005); Wyo. Stat. Ann. § 6-1-201 (2005).

[6] See Alaska Stat. §§ 11.16.100, 11.16.110 (2004); Ariz. Rev. Stat. Ann. §§ 13-301, 13-302, 13-303(A) (2001); Colo. Rev. Stat. §§ 18-1-601, 18-1-603 (2005); Del. Code Ann. tit. 11, § 271 (2001); Haw. Rev. Stat. Ann. §§ 702-221, 702-222 (LexisNexis 2003); Ky. Rev. Stat. Ann. § 502.020(1) (LexisNexis 1999); Me. Rev. Stat. Ann. tit. 17-A, § 57 (2006); Mo. Ann. Stat. §§ 562.036, 562.041(1) (West 1999); N.H. Rev. Stat. Ann. § 626:8 (LexisNexis Supp. 2005); N.J. Stat. Ann. § 2C:2-6 (West 2005); Or. Rev. Stat. §§ 161.150, 161.155 (2005); 18 Pa. Cons. Stat. Ann. § 306 (West 1998); Wash. Rev. Code Ann. § 9A.08.020 (West 2000).

[7] See Ala. Code §§ 13A-2-20, 13A-2-23 (LexisNexis 2005); Ark. Code Ann. §§ 5-2-402, 5-2-403(a) (2006); Conn. Gen. Stat. Ann. § 53a-8(a) (West 2001); 720 Ill. Comp. Stat. Ann. 5/5-1, 5/5-2 (West 2002); Kan. Stat. Ann. § 21-3205(1) (1995); Minn. Stat. Ann. § 609.05 subdiv. 1 (West 2003); Mont. Code Ann. §§ 45-2-301, 45-2-302 (2005); N.Y. Penal Law

provide that an aider and abettor "commits" the principal offense, or at least may be "convicted of commission" of the offense.[8]

In addition to the laws of the States (and of the United States), the Model Penal Code has sometimes been thought relevant in determining the generic definition of an offense. See, *e.g.*, *Taylor*, 495 U.S. at 580, 598 n.8 ("burglary" under the ACCA); *Hernandez-Mancilla* v. *INS*, 246 F.3d 1002, 1007 (7th Cir. 2001) ("theft offense" under the INA); *V-Z-S-*, 22 I. & N. Dec. at 1344-1345 (same). And, like many of the state statutes that appear to be based upon it, the Model Penal Code provides that an aider and abettor is "guilty" of the principal offense. Model Penal Code § 2.06, at 295-296 (1985).[9]

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§ 20.00 (McKinney 2004); Tenn. Code Ann. §§ 39-11-401(a), 39-11-402 (2003); Tex. Penal Code Ann. §§ 7.01, 7.02(a) (Vernon 2003); Utah Code Ann. § 76-2-202 (2003).

[8] See Ga. Code Ann. § 16-2-20 (2003); Ind. Code Ann. § 35-41-2-4 (LexisNexis 2004); N.M. Stat. § 30-1-13 (2004); N.D. Cent. Code § 12.1-03-01(1) (1997); Wis. Stat. Ann. § 939.05 (West 2005).

[9] Under the applicable provision, "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable," Model Penal Code § 2.06(1), at 295; a person is legally accountable for the conduct of another person if (among other things) "he is an accomplice of such other person in the commission of the offense," *id.* § 2.06(2)(c), at 296; and a person is an accomplice of another person if, "with the purpose of promoting or facilitating the commission of the offense," he (among other things) "solicits such other person to commit it" or "aids or agrees or attempts to aid such other person in planning or committing it," *id.* § 2.06(3)(a)(i) and (ii), at 296.

2. Aiding and abetting has been held to be included in the definition of predicate offenses similar to the one at issue here

Consistent with the uniformly held view described above, federal courts of appeals outside the Ninth Circuit have treated aiders and abettors as principals in circumstances analogous to those here. They have held, correctly, that the definitions of particular predicate offenses, including offenses that constitute an aggravated felony under the INA, encompass aiding and abetting.

For example, the Second Circuit has held that aiding and abetting is encompassed within the generic definition of "arson," which is a "violent felony" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii). *United States* v. *Hathaway*, 949 F.2d 609 (1991) (per curiam), cert. denied, 502 U.S. 1119 (1992). The court reasoned that *Taylor* requires courts to look to "modern definitions"; that "the laws of many states today include counseling, aiding or procuring the burning within the definition of actual arson"; and that "[a]iding and abetting also supports a substantive conviction for arson under Federal law." *Id.* at 610-611 (citing 18 U.S.C. 2).

Similarly, the Seventh Circuit has held that the generic definition of "burglary," which is also a "violent felony" under the ACCA, "extends to the context of aiding and abetting," such that "one who aided and abetted the commission of a generic burglary has committed generic burglary." *United States* v. *Groce*, 999 F.2d 1189, 1192 (1993). The court relied on the fact that "both federal law and * * * state law punish an aider and abettor as a principal." *Ibid.* (citing 18 U.S.C. 2).

The First Circuit has held that aiding and abetting is encompassed within the definition of "crime of violence" under the Bail Reform Act of 1984, 18 U.S.C. 3143(a)(2), such that "aiding and abetting the commission of a crime of violence is a crime of violence itself." *United States* v. *Mitchell*, 23 F.3d 1, 3 (1994) (per curiam) (Breyer, C.J., Selya & Boudin, JJ.). The court reasoned that "aiding and abetting 'is not a separate offense' from the underlying substantive crime" and that "the *acts* of the principal [are] those of the aider and abetter as a matter of law." *Id.* at 2-3 (quoting *United States* v. *Sanchez*, 917 F.2d 607, 611 (1st Cir. 1990), cert. denied, 499 U.S. 977 (1991), and *United States* v. *Simpson*, 979 F.2d 1282, 1285 (8th Cir. 1992), cert. denied, 507 U.S. 943 (1993)).

The Eighth Circuit has held that the federal offense of aiding and abetting possession of cocaine with the intent to distribute it categorically constitutes "illicit trafficking in a controlled substance," and thus an aggravated felony, under Sentencing Guidelines § 2L1.2, which incorporates the INA's definition of aggravated felony, 8 U.S.C. 1101(a)(43)(B). *United States* v. *Baca-Valenzuela*, 118 F.3d 1223, 1231-1233 (1997).[10] The court explained its holding as follows:

> A fundamental theory of American criminal law is that there is no offense of aiding and abetting or accomplice liability as such. Instead, accomplice liability is merely a means of determining which persons were closely enough related to the underlying

[10] Section 2L1.2 of the Guidelines has since been amended to provide, explicitly, that "[p]rior convictions of offenses counted under subsection (b)(1)," one of which is an aggravated felony, "include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses." Sentencing Guidelines § 2L1.2, comment. (n.5).

> offense to be prosecuted and convicted of that offense. Whether one is convicted *as* a principal or *as* an accomplice/aider and abettor, the crime *of which* he is guilty is the same: whatever is the underlying offense.

Id. at 1232.

Similarly, the Fifth Circuit has held that the federal offense of aiding and abetting bank fraud is an aggravated felony under Section 101(a)(43)(M)(i) of the INA, 8 U.S.C. 1101(a)(43)(M)(i), which covers offenses that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000," because "the underlying offense"—bank fraud—"necessarily involves fraud." *James* v. *Gonzales*, No. 04-60445, 2006 WL 2536614, at *3 (Sept. 5, 2006). The court explained that "'the aiding and abetting statute, 18 U.S.C. § 2, does not define a separate crime,' but rather provides another means of convicting someone of the underlying offense." *Ibid.* (quoting *United States* v. *Sorrells*, 145 F.3d 744, 752 (5th Cir. 1998)).[11]

The Ninth Circuit is the only court of appeals to hold that the generic definition of an offense does not include aiding and abetting. Dissenting judges in that circuit have criticized the holding, however, and have emphasized its dramatic consequences. In one of the cases on which *Penuliar* relied, *Corona-Sanchez*, *supra*, the en banc Ninth Circuit held that the California offense of

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[11] Like "illicit trafficking in a controlled substance," "theft offense," and an "offense that * * * involves fraud or deceit," 8 U.S.C. 1101(a)(43)(B), (G) and (M)(i), "burglary offense" and "crime of violence" are explicitly included in the INA's definition of aggravated felony, 8 U.S.C. 1101(a)(43)(F) and (G). Arson, too, is ordinarily a crime of violence, and thus ordinarily an aggravated felony. *E.g.*, *In re Palacios-Pinera*, 22 I. & N. Dec. 434 (B.I.A. 1998).

general theft is not a theft offense, in part because a defendant can be convicted under an aiding-and-abetting theory. 291 F.3d at 1207-1208. In a dissenting opinion joined by Judges Kozinski, T.G. Nelson, and Kleinfeld, Judge Rymer rejected that reasoning:

> It cannot be that the possibility of being liable as an aider or abettor takes an offense out of the running, for this is true of any crime in California, where principals include those who aid or abet the commission of a crime. Cal. Penal Code § 31. In any event, "[t]o be liable as an aider and abettor, the defendant must have instigated or advised the commission of the offense or have been present for the purpose of assisting." 1 Witkin & Epstein, *California Criminal Law* (3d ed.), § 78, p. 124 (2000). This is unremarkable, and well within the bounds of whichever generic formulation is adopted.

291 F.3d at 1216.[12]

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[12] The BIA—whose interpretation of an immigration statute is entitled to deference, as long it is reasonable, see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999)—has not addressed the question presented in this case in a published decision. While the BIA has held that a violation of California Vehicle Code § 10851(a) is a "theft offense" under the INA, *V-Z-S-*, *supra*, the decision in that case did not address the theory subsequently adopted by the Ninth Circuit in *Penuliar*. And while the BIA has addressed, and rejected, the argument that aiding and abetting is not included within the definition of "aggravated felony" in general, *In re Malacas*, No. A41 245 089, 2004 WL 2374341 (Sept. 13, 2004), the decision in that case is unpublished and has not been designated as a precedent, see 8 C.F.R 1003.1(g) .

3. The text of 8 U.S.C. 1101(a)(43) confirms that the generic definition of "theft offense" encompasses aiding and abetting

The text of 8 U.S.C. 1101(a)(43) confirms that the term "aggravated felony" includes aiding and abetting the specified offense. In 8 U.S.C. 1101(a)(43)(N) and (P), respectively, Congress made alien smuggling and certain types of passport fraud aggravated felonies. In each instance, however, Congress created an exception for a "case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate [the immigration laws]." 8 U.S.C. 1101(a)(43)(N) and (P). For those crimes, see 8 U.S.C. 1324(a)(1)(A) and (2); 18 U.S.C. 1543 (2000 & Supp. IV 2004); 18 U.S.C. 1546(a) (Supp. IV 2004), aiding and abetting is not treated differently than for any other federal crime. Under 18 U.S.C. 2, a person who aids and abets alien smuggling or passport fraud is liable as a principal. See also 8 U.S.C. 1324(a)(1)(A)(v)(II) (making it a crime to "aid[] or abet[] the commission of any of the preceding acts" made criminal by the alien-smuggling statute). If aiding and abetting an aggravated felony were not itself an aggravated felony, the exceptions in 8 U.S.C. 1101(a)(43)(N) and (P) would be unnecessary, because *no one* who merely aided and abetted alien smuggling or passport fraud—or, for that matter, any of the other listed offenses—would be an aggravated felon. The inclusion of an exception for a limited class of aiders and abettors confirms that Congress intended to reach all others.

4. The Ninth Circuit's rule is inconsistent with this Court's decision in Taylor *and has consequences that Congress could not have intended*

The Ninth Circuit's rule—that the generic definition of "theft offense" excludes aiding and abetting—is flawed on a number of levels. First, and most fundamentally, it rests on the mistaken premise that aiding and abetting is separate and distinct from the underlying offense. It ignores the fact that, under the law of every jurisdiction, a person who aids and abets a crime has *committed* that crime, and is *guilty* of it, such that aiding and abetting a "theft offense" is *itself* a "theft offense."

Second, while the modern criminal codes have abolished the common law's technical distinctions between principal and accessory, the Ninth Circuit resurrected those very distinctions in imposing a narrow, "principal-only" limitation on the generic definition. The Ninth Circuit's definition is therefore doubly inconsistent with *Taylor*. It is not what *Taylor* says a generic definition should be—one that reflects the rule in "a majority of the States' criminal codes." 495 U.S. at 589; accord *id.* at 598. And it *is* what *Taylor* says a generic definition should *not* be—one that reflects the "arcane distinctions embedded in the common[]law." *Id.* at 593; accord *id.* at 589.

Third, the Ninth Circuit's interpretation of the INA presumes that Congress intended that a theft offense include aiding and abetting for purposes of the federal criminal laws, see 18 U.S.C. 2, but not for purposes of the federal immigration laws. Under the Ninth Circuit's view, someone convicted of (for example) aiding and abetting the theft of public money, see 18 U.S.C. 641

(2000 & Supp. IV 2004), would be subject to the same criminal penalties as a principal but not to the same immigration consequences. It is highly implausible that Congress intended such a result.

Fourth, under the Ninth Circuit's approach, only a small fraction of those convicted of violating a theft statute would be deemed to have been convicted of a "theft offense." A violation of a theft statute would *never* be deemed a "theft offense" under the Ninth Circuit's "categorical" holding, because every theft statute can be violated by aiding and abetting.[13] And a violation of a theft statute would only *rarely* be deemed a "theft offense" under the Ninth Circuit's "modified categorical" holding, because, for the very reason that someone who commits a crime and someone who aids and abets its commission are treated the same in every jurisdiction, a defendant charged as a principal can be convicted as an aider and abettor. See, *e.g.*, Cal. Penal Code § 971 (West 1985) ("no other facts need be alleged in any accusatory pleading against any * * * person [concerned in the commission of a crime] than are required in an accusatory pleading against a principal"). See generally 2 LaFave § 13.1(e), at 335; *id.* § 13.6(a), at 405. Producing the charging instrument and corresponding judgment—the most common method of establishing a prior conviction in a removal proceeding—would therefore be insufficient.

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[13] The Ninth Circuit's "categorical" holding is not limited to theft statutes, like the one under which respondent was convicted, that include their own aiding-and-abetting provisions. See *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022, 1027-1028 (9th Cir. 2005) (grand theft under California Penal Code § 487(c) (West Supp. 2006)); *Corona-Sanchez*, 291 F.3d at 1207-1208 (general theft under California Penal Code § 484(a) (West Supp. 2006)).

Under the Ninth Circuit's approach, the only cases in which the government would be able to establish that an alien who pleaded guilty was convicted of a "theft offense" would likely be ones in which the plea colloquy showed that the alien acted alone or was otherwise a "true" principal. Cf. *Shepard* v. *United States*, 544 U.S. 13, 21 (2005) (transcript of plea colloquy may be used to determine whether defendant pleaded guilty to generic "burglary"). And the only cases in which the government would be able to show that an alien who stood trial was convicted of a "theft offense" would likely be ones in which the jury was not instructed on an aiding-and-abetting theory and therefore must have found that the alien was a principal. Cf. *Taylor*, 495 U.S. at 602 (jury instructions may be used to determine whether jury found defendant guilty of generic "burglary"). But plea colloquies and jury charges are not always transcribed; even when they have been transcribed, the transcript is often unavailable or difficult to obtain by the time removal proceedings are commenced; and even when the transcript can be obtained, it may reflect that, in pleading guilty, the alien admitted only that he committed the statutory offense, or that, at the conclusion of trial, the jury was instructed that it could find the alien guilty *either* as a principal *or* as an aider or abettor. In any of those circumstances, it would be impossible to know whether the alien was convicted as a principal or an aider and abettor. It is highly improbable that Congress contemplated a regime in which only a small proportion of those convicted of violating a theft statute could be shown to be removable on the basis of having been convicted of a "theft offense." Cf. *id.* at 594 ("[C]onstruing 'burglary' to mean common-law burglary would come close to nullifying that term's effect in the statute, be-

cause few of the crimes now generally recognized as burglaries would fall within the common-law definition.").

Finally, there is no obvious reason why the Ninth Circuit's rule would not apply to other crimes that constitute an aggravated felony under 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). The rationale for the rule is that aiding and abetting a theft does not require the taking of or exercise of control over property, which the court deemed an essential element of the generic definition of "theft offense." *Penuliar*, 435 F.3d at 970. While, under that rationale, there may be some offenses whose generic definition is satisfied by aiding and abetting, there are not likely to be many. For example, one can aid and abet "murder," 8 U.S.C. 1101(a)(43)(A), without personally taking the life of another; one can aid and abet "rape," *ibid.*, without engaging in forcible sex; and one can aid and abet "burglary," 8 U.S.C. 1101(a)(43)(G), without entering or remaining in a building, *Taylor*, 495 U.S. at 599. Because there does not appear to be any principled basis for distinguishing those crimes from a "theft offense" for present purposes, consistent application of the Ninth Circuit's rule would prevent the removal of a very substantial proportion of the criminal aliens who have been convicted of crimes listed in 8 U.S.C. 1101(a)(43)(G). It is even less likely that Congress intended *that* result.

5. There is no indication that Congress intended to depart from the uniform rule that aiders and abettors are treated as principals

The INA's definition of "aggravated felony" includes a long list of offenses. 8 U.S.C. 1101(a)(43)(A)-(T) (2000 & Supp. IV 2004). It also provides that the term encom-

passes "an attempt or conspiracy to commit an offense described in this paragraph." 8 U.S.C. 1101(a)(43)(U). The fact that the definition explicitly includes attempt and conspiracy but not aiding and abetting does not mean, however, that Congress intended to exclude aiding and abetting. The express exceptions in 8 U.S.C. 1101(a)(43)(N) and (P) for certain instances of aiding and abetting makes the general inclusion of aiding and abetting clear. See p. 20, *supra*. Moreover, the differential treatment of attempt and conspiracy reflects critical differences between conspiracy and attempt, on the one hand, and aiding and abetting, on the other. Unlike aiding and abetting, attempt and conspiracy are distinct from the underlying offense,[14] and therefore would not constitute an aggravated felony unless Congress explicitly so provided. Indeed, the express inclusion of attempt and conspiracy, which ordinarily entail conduct further removed from the underlying substantive offense than does aiding and abetting, only underscores the anomaly introduced by the Ninth Circuit's rule, under which remote conspirators would be included, but

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[14] See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) ("Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes."); *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946) ("It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."); *Garcia*, 400 F.3d at 819 ("In an attempt case there is no crime apart from the attempt, which is the crime itself[.]"); 2 LaFave§ 11.2(a), at 207 ("attempt [i]s a distinct crime"). Consistent with this view, California law provides that aiders and abettors "are principals," Cal. Penal Code § 31 (West 1999), but makes attempt and conspiracy separate offenses, see *id.* § 182(a)(1) (West Supp. 2006) (conspiracy); *id.* § 664 (attempt).

not aiders and abettors, whom the law has long treated as indistinguishable from principals.

Unlike the INA, the Sentencing Guidelines do explicitly include aiding and abetting—as well as attempt and conspiracy—as an "aggravated felony." Sentencing Guidelines § 2L1.2, comment. (n.5); see note 10, *supra*. It is hardly unusual, however, for a legislature (or an agency) to include in a statute (or a regulation) a principle of law that would apply even if it were omitted, so as to remove any conceivable doubt. And even if it *were* unusual, the *Sentencing Commission's* inclusion of particular language in the Guidelines would not be evidence of what *Congress* intended when it enacted the INA—especially since aiding-and-abetting liability is *automatically* included as a form of principal liability under federal law and the laws of all 50 States, whether or not it is explicitly mentioned in the particular criminal statute at issue. Indeed, the Guidelines themselves apply that principle, providing that the offense level for aiding and abetting "is the same level as that for the underlying offense." Sentencing Guidelines § 2X2.1.

As part of proposals for comprehensive reform of the immigration laws, two pending bills would amend 8 U.S.C. 1101(a)(43)(U) to make explicit, as the Guidelines do, that the definition of "aggravated felony" includes aiding and abetting.[15] For the same reasons that are set

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[15] The House bill would amend the statute to provide that "aggravated felony" includes "soliciting, aiding, abetting, counseling, commanding, inducing, procuring or an attempt or conspiracy to commit an offense described in this paragraph." *Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005*, H.R. 4437, 109th Cong., 1st Sess. § 201(a)(3) (passed Dec. 16, 2005). The Senate bill would amend the statute to provide that "aggravated felony" includes "aiding or abetting an offense described in this paragraph, or soliciting,

forth above, however, the proposed amendment does not suggest that the Congress that enacted the current version of the statute intended to exclude aiding and abetting from the definition of "aggravated felony." As the Judiciary Committee Report accompanying the House bill explains, the purpose of adding aiding and abetting to 8 U.S.C. 1101(a)(43)(U) is simply to "make[] clear" that it is included in the definition of aggravated felony and to "reverse" contrary "Ninth Circuit precedent." H.R. Rep. No. 345, 109th Cong., 1st Sess. 59 (2005). The proposed amendment, in other words, is intended to clarify existing law, not to change it.

B. The Offense Of Which Respondent Was Convicted Satisfies The Generic Definition Of "Theft Offense"

1. The California statute under which respondent was convicted makes it a crime, not only to engage in an unauthorized taking or stealing of a vehicle, but also to be "a party or an accessory to or an accomplice in" the unauthorized taking or stealing. Cal. Veh. Code § 10851(a) (West 2000). Understanding the latter portion of the statute to criminalize aiding and abetting, the Ninth Circuit in *Penuliar* held that a violation of the vehicle-theft statute is not a "theft offense" as a "categorical" matter, because, in the Ninth Circuit's view, the generic definition of "theft offense" excludes aiding and abetting. 435 F.3d at 969-970. The Ninth Circuit relied on that holding in granting respondent's petition for

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counseling, procuring, commanding, or inducing another, attempting, or conspiring to commit such an offense." *Comprehensive Immigration Reform Act of 2006*, S. 2611, 109th Cong., 2d Sess. § 203(a)(5) (passed May 25, 2006). As of the date of the filing of this brief, it remains the case that no conference committee has been appointed to reconcile the bills, which differ in significant respects.

review. Pet. App. 2a. Because the Ninth Circuit was mistaken in its view that the generic definition of "theft offense" excludes aiding and abetting, it was mistaken in its holding that a violation of California Vehicle Code § 10851(a) is not categorically a "theft offense." Its judgment should therefore be reversed.

2. In his brief in opposition, respondent contended that a violation of the California vehicle-theft statute is not categorically a "theft offense" under the INA for an additional reason: that the statute reaches accessories after the fact. See Br. in Opp. 8-26. That contention, which was raised for the first time in this Court, does not furnish respondent a basis for relief.

a. As noted above, the California statute does not in terms refer to aiding and abetting, but instead makes it a crime to be a "party" to, an "accessory" to, or an "accomplice" in the unauthorized taking of the vehicle. Cal. Veh. Code § 10851(a) (West 2000). The crime of being an "accessory" is addressed in Section 32 of the California Penal Code. It provides that

> [e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Cal. Penal Code § 32 (West 1999). As used in Section 32 of the Penal Code, therefore, an "accessory" is an accessory after the fact. And, unlike aiding and abetting, "[t]he crime of being an accessory [after the fact] is separate and distinct from the underlying felony." 1 B.E. Witkin & Norman L. Epstein, *California Criminal Law*,

Introduction to Crimes § 91, at 144 (3d ed. 2000); see note 3, *supra*. If Section 10851(a) reaches accessories after the fact, therefore, a violation of the statute is not a theft offense as a "categorical" matter.[16]

It is not clear, however, that Section 10851(a) does reach accessories after the fact. California Penal Code § 32 describes an offense—*i.e.*, a proscription of certain conduct; it does not appear to provide a definition of a term—"accessory"—that applies in every California statute in which the term appears. Support for that conclusion is found both in the language of Section 32 itself and in the fact that the very next section of the Penal Code describes the penalties for the offense of being an accessory, see Cal. Penal Code § 33 (West 1999). But even if Section 32 defines a *term*, we are not aware of any case holding that "accessory" in Section 10851(a) of the *Vehicle Code* has the same meaning that it has in Section 32 of the *Penal Code*. Indeed, the very California decision on which the Ninth Circuit relied in *Penuliar*, see 435 F.3d at 970, suggests that Section 10851(a) of the Vehicle Code does not reach accessories after the fact. Instead, that case suggests that the statutory phrase "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" is merely shorthand for aider and abettor. See *People* v. *Clark*, 60 Cal. Rptr. 58, 62 (Ct. App. 1967) (to convict a defendant on the theory that he was "a

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[16] This objection is not available in cases involving the other California theft statutes to which the Ninth Circuit has applied its rule that the generic definition of "theft offense" excludes aiding and abetting, because those statutes do not include the term "accessory." See *Martinez-Perez*, 417 F.3d at 1027-1028 (grand theft under California Penal Code § 487(c)); *Corona-Sanchez*, 291 F.3d at 1207-1208 (general theft under California Penal Code § 484(a)).

party or [an] accessory to or an accomplice in the driving," it must be shown that the defendant "aided or assisted" in the driving with the requisite state of mind).[17]

b. It is ultimately irrelevant for purposes of this case, however, whether Section 10851(a) reaches accessories after the fact. Even if it does, even if the statute is therefore broader than the generic definition of "theft offense" in the INA, and even if a violation of Section 10851(a) is for that reason not a "theft offense" as a "categorical" matter, the government has still demonstrated that respondent was convicted of a "theft offense" under the "modified categorical" approach, because the charging instrument and corresponding judgment show that he was not convicted as an accessory after the fact.

Respondent was charged with violating Section 10851(a) as a principal. In particular, he was charged with

> willfully and unlawfully driv[ing] or tak[ing] a certain vehicle, to wit: 1992 Honda Accord, California license number 3JHJ638,[] then and there the per-

[17] Section 499b(b) of the California Penal Code (West Supp. 2006) provides that "[a]ny person who shall, without the permission of the owner thereof, take any vessel for the purpose of temporarily using or operating the same, is guilty of a misdemeanor." A 2003 law amended that provision to increase the maximum penalties. 2003 Cal. Stat., ch. 391, § 1. An analysis of the bill that became the 2003 law noted that Section 10851(a) of the California Vehicle Code provides "the same penalty for an accessory or accomplice" as for the person who drives or takes the vehicle, and that "[a]ppellate cases interpreting this section appear to require an aiding and abetting standard (intent that the crime be committed and assistance of the perpetrator) for a conviction under this section for any person who did not take or drive the car." S. Comm. on Public Safety, B. Analysis of Assemb. B. 928 (2003-2004 Reg. Sess.), July 8, 2003, at B-C & n.1 (citing *People* v. *Clark*, *supra*).

> sonal property of Deborah and Michael Wood, * * * without the consent of and with the intent to permanently or temporarily deprive the said owner of title to and possession of said vehicle.

Pet. App. 13a. "[W]hile it is now generally accepted that a defendant may be charged as if a principal and convicted on proof that he aided another, a conviction as an accessory after the fact cannot be sustained upon an indictment charging the principal crime." 2 LaFave § 13.6(a), at 405 (footnote omitted).[18] The reason for the distinction is that, because an aider and abettor is treated as a principal and an accessory after the fact is not, a charging instrument alleging that the defendant committed the principal crime "only places him on notice that he must defend against accountability for the crime as a principal or accessory before the fact, not that he must be prepared to meet evidence that he aided the perpetrator after the crime had been committed." *Ibid.*

Accordingly, even if Section 10851(a) covers accessories after the fact, a defendant, like respondent, who was charged with violating the statute as a principal has necessarily *not* been convicted as an accessory after the fact, and therefore *has* been convicted of a "theft offense"—either as a principal or as an aider and abet-

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[18] That is the law in California. See, *e.g.*, *People* v. *Prado*, 136 Cal. Rptr. 521, 523 (Ct. App. 1977) ("a person charged in an indictment as principal cannot be convicted on evidence showing him to be only an accessory after the fact") (citation omitted); *People* v. *Baker*, 330 P.2d 240, 245-246 (Cal. Ct. App. 1958) (defendant "was charged and prosecuted as a principal" and therefore "could not have been convicted as an accessory"), cert. denied, 359 U.S. 956 and 361 U.S. 851 (1959); 17 Cal. Jur. 3d *Criminal Law: Core Aspects* § 124, at 192 (2002) ("one charged as a principal cannot be convicted on proof that he or she was an accessory").

tor—under the "modified categorical" approach. Indeed, it makes little practical difference whether the government is required to meet its burden under the "categorical" or the "modified categorical" approach, because, in this case, as in the vast majority of cases involving a violation of California Vehicle Code § 10851(a), see, *e.g.*, *Penuliar*, 435 F.3d at 971 n.8; *United States* v. *Vidal*, 426 F.3d 1011, 1017 (9th Cir. 2005), reh'g granted, 453 F.3d 1114 (9th Cir. 2006), the same documents that establish the fact of conviction—the charging instrument and corresponding judgment—also establish that the alien was convicted as either a principal or an aider and abettor.

In other words, precisely because the law generally—and California law specifically—treats accessories after the fact as distinct from principals, the "modified categorical" approach will readily allow reviewing courts to exclude the possibility that the defendant was convicted as an accessory after the fact. At the same time, however, because the law generally—and California law specifically—does not distinguish between aiding and abetting and the offense of the principal, the "modified categorical" approach will generally not permit reviewing courts to exclude the possibility that the defendant was convicted as an aider or abettor. Accordingly, the Ninth Circuit's actual holding concerning aiding and abetting, unlike respondent's belated accessory-after-the-fact argument, risks allowing countless individuals who in fact committed aggravated felonies as principals to escape the consequences of their crimes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

AIDING-AND-ABETTING STATUTES

United States: 18 U.S.C. 2(a) ("Whoever 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(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.").

Alabama: Ala. Code § 13A-2-20 (LexisNexis 2005) ("A person is criminally liable for an offense if it is committed by his own behavior or by the behavior of another person for which he is legally accountable * * * ."); *id.* § 13A-2-23 ("A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense[,] (1) [h]e procures, induces or causes such other person to commit the offense; or (2) [h]e aids or abets such other person in committing the offense * * * .").

Alaska: Alaska Stat. § 11.16.100 (2004) ("A person is guilty of an offense if it is committed by the person's own conduct or by the conduct of another for which the person is legally accountable * * * ."); *id.* § 11.16.110 ("A person is legally accountable for the conduct of another constituting an offense if[,] * * * with intent to promote or facilitate the commission of the offense, the person (A) solicits the other to commit the offense; or (B) aids or abets the other in planning or committing the offense * * * .").

Arizona: Ariz. Rev. Stat. Ann. § 13-301 (2001) ("'[A]ccomplice' means a person * * * who with the intent to promote or facilitate the commission of an offense[,] * * * [s]olicits or commands another person to commit the offense; or * * * [a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense."); *id.* § 13-302 ("A person may be guilty of an offense committed by such person's own conduct or by the conduct of another for which such person is criminally accountable * * * , or both."); *id.* § 13-303(A) ("A person is criminally accountable for the conduct of another if * * * [t]he person is an accomplice of such other person in the commission of an offense.").

Arkansas: Ark. Code Ann. § 5-2-402 (2006) ("A person is criminally liable for the conduct of another person if * * * [t]he person is an accomplice of another person in the commission of an offense[.]"); *id.* § 5-2-403(a) ("A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person: (1) [s]olicits, advises, encourages, or coerces the other person to commit the offense; [or] (2) [a]ids, agrees to aid, or attempts to aid the other person in planning or committing the offense[.]").

California: Cal. Penal Code § 31 (West 1999) ("All persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed."); *id.* § 971 (West 1985) ("The distinction between an acces-

sory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals * * * .").

Colorado: Colo. Rev. Stat. § 18-1-601 (2005) ("A person is guilty of an offense if it is committed by the behavior of another person for which he is legally accountable * * * ."); *id.* § 18-1-603 ("A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.").

Connecticut: Conn. Gen. Stat. Ann. § 53a-8(a) (West 2001) ("A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.").

Delaware: Del. Code Ann. tit. 11, § 271 (2001) ("A person is guilty of an offense committed by another person when[,] * * * [i]ntending to promote or facilitate the commission of the offense[,] the person * * * [s]olicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or * * * [a]ids, counsels or agrees or attempts to aid the other person in planning or committing it[.]").

District of Columbia: D.C. Code § 22-1805 (2001) ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories * * * .").

Florida: Fla. Stat. Ann. § 777.011 (West 2005) ("Whoever commits any criminal offense against the state, * * * or aids, abets, counsels, hires, or otherwise procures such offense to be committed * * * , is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.").

Georgia: Ga. Code Ann. § 16-2-20(a) (2003) ("Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime."); *id.* § 16-2-20(b) ("A person is concerned in the commission of a crime only if he: (1) [d]irectly commits the crime; (2) [i]ntentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity; (3) [i]ntentionally aids or abets in the commission of the crime; or (4) [i]ntentionally advises, encourages, hires, counsels, or procures another to commit the crime.").

Hawaii: Haw. Rev. Stat. Ann. § 702-221(1) (LexisNexis 2003) ("A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both."); *id.* § 702-221(2) ("A person is legally accountable for the conduct of another person when * * * [h]e is an

accomplice of such other person in the commission of the offense."); *id.* § 702-222 ("A person is an accomplice of another person in the commission of an offense if[,] * * * [w]ith the intention of promoting or facilitating the commission of the offense, the person: (a) [s]olicits the other person to commit it; or (b) [a]ids or agrees or attempts to aid the other person in planning or committing it[.]").

Idaho: Idaho Code Ann. § 19-1430 (2004) ("The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals * * * .").

Illinois: 720 Ill. Comp. Stat. Ann. 5/5-1 (West 2002) ("A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both."); *id.* at 5/5-2 ("A person is legally accountable for the conduct of another when[,] * * * [e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.").

Indiana: Ind. Code Ann. § 35-41-2-4 (LexisNexis 2004) ("A person who knowingly or intentionally aids,

induces, or causes another person to commit an offense commits that offense * * * .").

Iowa: Iowa Code Ann. § 703.1 (West 2003) ("All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals.").

Kansas: Kan. Stat. Ann. § 21-3205(1) (1995) ("A person is criminally responsible for a crime committed by another if such person intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime.").

Kentucky: Ky. Rev. Stat. Ann. § 502.020(1) (LexisNexis 1999) ("A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he: (a) [s]olicits, commands, or engages in a conspiracy with such other person to commit the offense; or (b) [a]ids, counsels, or attempts to aid such person in planning or committing the offense[.]").

Louisiana: La. Rev. Stat. Ann. § 14:24 (1997) ("All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 57(1) (2006) ("A person may be guilty of a crime if it is committed by the conduct of another person for which he is legally

accountable as provided in this section."); *id.* § 57(2) ("A person is legally accountable for the conduct of another person when * * * [h]e is an accomplice of such other person in the commission of the crime[.]"); *id.* § 57(3) ("A person is an accomplice of another person in the commission of a crime if[,] * * * [w]ith the intent of promoting or facilitating the commission of the crime, he solicits such other person to commit the crime, or aids or agrees to aid or attempts to aid such other person in planning or committing the crime.").

Maryland: Md. Code Ann., Crim. Proc. § 4-204(b) (LexisNexis 2001 & Supp. 2005) ("[T]he distinction between an accessory before the fact and a principal is abrogated; and * * * an accessory before the fact may be charged, tried, convicted, and sentenced as a principal.").

Massachusetts: Mass. Ann. Laws ch. 274, § 2 (LexisNexis 1992) ("Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon.").

Michigan: Mich. Comp. Laws Ann. § 767.39 (West 2000) ("Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.").

Minnesota: Minn. Stat. Ann. § 609.05 subdiv. 1 (West 2003) ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.").

Mississippi: Miss. Code Ann. § 97-1-3 (West 2005) ("Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such[.]").

Missouri: Mo. Ann. Stat. § 562.036 (West 1999) ("A person with the required culpable mental state is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible, or both."); *id.* § 562.041(1) ("A person is criminally responsible for the conduct of another when[,] * * * [e]ither before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.").

Montana: Mont. Code Ann. § 45-2-301 (2005) ("A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself or that of another and he is legally accountable for such conduct as provided in 45-2-302, or both."); *id.* § 45-2-302 ("A person is legally accountable for the conduct of another when[,] * * * either before or during the commission of an offense with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense.").

Nebraska: Neb. Rev. Stat. Ann. § 28-206 (LexisNexis 2003) ("A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.").

Nevada: Nev. Rev. Stat. Ann. § 195.020 (LexisNexis 2006) ("Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such.").

New Hampshire: N.H. Rev. Stat. Ann. § 626:8(I) (LexisNexis Supp. 2005) ("A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both."); *id.* § 626:8(II) ("A person is legally accountable for the conduct of another person when * * * [h]e is an accomplice of such other person in the commission of the offense."); *id.* § 626:8(III) ("A person is an accomplice of another person in the commission of an offense if[,] * * * [w]ith the purpose of promoting or facilitating the commission of the offense, he solicits such other person in committing it, or aids or agrees or attempts to aid such other person in planning or committing it[.]").

New Jersey: N.J. Stat. Ann. § 2C:2-6(a) (West 2005) ("A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for

which he is legally accountable, or both."); *id.* § 2C:2-6(b) ("A person is legally accountable for the conduct of another person when * * * [h]e is an accomplice of such other person in the commission of an offense[.]"); id. § 2C:2-6(c) ("A person is an accomplice of another person in the commission of an offense if[,] * * * [w]ith the purpose of promoting or facilitating the commission of the offense[,] he * * * [s]olicits such other person to commit it; [or] * * * [a]ids or agrees or attempts to aid such other person in planning or committing it[.]").

New Mexico: N.M. Stat. § 30-1-13 (2004) ("A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime * * * .").

New York: N.Y Penal Law § 20.00 (McKinney 2004) ("When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.").

North Carolina: N.C. Gen. Stat. § 14-5.2 (2005) ("All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony.").

North Dakota: N.D. Cent. Code § 12.1-03-01(1) (1997) ("A person may be convicted of an offense based

upon the conduct of another person when[,] * * * [a]cting with the kind of culpability required for the offense, he causes the other to engage in such conduct; [or] * * * [w]ith intent that an offense be committed, he commands, induces, procures, or aids the other to commit it[.]").

Ohio: Ohio Rev. Code Ann. § 2923.03(A) (LexisNexis 2006) ("No person, acting with the kind of culpability required for the commission of an offense, shall * * * [s]olicit or procure another to commit the offense; [or] * * * [a]id or abet another in committing the offense[.]."); *id.* § 2923.03(F) ("Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender.").

Oklahoma: Okla. Stat. Ann. tit. 21, § 172 (West 2002) ("All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.").

Oregon: Or. Rev. Stat. § 161.150 (2005) ("A person is guilty of a crime if it is committed by the person's own conduct or by the conduct of another for which the person is criminally liable, or both."); *id.* § 161.155 ("A person is criminally liable for the conduct of another person constituting a crime if[,] * * * [w]ith the intent to promote or facilitate the commission of the crime[,] the person * * * [s]olicits or commands such other person to commit the crime; or * * * [a]ids or abets or agrees or

attempts to aid or abet such other person in planning or committing the crime[.]").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 306(a) (West 1998) ("A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both."); *id.* § 306(b) ("A person is legally accountable for the conduct of another person when * * * he is an accomplice of such other person in the commission of the offense."); *id.* § 306(c) ("A person is an accomplice of another person in the commission of an offense if[,] * * * with the intent of promoting or facilitating the commission of the offense, he * * * solicits such other person to commit it; or * * * aids or agrees or attempts to aid such other person in planning or committing it[.]").

Rhode Island: R.I. Gen. Laws § 11-1-3 (2002) ("Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to * * * .").

South Carolina: S.C. Code. Ann. § 16-1-40 (2003) ("A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.").

South Dakota: S.D. Codified Laws § 22-3-3 (2005) ("Any person who, with the intent to promote or facilitate the commission of a crime, aids, abets, or advises another person in planning or committing the crime, is legally accountable, as a principal to the crime."); *id.* § 22-3-3.1 ("The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated. Any person connected with the commission of a felony, whether that person directly commits the act constituting the offense or aids and abets its commission, though not present, shall be prosecuted, tried, and punished as a principal.").

Tennessee: Tenn. Code Ann. § 39-11-401(a) (2003) ("A person is criminally responsible as a party to an offense if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both."); *id.* § 39-11-402 ("A person is criminally responsible for an offense committed by the conduct of another if[,] * * * [a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]").

Texas: Tex. Penal Code Ann. § 7.01(a) (Vernon 2003) ("A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both."); *id.* § 7.01(c) ("All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as

a principal or accomplice."); *id.* § 7.02(a) ("A person is criminally responsible for an offense committed by the conduct of another if[,] * * * acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]").

Utah: Utah Code Ann. § 76-2-202 (2003) ("Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.").

Vermont: Vt. Stat. Ann. tit. 13, § 3 (1998) ("A person who aids in the commission of a felony shall be punished as a principal."); *id.* § 4 ("A person who is accessory before the fact by counseling, hiring or otherwise procuring an offense to be committed may be * * * indicted, tried, convicted and punished as if he were a principal offender * * * .").

Virginia: Va. Code Ann. § 18.2-18 (2004) ("In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree[.]").

Washington: Wash. Rev. Code Ann. § 9A.08.020(1) (West 2000) ("A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable."); *id.* § 9A.08.020(2) ("A person is legally accountable for the conduct of another person when * * * he is an accomplice of such other person in

the commission of the crime."); *id.* § 9A.08.020(3) ("A person is an accomplice of another person in the commission of a crime if[,] * * * [w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it[.]").

West Virginia: W. Va. Code Ann. § 61-11-6 (LexisNexis 2005) ("In the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree[.]").

Wisconsin: Wis. Stat. Ann. § 939.05(1) (West 2005) ("Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it * * * ."); *id.* § 939.05(2) ("A person is concerned in the commission of the crime if the person: (a) [d]irectly commits the crime; or (b) [i]ntentionally aids and abets the commission of it; or (c) * * * advises, hires, counsels or otherwise procures another to commit.").

Wyoming: Wyo. Stat. Ann. § 6-1-201(a) (2005) ("A person who knowingly aids or abets in the commission of a felony, or who counsels, encourages, hires, commands or procures a felony to be committed, is an accessory before the fact."); *id.* § 6-1-201(b) ("An accessory before the fact * * * [m]ay be indicted, * * * tried and convicted as if he were a principal; * * * [and] [u]pon conviction, is subject to the same punishment and penalties as are prescribed by law for the punishment of the principal.").