UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17-50295, No. 16-50423

UNITED STATES OF AMERICA
Plaintiff-Appellee,
v.

JOSUE MARTINEZ-HERNANDEZ & OSCAR CARCAMO-SOTO
Defendants-Appellants

On Appeal from the U.S. District Court for the Southern District of California,
Hon. John A. Houston & Hon. Marilyn Huff

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT IN SUPPORT OF PETITIONER'S EN BANC REHEARING REQUEST

Kari Hong
NINTH CIRCUIT APPELLATE PROGRAM
BOSTON COLLEGE LAW SCHOOL
885 Centre Street
Newton, MA 02459
(510) 384-4524
kari.hong@bc.edu

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Other

CORPORATE DISCLOSURE STATEMENT

Amici Curiae American Immigration Lawyers Association and Florence Immigrant & Refugee Rights Project state that they, their subsidiaries and any corporate interests involved in this matter, do not have any monetary interest in the outcome of this case.

FRAP RULE 29 STATEMENT OF CONSENT

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a) and Circuit Rule 29-3, attorneys representing both of the parties consent to the filing of this amicus brief. Amici state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amici and their counsel contributed money that was intended to fund the preparing or submitting of the brief.

INTEREST OF AMICI CURIAE

Amici are non-profit organizations providing direct legal services to noncitizens and advice, training, and technical support to counsel and advocates in California, Arizona, and nationally. Amici has an interest in ensuring that the immigration laws, including the generic definition of a theft offense, is applied fairly and uniformly.

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United

States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. As part of its mission, AILA provides trainings, information, and practice advisories to practitioners providing direct services to noncitizens, and, increasingly, to counsel representing noncitizens accused of criminal offenses in federal and state courts.

The Florence Immigrant and Refugee Rights Project ("the Florence Project") is a 501(c)(3) nonprofit legal service organization providing free legal services to men, women, and unaccompanied children in immigration custody in Arizona and technical assistance to counsel and advocates nationwide. The Florence Project redresses the lack of counsel in immigration proceedings, both locally and nationally through direct service, partnerships with the community, and advocacy and outreach efforts. The Florence Project's vision is to ensure that all immigrants facing removal have access to counsel, understand their rights under the law, and are treated fairly and humanely.

INTRODUCTION

Amici respectfully submits that there are two reasons why *United States v. Martinez Hernandez,* 912 F.3d 1207 (9th Cir. 2019) misapprehends California law when holding that California Penal Code § 211 ("211") is a categorical match to the generic definition of theft.

First, it sounds incredulous to convict someone for the crime of robbery when the only act was giving a robber a ride. But California is the only state that does just that. Attached at Appendix A, in a 50-state survey, only seven states have addressed the express question of whether an "innocent driver" or "clueless driver"—one with no prior or contemporaneous knowledge of a robbery—becomes liable for robbery for simply giving a robber a ride. Of those seven, only California has held that an "innocent driver" will be liable as an aider and abettor—rather than an accessory after the fact—when there is no prior or contemporaneous knowledge of the theft. By contrast, Washington state expressly has held that the innocent driver cannot be an accessory after the fact. The panel thus erred in contending that § 211 is indistinguishable from the Washington robbery statute underlying *United States v. Alvarado-Pineda,* 774 F.3d 1198 (9th Cir. 2014).

This unique operation of robbery renders § 211 overbroad to the generic theft offense. *Duenas-Alvarez* explains that those who help a thief before a taking

will be equally liable—an aider and abettor—for possession, because a person's intent and assistance prior to or during the taking, helped the thief get the goods. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007). Those who help the thief after the taking, however, will not have possession, because their help occurs after the taking is over. *See United States v. Vidal,* 504 F.3d 1072, 1079–80 (9th Cir. 2007). *United States v. Martinez Hernandez* also overlooks that California is the only state that criminalizes "innocent drivers" who assist in the crime after the taking is completed.

Second, as a second and independent reason to hold § 211 is overbroad to the generic theft offense, § 211 criminalizes consensual takings. The panel rendered its decision without the benefit of the attached 50-state survey, *see* Appendix B, which establishes that only 2 states criminalize fraud as a predicate act to robbery and 2 more criminalize receiving stolen property. § 211's criminalization of fraud is a significant departure from how other states define robbery and renders it overbroad to the generic definition of theft.

ARGUMENT

As set forth below, § 211 is a substantial departure from how the 50 states and District of Columbia define the elements of robbery.

//

//

I. § 211 IS A DEPARTURE FROM COMMON LAW ROBBERY IN THAT CONDUCT THAT WOULD BE PROSECUTED AS THEFT, FOLLOWED BY ASSAULT, FORMS INTO A SINGLE COUNT OF ROBBERY

The crime of robbery began as a form of aggravated larceny. That is why, "at common law, a robbery required that the force, violence, or putting in fear occur ***before or contemporaneous with*** the larcenous taking." *People v. Randolph*, 466 Mich. 532, 546 (2002) (emphasis added), superseded by statute on other grounds as stated in *People v. March*, 499 Mich. 389, 886 (2016).

As explained by the Michigan Supreme Court, when someone committed an assault after a theft, that conduct could not support a common law robbery conviction "because the defendant did not use force, violence, assault, or putting in fear ***to accomplish*** his taking of property. . . ." 466 Mich. at 551 (emphasis added) (reversing robbery conviction in absence of evidence that force was used to effectuate the taking). The use of force was still actionable. But it was the crime of assault and theft, not robbery. *See* 466 Mich. at 546 ("If the violence, force, or putting in fear occurred after the taking, the ***crime was not robbery***, ***but rather larceny and perhaps assault."***) (emphasis added).

As set forth in Appendix B, 20 states still follow the common law definition of robbery in this manner. *See generally Sweed v. State*, 351 S.W.3d 63, 69 (Tex. Crim. App. 2011) (reversing robbery conviction to instruct jury on lesser included offense of theft because "based upon the evidence presented, that the assault was a

separate event from the theft").

§ 211, like 19 other states, however, define robbery differently, separating the element of force from the taking element. *See* Appendix B. For robberies in California then, any assault subsequent to a taking elevates the entire conduct into the more serious crime of robbery. *See People v. Estes,* 147 Cal. App. 3d 23, 27–28 (1983).

For example, in *Estes*, a man shoplifted clothing from a department store. 147 Cal. App. 3d at 26. In the parking lot, defendant took out a knife, swung it, and threatened to kill a security guard. *Id*. On appeal, Mr. Estes argued that he should have only been convicted of petty theft and assault, and not robbery, because the force did not occur at the time of the taking. 147 Cal. App. 3d at 28. Mr. Estes' argument comports with how a jurisdiction following the common law definition of robbery would charge him: guilty of the crimes of theft and assault but not robbery because the use of force was subsequent to, and independent of, the taking.

In *Estes*, the Court of Appeal disagreed. 147 Cal. App. 3d at 28. Unlike the common law definition of robbery, § 211 lets the elements add up "over large distances and take some time to complete" as long as the elements "are linked by a single-mindedness of purpose." *Id*.

//

II. § 211 IS OVERBROAD TO THE GENERIC THEFT DEFINITION BECAUSE CALIFORNIA IS THE ONLY STATE THAT CRIMINALIZES "INNOCENT" DRIVERS AS ACCESSORIES-AFTER-THE-FACT

The panel rendered its decision without the benefit of a 50 state survey that shows that of the seven states have addressed this issue, only California criminalizes conduct that occurs after a taking as aiding and abetting instead of accessory-after-the-fact liability.

A. *Duenas-Alvarez* and *Vidal* Explain That Those Who Assist A Theft After It Occurs Are Not Aiders and Abettors To The Generic Theft Offense

To understand how § 211 criminalizes conduct that is usually assigned to accessories after the fact, the starting place is the framework that *Duenas-Alvarez* and *Vidal* held relevant.

Those who help a thief before or during a taking will be equally liable for possession, because a person's intent and assistance prior to or during the taking, helped the thief get the goods. *See Duenas-Alvarez*, 549 U.S. at 190. Those who help the thief after the taking, however, will not be aiders and abettors to the generic theft offense because their help occurs after the taking is over. *Vidal*, 504 F.3d at 1079–80. As accessories after the fact, they "had no part in causing the crime." *Id*. "Because one need only have assisted the offender with knowledge that ***the offense has already been committed*** . . . one who is convicted as an

accessory after the fact to theft cannot be said to have committed all elements of generic theft. . . ." *Id.* (emphasis added).

Then, the key questions are: what did a driver know when he gave a robber a ride and when did he know it. In answering these questions, a traditional get-away driver who was in on the plan to rob a bank would be held to aid and abet the generic theft offense even if his conduct of driving the getaway car took place after his compatriots robbed a bank. That is so because he had knowledge of the taking before it occurred and assisted or abetted those who took the stolen goods or money.

§ 211 is overbroad to the generic theft offense because it also sweeps in what courts call the "innocent driver" or the "clueless driver"—one who just gave a robber a ride without prior knowledge of the taking—as an aider and abettor to the state's robbery offense.

B. § 211 Is Complete, Not At The Taking, But At The End Of The Asportation Element

The starting point to understand why § 211 is different is *People v. Cooper.* 53 Cal.3d 1158, 1161 (1991). Mr. Cooper and his two friends were in a parking lot of a mall. Mr. Cooper wandered off and his two friends "slammed into an 89-year-old shopper, stealing his wallet." 53 Cal.3d at 1161. The two friends then jumped into Mr. Cooper's car, which was moving with "its two right-side doors open." *Id.* At trial, all three men were charged with robbery, and Mr. Cooper was charged

with aiding and abetting, which permitted him to be prosecuted as a principal. 53 Cal. 3d at 1161–62. Mr. Cooper challenged his conviction because, as a getaway driver, "the evidence proved no more than he was an accessory after the fact. Specifically, defendant contended that the evidence did not show beyond reasonable doubt that ***he possessed prior knowledge of or intent to aid the robbery.***" 53 Cal. 3d at 1162 (emphasis added).

The California Supreme Court reiterated the general aiding and abetting rule, which provides "[i]t is legally and logically impossible to both form the requisite intent and in fact aid, promote, encourage, or facilitate commission of a crime after the commission of that crime has ended." 53 Cal. 3d at 1164. But unique to robbery, *Cooper* explained that the crime does not end at the taking. Rather, "in determining the duration of a robbery's commission[,] we must necessarily focus on ***the duration of the final element of the robbery, asportation.***" *Id*. at 1165 (emphasis added). The duration of the asportation element is broad: it is "initially ***satisfied*** by evidence of slight movement", but "continues thereafter as long as the loot is being carried away to a place of temporary safety." *Id*. at 1165 (emphasis in original).

§ 211 then uniquely combines with the aiding and abetting doctrine, so that "a getaway driver must form the intent to facilitate or encourage commission of the robbery *prior to* ***or during the carrying away of the loot*** *to a place of temporary*

safety." 53 Cal. 3d at 1165 (emphasis in *Cooper).* In justifying the expansion of § 211 to those who are typically accessories after the fact, *Cooper* cited favorably to *People v. Jardine* in which, "the defendant and a cohort testified that the defendant had no knowledge of the robbery until the perpetrators entered the car after robbing the store." 53 Cal. 3d at 1167 (citing 116 Cal. App. 3d 907, 919–20 (1991)). *Cooper* cited *Jardine* to explain how a getaway driver, without prior knowledge of the robbery, can still be prosecuted as an aider and abettor under § 211. *See* 53 Cal. 3d at 1167 (citing *People v. Jardine*, 116 Cal. App. 3d 907, 919–20 (Cal. App. 1981)).

In a lively dissent at the time, Justice Kennard argued that a robbery conviction on those facts makes no sense as a policy matter. She argued that "the majority now holds that a person who aids an escaping robber ***after the robbery has been completed*** may be held criminally liable ***as a principal to the robbery*** if the robber, at the time of the assistance, still has possession of the stolen property and the assistance is given before the robber has reached a place of 'temporary safety.'" 53 Cal. 3d at 1171 (Kennard, J., dissenting) (emphasis added).

As applied to Mr. Cooper, Justice Kennard further noted the unfairness of convicting him as a principal without evidence that he intended to assist in the robbery before it occurred. "[T]he prosecutor asserted forcefully in his final argument that, ***regardless of whether defendant had prior knowledge of, or***

involvement in, planning the robbery, he was guilty of robbery because of his actions during the escape." 53 Cal. 3d at 1178 (Kennard, J., dissenting) (emphasis added). Her criticisms were that the asportation element of § 211 in effect collapsed the doctrines of aiding and abetting and accessory after the fact. They, however, did not persuade the majority to change how § 211 applied.

C. *People v. Mata* Has Held That § 211 Criminalizes An Innocent Driver As An Aider and Abettor And Not An Accessory After The Fact

A California court of appeal also explains how § 211 reaches conduct that even an attempted robbery would not. In *People v. Mata,* the Court of Appeal reversed an attempted § 211 conviction for an "innocent" getaway driver who had picked up his brother, and while giving him a ride, was first told that his brother had unsuccessfully tried to rob a gas station. No. G031362, 2004 WL 1173063, at *3–4 (Cal. Ct. App. May 27, 2004). There, the court explained that without prior or contemporaneous knowledge of the attempted robbery, the driver was at most an accessory after the fact. *Id*. Of note, the court explained that if the brother had, however, successfully robbed the store, the same driver who first learned of the robbery while giving the robber a ride would be an aider and abettor to the substantive § 211 crime because asportation continues the reach of § 211. *Id*. *Mata* is an important case to understand how those who help a robber escape, even when they have no prior or contemporaneous knowledge of a taking, will nonetheless be deemed an aider and abettor to a robbery.

D. Of The Seven Other States That Decided This Issue, Only One Holds A "Clueless" Driver Liable For Robbery As An Aider and Abettor To The Generic Theft Offense

The panel made its decision without the benefit of a 50-state survey that establishes that California is the only state that criminalizes robbery as broadly as § 211 does. The six other states that have squarely addressed this issue stopped short of § 211's breadth and would have assigned the innocent driver an accessory after the fact. For instance, in New Jersey, the Supreme Court made the policy choice that Justice Kennard would have preferred. In New Jersey "the State argues that a person who assists the immediate flight of a robber, per se, is an accomplice to the robbery. The appellate panel in this case rejected that sweeping interpretation of our accomplice liability and robbery statutes . . . . We do so as well." *State v. Whitaker*, 200 N.J. 444, 463, 983 A.2d 181, 192–93 (2009). ***"[A] clueless* getaway driver**—a defendant who did not know that his cohorts were armed, intended to commit a robbery, and indeed carried out a robbery—would be guilty as an accomplice based on what he learned after-the-fact." *Id*. (emphasis added). Significantly, under this rule, which is the one adopted by *Cooper*, "a person who aids the escape of a robber is an accomplice to robbery even if he did not have a purpose to promote or facilitate the theft when it occurred. That result is at odds with the language of our accomplice liability and robbery statutes and the precedents of this Court." *Id*. (emphasis added)

New Jersey, however, rejected criminalizing a clueless driver as aiding and abetting a robbery. In so doing, New Jersey's liability aligned perfectly with the generic theft definition, which provides that those who drive their friends before learning about the robbery would be aiders and abettors but those who drove their friends after learning about the robbery liable for accessories after the fact. "As stated earlier, theft is an essential element of robbery. The driver of a vehicle spiriting away the culprits who committed a robbery is not retroactively guilty of that crime if he had no intent to participate in the theft at or before the time of its occurrence. The driver, however, would be guilty of hindering their apprehension if—after-the-fact—he became aware of the crime they had committed and aided in their getaway." 200 N.J. at 463.

The robbery statute in Washington state is applied in this manner. *See State v. Robinson*, 73 Wash. App. 851, 852 (1994) (reversing robbery conviction for driver who gave his friend a ride after watching the friend mug a woman because the driver did not have prior knowledge of the friend's planned purse snatching). In addition, the four other states that addressed this issue followed this formulation. *See Holley v. State,* 406 So. 2d 65 (Fla. Dist. Ct. App. 1981) (robbery conviction overturned for driver who gave robber a ride); *Com. v. Lombard*, 419 Mass. 585, 591, 646 N.E.2d 400, 405 (1995) (robbery conviction overturned for driver who gave robber a ride); *State v. Lucero,* 1957-NMSC-062, ¶ 7, 63 N.M. 80, 82, 313

P.2d 1052, 1053 (1957) (upheld robbery conviction for driver who kept car running during mugging but reversed robbery conviction for friend in car who was asleep during the mugging); *Com. v. Petrie,* 277 Pa. Super. 239, 243, 419 A.2d 750, 752 (1980) (reversing aiding and abetting conviction for drunk friend who was in car when friends committed robbery).

When noting that § 211 is indistinguishable from the Washington robbery statute underlying *Alvarado-Pineda,* the panel failed to account for how *Robinson* will not prosecute an unwitting getaway driver for robbery but that *Cooper* will.

III. § 211 IS OVERBROAD TO THE GENERIC THEFT OFFENSE BECAUSE CALIFORNIA IS ONE OF TWO STATES THAT PERMITS FRAUDULENT TAKINGS FOLLOWED BY FORCE TO BE PROSECUTED AS ROBBERY

The panel held that § 211 is not overbroad to the generic definition of theft because force used during the asportation element is the gravamen of the offense. *See* 912 F.3d at 1214. With all due respect, the panel did not have the benefit of the attached 50-state survey that shows that only two states—California and Michigan—have expressly held that fraud may serve as a predicate act to robbery.

A. California's Robbery Statute Is Not Limited To Takings By Larceny

First, the generic definition of theft is limited to takings by larceny. In *Carrillo-Jaime v. Holder*, California's chop shop statute was held overbroad to the generic theft offense because the statute criminalized fraudulent takings. 572 F.3d 747, 754 (9th Cir. 2009). This is true because "'theft occurs without consent,

while fraud occurs with consent that has been unlawfully obtained.'" *Soliman v. Gonzales*, 419 F.3d 276, 282 (4th Cir. 2005) (quoting Black's Law Dictionary (6th ed. 1951)) (credit card fraud statute is overbroad to the generic theft statute because the statute criminalizes fraud); *see Martinez v. Mukasey*, 519 F.3d 532, 540 (5th Cir. 2008) (federal bank fraud statute is overbroad to the generic theft offense because it permits property to be taken by fraud).

Second, only four states have held that their robbery statutes will include acts that are not limited to just larceny.

In California, in *People v. Williams*, California's Supreme Court reversed a robbery conviction for a man who had obtained gift cards by false pretenses and then later shoved a guard, which was alleged to be sufficient force to elevate the theft into robbery. 57 Cal. 4th 776, 779 (2013). In reversing the § 211 conviction, the California Supreme Court, in an opinion authored by Justice Joyce Kennard, clarified that this holding was predicated on the fact that "***theft by false pretenses***, unlike larceny, has no requirement of asportation." *Id.* at 787. (emphasis added). When a taking occurs by false pretenses, § 211 follows the traditional common law approach, which does not let a subsequent assault elevate a prior taking into a robbery. *See* 466 Mich. at 546 (discussing common law definitions of robbery that required the force to be part of the taking).

Williams explained, however, that this limitation applied only to takings by false pretenses. Larceny and larceny-by-trick remained predicate acts to § 211. *See* 57 Cal. 4th at 788–89 (discussing why theft by false pretenses is not a predicate act to robbery but theft by larceny and theft by trick are).

Indeed, after *Williams*, California courts repeatedly upheld robbery convictions for defendants who argued that the initial peaceful or duplicitous takings predicated on fraud are takings that are criminalized by California's definition of robbery. *See People v. Bailey,* No. A147673, 2017 WL 3699875, at *4 (Cal. Ct. App. Aug. 28, 2017) (tricking a victim to voluntarily give her phone to a defendant, followed by assault, is robbery); *In Re William M.*, A145191, 2016 WL 193411, at *2 (Cal. Ct. App. Jan. 1, 2016) (upholding robbery conviction when possession of phone obtained by trick); *In Re Moises R.*, G050550, 2015 WL 7721175, at *4 (Cal. Ct. App. Nov. 30, 2015) (upholding robbery conviction when possession of property was obtained peacefully).

In Michigan, fraud was also predicate act to robbery, and the robbery conviction was reversed because taking occurred without force. *See People v. Cherry*, 467 Mich. 901, 653 N.W.2d 182 (2002).

There are two other states that have expressly predicated robbery on takings not involving larceny. In Oregon, theft by receiving goods may be predicate act to robbery. *State v. Boucher,* 13 Or. App. 339, 341, 509 P.2d 1228, 1230 (1973).

The Court of Appeals supported this holding because Oregon's robbery statute expressly refers to "theft" as "[t]akes, appropriates, obtains or withholds such property from an owner thereof." *Id*. at 344; *see also Matter of Jerry H.*, 49 A.D. 2d 925, 925, 373 N.Y.S. 2d 647, 648 (1975) (in New York, possession of stolen property may be predicate act to robbery).

By contrast, four states have held that a taking not involving larceny is not a predicate act to robbery. *See Thomas v. State,* 91 Ala. 34, 36 (1890) (reversing robbery because item obtained by trick, followed by assault, is not robbery); *People v. Moore,* 184 Colo. 110, 111, 518 P.2d 944, 945 (1974) (extortion may not be predicate to robbery); *Leeson v. State,* 293 Md. 425, 436, 445 A.2d 21, 27 (1982) (insurance fraud is not predicate to robbery because the victim consented to the scheme); *State v. Shipley,* 920 S.W.2d 120, 123 (Mo. Ct. App. 1996) (stealing by deceit cannot be predicate act to robbery that criminalizes only "stealing", which is similar to generic larceny).

B. The Overwhelming Majority Of State Robbery Offenses Do Not Criminalize Clueless Drivers As Aiders and Abettors Or Fraud As Predicate Acts To Robbery

When determining the generic definition of an offense, "'[t]he generic definition of an offense 'roughly corresponds to the definitions of the offense in a majority of the States' criminal codes.'" *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1084 (9th Cir. 2015) (quoting *Taylor v. United States*, 495 U.S. 575,

589 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)). Only one of the 50 states criminalizes "innocent" or "clueless" drivers as aiders and abettors to theft; only two expressly criminalize fraud as a predicate act. The most reasonable generic definition of theft thus excludes robbery statutes that criminalize fraud and "innocent drivers" as aiders and abettors. Notably, § 211 is overbroad to both definitions.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant the petition for rehearing en banc and hold that § 211 is overbroad to the generic crime of theft.

Dated: April 2, 2019 Respectfully submitted,

s/ Kari E. Hong
KARI E. HONG
Counsel for Amici Curiae

AMICI CURIAE SIGNATORIES

American Immigration Lawyers Association
Florence Immigrant & Refugee Rights Project

CERTIFICATE OF COMPLIANCE

I certify that: Pursuant to Fed. R. App. P., Rule 32(a)(7)(B) and (C), Rule (a)(5) and (6), and Ninth Circuit Rules 32-1 and 32-4, the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 4,198 words, exclusive of the table of contents, table of authorities, corporate disclosure statement, certificates of counsel, and signature block, which is does not exceed the 4,200 word-limit for an amicus brief. The word count includes the FRAP RULE 29 Statement.

CERTIFICATE OF SERVICE

I, Kari Hong, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 2, 2019 Respectfully submitted,

/s Kari Hong
KARI HONG

APPENDIX A

Chart of State Robbery Laws: Whether Innocent Drivers Are Aiders and Abettor

State	Robbery Statute Citation	Can an "innocent" driver be guilty of aiding and abetting without prior knowledge of robbery	Authority
Totals			*Yes – 1* *No – 6* *States in Ninth Circuit's jurisdiction are highlighted*
CA	**Robbery**: Cal. Penal Code § 211 (West 2018)	Yes.	People v. Cooper, 53 Cal.3d 1158, 1161 (1991)
FL	Fla. Stat. § 812.13 (2018)	No	Holley v. State, 406 So. 2d 65 (Fla. Dist. Ct. App. 1981) (robbery conviction overturned for driver who gave a robber a ride)
MA	**Armed robbery**: Mass. Gen. Laws Ann. ch. 265, § 17 (West 2018) **Unarmed robbery**: Mass. Gen. Laws Ann. ch. 265, § 19 (West 2018)	No.	Com. v. Lombard, 419 Mass. 585, 591, 646 N.E.2d 400, 405 (1995) (robbery conviction overturned for driver who gave a robber a ride)
NJ	N.J. Stat. Ann. § 2C:15-1 (West 2018) *(PL)	No	State v. Whitaker, 200 N.J. 444, 463, 983 A.2d 181, 193 (2009) "The driver of a vehicle spiriting away the culprits who committed a robbery is not retroactively guilty of that crime if he had no intent to participate in the theft at or before the time of its occurrence. The driver, however, would be guilty of hindering their apprehension if—after-the-fact—he became aware of the crime they had committed and aided in their getaway"

NM	N.M. Stat. Ann. § 30-16-2 (2018)	No.	State v. Lucero, 1957-NMSC-062, ¶ 7, 63 N.M. 80, 82, 313 P.2d 1052, 1053 (upheld robbery conviction for driver who kept car running during mugging but reversed robbery conviction for friend in car who was asleep during the mugging)
PA	18 Pa. Stat. and Cons. Stat. Ann. § 3701 (West 2018)	No.	Com. v. Petrie, 277 Pa. Super. 239, 243, 419 A.2d 750, 752 (1980) (reversing aiding and abetting for drunk friend in back seat of car who was present when friends committed robbery)
WA	**Robbery definition**: Wash. Rev. Code. Ann. § 9A.56.190 (West 2011) **Robbery in the first degree**: Wash. Rev. Code. Ann. § 9A.56.200 (West 2018) **Robbery in the second degree**: Wash. Rev. Code. Ann. § 9A.56.210 (West 2011)	No	State v. Robinson, 73 Wash. App. 851, 855, 872 P.2d 43, 45 (1994) (reversed robbery conviction with no proof of knowledge before or while friend's mugging was happening)

APPENDIX B

Chart of State Robbery Laws: Force Must Be Used Before or During Taking And Fraud As Predicate Act

State	Robbery Statute Citation	Must force be used before or during taking?	Can fraud be a predicate act?	Authority.
Totals		*Yes – 20* *No – 12* *Not decided – 19*	*Yes – 4* *No – 5* *Not decided – 42*	*States in Ninth Circuit jurisdiction are highlighted*
AL	**Robbery in the first degree**: Ala. Code § 13A-8-41 (2018) **Robbery in the second degree**: Ala. Code § 13A-8-42 (2018) **Robbery in the third degree**: Ala. Code § 13A-8-43 (2018)	**Yes**. In comments to Ala. Code § 13A-8-44 explains how new robbery offense was broadened from the common law reversion.	**No**.	Thomas v. State, 91 Ala. 34 (1890): Force must be used in the taking. Robbery conviction reversed when item obtained by trick and then pointed gun at owner.
AK	**Robbery in the first degree**: Alaska Stat. § 11.41.500 (2017) **Robbery in the second degree**: Alaska Stat. § 11.41.510 (2017)	*No*. Ward v. State, 120 P.3d 204 (2005): Robbery includes violence "subsequent to the taking of the property. . . '"	Not expressly addressed.	
AZ	**Robbery**: Ariz. Rev. Stat. Ann. § 13-1902 (2018) **Aggravated Robbery**: Ariz. Rev. Stat. Ann. § 13-1903 (2018) **Armed Robbery**: Ariz. Rev. Stat. Ann. § 13-1904 (2018)	*No*. State v. Comer, 165 Ariz. 413 (1990) (taking must occurring during or before taking)	Not expressly addressed.	

AR	**Robbery**: Ark. Code Ann. § 5-12-102 (2018) **Aggravated Robbery**: Ark. Code Ann. § 5-12-103 (2018)	**Yes.** Routt v. State, 61 Ark. 594, 34 S.W. 262, 263 (1896) (force must be part of taking)	Not expressly addressed in case law	
CA	**Robbery**: Cal. Penal Code § 211 (West 2018)	*No*	**Yes.**	People v. Bailey, No. A147673, 2017 WL 3699875, at *4 (Cal. App. 1st Dist. Aug. 28, 2017): robbery upheld with larceny by trick occurred, followed by the use of force.
CO	Colo. Rev. Stat. § 18-4-301 (2017)	Issue pending before Colorado Supreme Court. *People v. Delgado*, *cert. granted,* No. 17SC29, 2017 WL 6278291 (Colo. Dec. 11, 2017)	No.	Robbery reversed because extortion not predicate act to robbery. People v. Moore, 184 Colo. 110, 111, 518 P.2d 944, 945 (1974)
CT	**Robbery**: Conn. Gen. Stat. § 53a-133 (2018) **Robbery in the first degree**: Conn. Gen. Stat. § 53a-134 (2018) **Robbery in the second degree**: Conn. Gen. Stat. § 53a-135 (2018) **Robbery in the third degree**: Conn. Gen. Stat. § 53a-136 (2018)	**Yes.** Force must be used before, during, or immediately after to secure possession. *State v. Preston*, 248 Conn. 472, 479, 728 A.2d 1087, 1091 (1999)	Not expressly addressed in case law	
DE	**Robbery in the first degree**: Del. Code Ann. tit.11, § 832 (2018) **Robbery in the**	**Yes**. Dixon v. State, 673 A.2d 1220 (1996) : reversing robbery	Not expressly addressed in case law	

	second degree: Del. Code Ann. tit.11, § 831 (2018)	conviction because force used after taking not related to taking		
DC	D.C. Code § 22-2801 (current through May 4, 2018)	**Yes**. *Gray v. United States*, 155 A.3d 377, 387 (D.C. 2017) (robbery conviction overturned because the assault was separate from the taking)	Not expressly addressed	
FL	Fla. Stat. § 812.13 (2018)	No. *Rockmore v. State*, 140 So. 3d 979, 984 (Fla. 2014) (force can occur after taking)	Not expressly addressed in case law	
GA	**Robbery:** Ga. Code Ann. § 16-8-40 (2017) **Armed robbery**: Ga. Code Ann. § 16-8-41 (2017)	**Yes**. Hicks v. State, 232 Ga. 393 (1974): Armed robbery conviction was reversed because the billfold was not taken by force.	Not expressly addressed.	
HI	**Robbery in the first degree**: Haw. Rev. Stat. Ann. § 708-840 (LexisNexis 2018) **Robbery in the second degree**: Haw. Rev. Stat. Ann. § 708-841 (LexisNexis	**Yes** State v. Arlt, 9 Haw. App. 263 (1992): Defendant stole a bottle of tequila without force. When he returned to the store with the bottle, he hit the storeowner. The	Not expressly addressed in case law	

	2018) **Robbery; "in the course of committing a theft"**: Haw. Rev. Stat. Ann. § 708-842 (LexisNexis 2018)	force was not used in the course of committing theft, so it was not robbery.		
ID	Idaho Code § 18-6501 (2018)	Not expressly addressed in case law	Not expressly addressed in case law	
IL	**Robbery; aggravated robbery**: 720 Ill. Comp. Stat. 5/18-1 (2018)	Yes. *People v. Huntington*, 115 Ill. App. 3d 943, 945, 451 N.E.2d 923, 924 (1983) (taking without force is not robbery)	Not expressly addressed in case law	
IN	Ind. Code Ann. § 35-42-5-1 (West 2017)	**Yes.** *Young v. State*, 725 N.E.2d 78 (Ind. 2000)	Not expressly addressed in case law	
IA	**Robbery defined**: Iowa Code Ann. § 711.1 (West 2013) **Robbery in the first degree**: Iowa Code Ann. § 711.2 (West 2018)) **Robbery in the second degree**: Iowa Code Ann. § 711.3 (West 2016) **Robbery in the third degree**: Iowa Code Ann. § 711.3A (West 2016)	Not expressly addressed in case law	Not expressly addressed in case law	

KS	Kan. Stat. Ann. § 21-5420 (2018)	**<u>Yes</u>** State v. Aldershof, 220 Kan. 798 (1976): "...the offense of robbery should not be extended to situations where a purse snatcher grabs a purse without violence or injury to the person of the owner, leaves the scene, and then later uses his fist to effect his escape."	Not expressly addressed in case law	
KY	**Robbery in the first degree**: Ky. Rev. Stat. Ann. § 515.020 (West 2018) **Robbery in the second degree**: Ky. Rev. Stat. Ann. § 515.030 (West 2018)	Not expressly addressed in case law	Not expressly addressed in case law	
LA	**Robbery in the first degree**: La. Rev. Stat. Ann. § 14:64.1 (2018) **Robbery in the second degree**: La. Rev. Stat. Ann. § 14:64.4 (2018)	Not expressly addressed in case law	Not expressly addressed in case law	
ME	Me. Rev. Stat. Ann. tit. 17, § 651 (2017)	Not expressly addressed in case law	Not expressly addressed in case law	
MD	**Robbery definition**: Md. Code Ann., Crim. Law § 3-401 (LexisNexis 2018) **Robbery**: Md.	Not expressly addressed in case law	**<u>No.</u>**	Leeson v. State, 293 Md. 425, 436, 445 A.2d 21, 27 (1982) Robbery reversed because evidence shows

	Code Ann., Crim. Law § 3-402 (LexisNexis 2018) **Robbery with dangerous weapon**: Md. Code Ann., Crim. Law § 3-403 (LexisNexis 2018)			it was part of insurance fraud scheme
MA	**Armed robbery**: Mass. Gen. Laws Ann. ch. 265, § 17 (West 2018) **Unarmed robbery**: Mass. Gen. Laws Ann. ch. 265, § 19 (West 2018)	Not expressly addressed in case law	Not expressly addressed in case law	
MI	**Robbery**: Mich. Comp. Laws Ann. § 750.530 (West 2018) **Armed robbery**: Mich. Comp. Laws Ann. § 750.529 (West 2018)	**Yes.** *People v. Randolph,* 466 Mich. 532, 648 N.W.2d 164 (2002) (robbery reversed when force was after taking)	**Yes.**	People v. Cherry, 467 Mich. 901, 653 N.W.2d 182 (2002) (fraud was predicate act, reversed because taking occurred without force)
MN	**Simple robbery**: Minn. Stat. Ann. § 609.24 (West 2018) **Aggravated robbery**: Minn. Stat. Ann. § 609.245 (West 2018)	Not expressly addressed in case law	Not expressly addressed in case law	
MS	**Robbery**: Miss. Code Ann. § 97-3-73 (2017) **Robbery; use of deadly weapon**: Miss. Code Ann. § 97-3-79 (2017)	**Yes.** Fear after taking insufficient evidence. *Washington v. State*, 794 So. 2d 253, 257	Not expressly addressed in case law	

	Robbery; threat to injure person or relative at another time: Miss. Code Ann. § 97-3-77 (2017)	(Miss. Ct. App. 2001)		
MO	**Robbery in the first degree**: Mo. Ann. Stat. § 570.023 (West 2017) **Robbery in the second degree**: Mo. Ann. Stat. § 570.025 (West 2017)	Not expressly addressed in case law	**No.**	State v. Shipley, 920 S.W.2d 120, 123 (Mo. Ct. App. 1996) (stealing by deceit cannot be predicate act to robbery)
MT	Mont. Code Ann. § 45-5-401 (West 2017)	**No**. Force may be used during asportation. *State v. Case*, 190 Mont. 450, 453, 621 P.2d 1066, 1069 (1980)	Not expressly addressed in case law	
NE	Neb. Rev. Stat. Ann. § 28-324 (LexisNexis 2018)	No. Force may be used during asportation. *State v. Bell*, 194 Neb. 554, 556, 233 N.W.2d 920, 922 (1975)	Not expressly addressed in case law	
NV	Nev. Rev. Stat. Ann. § 200.380 (LexisNexis 2017)	Not expressly addressed in case law	Not expressly addressed in case law	
NH	N.H. Rev. Stat. Ann. § 636:1 (2018)	Not expressly addressed in case law	Not expressly addressed in case law	
NJ	N.J. Stat. Ann. § 2C:15-1 (West 2018)	**Yes.** State v. Lopez, 187 N.J. 91, 101, 900 A.2d 779, 785 (2006) (force must be before or during	Not expressly addressed in case law	

		taking, no "afterthought robbery")		
NM	N.M. Stat. Ann. § 30-16-2 (2018)	**Yes.** State v. Lewis, 116 N.M. 849 (1993): Force used to retain property or to facilitate escape did not satisfy the force element necessary for the crime of robbery.	Not expressly addressed in case law	
NY	**Robbery defined**: N.Y. Penal Law § 160.00 (McKinney 2018) **Robbery in the first degree**: N.Y. Penal Law § 160.15 (McKinney 2018) *(PL) **Robbery in the second degree**: N.Y. Penal Law § 160.10 (McKinney 2018) *(PL) **Robbery in the third degree**: N.Y. Penal Law § 160.05 (McKinney 2018)	**No**. Force may be used in asportation. *People v. Dekle*, 83 A.D.2d 522, 522, 441 N.Y.S.2d 261, 262 (1981), *aff'd,* 56 N.Y.2d 835, 438 N.E.2d 101 (1982)	**Yes.**	*Matter of Jerry H.*, 49 A.D.2d 925, 925, 373 N.Y.S.2d 647, 648 (1975) (possession of stolen property may be predicate of robbery)
NC	**Robbery with firearms or other dangerous weapons**: N.C. Gen. Stat. § 14-87 (2017)	Not expressly addressed in case law	Not expressly addressed in case law	
ND	N.D. Cent. Code § 12.1-22-01 (2017)	Not expressly addressed in case law	Not expressly addressed in case law	

OH	**Robbery**: Ohio Rev. Code Ann. § 2911.02 (LexisNexis 2018) **Aggravated Robbery**: Ohio Rev. Code Ann. § 2911.01 (LexisNexis 2018)	**Yes.** State v. Thomas, 106 Ohio St. 3d 133 (2005): (reversed robbery conviction because force was too far after taking)	Not expressly addressed in case law	
OK	**Robbery defined**: Okla. Stat. Ann. tit. 21, § 791 (West 2018) **Degeres of robbery**: Okla. Stat. Ann. tit. 21, § 797 (West 2018) **Robbery or attempted robbery with dangerous weapon or imitation firearm a felony**: Okla. Stat. Ann. tit. 21, § 801 (West 2018)	**No**	Not expressly addressed in case law	
OR	**Robbery in the first degree**: Or. Rev. Stat. Ann. § 164.415 (West 2018) **Robbery in the second degree**: Or. Rev. Stat. Ann. § 164.405 (West 2018) **Robbery in third degree**: Or. Rev. Stat. Ann. § 164.395 (West 2018)	**Yes.** State v. Jackson, 40 Ore. App. 759 (1979) (reversing robbery conviction because force was used after the completion of the attempted theft)	**Yes.**	State v. Boucher, 13 Or. App. 339, 341, 509 P.2d 1228, 1230 (1973) (theft by receiving goods may be predicate act to robbery)

PA	18 Pa. Stat. and Cons. Stat. Ann. § 3701 (West 2018)	**No.** Force during asportation permitted. *Com. v. Ford*, 539 Pa. 85, 650 A.2d 433 (1994)	Not expressly addressed in case law	
RI	**Penalty for robbery**: 11 R.I. Gen. Laws § 11-39-1 (2018)	**Yes.** State v. Holley, 604 A.2d 772 (1992): (vacating robbery conviction because taking occurred without force)	Not expressly addressed in case law	
SC	**Robbery and attempted robbery while armed with deadly weapon**: S.C. Code Ann. § 16-11-330 (2018)	**No.** Force must be accompanying taking, which includes asportation. *State v. Moore*, 374 S.C. 468, 474, 649 S.E.2d 84, 86 (Ct. App. 2007) affirm	Not expressly addressed in case law	
SD	**Robbery defined**: S.D. Codified Laws § 22-30-1 (2018) **Requisite force or fear**: S.D. Codified Laws § 22-30-2 (2018) **Fear of force necessary to robbery**: S.D. Codified Laws § 22-30-3 (2018) **Taking without knowledge of victim not robbery**: S.D. Codified Laws § 22-30-4 (2018)	Not expressly addressed in case law	Not expressly addressed in case law	

	Degrees of robbery: S.D. Codified Laws § 22-30-6 (2018)			
TN	**Robbery**: Tenn. Code Ann. § 39-13-401 (2018) **Aggravated robbery**: Tenn. Code Ann. § 39-13-402 (2018) **Especially aggravated robbery**: Tenn. Code Ann. § 39-13-403 (2018)	**Yes** State v. Owens, 20 S.W.3d 634 (2000) (reversing robbery because assault arose after taking)	Not expressly addressed in case law	
TX	**Robbery**: Tex. Penal Code Ann. § 29.02 (West 2017) **Definitions**: Tex. Penal Code Ann. § 29.01 (West 2017) **Aggravated Robbery**: Tex. Penal Code Ann. § 29.03 (West 2017)	Yes. *Sweed v. State*, 351 S.W.3d 63, 69 (Tex. Crim. App. 2011)	Not expressly addressed in case law	
UT	**Robbery**: Utah Code Ann. § 76-6-301 (LexisNexis 2018) **Aggravated robbery**: Utah Code Ann. § 76-6-302 (LexisNexis 2018)	Not expressly addressed in case law	Not expressly addressed in case law	
VT	**Assault and robbery**: Vt. Stat. Ann. tit. 13, § 608 (2018)	Not expressly addressed in case law	Not expressly addressed in case law	

VA	**Robbery; how punished**: Va. Code Ann. § 18.2-58 (2017)	**Yes** Branch v. Commonwealth, 225 Va. 91 (1983) (common law robbery to mean that the violence of a robbery must occur before at the time of the taking)	Not expressly addressed in case law	
WA	**Robbery definition**: Wash. Rev. Code. Ann. § 9A.56.190 (West 2011) **Robbery in the first degree**: Wash. Rev. Code. Ann. § 9A.56.200 (West 2018) **Robbery in the second degree**: Wash. Rev. Code. Ann. § 9A.56.210 (West 2011)	No	Not expressly addressed in case law	
WV	**Robbery or attempted robbery; penalties**: W. Va. Code § 61-2-12 (2018)	Not expressly addressed in case law	Not expressly addressed in case law	
WI	Wis. Stat. Ann. § 943.32 (West 2018)	Not expressly addressed in case law	Not expressly addressed in case law	
WY	Wyo. Stat. Ann. § 6-2-401 (2018)	Not expressly addressed in case law	Not expressly addressed in case law	