No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ROBERT J. GORENCE
GORENCE & OLIVEROS, P.C.
1305 Tijeras Ave., NW
Albuquerque, NM 87102
(505) 244-0214

JOHN P. ELWOOD
Counsel of Record
ERIC A. WHITE
NICHOLAS D. STEPP
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Other Authorities:

REPLY BRIEF FOR PETITIONER

A. The Acknowledged Circuit Split Is Important

1. For all its rhetoric, the government does not contest that this case concerns a frequently recurring issue that has split the courts of appeals. It concedes (Opp. 10) that courts are sharply divided about whether "the government [must] prove that the defendant encouraged or facilitated the principal's use of a firearm in order to obtain a conviction for aiding and abetting a Section 924(c) violation," *ibid.*, or whether it suffices to prove, as the Tenth Circuit and a minority of other courts of appeals have held, that "the defendant knowingly and actively participated in the drug trafficking crime" while knowing a confederate possessed a firearm, *id.* at 3-4 (quoting 1 C.A. App. 26). And it does not deny (see Pet. 17-18) that this issue arises frequently in federal courts: Over 2,300 defendants are convicted of violating Section 924(c) *each year*, U.S. Sentencing Comm'n, *Final Quarterly Data Reports 2008-2011*, at 16, and "aiding and abetting liability under 18 U.S.C. § 2 has been routinely applied in conjunction with 18 U.S.C. § 924(c) to convict individuals of aiding and abetting in using *** a firearm," *Jordan* v. *United States*, No. 08-C-0209, 2008 WL 2245856, *1 (E.D. Wis. May 30, 2008).

Instead, the government attempts to brush aside the issue as unimportant, because purportedly it "does not take much to satisfy the facilitation element." Opp. 6 (quoting *United States* v. *Bennett*, 75 F.3d 40, 45 (1st Cir.), cert. denied, 519 U.S. 845

(1996)). But the government's self-serving claim is belied by how vigorously it litigates this issue whenever and wherever it arises, including in this very case, demonstrating that the government full well appreciates how its burden of proof is eased by the minimal showing necessary under the minority rule.[1] Under it, the government can obtain an additional term of imprisonment of from five years to life without parole by proving just a *single element* beyond what is necessary to establish the underlying drug trafficking crime or crime of violence: that the defendant "knew his cohort" used or carried a firearm, Pet. App. 7a-9a—even if, the government acknowledges, "the defendant has no *advance* knowledge" that his confederate is armed and learns too late to dissuade his confederate "to leave his gun at home," Opp. 9 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998)). This is to say nothing about the vast majority of cases that do not go to trial, in which the government is able to exploit the trivial showing of the minority rule to strong-arm a guilty plea, since "defendants often respond to easily proved charges by pleading guilty." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 520 (2001). The government's assertion is further belied by its calculated, and repeated, hedging that further review is not warranted "*at this time*," Opp. 6, 11, 13

---

[1] See, *e.g.*, U.S. Br. at 42-43, *United States* v. *Jackson* (11th Cir.), Nos. 12-16046, 12-16045 (Apr. 3, 2013), 2013 WL 1543254; U.S. Br. at 44-45, *United States* v. *Tubbs*, 463 F. App'x 706 (9th Cir. 2011) (No. 09-10149), 2011 WL 2617483; U.S. Br. at 12, *United States* v. *Baldwin*, 347 F. App'x 911 (4th Cir. 2009) (No. 08-5226), 2009 WL 1765187; U.S. Br. at *16, *20, *United States* v. *Bowen*, 527 F.3d 1065 (10th Cir. 2008) (No. 07-1216), 2007 WL 4778855.

(emphasis added), suggesting that the issue will promptly become certworthy in the government's eyes when it arises from one of the circuits where it loses convictions under the majority rule.

2. The government suggests that the majority rule's "facilitation" requirement is satisfied where a defendant has passively "benefitted" from a confederate's "use of the weapon" (Opp. 13; see also *id.* at 12) while he continues to participate in an underlying offense, without acting affirmatively to encourage use of the firearm. But it quietly acknowledges that not all courts have adopted such a minimal—and atextual, see pp. 7-8, *infra*—showing. See Opp. 13 (stating that this showing is only "generally" accepted). That even the courts following the majority rule disagree about its application only underscores the need for this Court's review. And, in fact, the government is only able to maintain that the disagreement is unimportant by ignoring cases that undeniably conflict with its preferred variant of the majority rule: It conspicuously fails to address numerous cases discussed in the petition, which make plain that other circuits have rejected the government's view—and have adopted a position under which petitioner's conviction would unquestionably be invalid.

The Ninth Circuit, for example, has repeatedly rejected the idea that it is enough for a defendant to actively participate in the underlying drug offense while knowing that a gun will be used. In *United States* v. *Nelson*, 137 F.3d 1094 (9th Cir. 1998), the court reversed the conviction of a defendant who actively participated in a robbery knowing that a confederate was using a gun, and thus who might be said to have "benefitt[ed] from the use of [a gun]." Opp.

12. Nevertheless, the court reversed the conviction because of the lack of proof that she actually encouraged use of the firearm (137 F.3d at 1104) (emphasis added):

> there is no evidence that [defendant] directly facilitated or encouraged the use of the firearm during the August 12 robbery. As noted above, while she participated in planning the robbery in general, she did not counsel or encourage the use of the gun in particular. While *she participated in the robbery knowing a gun would be used, she took no action at the scene of the crime that encouraged or facilitated the use of the firearm*.

That court likewise reversed the conviction in *United States* v. *Bancalari*, 110 F.3d 1425 (9th Cir. 1997), because of a similar failure of proof, very much like the facts here (*id.* at 1430):

> [T]here is no way we can say that [defendant] consciously and intentionally assisted his accomplice in using or carrying a firearm during and in relation to the kidnapping, even though he knew at some point that his accomplice did use the firearm during the actual kidnapping. There was ample evidence that the accomplice's chasing Pittman off with a gun was part of the kidnapping crime and that the accomplice violated § 924(c), however there is no finding that [defendant] intentionally assisted or facilitated the accomplice's use or carrying of the gun in doing so. The error is not harmless because we cannot determine that the jury necessarily found this element of the crime. We therefore reverse the firearm conviction.

The Fifth Circuit also has held that "in order to be convicted of aiding and abetting the § 924(c)(1) offense (under the 'use' prong), the defendant must act with the knowledge or specific intent of advancing the 'use' of the firearm in relation to the drug trafficking offense" and "perform[] some *affirmative act* relating to the firearm." *United States* v. *Sorrells*, 145 F.3d 744, 753-754 (5th Cir. 1998) (quoting *United States* v. *Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996)) (emphasis added). In words directly relevant here, the court wrote:

> Proof simply that a defendant knew that a firearm would be carried, even accompanied by proof that he performed some act to facilitate or encourage the underlying crime in connection with which the firearm was carried, is insufficient to support a conviction for aiding and abetting the carrying of a firearm.

Ibid. (quoting *Giraldo*, 80 F.3d at 676).

There is no serious question that petitioner's conviction would be invalid under this standard. But instead of addressing these authorities, so central to the petition (see Pet. 12, 14, 15, 16, 17, 21, 23, 25) that two were cited *passim*, the government *nowhere mentions them*—understandably, because doing so would have made plain the falsity of its claim that the acknowledged "division of authority appears to be largely academic," Opp. 13.

B. The Tenth Circuit's Rule Is Wrong

The government does not dispute that the Tenth Circuit's aiding-and-abetting standard imposes "quintessential strict liability" (Pet. 23) by authorizing Sec-

tion 924(c) convictions even for defendants who did not intend for the principal to use a firearm and did nothing to facilitate or encourage it—indeed, even if they *discouraged* its use. In doing so, however, the government repeats the Tenth Circuit's fundamental mistake—confusing the underlying drug trafficking crime or crime of violence with the gun offense itself.

Its position depends on the proposition that "[w]hen a person actively participates in the underlying * * * drug trafficking offense, he facilitates the principal's completion of the *second* element of the Section 924(c) offense," Opp. 8 (emphasis added), namely, "that the use or carrying was 'during and in relation to' a 'crime of violence or drug trafficking crime,'" *ibid.* (quoting *Smith* v. *United States*, 508 U.S. 223, 228 (1993)). The government cites no authority for the novel assertion that a defendant's active participation in (and thus facilitation of) the underlying offense somehow "bring[s] about" the use or carrying of a firearm, Opp. 8-9, regardless of his intent or actions with respect to the firearm's use. The government is also conspicuously silent about what participation in the drug offense shows about the *first* Section 924(c) element, "that the defendant use[d] or carr[ied] a firearm." Opp. 8 (internal quotation omitted).

The government recognizes this error. In its Criminal Resource Manual, which serves as guidance to all U.S. Attorneys, the government acknowledges that it must prove "that the accused had *specific intent* to facilitate the commission of a crime by another" and "that the accused had the *requisite intent* of the underlying substantive offense." U.S. Dep't of Justice, *U.S. Attorney's Manual*, *Title 9*, *Crim. Re-*

source Manual § 2474 (1997) (*Manual*) (emphasis added), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02474.htm. The *Manual* explicitly acknowledges that "a jury must find beyond a reasonable doubt that the defendant knowingly and intentionally aided and abetted the principal(s) *in each essential element of the crime*." *Ibid*. (emphasis added). Thus, outside the convenient litigating position espoused in its opposition, the government has *specifically rejected* the view that it is enough merely to intentionally facilitate *some* of the elements of a Section 924(c) offense.

The sole authority the *Manual* cites for its statement makes the government's about-face on accessory liability under § 924(c) absolutely clear: It is *United States* v. *Bancalari*—one of the cases the government neglected to address in its opposition, see p. 4, *supra*. See *Manual* § 2474 (citing *Bancalari*, 110 F.3d at 1429). There, the Ninth Circuit *expressly rejected* the government's current position, holding that "to be guilty of aiding and abetting under § 924(c), the defendant must have directly facilitated or encouraged the use of the firearm and *not simply* [*have*] *be*[*en*] *aware of its use*." 110 F.3d at 1429-1430 (emphasis added).

The government's position that simply "benefitting from the use of a gun" (Opp. 12) is sufficient to support a conviction is also impossible to square with the text of Section 2. "To 'aid' is to assist or help another. To 'abet' means, literally, to bait or excite * * *. In its legal sense, it means to encourage, advise, or instigate the commission of a crime." 1 Charles E. Torcia, *Wharton's Criminal Law* § 29, at 181 (15th ed.

1993). "Aiding and abetting," then, necessarily entails affirmative action.

C. No Vehicle Problem Prevents Resolution Of This Issue

Finally, the government contends that "this case [is] not a suitable vehicle" to resolve the admitted circuit split because, it claims, petitioner's conviction for possessing empty shell cases found at the crime scene "necessarily" implies the jury concluded he possessed the firearm, Opp. 14, which, it says, "would qualify as facilitation of the use of the firearm even if petitioner was not the one who ultimately pulled the trigger," *ibid.*

In essence, the government attempts to inflate a potential alternative ground for affirmance into a vehicle problem. This Court, however, routinely reviews cases where it is uncertain if the petitioner would prevail once the erroneous legal standard is rejected. See, *e.g.*, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430-1431 (2012). This is not news to the Solicitor General, who has argued time and again that uncertainty as to "the ultimate outcome" of a case "does not deny * * * a vehicle for the Court to consider important questions concerning [statutory] interpretation," and that "[t]he possibility that [respondent] might ultimately be able to [win on alternative grounds] * * * would not prevent the Court from addressing the questions presented in the petition." Cert. Reply Br. at 10, United States, *Match-E-Be-Nash-She-Wish Band* v. *Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247); *accord* Cert. Reply Br. at 8, *Astrue* v. *Capato*, 132 S. Ct. 2021 (2012) (No. 11-159).

Even taken at face value, the government's so-called "vehicle" argument falls flat. The error here was not harmless. The government has never before resorted to its strained reading of the record to justify the tripling of petitioner's sentence, and for good reason: It accords with neither the government's theory at trial nor the instructions it urged on the district court, which emphatically encouraged the jury to take an expansive view of "possession" that was readily satisfied by petitioner's already-tenuous aiding-and-abetting liability for "using or carrying" the firearm.

The district court instructed the jury that possession of a firearm is an element of a Section 924(c) violation, and that the "possession involved carrying, using, brandishing or discharging the firearm during and in relation to the drug trafficking crime." 1 C.A. App. 66. And the court explicitly instructed the jury that "[a]iding and abetting is simply another way of committing the offenses charged in those counts," *id.* at 72, making clear that aiding and abetting Section 924(c) involved "possession." It reinforced that point by emphasizing that "[p]ossession may be sole or joint," "actual [or] constructive," and that the term applied to anyone who exercised "authority, dominion, or control over" the firearm, *id.* at 83; see also *id.* at 54 (stating, with respect to drug-possession offense, "a person need not have actual physical custody of an object in order to be in legal possession of it," but is in possession if he "has the ability to exercise substantial control over an object"). It is thus unsurprising that after the judge explicitly instructed the jury that it should "find that the defendant 'carried' the firearm" (Pet. App. 29a) if it believed he "aided

and abetted" the offense, that the jury concluded he also "possessed" the ammunition inside it—"jointly with another," 1 C.A. App. 68, namely the person who actually brandished and discharged the firearm.

The government claims (Opp. 14) that "[its] only argument to the jury on [the ammunition] counts was that because the evidence established petitioner's 'possession of the 9 millimeter firearm,' it necessarily" established possession of the empty cartridge cases later found on the ground, *ibid.* But it omits portions of the prosecutor's statement that undermine its recently discovered harmless-error theory. What the prosecutor actually stated is that "the government's evidence establishing the defendant's possession of the 9 millimeter firearm is *what I've already talked to you about*." 11/16/11 Tr. 24 (emphasis added). And what was that? As it happens, it was *both* that petitioner "was the shooter," *id.* at 22, and the "alternative legal theory [that] is called aiding and abetting," so that even if "Ronald Joseph or Vashti Perez fired the gun," *id.* at 22-23, he is guilty of "using or carrying it." Thus, contrary to the government's newly minted theory that the ammunition counts of the indictment prove he was convicted of actually possessing the firearm, the far likelier scenario is that petitioner's legally flawed "aiding and abetting" conviction permitted him to be convicted of possessing ammunition because a confederate discharged a firearm.

The government ends its opposition with a half-hearted assertion that "[i]n any event, the trial evidence established beyond doubt that petitioner was the shooter." Opp. 15. The government's new expressions of confidence are difficult to square with

the statement of the government attorney who tried the case, who conceded to the trial court, "I still don't think we know what the jury – what the basis for their verdict was." Pet. App. 40a. Even that equivocal statement gave too much credence to the government's discredited theory that petitioner was the shooter. The government offers no explanation why a jury that believed petitioner himself discharged the firearm would have bothered to send out a note asking whether "aiding and abetting appl[ied] to" the verdict form question asking whether petitioner had "used," "carried," "brandished," or "discharged" a firearm. *Id.* at 29a, 40a.

* * * * *

Nearly three-quarters of petitioner's 14-year prison sentence stems from his conviction for "aiding and abetting" the use of a firearm, although the government readily concedes no jury ever found that he "gave assistance or encouragement" to its use, much less that he did so "with the intent thereby to promote or facilitate commission" of the firearm offense. Wayne R. LaFave, *Substantive Criminal Law* § 13.2 (2d ed. 2003). Petitioner is not alone. The government "routinely" charges "individuals [with] aiding and abetting in using or carrying a firearm." *Jordan*, 2008 WL 2245856, at *1. The rule applied here, and by a minority of courts of appeals, is tantamount to strict liability, appreciably increasing the likelihood that a defendant will be subject to the "severe penalties of § 924(c)," *Busic* v. *United States*, 446 U.S. 398, 404 n.9 (1980), which can include imprisonment for five, ten, twenty years or for life. By visiting draconian penalties on defendants significantly less culpable than the principals they purportedly "abet," the mi-

nority runs afoul of the "basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense," *Miller* v. *Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Weems* v. *United States*, 217 U.S. 349, 367 (1910)).

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ROBERT J. GORENCE
GORENCE & OLIVEROS, P.C.
1305 Tijeras Ave., NW
Albuquerque, NM 87102
(505) 244-0214

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

JOHN P. ELWOOD
Counsel of Record
ERIC A. WHITE
NICHOLAS D. STEPP
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MAY 2013