No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER,

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government begins its argument by acknowledging that "accomplice liability under [18 U.S.C. §] 2(a) has two requirements: 'that the defendant (1) *affirmatively acted* to facilitate or encourage commission of *the offense he is accused of aiding and abetting*; and that he (2) *intended* to facilitate or encourage the commission of that offense.'" U.S.Br. 14 (quoting Pet.Br. 13; second emphasis added). It then spends forty pages rationalizing the decision to ask the jury instead whether Rosemond (1) facilitated a *different* crime—a "distinct" and lesser drug trafficking offense, *Castillo* v. *United States*, 530 U.S. 120, 125 (2000), and (2) acted with a *different mens rea*—after-acquired "knowledge" of the firearm, rather than the specific intent to facilitate the firearm's use. The government breathlessly claims that requiring proof that the defendant intentionally facilitated the firearm's use during and in relation to a drug trafficking crime, see 18 U.S.C. § 924(c)—the actual crime of conviction—would bestow "special immunity from accomplice liability," U.S.Br. 31.

Nonsense. It is the government that seeks an exemption from what it concedes are ordinary principles of accomplice liability. As "eight of the eleven circuits to consider the issue," U.S.Br. 12, have concluded (not just the Ninth Circuit, *id.* at 26, 42), fulfilling the two bedrock requirements of accessory liability requires proof the defendant facilitated the distinct Section 924(c) offense, and did so intentionally. Compliance with those two essential requirements is necessary to ensure that the severe

penalties of Section 924(c)—mandatory, consecutive terms of between five years' and life imprisonment—punish an additional offense, and do not simply penalize the defendant twice for the same crime.

The government's brief is most remarkable for its efforts to change the subject. The government *treats* this case like it involved a conspiracy Rosemond joined with full foreknowledge of an agreed-upon plan to use the gun during the offense. Thus every government example hypothesizes offenders acting with "full knowledge" (U.S.Br. 33, 50, 51) of a confederate's plans, purposefully engaging in unequivocal acts to facilitate horrific crimes, *id.* at 30-31, 32, 33, 33-34, 35, 38, 42, 46, 50, 51—frequently, armed sexual assault, *id.* at 32, 33, 37, 38, 48, 51.[1] But this case is noteworthy for the complete absence of evidence that petitioner knew beforehand that Ronald Joseph had brought a gun to the sale of what the government itself deemed a "measly" amount of poor-quality marijuana, J.A. 207, 93—an offense unlikely to involve a weapon of any kind[2]—and for the meager

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[1] The government's brief recites nearly as many instances of armed sexual assault as federal courts have seen during the last five years. Of the 11,962 defendants sentenced for Section 924(c)) offenses during 2008-2012, eight were convicted of sexual abuse, and 6,207 of a drug trafficking offense. U.S. Sentencing Comm'n, 2008-2012 Datafiles, *available at* http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm.

[2] At the time Rosemond was sentenced, only 7.3% of marijuana offenses involved any kind of weapon; just 4.07% implicated Section 924(c)). See U.S. Sentencing Comm'n, *Annual Reports*, tbl. 39 (2011), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table39.pdf; U.S. Sentencing Comm'n, 2011 Datafile,

evidence that petitioner acted to facilitate any offense after learning of the gun's use.

Partly, this reflects the government's appreciation that it cannot win on the facts of *this* case. But it also reflects an effort to abstract away a basic reason courts have insisted on high standards of proof for accessory liability: "[B]ecause there is generally more ambiguity in the overt conduct engaged in by the accomplice [than the principal], and thus a higher risk of convicting the innocent," Model Penal Code ("MPC") § 2.06 cmt. at 312 n.42 (1985), courts traditionally have demanded clear proof of facilitation and a high *mens rea* standard to punish accessories. Cf. *United States* v. *Manatau*, 647 F.3d 1048 (10th Cir. 2011) (Gorsuch, J.) ("proof of intent" rather than "lesser *mens rea*" used for accessories because of more "tangential[]" involvement in offense); *People* v. *Mendoza*, 959 P.2d 735 (Cal. 1998) (further act and specific intent necessary because accessories' conduct "often" "innocuous"). The culpability of someone who discharges a gun in public is apparent; the culpability of those surrounding him is less clear. But while the government can assume away difficulties of proof, courts cannot. And though the government almost completely avoids discussing the facts of this case, Rosemond's experience illustrates the dangers of the Tenth Circuit's minimal standard. Rosemond's Section 924(c) conviction must be reversed.

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available at http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm.

A. The Tenth Circuit's Rule Eliminates The Required Mental State

1. The Government's Concession Requires Reversal

The government now agrees that it must show that the defendant had the requisite mental state *before* committing the act of facilitation that subjects him to accomplice liability:

> A defendant who does not know that his confederate intends to bring along a firearm to a violent crime or drug transaction when he completes his intentional act of facilitation or encouragement is not guilty of aiding and abetting a Section 924(c) offense, though he is guilty of aiding and abetting the underlying crime.

U.S.Br. 30. While the government mistakenly contends that *knowledge* that the principal has a firearm is enough for liability, *id.* at 46-47; but see pp. 5-11, *infra,* even if it were right, its concession that *mens rea* must precede facilitation alone requires reversal.

The (government-proposed) instruction required only that "the defendant *knew* his cohort *used* a firearm in the drug trafficking crime"—past tense, J.A. 196 (emphasis added). While the government dismisses that as a "conjugation choice," U.S.Br. 49, it recognizes that its instruction failed to clearly indicate knowledge must precede facilitation, *ibid.*[3]

[3] Although the government argues that Rosemond's "own proposed knowledge instruction" was worded similarly, U.S.Br. 49, its requirement of "intentional[] * * * action to facilitate" the firearm's use, J.A. 14, necessarily implied prior knowledge.

The government exploited that understanding, arguing that Rosemond had the requisite knowledge because "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." J.A. 158.

It is impossible to "confidently say" that error "did not contribute to the verdict," *Neder* v. *United States*, 527 U.S. 1 (1999). The government presented *no evidence* that anyone but the shooter knew of the gun beforehand, and *never* argued that Rosemond's actions afterward facilitated a confederate's crimes; it argued only that his actions suggested he was the shooter. J.A. 156. Indeed, the government elicited testimony that as the shooter tried to hide the gun, the other passenger refused to touch it. J.A. 111, 134. Although Rosemond argued on appeal that there was no evidence he knew of the firearm until the crime was complete, Pet.C.A. Br. 17-19, the government argued it was enough that "Rosemond was in the immediate vicinity[] [when] one of Rosemond's cohorts fired several gunshots," U.S.C.A.Br. 12. The government *first argued* in its brief in opposition that Rosemond's facilitation continued after the gun's discharge; even then, it maintained that "the absence of *advance* knowledge" was permissible so long as Rosemond "had knowledge of the firearm before the underlying crime was *completed*." Br. Opp. 9-10.

2. The Government Must Show Intentional Facilitation, Not Simply Knowledge

The government agrees that the defendant's assistance must be "furnished with the *intent* to facilitate or encourage another's commission of the Section 924(c) offense." U.S.Br. 43 (emphasis added).

But it contends that "intent" means something *less* than "intent," pronouncing categorically that "[i]t has always been enough [for aiding and abetting] that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would (whether or not he cared that it would) make the principal's success more likely." *Id.* at 46-47 (quoting *United States* v. *Ortega*, 44 F.3d 505 (7th Cir. 1995)). At times, the government attempts to dilute the showing further, saying it suffices simply to know that a confederate is *armed*, U.S.Br. 25, 33, rather than that he plans to use a firearm.

That is not so. To be sure, "[t]here is some authority to the effect that one may become an accomplice by giving encouragement or assistance with knowledge that it will promote or facilitate a crime, *although liability has seldom been imposed on this basis*." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(b) (2d ed. 2003) (emphasis added). "[T]he usual requirement [is] that the accomplice must intentionally assist or encourage"—that is, "the accomplice must intend that his acts have the effect of assisting or encouraging another." *Id.* § 13.2(c); accord Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 346 (1985) ("[T]he law of complicity generally requires that the [accomplice] * * * must act with the intention of influencing or assisting the primary actor to engage in the conduct constituting the crime."; "if that was not his purpose, he is not liable."). "[A]lthough dictum to the contrary still persists," 2 LaFave § 13.2(d), "[t]he dominant approach in the federal system * * * has been to

follow [*United States* v.] *Peoni*," 100 F.2d 401 (2d Cir. 1938), Learned Hand's classic formulation of accessory liability requiring proof of a purpose to facilitate rather than basing liability on the accessory's "knowledge of the perpetrator's criminal intent." Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. Cal. L. Rev. 2169, 2176-2177 & n.32 (1988); *id.* at 2174 ("the *mens rea* most often mentioned in the statutes and explicit in the common law is the intent to promote"); see also MPC § 2.06 cmt. at 316 (1985) (equating *Peoni* with "purpose of promoting"); 2 LaFave § 13.2(e) (similar).

There is no reason to believe that Congress intended to depart from this dominant view. Indeed, before Congress adopted the predecessor of Section 2, this Court reversed a conviction because the jury instruction did not require proof that the defendant acted "with the intention of encouraging and abetting" a crime, emphasizing that action "for a different purpose" that has "the actual effect of inciting" is insufficient for accessory liability. *Hicks* v. *United States*, 150 U.S. 442, 449 (1893). And this Court has repeatedly cited *Peoni* in describing the mental state necessary for accessory liability. *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949).

The cases the government cites (U.S.Br. 13, 47) are not to the contrary. *Ortega* itself recognized *Peoni* as "the canonical definition of aiding and abetting a federal offense," that by its terms requires that the accessory must "have some actual desire for his principal to succeed." 44 F.3d at 507-508. *Ortega*

only observed that, as a practical matter in the "administration of the law," *id.* at 508, "intent can be inferred from the natural consequences of [a defendant's] knowing acts." *United States* v. *Irwin*, 149 F.3d 565 (7th Cir. 1998). But the Seventh Circuit *explicitly rejected* that *Ortega* held that "knowledge of the crime and any assistance is sufficient to prove aiding and abetting," saying "[n]one of our prior cases has suggested this is the appropriate test." *Ibid.* *Bozza* v. *United States*, 330 U.S. 160 (1947), likewise stands for the proposition that in appropriate circumstances, a jury may "draw[] inferences as to fraudulent *purposes* from th[e] circumstances" surrounding an offense, *id.* at 165 (emphasis added); and two Terms later, this Court embraced *Peoni*'s purpose test in *Nye & Nissen*.[4]

The government is wrong to dismiss the difference between intent and knowledge as "theoretical." U.S.Br. 48. While knowledge is *relevant*, intent "is not identical with mere knowledge that another purposes unlawful action." *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943). "[A]id rendered with guilty knowledge implies purpose

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[4] *Hanauer* v. *Doane*, 79 U.S. (12 Wall.) 342 (1870), did not address the requisite *mens rea* to uphold a criminal conviction; it was a *civil* action seeking payment for supplies provided the Confederate army. This Court held only that "[a]ny contract, tinctured with the vice of giving aid and support to the rebellion, can receive no countenance or sanction from the courts of the country" and is unenforceable. *Id.* at 345. The portion of *Pereira* v. *United States*, 347 U.S. 1, 12-13 (1954), that the government cites (U.S.Br. 47), concerns *conspiracy* liability, not aiding and abetting.

[when] it has no other motivation." MPC § 2.06 cmt. at 316. While that may be the case for the getaway driver who "urged his confederates not to rob the bank as he drove them to its front door," U.S.Br. 51, because there was no other purpose for his actions, the difference can be significant when factors besides a purpose to further criminality animate conduct (*e.g.*, mistaken judgment about the principal's intentions, a failed effort to discourage conduct or intercede on behalf of a victim, or an effort to flee unexpected violence). For example, the defendant who spends the short drive to a convenience store trying to persuade a friend to leave his gun behind when shoplifting is certainly less culpable than the principal who pulls it when confronted stealing. While the accessory may have facilitated shoplifting by saving the principal the short walk, imposing full liability for an armed robbery he sought to prevent conflicts with basic principles of culpability and eliminates incentives for those who seek to discourage such behavior.

3. Requiring Purposeful Intent Serves Important Interests

The government's exclusive focus on hypotheticals involving advance knowledge and agreed-upon plans seeks to minimize one of the principal reasons courts have made proof of intent the consensus requirement for accessory liability: A *mens rea* greater than simple knowledge is necessary "because there is generally more ambiguity in the overt conduct engaged in by the accomplice [than the principal], and thus a higher risk of convicting the innocent." MPC § 2.06 cmt. at 312 n.42. The "knowledge"

standard is especially open to abuse, because prosecutors rarely limit themselves to bringing cases involving clear proof of *actual* knowledge, and "the law often permits probabilistic judgments to count as knowledge." *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2073 (2011) (Kennedy, J., dissenting); *United States* v. *Spinney*, 65 F.3d 231 (1st Cir. 1995) ("knowledge" encompasses "continuum" of awareness from "actual knowledge" to "constructive knowledge" tantamount to negligence); see also 2 LaFave § 13.2(d) ("'wilful blindness' would suffice as a mental state for accomplice liability" under knowledge standard).

Courts have also widely rejected a "knowledge" standard "in order not to include situations where liability was inappropriate." MPC § 2.06 cmt. at 318. That category includes lawful transactions that a businessperson may suspect will facilitate crime (*e.g.*, selling condoms to a suspected prostitute; providing a taxi ride to a suspected drug buyer; selling lithium batteries potentially usable to make methamphetamine). *Ibid.* But it also includes imposing liability *as principals* on substantially less-culpable accessories. That risk is especially pronounced for offenses like Section 924(c), where a defendant confronting a substantial sentence for a predicate offense could face a second conviction for the *same conduct*, based only on suspicion that he knew of *possible* additional criminality.

The government does not deny that its theory would permit imposition of "drug kingpin" liability for a defendant's single drug transaction with someone suspected of being a significant dealer. See Pet.Br.

37-38. By the same token, facilitating a single transaction involving any of numerous RICO predicate crimes with a suspected gang member could yield racketeering liability; helping a friend place one bet with someone suspected of running a numbers game could make him an accomplice to a gambling operation, *id.* at 41-42. The government's theory would thereby subject minor players that a jury might (with hindsight) deem to have had "knowledge" of wider criminal operations to the extraordinary sentences usually reserved for criminal masterminds.

4. The Intent Instruction Is Squarely Before This Court

Appreciating that its concession makes Rosemond's Section 924(c) conviction untenable, the government argues that he did not object to the adequacy of the intent instruction. U.S.Br. 45. The government has itself waived that argument by not raising it in its brief in opposition. See Sup. Ct. R. 15.2. In any event, it is not a serious argument. Rosemond objected at trial that the "second prong of [the instruction's] test" required only that "the defendant knowingly and actively participated in the drug trafficking crime," rather than he *intentionally* facilitated the firearm's use. J.A. 17. Rosemond supported his request by citing cases discussing the *mens rea* for accomplice liability, quoting *United States* v. *Daniels*, 370 F.3d 689 (7th Cir. 2004), for the proposition that the government must prove that the defendant, "after acquiring knowledge[,] intentionally facilitate[d] the weapon's possession or use." J.A. 14-15.

On appeal, Rosemond argued that "[a] *mens rea* of knowledge * * * falls short of the mark," Pet.C.A. Reply 10, "exposing defendants who have no intent that the charged offense be committed and take no action to further [it] to severe penalties," *id.* at 11; Pet.C.A. Br. 13-18. Rosemond argued that "once he became aware that the firearm had been discharged, he took no subsequent action in relation to the weapon." Pet.C.A. Reply 9. The government did not argue that claim was forfeited, just that after-acquired knowledge was enough, asserting "there was sufficient evidence of this knowledge based on the testimony" that when "Rosemond was in the immediate vicinity, one of Rosemond's cohorts fired several gunshots." U.S.C.A. Br. 12.

And it is plain from reviewing the actual question presented, rather than the government's excerpt, U.S.Br. 15, that the petition raised both facilitation and the required mental state, framing the issue as whether a Section 924(c) conviction requires a showing of "*intentional* facilitation or encouragement" of the firearm's use, or whether conviction can be based on "simple knowledge that the principal used a firearm" during a predicate offense. Pet. I (emphasis added). The petition faulted the Tenth Circuit's rule because it "requires *neither*" of the "two requirements of aiding and abetting liability," proof that the defendant "(a) gave assistance or encouragement * * * (b) with the intent thereby to promote or facilitate commission of the crime." Pet. 22 (quoting 2 LaFave § 13.2); *id.* at 21 (similar); Pet. Reply 11. The government responded to Rosemond's argument that the Tenth Circuit's rule allowed conviction "even

where the defendant has no 'advance knowledge' of the firearm," Br. Opp. 9, not by arguing waiver, but by saying that rule is correct: "the absence of *advance* knowledge" is permissible so long as the defendant knew of the firearm "before the underlying crime was *completed*," *id.* at 9-10.

B. The Jury Was Not Required To Find That Rosemond Facilitated The Section 924(c) Offense

The government concedes that accomplice liability requires a jury finding that the defendant "*affirmatively acted* to facilitate" *the crime of conviction*—using a firearm during and in relation to a drug trafficking crime.[5] U.S.Br. 14. It offers two rationales for why it was enough here simply to ask the jury whether Rosemond committed the "distinct" drug trafficking crime, *Castillo*, 530 U.S. at 125: (1) a defendant need not participate in every aspect of a crime to be guilty of aiding and abetting it; and (2) the drug crime is an element of a Section 924(c)

[5] While the government acknowledges the defendant must abet the *crime of conviction*, it suggests that facilitating "a general felonious plan * * * is enough to make a man an [accomplice]," U.S.Br. 10 (internal quotation marks omitted); cf. *ibid*. (facilitating "criminal venture"). But the government's own source makes clear that the dispositive inquiry is whether the defendant gives aid "to the *particular act*." 1 Francis Wharton, *A Treatise on the Criminal Law* § 211a, at 229 (10th ed., Philadelphia, Kay & Brother 1896) (emphasis added). The inquiry is not "whether the defendant is * * *, in general, an accomplice of another * * *; rather, it is the much more pointed question of whether the requisites for accomplice liability are met for the particular crime." MPC § 2.06 cmt at 306.

offense. Neither point is disputed. Neither is relevant.

While a defendant need not participate in *every aspect* of a crime to be an accessory, the jury still must find that he "*affirmatively acted* to facilitate" the *offense of conviction*, U.S.Br. 14, not some other crime. The Tenth Circuit requires only a finding that the defendant participated in a drug trafficking offense, not that he facilitated the distinct crime of using a firearm during and in relation to the predicate offense. That rule thus conclusively presumes facilitation of a Section 924(c) offense from mere participation in a predicate crime. But a jury determination that a person performed conduct satisfying one element of an offense does not mean he has "facilitated" or "encouraged" the complete crime. That is particularly true where, as here, the element is itself a freestanding crime that serves as a predicate for a distinct, additional offense.

1. Commission Of A Predicate Offense Does Not "Facilitate" Or "Encourage" The Section 924(c) Offense

It has been understood since common law that a person who abets one offense is not, without more, liable if the principal *also* commits an additional crime—even if the first offense satisfies an element of the additional crime: "if *A.* commands *B.* to steal a plate, and *B.* commits burglary to steal the plate, *A.* is accessary to the theft, but not to the burglary." 1 Matthew Hale, *The History of the Pleas of the Crown* 617 (Sollom Emlyn ed., London 1736); 1 William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 187, at 384-385 (1900) (similar). Courts

similarly have held that involvement in a predicate offense does not prove intentional facilitation of an additional crime. *E.g.*, *United States* v. *Lombardi*, 138 F.3d 559 (5th Cir. 1998) (evidence defendant "aid[ed] and abet[ted] the overall drug trafficking scheme" does not show he "share[d] in the intent to commit," or "play[ed] an active role in [the] commission" of, separate crime of using minor in drug offense, 21 U.S.C. § 861(a)(1)).

Thus, as Judge O'Scannlain explained, to demonstrate that a defendant aided and abetted an offense incorporating a separately punishable predicate offense, the government must provide "discrete proof of the accomplice's intentional abetment" of the "essential element" that "aggravates the crime from a less serious to a more serious offense" or that "by itself imposes an additional criminal offense." *United States* v. *Weaver*, 290 F.3d 1166, 1174 (9th Cir. 2002); cf. *United States* v. *Jones*, 678 F.2d 102 (9th Cir. 1982) ("[W]here a defendant is charged with aiding and abetting a crime involving an element which enhances or aggravates the offense, there must be proof that the defendant associated herself with and participated in both elements.") (internal quotation marks omitted); *id.* at 106 (Kennedy, J., concurring) (suggesting that accomplice liability for aggravated bank robbery requires, in addition to facilitation, "more than an intent to commit a bank robbery"); *United States* v. *Garcia*, 567 F.3d 721 (5th Cir. 2009) (same). Courts have applied this principle in a variety of contexts. *E.g.*, *United States* v. *Capers*, 708 F.3d 1286 (11th Cir. 2013) ("[I]n a prosecution for aiding and abetting possession of [narcotics] with

intent to distribute, there must be evidence connecting the defendant with both aspects of the crime, possession and intent to distribute."); *Lombardi*, 138 F.3d at 561-562 (using minor in drug offense); cf. *United States* v. *Hill*, 55 F.3d 1197 (6th Cir. 1995) (accomplice liability for gambling operations under 18 U.S.C. § 1955 requires "intent * * * to assist the gambling enterprise itself, not simply an intent to have a particular transaction").

The majority rule represents a straightforward application of this principle. It follows not from any mistaken idea that using a firearm is "the only significant element in a Section 924(c) offense," U.S.Br. 26, but from the fact that Section 924(c) established an "entirely new crime[]" that is "distinct from the underlying federal felony," *Castillo*, 530 U.S. at 125, because it addresses something different—"us[ing] a gun in the circumstances described," *Watson* v. *United States*, 552 U.S. 74 (2007). While the jury's finding here on the drug offense demonstrated facilitation of the predicate crime, see J.A. 191, additional proof of facilitation is necessary to establish the distinct conduct underlying Section 924(c). The government *itself* has recognized that: As the Seventh Circuit observed in adopting the majority rule, "[t]he government agrees that to be convicted of aiding and abetting a § 924(c) violation, the defendant must aid and abet the use or carrying of the firearm. Merely aiding the underlying crime and knowing that a gun would be used or carried cannot support a conviction under 18 U.S.C. § 924(c)." *United States* v. *Woods*, 148 F.3d 843, 848 (7th Cir. 1998) (citations omitted).

The government concedes that participation in a drug offense "does not necessarily facilitate or encourage the use of the firearm in a specific way." U.S.Br. 25. But in a passage that virtually makes the paper blush, the government asserts that the drug offense "facilitates the gun's use during and in relation to a * * * drug trafficking crime" because the principal, "despite his use or carriage of the firearm, could not commit the Section 924(c) offense without" the predicate offense. *Id.* at 25-26. Under that reasoning, those who build schools "facilitate or encourage" the sale of drugs within 1000 feet of them, 21 U.S.C. § 860(a), because drug dealers "could not commit the Section [860(a)] offense without the[m]." U.S.Br. 26. In both instances, the conduct creates "circumstances" supporting additional liability, see *Watson*, 552 U.S. at 81; but in no conventional sense does that conduct "give help or support to" (aid) or "incite, encourage, instigate, or countenance" (abet) the further criminal offense. *Webster's Third New International Dictionary* 44, 3 (2002).

2. The Government's Authorities Do Not Support The Tenth Circuit's Rule

Nothing in *United States* v. *Rodriguez-Moreno*, 526 U.S. 275 (1999), suggests that evidence a defendant committed a predicate felony proves he "aided and abetted" a Section 924(c) violation. Contra U.S.Br. 26-29. That case involved the very different inquiry into the propriety of laying venue in a particular district, which turns on the "unfairness and hardship [of] trial in an environment alien to the accused." *United States* v. *Johnson*, 323 U.S. 273 (1944). The facilitation requirement serves the very

different purpose of proving the defendant's culpable participation by "unmistakably evinc[ing] a design to encourage, incite," or aid a criminal offense. Francis Wharton, *A Treatise on the Law of Homicide* § 333 (Philadelphia, 1875). The government has not demonstrated that the minimal showing necessary to satisfy venue requirements, *e.g.*, *United States* v. *Abdallah*, No. 12-0409, 2013 WL 3198163, *2 (2d Cir. June 26, 2013) (single telephone call suffices to establish venue for wire fraud), would ensure the defendant has acted to facilitate the "distinct" and "entirely new" offense of conviction, *Castillo*, 530 U.S. at 125.

The government's attempt to demonstrate that an accessory can be liable for a principal's "further crime" without additional facilitation (U.S.Br. 30-31) is a bust. Both of its examples involve aggravated forms of a single offense, rather than (as here) distinct crimes. The government overlooks (*id.* at 31) that courts widely require that accessories to drug distribution "must have aided both the possession and the intent to distribute." *Lombardi*, 138 F.3d at 561; *Capers*, 708 F.3d at 1306-1307; *United States* v. *Graves*, No. 93-5116, 1994 WL 548899, *2 (4th Cir. Oct. 7, 1994). The government acknowledges that some courts require proof a defendant assisted the use of a gun to support conviction for abetting the aggravated offense of armed bank robbery (18 U.S.C. § 2113(d)), U.S.Br. 31, but overlooks that cases on *its* side of the issue distinguish between the proof appropriate for Section 2113(d) and Section 924(c), because the latter imposes an additional conviction (and consecutive sentence) and applies to crimes that

are less likely than bank robbery to involve firearms, *e.g.*, *United States* v. *Spinney*, 65 F.3d 231 n.8 (1st Cir. 1995); see also *Woods*, 148 F.3d at 848.

That *conspiracy* doctrine supports liability for a "confederate's further crime" without showing the defendant's intentional facilitation, U.S.Br. 30 n.4 (citing *Pinkerton* v. *United States*, 328 U.S. 640 (1946)), counsels *against* imposing such broad liability here. Accessory liability, which derives from the defendant's *own* acts and intent, is analytically much different than the agency theory based on prior agreement that allows co-conspirators to be punished for acts they did not personally facilitate. Indeed, one reason courts have refused to equate a defendant's participation in a predicate offense with facilitating an additional offense is that "the difference between conspiracy * * * and aiding and abetting would cease to exist." *Lombardi*, 138 F.3d at 561.

C. The Majority Rule Does Not Grant "Special Immunity From Accomplice Liability"

1. The government's breathless claims that petitioner's interpretation would grant "impunity" to every participant in armed robberies and drug deals besides the triggermen, U.S.Br. 35, are difficult to square with its earlier assurances to this Court that because "[l]ittle is required to satisfy the element of facilitation" under the majority rule, its application would have "minimal practical significance," Br. Opp. 10-11 (quoting Pet. App. 10a). The government strains to exaggerate the difficulty of proof, mainly through sheer repetition of a purported requirement that the defendant "directly facilitate[]" the firearm's use. Compare U.S.Br. 10, 12, 15, 29, 34, 35, 40, 42,

with Pet.Br. 34. In truth, adopting the majority rule would simply mean that the kind of argument the government is *now* making to salvage Rosemond's conviction—that his conduct after learning of the gun intentionally facilitated its use, see U.S.Br. 50—would instead have to be made *to the jury*. Although the government decided not to charge Rosemond with conspiracy (presumably for want of evidence), gang members who plan to use firearms to commit predicate crimes can be charged with conspiring to violate Section 924(c). *Id*. at 20, 30.

The factual questions the government labels "unanswerable" (U.S.Br. 40) are the kind juries routinely answer and indeed are ones juries have *already confronted* without reported difficulty, see *ibid.* The government identifies no authority for removing issues from jury consideration based on purported difficulty, much less for directing jury findings about the Section 924(c) offense from the defendant's participation in a separate predicate crime. The government's reliance on decisions imposing accomplice liability on defendants who "benefitted from [a] weapon in some way" is curious given its concession that their reasoning is "not grounded in traditional aiding-and-abetting principles." *Id*. at 41. Because that theory bases liability on the *happenstance* of whether the firearm facilitated the defendant's conduct, rather than whether his actions *intentionally facilitated* the firearm's use, it is at best a haphazard basis for imposing severe, consecutive Section 924(c) sentences. It has no place in the law of accessory liability.

2. Rosemond's experience illustrates the dangers of the government's relaxed standard. The government does not even *attempt* to show Rosemond knew about the gun before its discharge, and it cites no evidence that he facilitated *any* offense afterward. U.S.Br. 50. Only Joseph (the apparent shooter) explicitly testified that Rosemond stepped out of the car (on the passenger side, J.A. 123); an impartial bystander with a "good view" (J.A. 146) testified that everyone but the shooter (who came from the *driver's* side) remained seated, J.A. 40, 41-42, 48. The government's theory assumes an improbable decision to switch seats for no apparent purpose just as they were hurrying to depart. U.S.Br. 4-5. Even if Rosemond stepped out, reentering the car is highly ambiguous. The government introduced no testimony regarding conduct or statements among Perez's passengers reflecting an understood purpose to pursue Gonzales rather than flee; Perez testified, "*I* was trying to catch up to the other guys that took the stuff," but never said she informed her passengers of her plans. J.A. 109 (emphasis added). The government maintains there is "[n]othing inequitable" about the Tenth Circuit's rule, U.S.Br. 39; but it permits ten years' imprisonment for conduct as ambiguous as failing to exit a car.

3. Contrary to the government's contention, U.S.Br. 34-35, nothing in the legislative history of Section 924(c) suggests Congress sought to cut corners by eliminating the ordinary prerequisites of accomplice liability. Although the circuits lopsidedly favored the majority rule before enactment of the

1998 amendment, Congress left it in place.[6] Indeed, when Congress amended Section 924(c) that year to cover possession, it added language requiring that possession be "in furtherance of" a crime, to "assure that someone who possesse[d] a gun that ha[d] nothing to do with the crime [did] not fall under 924(c)." 144 Cong. Rec. 26,609 (1998) (statement of Sen. DeWine). Given Congress's care to ensure that Section 924(c) did not apply to individuals who lawfully possessed a gun (even at a crime scene), there is nothing exceptional about applying ordinary procedures to ensure that defendants are culpable in a firearm's use before imposing punishment.

D. The Rule Of Lenity Requires Reversal

The government is not "unambiguously correct" that accessory liability under Section 924(c) requires no showing the defendant intentionally facilitated the distinct offense of using a firearm during and in relation to a drug trafficking crime. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). Reversal would appropriately "place[] the weight of inertia upon the party that can best induce Congress to speak more clearly." *United States* v. *Santos*, 553 U.S. 507 (2008).

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[6] See *United States* v. *Sorrells*, 145 F.3d 744, 752 (5th Cir. 1998); *Bazemore* v. *United States*, 138 F.3d 947, 949-950 (11th Cir. 1998); *United States* v. *Nelson*, 137 F.3d 1094, 1103-1104 (9th Cir. 1998); *United States* v. *Bancalari*, 110 F.3d 1425 (9th Cir. 1997); *United States* v. *Luciano-Mosquera*, 63 F.3d 1142, 1150 (1st Cir. 1995); *United States* v. *Medina,* 32 F.3d 40 (2d Cir. 1994); but see *United States* v. *Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997).

The government contends that the rule of lenity requires only notice "of what the criminal laws require." U.S.Br. 32. But "[e]lementary notions of fairness * * * dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996). Moreover, the Rule serves a purpose besides notice: that "because of the seriousness of criminal penalties, * * * legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336 (1971) (internal quotation marks omitted). This Court invoked lenity in *Busic* v. *United States*, 446 U.S. 398 (1980), a Section 924(c) case involving circumstances where notice was not at issue.

E. The Error Was Not Harmless

The government concedes (U.S.Br. 52 n.12) that it did not present its harmless error argument to the Tenth Circuit. That concession alone precludes it; this Court "do[es] not decide questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198 (2001).

In any event, the argument is meritless. It rests on the inference that because there was no aiding and abetting instruction for the ammunition counts, those convictions necessarily mean the jury concluded Rosemond physically possessed the firearm. U.S.Br. 52. That argument depends on the government's representation that its "only argument to the jury on those counts was that" Rosemond actually possessed

the firearm. *Ibid.* But the government actually told the jury that its evidence of possession was "what I've already talked to you about," J.A. 159—namely, *both* actual possession and constructive possession as an accomplice, J.A. 157; Cert. Reply 10. The instructions emphasized that "possession" included constructive possession through a confederate, J.A. 187-188, 198, 200, which the verdict form underscored by indicating accomplice liability meant Rosemond had "used" the gun, J.A. 203. Because the ammunition convictions provide no basis to "confidently say" Rosemond's Section 924(c) conviction was untainted by the flawed instructions, *Neder*, 527 U.S. at 15-16, it must be reversed.

CONCLUSION

For the reasons set forth herein and in our opening brief, the judgment should be reversed.

Respectfully submitted.

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