No. 12-895

In the Supreme Court of the United States

JUSTUS C. ROSEMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.*

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of federal criminal law. NACDL files numerous *amicus curiae* briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the proper administration of justice requires that the government meet its burden to show that a defendant aided and abetted the crime he or she is charged with aiding and abetting under 18 U.S.C. § 2(a), and not

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* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of the brief.

simply that he or she aided and abetted some other crime or predicate offense.

SUMMARY OF ARGUMENT

Seventy-five years ago, Judge Learned Hand examined the text of the federal aiding and abetting statute and the centuries-old common law crime it codified and formulated the classic test that this Court and every federal court of appeals has adopted since: the statute "demand[s] that [the defendant] in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Thus stated, the defendant's "guilty act" is his participation in another's crime, and his "guilty mind" is his intent to facilitate that crime. This Court, and every federal court of appeals with criminal jurisdiction, has held that the current aiding and abetting statute, 18 U.S.C. § 2(a), requires this same actus reus and mens rea.

The Tenth Circuit's rule inexplicably casts aside this precedent, and permits a defendant to be convicted of aiding and abetting a violation of 18 U.S.C. § 924(c) without *either* the required actus reus *or* the required mens rea. Under the Tenth Circuit's rule, the government must make two *different* showings: that the defendant participated in and intended to facilitate the predicate crime of violence or drug trafficking, and that he or she acquired knowledge of the full Section 924(c) violation (including the use or carrying of a firearm).

This approach alters the crime of aiding and abetting in a fundamental way. It allows conviction where the evidence demonstrates the defendant's

participation in a predicate crime and not the crime he or she is charged with aiding and abetting, and where the evidence demonstrates the defendant's knowledge of the crime he or she is charged with aiding and abetting and not the defendant's intent to facilitate that crime. Altering the proof required as the Tenth Circuit has done dramatically expands the scope of criminal aiding and abetting liability under the federal statute.

It is plainly not true that in *every case* in which a defendant participated in the predicate crime of violence or drug offense, and gained some knowledge of the full Section 924(c) violation, he or she also participated in and intended to facilitate the full Section 924(c) violation. To the extent that the Tenth Circuit's rule presumes a perfect correlation, it is wrong. To the extent that it simply considers the outlying cases to be insignificant or unimportant, it is unfair.

The well-established rule that the Tenth Circuit has renounced—as Judge Hand explained and as the federal courts have held in applying that rule to endlessly varying fact patterns—requires the government to show participation in and intent to facilitate the crime the defendant is charged with aiding and abetting. By requiring the government to prove aiding and abetting in this way, the rule ensures that defendants who are innocent of the crime charged are not automatically swept up in a standard that is too broad or too vague. This Court should reject the Tenth Circuit's rule and reaffirm that the federal aiding and abetting statute requires proof that the defendant participated in and sought to facilitate the principal's crime.

ARGUMENT

A. The Majority Rule Is Consistent With Basic Principles Of The Law Of Aiding And Abetting

As relevant here, 18 U.S.C. § 924(c) makes it a crime to use or carry a firearm during and in relation to a crime of violence or drug trafficking crime. The majority of courts of appeals have correctly concluded that, to be guilty of aiding and abetting a violation of Section 924(c), a defendant must have intentionally facilitated the entire offense, including the use or carrying of the firearm. That conclusion follows from two basic principles of the law of aiding and abetting. The first is that aiding and abetting has two critical elements: that the accused aider and abettor participated in the principal's crime *and* that he or she intended to facilitate that crime. The second is that, for crimes with a predicate-offense element, like Section 924(c), the accused aider and abettor must have participated in and sought to facilitate the principal's *entire* crime, not merely the predicate-offense element.

1. To prove aiding and abetting, the government must establish that the defendant participated in and sought to facilitate the commission of the principal's crime

In *Peoni*, Judge Hand held that an earlier version of the federal aiding and abetting statute—which, like the present one, punished as a principal anyone who "aids, abets, counsels, commands, induces, or procures" the commission of an offense—required intentional conduct on the part of the accused aider and abettor. 100 F.2d at 402. All of the

words chosen by Congress, Judge Hand explained, demand that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Ibid.* In *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), this Court adopted Judge Hand's test for prosecutions brought under the current aiding and abetting statute, 18 U.S.C. § 2(a).

As this Court has since reaffirmed, aiding and abetting thus requires "intentional wrongdoing." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994). Section 2(a) "decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Id.* at 181 (citing *Nye & Nissen*, 336 U.S. at 619).

The federal courts of appeals—including the Tenth Circuit, whose decision is under review in this case—have uniformly employed similar formulations for criminal aiding and abetting liability. See, *e.g.*, *United States* v. *Poston*, 902 F.2d 90, 93 (D.C. Cir. 1990) (Thomas, J.) ("the elements of aiding and abetting" include "the specific intent to facilitate the commission of a crime by another" and "that the accused assisted or participated in the commission of the offense") (internal quotation marks omitted); *United States* v. *Samaria*, 239 F.3d 228, 234-35 (2d Cir. 2001) (Sotomayor, J.) ("[A]iding and abetting is * * * a specific intent crime. * * * [T]he government must prove * * * that the defendant acted * * * with the specific purpose of bringing about the underlying crime.") (internal quotation marks omitted), overruled on other grounds by *United States* v. *Huezo*,

546 F.3d 174 (2d Cir. 2008); *United States* v. *Garth*, 188 F.3d 99, 113 (3d Cir. 1999) ("[L]iability for aiding and abetting * * * requires the specific intent of facilitating the crime, and mere knowledge of the underlying offense is not sufficient for conviction.") (citations omitted); *United States* v. *Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997) ("Aiding and abetting is a specific intent crime."); see also *United States* v. *Jackson*, 213 F.3d 1269, 1292 (10th Cir.) ("[A]iding and abetting is a specific intent crime because it requires the defendant to act willfully by participating in the venture and also requires the defendant to have the specific intent to make the venture succeed through his or her acts."), vacated on other grounds, 531 U.S. 1033 (2000).

It is thus a settled principle that, to prove a defendant guilty of aiding and abetting someone else in the commission of a particular crime, the government must establish that the defendant committed the required actus reus—that is, that he or she participated in that crime—and that the defendant did so with the required mens rea—that is, that he or she had the specific purpose of bringing about that crime. To meet this burden of proof, the government must establish both of these requirements with respect to the particular crime the defendant is charged with aiding and abetting.

2. To prove aiding and abetting of a crime with a predicate-offense element, the government must establish that the defendant participated in and sought to facilitate the entire crime, not merely the predicate-offense element

The actus reus and mens rea requirements of the federal aiding and abetting statute apply in just this way, and the government's burden does not change, when the charged crime incorporates a predicate offense or is an aggravated offense that includes a lesser offense. To convict a defendant of aiding and abetting such a crime, the government must prove that the defendant participated in and intended to facilitate the *entire* crime. Proof that the defendant participated in and intended to facilitate the predicate or lesser offense alone is insufficient.

To ensure that the government meets its burden of proof for a crime of this kind, courts require a showing that the defendant participated in and intended to facilitate the aggravated or separate offense component of the crime. It has thus been held that, "[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 of the crime." *United States* v. *Garcia*, 567 F.3d 721, 732 (5th Cir. 2009) (internal quotation marks omitted). This rule has been applied to various crimes. See, *e.g.*, *United States* v. *Dinkane*, 17 F.3d 1192, 1197 (9th Cir. 1994) ("[T]o convict a getaway driver of aiding and abetting an armed bank robbery, the government must first show that the defendant knowingly and intentionally

aided and abetted the underlying offense of unarmed bank robbery and then show that the defendant knowingly and intentionally aided the commission of the aggravating element: assaulting a person or putting a life in jeopardy before or during the commission of that aggravating element."); *United States* v. *Capers*, 708 F.3d 1286, 1306-1307 (11th Cir.) ("[O]ur precedent provides that in 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.") (internal quotation marks omitted), petition for cert. filed, No. 12-10635 (June 3, 2013).

These proof requirements ensure that the government meets its burden under 18 U.S.C. § 2(a) to show that the defendant aided and abetted the complete offense and not just the predicate- or lesser-offense element. Not every defendant who participates in and intends to facilitate the predicate or lesser included offense is also guilty of participating in and intending to facilitate the greater offense.

This rule makes good sense. If it were otherwise, a defendant who merely *assisted* in the commission of a *lesser* offense would be treated the same as a defendant who actually *carried out* the *greater* offense. There is no possible justification for such a counter-intuitive and profoundly unfair result.

3. As applied to aiding and abetting a violation of 18 U.S.C. § 924(c), these principles require the government to establish that the defendant participated in and sought to facilitate the use or carrying of the firearm during and in relation to the predicate offense

These principles have a straightforward application to 18 U.S.C. § 924(c). As relevant here, the offense defined by that provision has two elements: (1) the commission of the predicate crime of violence or drug trafficking, and (2) the use or carrying of a firearm during and in relation to that crime. See 2 Leonard B. Sand *et al.*, *Modern Federal Jury Instructions: Criminal*, Instruction 35-87 (2013). As the majority of courts of appeals have held, to convict a defendant of aiding and abetting a Section 924(c) violation, the government must therefore show that the defendant *both* participated in *and* intended to facilitate the use or carrying of the firearm during and in relation to the predicate crime, not merely that he or she participated in and sought to facilitate the predicate offense. See *United States* v. *Medina-Roman*, 376 F.3d 1, 6 (1st Cir. 2004); *United States* v. *Medina*, 32 F.3d 40, 45 (2d Cir. 1994); *Garth*, 188 F.3d at 113; *United States* v. *Sorrells*, 145 F.3d 744, 754 (5th Cir. 1998); *United States* v. *Daniels*, 370 F.3d 689, 691 (7th Cir. 2004) (per curiam); *United States* v. *Rolon-Ramos*, 502 F.3d 750, 758-759 (8th Cir. 2007); *Bancalari*, 110 F.3d at 1429-1430; *United States* v. *Hamblin*, 911 F.2d 551, 558 (11th Cir. 1990).

Judge O'Scannlain has explained the connection between that holding and the broader principles of the law of aiding and abetting discussed above. As

he put it, to convict a defendant of aiding and abetting an aggravated crime or a crime that incorporates a separately punishable predicate offense, the government must offer "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). Judge O'Scannlain went on to point out that, in the absence of such proof, courts not only have "reduc[ed] an aiding and abetting conviction from *armed* bank robbery to *unarmed* bank robbery," but have "revers[ed] a conviction for aiding and abetting a violation of 18 U.S.C. § 924(c)(1)(A), which creates an additional offense for using a firearm in the course of a federal crime." *Ibid.* (citing *Dinkane*, 17 F.3d at 1196-1197, and *Bancalari*, 110 F.3d at 1429-30). The latter result necessarily follows from the broader principles he described.

As the majority of courts of appeals have recognized, these principles mandate a showing that the defendant participated in and intended to facilitate the entire Section 924(c) offense, which includes the use or carrying of a firearm. The government must prove as the actus reus and mens rea the defendant's participation in and intent to facilitate the firearm element. A showing that the defendant participated in and intended to facilitate the predicate-offense element is not enough. Nor is a showing that the defendant participated in and intended to facilitate the predicate crime with mere *knowledge* of the firearm element.

B. The Tenth Circuit's Rule Eliminates Both The Actus Reus And The Mens Rea Requirements For Aiding And Abetting

In contrast with the majority rule, the rule in the Tenth Circuit, applied below, is that a defendant can be convicted of aiding and abetting a violation of 18 U.S.C. § 924(c) if he or she (1) "knowingly and actively participated in the drug trafficking crime" and (2) "knew his [or her] cohort used a firearm in the drug trafficking crime." Pet. App. 7a. This rule is wrong for two independent reasons: it eliminates the required *actus reus* for aiding and abetting—that the defendant *participated in* the entire offense, including the use or carrying of a firearm; and it eliminates the required *mens rea* for aiding and abetting—that the defendant *intended to facilitate* the entire offense, including the use or carrying of a firearm.

1. The Tenth Circuit's rule eliminates the required actus reus

The Tenth Circuit's rule eliminates the requirement that, to convict a defendant of aiding and abetting a particular crime, the government must demonstrate that he or she participated in that crime, and not merely in some predicate or lesser offense that is a component or element of the crime. Instead, the Tenth Circuit permits the government to demonstrate aiding and abetting by establishing participation in the predicate offense.

At the petition stage, the government argued that the Tenth Circuit's rule did not eliminate the actus reus requirement because, "[t]o be convicted of aiding and abetting, participation in every stage of an illegal venture is not required," and "[w]hen a person actively participates in the underlying crime

of violence or drug trafficking offense, he facilitates the principal's completion of the second element of the Section 924(c) offense." Br. in Opp. 8 (internal quotation marks omitted). This defense of the Tenth Circuit's rule is groundless. While it may be true that the government need not prove that an accused aider and abettor participated in "every stage" of an "illegal venture," it still must establish that he or she participated in some way in the "illegal venture" of the principal. In a case in which the defendant is charged with aiding and abetting a violation of Section 924(c), the "illegal venture"—*i.e.*, the principal's *crime*—is not "the underlying crime of violence or drug trafficking offense," which can be and ordinarily is prosecuted separately, but rather the use or carrying of a firearm during and in relation to the underlying crime. A defendant who does not participate at all in the use or carrying of a firearm has not participated in *any* stage of this crime.

Indeed, if it were really the case that a defendant could be convicted of aiding and abetting a Section 924(c) violation as long as he or she aided and abetted the underlying offense (on the theory that the underlying offense is a "stage" of the crime), there would be no obvious reason to require *anything*—whether actus reus or mens rea—with respect to the use or carrying of a firearm. Yet even the government agrees that it is not enough to participate intentionally in the underlying offense; the accused aider and abettor, according to the government, must also have knowledge that the principal used or carried a firearm. See Br. in Opp. 7-10. As we next explain, that limitation is not much of a limitation at all. But whether it is or is not, it is a tacit concession that aiding and abetting a Section 924(c) offense re-

quires more than merely aiding and abetting the underlying crime of violence or drug trafficking crime.

2. The Tenth Circuit's rule eliminates the required mens rea

The Tenth Circuit's rule also eliminates the requirement that, to convict a defendant of aiding and abetting a particular crime, the government must show that the defendant intended to facilitate that crime. Instead, the Tenth Circuit reduces the required mental state, at least as to the firearm, to simple knowledge.

That aspect of the Tenth Circuit's rule is wrong, not only because it is inconsistent with longstanding principles of aiding and abetting, but also because it has absurd consequences. Under a simple knowledge requirement, a defendant may be convicted of aiding and abetting a Section 924(c) violation even if the defendant learned of the gun's existence after his or her own role in the crime ended, even if the defendant responded to the principal's possession of the gun by opposing and attempting to thwart its use, and even if the gun was "used" against the accused aider and abettor during the commission of the crime.

At the petition stage, the government asserted that a defendant cannot be convicted under the Tenth Circuit's rule "unless he had knowledge of the firearm before the underlying crime was *completed*." Br. in Opp. 10. But this limitation offers no protection to defendants whose *role* in the crime was completed when they learned of the gun's existence. For example, if a defendant drove his friend to what his friend promised would be a gun-free drug transaction, and the defendant saw his friend draw a gun to

be used in the transaction as he drove away, the defendant could be convicted of aiding and abetting a Section 924(c) violation in the Tenth Circuit despite having had no advance knowledge of the gun and having not assented to its use by continuing to participate in the crime.

Likewise, if upon discovering the gun, the defendant actively opposed and tried to prevent its use, he still could be convicted of aiding and abetting a Section 924(c) violation in the Tenth Circuit. For example, even if the defendant in the scenario described above had driven back to the drug transaction and persuaded his friend to throw away the gun, he could be liable for aiding and abetting its use. The same would be true if a defendant's cohort pulled out a gun during a drug transaction after agreeing with the defendant that they would "leave his gun at home," cf. Br. in Opp. 9 (quoting *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998)), and the defendant tackled him, seized the gun, and threw it into a river.

Finally, the Tenth Circuit's rule would permit the imposition of aiding and abetting liability when the firearm was used against the defendant himself. For example, if the defendant's cohort pulled out a gun during the drug transaction with the sole purpose of forcing *the defendant* to perform some act related to the transaction, the defendant could be convicted of aiding and abetting a violation of Section 924(c) in the Tenth Circuit.

These scenarios illustrate just how different mere knowledge of criminal conduct is from an intent to facilitate the conduct—and why it is settled law that the latter is necessary to prove aiding and abetting while the former is insufficient. The scenarios

accordingly demonstrate how little sense it makes to say that the defendant in any of them could have aided and abetted the use or carrying of a firearm during and in relation to a crime of violence or drug trafficking crime. Yet that is the result under the Tenth Circuit's rule.

The requirement of intent or purpose to bring about the crime ensures that criminal aiding and abetting liability does not become strict liability or liability based upon mere foreseeability. In *Peoni*, Judge Hand rejected the government's argument that a foreseeability standard should be read into the aiding and abetting statute, finding that its text and history "have nothing whatever to do with the *probability* that the forbidden result would follow upon the accessory's conduct." *Peoni*, 100 F.2d at 402 (emphasis added). The Tenth Circuit's rule elides these critical distinctions and should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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