No.

In the Supreme Court of the United States

JUSTUS C. ROSEMOND, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the offense of aiding and abetting the use of a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2, requires proof of (i) intentional facilitation or encouragement of the use of the firearm, as held by the First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, or (ii) simple knowledge that the principal used a firearm during a crime of violence or drug trafficking crime in which the defendant also participated, as held by the Sixth, Tenth, and District of Columbia Circuits.

TABLE OF CONTENTS

APPENDIX CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Statutes—Continued: **Page(s)**

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-11a, is reported at 695 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2012. On December 4, 2012, Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including January 16, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of title 18 of the United States Code provides, in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Section 2(a) of that title provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

STATEMENT

The decision below implicates an acknowledged conflict among the circuits concerning the elements necessary to prove aiding and abetting liability for one of the most common federal crimes—using or carrying a gun during and in relation to a crime of violence or a drug trafficking crime, in violation of 18 U.S.C. § 924(c). In most circuits, a defendant cannot be convicted of aiding and abetting a confederate's use of a firearm under Section 924(c) unless the defendant facilitated or encouraged the use of the firearm. A minority of circuits, like the court of appeals here, do not require facilitation or encouragement as an element and permit a participant in a crime of violence or drug trafficking crime to be convicted of the firearm offense based merely on knowledge that the principal used or

carried a firearm during the offense. In these circuits, aiding and abetting the use of a firearm is virtually a strict-liability offense, subjecting the defendant to an enormous sentence enhancement even if he did not intend his confederate to use the firearm and did nothing to facilitate or encourage it—indeed, even if the defendant *discouraged* or sought to prevent its use.

This circuit conflict subjects defendants to disparate standards of proof and disparate punishment based on the happenstance of where prosecution occurs—disparities evident in this very case; if the drug transaction here had occurred near petitioner's home in Texas instead of the buyers' residence in Utah, a different rule would have governed. The conflict gives rise to disparities in punishment that are quite substantial. Petitioner's firearms conviction accounts for the vast majority of his sentence—120 of 168 months, or 71%. And yet the conviction—and its mandatory-minimum sentence—would be invalid in his home jurisdiction, and indeed, in *most* jurisdictions. This is an issue that arises *every day* in U.S. courts; more than two thousand Section 924(c) cases are prosecuted annually, and aiding and abetting liability is "routinely" charged with the offense, *Jordan* v. *United States*, 08-C-0209, 2008 WL 2245856, at *1 (E.D. Wisc. May 30, 2008) (citing *United States* v. *Golden*, 102 F.3d 936, 945 (7th Cir. 1996)). This Court's review is warranted.

1. The government presented evidence at trial that cooperating witness Vashti Perez arranged the

sale of one pound of marijuana in Tooele, Utah on August 26, 2007. According to Perez, her boyfriend's nephew, Ronald Joseph, and petitioner were the sellers. App., *infra*, 2a.

At approximately 9 pm, Perez, Joseph, and petitioner arrived at the agreed-upon location in Perez's car. The two buyers arrived soon afterwards. App., *infra*, 2a. One of the buyers approached Perez's car and got in the back seat. A short time later, the buyer struck an occupant of the car, grabbed the marijuana, and fled with the other buyer. As the buyers ran, shots were fired in their direction. Perez then drove off in pursuit of the buyers with Joseph and petitioner in her car. *Ibid.*

About one mile away, a police officer stopped Perez's car. The officer asked for permission to search the car, and Perez consented. The officer found no weapons or drugs. App., *infra*, 2a-3a.

2. Petitioner was charged with: (1) possession of marijuana with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1); (2) discharging a firearm, or aiding and abetting the discharge of a firearm, during and in relation to a federal drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(A)(1) and 2; (3) two counts of unlawful ammunition possession, relating to a shell casing, in violation of 18 U.S.C. § 922(g)(1) and (g)(5)(A). Petitioner pleaded not guilty on all counts. App., *infra*, 3a, 12a.

a. At trial, Perez, Joseph, and the two buyers testified after receiving immunity from the government; some onlookers also testified. 2 C.A.

App. 245, 272, 295-296, 318. With one exception, all the witnesses testified that they did not see whether Joseph or petitioner had fired the shots; only Joseph—the other possible shooter—testified that petitioner had discharged a gun. Gov't C.A. Br. 2; App., *infra*, 3a. Although Perez had previously told police she thought petitioner fired a gun, she admitted at trial that she did not see who had fired because her back was turned. App., *infra*, 3a; 2 C.A. App. 285-287.

b. The government tried the Section 924(c) count on two alternative theories. First, the government argued that petitioner was the principal—*i.e.*, the shooter who discharged the firearm. Alternatively, the government argued that petitioner had aided and abetted Joseph's discharge of the firearm. App., *infra*, 1a, 4a-5a, 40a-41a.

The government and petitioner each submitted proposed jury instructions on the aiding and abetting theory. Petitioner proposed the following instruction:

> The defendant may be liable for aiding and abetting the use of a firearm during a drug trafficking crime, if (1) the defendant knew that another person used a firearm in the underlying drug trafficking crime, and (2) the defendant *intentionally took some action to facilitate or encourage the use of the firearm*.

1 C.A. App. 21 (emphasis added). The government proposed an instruction that did not require a showing that the defendant intended to facilitate or encourage the use of the firearm.

After extensive argument, the court accepted without material alteration the government's proposed instruction. The district court acknowledged that the issue was not well-settled, see 2 C.A. App. 199, and observed, "[i]f I'm wrong, you got a great issue for appeal and it's [the government's] fault." *Ibid.* The court instructed the jury that to find petitioner guilty of the Section 924(c) charge on an aiding and abetting theory:

> [Y]ou must find that:
>
> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and
>
> (2) the defendant knowingly and actively participated in the drug trafficking crime.

App., *infra*, 7a; see also 1 C.A. App. 73-74 (Instr. No. 38).

During closing arguments, the government explained its theory of aiding and abetting:

> [Petitioner] would be guilty of aiding and abetting another in the gun offense if he knew his cohort used a firearm in the drug trafficking crime and [he] knowingly and actively participated in the drug trafficking crime. So if [petitioner] were to * * * argue that Ronald Joseph or Vashti Perez fired the gun, he's still guilty of the crime. That is what the law says based on the evidence before you.
>
> * * * [T]he evidence establishes that [petitioner] was involved in the drug trafficking crime. He is involved with the [drug] deal with [the

> buyer]. He certainly knew and actively participated in that crime.
>
> And with regards to the other element of aiding and abetting the gun crime, the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it.

App., *infra*, 33a-34a.

During deliberations, the jury sent a note asking whether aiding and abetting applied to "question 3 on the verdict form," App., *infra*, 40a, which asked the jury to determine whether petitioner had "carried," "used," "brandished," or "discharged" the firearm. *Id.* at 29a. The judge responded that the jury should answer question 3 if the jury found petitioner guilty under any theory. 3 C.A. App. 25; see also App., *infra*, 28a-30a. A short time later, the jury found petitioner guilty on all counts. The verdict form did not require the jury to indicate whether petitioner had been found guilty of the firearm offense as a principal or as an aider and abettor. App., *infra*, 29a.

c. The district court sentenced petitioner to 168 months of imprisonment, to be followed by 60 months of supervised release. App., *infra*, 15a, 18a. Although the Guidelines range for the other counts of conviction was 70-87 months of imprisonment, the court imposed a substantially reduced sentence of 48 months. In imposing a consecutive mandatory-minimum sentence for the Section 924(c) count, the district judge explained to petitioner that he had no choice: "I *have* to give you 10 years consecutive." 2

C.A. App. 37 (emphasis added); see also 18 U.S.C. § 924(c)(1)(A)(iii), (c)(1)(D)(ii).

3. The court of appeals affirmed. App., *infra,* 1a-11a. The court began its analysis by recognizing that, whatever the sufficiency of the evidence supporting liability as a principal, it was required to "address [petitioner's] challenge to the instructions the trial court gave the jury on the aiding-and-abetting theory because '[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one,'" *id.* at 6a (quoting *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per curiam)), and the jurors had not been "required to specify under which theory they convicted" petitioner, *id.* at 5a.

The court rejected petitioner's argument that the aiding and abetting instruction was legally erroneous, relying on circuit precedent holding that a defendant need not take "some action to facilitate or encourage his cohort's use of the firearm" to be liable for the Section 924(c) firearm offense. App., *infra*, 9a. Instead, the court held it sufficient if the defendant "(1) knows his cohort used a firearm in the underlying crime [of violence or drug trafficking crime], and (2) knowingly and actively participates in that underlying crime." *Id.* at 8a (quoting *United States* v. *Bowen*, 527 F.3d 1065, 1078 (10th Cir. 2008)).

The court of appeals recognized that its holding "differs from the rules established by other courts"—in fact, the "vast majority" of them. App., *infra*, 9a-

10a (quoting *Bowen*, 527 F.3d at 1079). As the court acknowledged, "many of our sister circuits require the Government [to] prove not only (1) that an aider and abetter have knowledge that a cohort used a firearm * * *, but also that he (2) intentionally take some action to facilitate or encourage the use of the firearm." *Id.* at 9a. The court emphasized that because an earlier panel had adopted the minority view, it had "no authority to change our circuit's settled law on the subject." *Ibid.* (quoting *Bowen*, 527 F.3d at 1079).[1]

REASONS FOR GRANTING THE PETITION

There is an acknowledged conflict among the courts of appeals on whether aiding and abetting liability under 18 U.S.C. § 924(c) requires proof that the defendant facilitated or encouraged the principal's use of a firearm. The issue has important implications for the thousands of Section 924(c) prosecutions every year, which "routinely" allege aiding and abetting, *Jordan*, 2008 WL 2245856, at *1 (citing *Golden*, 102 F.3d at 945), because the view taken by the Sixth, Tenth, and D.C. Circuits significantly diminishes the government's burden of proof and increases the likelihood defendants will face the "severe penalties of § 924(c)," *Busic* v. *United States*, 446 U.S. 398, 404 n.9 (1980). For imposition

[1] The court of appeals declined to address petitioner's argument that there was insufficient evidence to support his conviction on the aiding and abetting theory because petitioner did not contest that there was sufficient evidence to convict him as the shooter. App., *infra,* 11a.

of such significant penalties to turn on the happenstance of where a crime is prosecuted undermines important "interest[s] in uniform and evenhanded sentencing." *United States* v. *Wilson*, 503 U.S. 329, 345 (1992). The decision below conflicts with the plain language of the aiding and abetting statute, 18 U.S.C. § 2, and basic principles of accomplice liability, subjecting less-culpable associates to the severe punishment Congress intended for more-culpable principals. As virtually every circuit has weighed in, there is no reason for further delay. This Court's review is warranted.

A. There Is An Acknowledged Conflict Among The Courts Of Appeals On Whether Aiding And Abetting A Section 924(c) Violation Requires Proof The Defendant Facilitated Or Encouraged The Principal's Use Of A Firearm

The court of appeals recognized that "our standard for determining whether a defendant has aided and abetted another's use of a firearm during and in relation to a crime of violence [or drug trafficking crime] differs from the rules established by" the "vast majority of our sister circuits." App., *infra*, 9a-10a (quoting *Bowen*, 527 F.3d at 1079); see also *United States* v. *Baldwin*, 347 F. App'x 911, 912 (4th Cir. 2009) ("*Most circuits* require that the defendant intentionally facilitate or encourage another's use of a gun.") (emphasis added) (internal quotation marks omitted). Two other circuits likewise require only that the defendant participated in the underlying violent crime or drug trafficking crime and know that

his confederate used a firearm. The large majority of circuits—eight—require that the defendant knowingly or intentionally facilitated or encouraged the use of the firearm. This split is stark and widespread. Because eleven of the twelve regional circuits have already addressed the issue, it has been thoroughly considered and is ripe for this Court's review.

1. Three Circuits Have Held That Aiding And Abetting A Section 924(c) Violation Does Not Require Facilitating Or Encouraging The Use Of A Firearm

The Tenth Circuit first held in *United States* v. *Wiseman*, 172 F.3d 1196, 1217 (10th Cir. 1999), that a defendant need not facilitate the use of a firearm to be liable for aiding and abetting under Section 924(c), but that it was enough to have participated in the underlying crime with knowledge a confederate was carrying a gun. The sole rationale that the Tenth Circuit has identified for its rule is that one "need not participate in an important aspect of a crime to be liable as an aider and abetter." *Bowen*, 527 F.3d at 1078.

The Tenth Circuit not only has repeatedly reaffirmed its rule; it has broadened its application. While *Wiseman* involved a series of crimes where it was clear the defendant had advance knowledge that the principal would be using a firearm, 172 F.3d at 1217, more recent decisions of that court have upheld aiding and abetting convictions where it was at least ambiguous whether the defendant knew before the crime occurred that the principal was using or

carrying a firearm. See *United States* v. *Vallejos*, 421 F.3d 1119, 1125 (10th Cir. 2005). In this case, for example, there was no evidence (aside from the disputed testimony of the other possible shooter that petitioner fired the weapon) that petitioner knew of the firearm *before the moment of discharge*; the jury instruction required only that petitioner "knew his cohort used a firearm," App., *infra*, 7a, and the government explicitly argued it was enough that petitioner learned of the firearm at the moment it was discharged. See *id.* at 34a (arguing that petitioner had 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. You simply can't do it."); but see *United States* v. *Nelson*, 137 F.3d 1094, 1103 (9th Cir. 1998) (holding that, among other things, advance knowledge of the firearm is necessary to establish that the defendant aided or abetted the use of the firearm).

The Sixth Circuit similarly does not require proof of facilitation or encouragement. See, *e.g.*, *United States* v. *Gardner*, 488 F.3d 700, 712 (6th Cir. 2007); *United States* v. *Franklin*, 415 F.3d 537, 554-55 (6th Cir. 2005). Under its rule, the government must prove only that (1) the defendant knew the principal was armed, and (2) the defendant "acted with the intent to assist or influence the commission of the underlying predicate crime" (*i.e.*, drug trafficking or a crime of violence). *Gardner*, 488 F.3d at 712.[2] Like

[2] Although the Tenth Circuit's *Bowen* opinion erroneously cited *United States* v. *Robinson*, 389 F.3d 582, 591 (6th Cir.

the Tenth Circuit, the Sixth Circuit applies a standard that is tantamount to strict liability, authorizing aiding and abetting liability under Section 924(c) so long as the defendant is aware a confederate is carrying a firearm if the defendant was "present at the scene of the crime * * * during which his accomplice carries a firearm." *United States* v. *Hopson*, 134 F. App'x 781, 793 (6th Cir. May 20, 2004) (mem. op.).

Finally, the D.C. Circuit appears not to require facilitation or encouragement. The D.C. Circuit will sustain a conviction for aiding and abetting if "the defendant kn[ew] to a practical certainty" that a confederate would use the firearm in a manner prohibited by Section 924(c). *United States* v. *Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997) (quoting *United States* v. *Powell*, 929 F.2d 724, 728 (D.C. Cir. 1991)). While the D.C. Circuit requires a heightened *mens rea* of "practical certainty," it does not require any intentional act of facilitation or encouragement. See *ibid.*

2004), as establishing that the Sixth Circuit requires proof of facilitation of the firearm offense, see *Bowen*, 527 F.3d at 1079 n.11, the Sixth Circuit has since made clear that it requires only that the defendant intended to assist or influence the commission of *the underlying predicate crime*, not the firearm offense. *Gardner*, 488 F.3d at 712; *Franklin*, 415 F.3d at 554-555. *Gardner* was quite explicit: "The government can meet [its] burden by showing that the defendant both [1] knew that the principal was armed and [2] acted with the intent to assist or influence the commission of *the underlying predicate crime*." 488 F.3d at 712 (emphasis added). That is distinct from requiring that the defendant have facilitated or encouraged the principal's *use, carrying, or discharge of the firearm*.

2. Eight Circuits Have Held That Aiding And Abetting A Section 924(c) Violation Requires Facilitating or Encouraging The Use Of A Firearm

"Most circuits require that the defendant 'intentionally facilitate or encourage'" the principal's use of the firearm to be convicted of aiding and abetting a Section 924(c) violation. *Baldwin*, 347 F. App'x at 912 (quoting *Bowen*, 527 F.3d at 1079). The First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have held that the defendant must perform an act to facilitate or encourage the principal's use or carriage of the firearm; facilitation or encouragement of the underlying drug crime or crime of violence is not sufficient. 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); *United States* v. *Garth*, 188 F.3d 99, 113 (3d Cir. 1999); *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); *United States* v. *Bancalari*, 110 F.3d 1425, 1429-1430 (9th Cir. 1997); *Bazemore* v. *United States*, 138 F.3d 947, 950 (11th Cir. 1998). Of those eight circuits, seven appear also to require that the defendant knowingly or intentionally facilitate or encourage the principal's use of the firearm. *Medina-Roman*, 376 F.3d at 6-7; *Medina*, 32 F.3d at 46-47; *Garth*, 188 F.3d at 113; *Sorrells*, 145 F.3d at 753-754; *Daniels*, 370 F.3d at 691; *Rolon-Ramos*, 502 F.3d at 758; *Bancalari*, 110 F.3d at 1429-1430. While the Eleventh Circuit requires an act of facilitation, it has

not expressly adopted or rejected any requirement of knowledge or intent. See *Bazemore*, 138 F.3d at 950.

Under the majority view, a defendant does not aid and abet a violation of Section 924(c) simply because he participated in the underlying violent crime or drug trafficking crime and knew that the principal used or carried a firearm. As the Seventh Circuit has explained, "[t]he defendant must know, either before or during the crime, that the principal will possess or use a firearm, and then after acquiring knowledge intentionally facilitate the weapon's possession or use." *Daniels*, 370 F.3d at 691; accord, *e.g.*, *Medina-Roman*, 376 F.3d at 6; *Medina*, 32 F.3d at 45; *Garth*, 188 F.3d at 113; *Sorrells*, 145 F.3d at 753-754; *Rolon-Ramos*, 502 F.3d at 758; *Bancalari*, 110 F.3d at 1429, *Bazemore*, 138 F.3d at 950. Those courts have held that, absent such proof, an aiding and abetting conviction cannot be sustained.

For example, the Second Circuit overturned a Section 924(c) conviction where the defendant "learned that [the principal] intended to carry a gun" during an armed robbery, but the government presented no evidence that the defendant "prompted or induced him to do so." *Medina*, 32 F.3d at 45. Judge Jacobs, writing for the court, reasoned that the principal was charged with "using or carrying a firearm during and in relation to a crime of violence," and that because "[t]his specific crime—not the robbery—is the crime that [the defendant] was charged with aiding and abetting * * * it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *Ibid.* The

court specifically rejected the contention that the defendant could be convicted as an aider and abettor "merely because he knew that a firearm would be used or carried and, with that knowledge, performed an act to facilitate or encourage the robbery itself" because "the language of [Section 2] requires proof that he performed some act that directly facilitated or encouraged *the use of the firearm*." *Ibid.* (emphasis added).

Similarly, the Ninth Circuit reversed the conviction of a defendant who "participated in [a] robbery *knowing the gun would be used*" because there was "no evidence that [the defendant] directly facilitated or encouraged the use of the firearm." *United States* v. *Nelson*, 137 F.3d 1094, 1104 (9th Cir. 1998) (emphasis added). That court has reasoned that "[t]he prosecution must still prove a specific intent to aid the firearms crime, *see Bancalari*, 110 F.3d at 1430, and some act that facilitates or encourages that crime." *Nelson*, 137 F.3d at 1103. Proof that the defendant facilitated the Section 924(c) firearm charge is necessary because "[i]t is the firearm crime that [the defendant] is charged with aiding and abetting, not the" underlying crime of violence or drug trafficking crime. *Bancalari*, 110 F.3d at 1429-1430 (holding that evidence must show the defendant "specifically intended to facilitate" the principal's use of the firearm, and simply "knowing" that the principal used the firearm does not establish the requisite specific intent); accord *Medina-Roman*, 376 F.3d at 6; *Daniels*, 370 F.3d at 691; *Garth*, 188 F.3d at 113; *Sorrells*, 145 F.3d at 753.

The Fifth Circuit likewise has held that a defendant must both "share in the criminal intent to use the firearm during a drug trafficking offense" and "perform[] some affirmative act relating to the firearm." *Sorrells*, 145 F.3d at 753-754. That court reasoned that because an aider and abettor "is punished as a principal for 'using' a firearm in relation to a drug offense, [he] therefore must facilitate in the 'use' of the firearm rather than simply assist in the crime underlying the § 924(c)[] violation." *Id.* at 754 (citing *Bazemore*, 138 F.3d 949-950)

The acknowledged circuit conflict over whether aiding and abetting a Section 924(c) violation requires proof the defendant facilitated the use of the firearm is well developed, and courts on both sides of the conflict have reaffirmed their positions. There is no justification for prolonging the disparate treatment of defendants prosecuted for this frequently charged offense. This Court's intervention is necessary to establish a uniform rule governing this recurring issue.

B. This Case Presents An Ideal Vehicle For Resolving An Issue Of Unquestionable Importance

1. The question presented here is unquestionably important. The government prosecutes a staggering number of Section 924(c) cases. Between 2008 and 2011, over 2,300 defendants were convicted of Section 924(c) violations *each year*, making Section 924(c) one of the most-common offenses carrying a mandatory-minimum sentence. U.S. Sent'g Comm'n, *Final*

Quarterly Data Reports 2008-2011, at 16; U.S. Sent'g Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* ("*Report to Congress*") 273, app. D tbl. D-3 (Oct. 2011). Those figures dwarf the number of convictions under the Armed Career Criminal Act (592 in 2010), *id.* at 282, a statute whose meaning this Court has addressed eight times since 2007. See U.S. Sent'g Comm'n, *Selected Supreme Court Cases on Sentencing Issues* 49 (July 2012). Because "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 or carrying a firearm," *Jordan*, 2008 WL 2245856, at *1 (citing *Golden*, 102 F.3d at 945), whether such an offense requires proof the defendant facilitated the firearm's use is an issue of unquestionable importance.

The issue is of particular significance because sentences under Section 924(c) are "severe." *Busic*, 446 U.S. at 404 n.9. A mandatory-minimum consecutive sentence of five years attends each act of using or carrying a firearm, climbing to seven years if the firearm is brandished and ten years if discharged; harsh additional penalties apply for using particular types of firearms, and sentences for repeat offenders are a minimum of 25 years or, if particular weapons are involved, mandatory life imprisonment without possibility of parole. A district court cannot impose a sentence below these statutory minimums unless the government files a substantial-assistance motion. 18 U.S.C. § 3553(e); see U.S.S.G. § 5K1.1 cmt. 1 (2012). This lack of sentencing flexibility creates a grave risk

that a defendant's punishment under Section 924(c) will exceed his culpability. See, *e.g.*, *United States* v. *Ezell*, 417 F. Supp. 2d 667, 671, 673 (E.D. Pa. 2006) (offender received "unduly harsh" mandatory minimum 132-year sentence under Section 924(c), "far in excess of what is required to accomplish all of the goals of sentencing"). The risk of excessive sentences is particularly acute in jurisdictions, such as the Sixth and Tenth Circuits, where this additional liability can be predicated on nothing more than knowledge that a confederate participating in the underlying crime possesses a firearm. App., *infra*, 9a; *Gardner*, 488 F.3d at 712; see also *Harrington*, 108 F.3d at 1471.

The circuits' inconsistent application of Section 924(c) promotes sentencing disparities. Because mandatory-minimum sentences typically increase a sentence dramatically, the Sentencing Commission has recognized they pose a particular "risk of inconsistent application" that can yield dramatically different sentences. *Report to Congress* 360 nn.904-906, 365. To curb that risk, the Commission has counseled that mandatory-minimum sentences must "be applied consistently." *Id.* at 368. The acknowledged circuit conflict at issue here undercuts important interests in uniformity by subjecting one of the most common mandatory-minimum sentencing schemes to differing standards of proof. The implications of the split are on stark display in petitioner's case. Had the drug transaction occurred near petitioner's home in Texas, the government would have been required to show that petitioner intentionally acted to facilitate the firearm's use; but

because it occurred near the buyers' residence in Utah, it was enough that petitioner was "present and active at a drug deal when shots [we]re fired." App., *infra*, 34a.

2. This case presents a highly suitable vehicle for resolving the question presented. Throughout the proceedings, petitioner has preserved his claim that the jury instruction on aiding and abetting was legally erroneous because it did not require a finding of facilitation or encouragement. App., *infra*, 5a-10a; 1 C.A. App. 21; 2 C.A. App. 198-200. As the court of appeals noted, petitioner squarely raised this issue. See App., *infra*, 9a. The government relied on the "aiding and abetting" theory at trial, explicitly noting in closing its availability as a "theory upon which you could convict [petitioner]," *id.* at 33a, and emphasizing the minimal showing necessary under the Tenth Circuit's strict-liability standard, *ibid.* The jury evidently convicted on that theory: The jurors asked whether the aiding and abetting instruction applied to their determination of whether petitioner "discharged" a firearm, see *id.* at 40a, and returned a "guilty" verdict shortly after receiving an affirmative response.

C. The Tenth Circuit's Rule Is Wrong

1. Aiding And Abetting The Use Of A Firearm Requires Proof That The Defendant Facilitated Or Encouraged The Use Of The Firearm

The Tenth Circuit's rule is inconsistent with the plain language of the aiding and abetting statute and

fundamental principles of accomplice liability. The statute provides that whoever "aids, abets, counsels, commands, induces or procures [an offense], is punishable as a principal." 18 U.S.C. § 2(a). "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). Each of the statute's verbs denotes an act of facilitation or encouragement—the defendant must have *done* something to promote the crime he is accused of aiding and abetting (here, the unlawful use a firearm under Section 924(c)). In addition, the statute also requires *intent* to facilitate or encourage. As Learned Hand long ago observed, "[a]ll the words used [in the statute]—even the most colorless, 'abet'—carry an implication of *purposive attitude*." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (emphasis added); accord *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (adopting reasoning of *Peoni*); 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(b) (2d ed. 2003) ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.").[3]

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[3] See also *Garth*, 188 F.3d at 113; *Sorrells*, 145 F.3d at 753; *Bancalari*, 110 F.3d at 1430; *United States* v. *Loder*, 23 F.3d 586, 591 (1st Cir. 1994); *United States* v. *Lambert*, 995 F.2d 1006, 1008 (10th Cir. 1993).

Thus, this Court has held, "[c]riminal aiding and abetting liability under [18 U.S.C.] § 2 requires proof that the defendant 'in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed.'" *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) (quoting *Nye & Nissen*, 336 U.S. at 619). It is black-letter law, then, that there are two requirements of aiding and abetting liability under federal law: "[O]ne is liable as an accomplice to the crime of another if he (a) gave assistance or encouragement * * * (b) with the intent thereby to promote or facilitate commission of the crime." LaFave, *supra*, § 13.2.

The Tenth Circuit requires *neither*. Like the Sixth Circuit, see *Gardner*, 488 F.3d at 712, that court "only require[s] that an aider and abetter (1) know a cohort used a firearm in an underlying crime of violence [or drug trafficking crime], and (2) knowingly and actively participated in that underlying crime." App., *infra*, 9a. The Tenth Circuit does not require that the defendant "intentionally take some action to facilitate or encourage the use of the firearm." *Ibid.*

The decision below contravenes basic principles of accomplice liability. "Under the general principles applicable to accomplice liability, *there is no such thing as liability without fault*. Thus, it is not enough that the alleged accomplice's acts in fact assisted or encouraged the person who committed the crime." LaFave, *supra*, § 13.2(f) (emphasis added); see also *Hicks* v. *United States*, 150 U.S. 442, 449 (1893)

(finding error in the failure to instruct the jury that "the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting"). But in the Tenth Circuit and the other minority jurisdictions, the defendant is liable *even if* he did not intend for the principal to use the firearm and did nothing to facilitate or encourage it—indeed, the defendant could be liable even if he discouraged or sought to prevent its use. See *ibid.* This is quintessential strict liability.

It is not enough that the defendant "knowingly and actively participated in the [crime of violence or] drug trafficking crime." App., *infra*, 6a. Even if construed to mean an intent to facilitate the underlying crime, that is insufficient to support a Section 924(c) conviction. As the Second Circuit wrote in reversing a similarly flawed conviction, where a defendant is charged with aiding and abetting a confederate's "using or carrying a firearm during and in relation to a crime of violence," "[t]his specific crime—not the [underlying crime]—is the crime that [the defendant] was charged with aiding and abetting * * * [and] it is this specific crime that [the defendant] must have consciously and affirmatively assisted." *Medina*, 32 F.3d at 45; accord *Bancalari*, 110 F.3d at 1430 ("It is the firearm crime that [the defendant] is charged with aiding and abetting, not the [underlying crime].").

2. The Tenth Circuit's Holding Eviscerates The Required Connection Between Criminal Culpability And Punishment

The Tenth Circuit's rule also fails to respect the necessary connection between a defendant's criminal culpability and his punishment. "[A] basic 'precept of justice [is] 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)). The decision below violates this basic precept because it permits the draconian penalties of Section 924(c) to be imposed on defendants significantly less culpable than the principal.

When Congress enacted the modern aiding and abetting statute in 1909, it rejected common law distinctions between principals and accessories and instead treated both as principals. *Standefer* v. *United States*, 447 U.S. 10, 18-19 (1980). But implicit in that decision was the idea that those who would be sentenced as aiders and abettors would be equally deserving of punishment as principals. See *ibid.* Because the Tenth Circuit's standard does not require that the defendant facilitate or encourage the use of a firearm, it subjects accomplices to the draconian penalties of Section 924(c) for significantly less culpable conduct than Congress intended.

Because of the erroneous aiding and abetting instruction in this case, the government was able to obtain an additional *ten years* of punishment by proving just one fact beyond those necessary to prove

the underlying drug trafficking crime: that petitioner "knew his cohort" used or carried a firearm. App., *infra*, 7a-9a. That is too slender a reed on which to base such a significant sentence increase. As the Fifth Circuit has explained, "because the defendant is *punished as a principal* for 'using' a firearm in relation to a drug offense, [the defendant] therefore must facilitate in the 'use' of the firearm rather than simply assist in the crime underlying the § 924(c)[] violation." *Sorrells*, 145 F.3d at 754 (emphasis added). Without this crucial link, the government can use an aiding and abetting theory to charge a defendant under Section 924(c) for conduct that would never establish culpability as a principal.

This case vividly illustrates how the minority rule divorces punishment from culpability. The Section 924(c) conviction increased petitioner's sentence from four years of imprisonment to *fourteen*. And yet there was no requirement that petitioner have any involvement besides "kn[owing] his cohort used a firearm in the drug trafficking crime," App., *infra,* 7a—even if he learned of its use only when the firearm was discharged. As the government aptly characterized the rule, it is enough if petitioner was "present and active at a drug deal when shots are fired." *Id.* at 34a. The minority rule thus permits a person convicted of aiding and abetting to be punished as a principal for conduct substantially less culpable than that of the person who actually used the firearm. That cannot be the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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