

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

JOEL RIVERA - Petitioner,

v.

UNITED STATES OF AMERICA - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

[1] WHETHER ROSEMUND v. UNITED STATES, 134 S.Ct. 1240 (2014), WAS WRONGLY INTERPRETED AND APPLIED BY THE SEVENTH CIRCUIT COURT OF APPEALS WHEN IT UPHELD MR. RIVERA'S CONVICTIONS FOR AIDING AND ABETTING MR. THOMAS'S ARMED ROBBERIES OF THE TWO DOLLAR STORES EVEN THOUGH NO EVIDENCE WAS PRESENTED AT TRIAL THAT MR. RIVERA KNEW MR. THOMAS WAS GOING TO COMMIT THE ROBBERIES, THAT MR. RIVERA TOOK ANY ACT IN FURTHERANCE OF THE ROBBERIES, OR THAT MR. RIVERA HAD ADVANCE KNOWLEDGE THAT MR. THOMAS WAS GOING TO USE A GUN DURING THE ROBBERIES.

[2] WHETHER THE COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO GRANT MR. RIVERA A NEW TRIAL EVEN THOUGH MR. THOMAS WAS [NOT] A CREDIBLE WITNESS AND NO OTHER EVIDENCE CORROBORATED THAT MR. RIVERA AIDED AND ABETTED MR. THOMAS'S ROBBERIES OF THE TWO DOLLAR STORES AND BRANDISHING OF A FIREARM DURING A CRIME OF VIOLENCE.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Joel Rivera, through PRO SE, respectfully
prays that a writ of certiorari issue to review the judgment
of the United States Court of Appeals for the Seventh Circuit
in case No. 18-1187, entered on August 27, 2018. No petition
for rehearing **en banc** was filed in this case.

OPINION BELOW

On August 27, 2018, a panel of the Court of Appeals entered
its ruling affirming Mr. Rivera's 432-months' sentence. The
Court of Appeals' decision is published at .
Mr. Rivera was sentenced in the United States District Court for
the Eastern District of Wisconsin, which did not issue any
published decisions related to his sentence.

JURISDICTION

The Court of Appeals entered its judgment on August 27, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2

Federal Rule of Criminal Procedure 29(c)

Federal Rule of Criminal Procedure 33(a)

STATEMENT OF THE CASE

The case at bar, arises out of a ten-count indictment alleging that Mr. Rivera and Antonio Thomas committed five armed robberies in Milwaukee, Wisconsin between January 4 and January 17, 2017. It was undisputed that Mr. Thomas --and not Mr. Rivera-- actually committed each robbery, that no one ever saw Mr. Rivera carrying a weapon, and that Mr. Rivera neither threatened nor demanded money of anyone. Yet a jury convicted Mr. Rivera of aiding and abetting two of Mr. Thomas's five armed robberies. And it did so based primarily on Mr. Thomas's shifting, inconsistent, and incentivized testimony. Mr. Rivera, who is twenty-nine years old, is now facing a thirty-six year prison sentence for robberies he did [not] personally commit. The evidence does not support the convictions, and the Court should correct this injustice.

The indictment alleges that Mr. Rivera and Mr. Thomas knowingly possessed and brandished a firearm while robbing two

Mexican restaurants, a Subway sandwich restaurant, and two Family Dollar convenience stores. Mr. Rivera and Mr. Thomas were charged with five counts of Hobbs Act Robbery and five counts of knowingly possessing and brandishing a firearm during a crime of violence. Mr. Rivera was charged and tried as an aider and abettor. Before trial, and after realizing he faced a mandatory minimum sentence of 107 years' imprisonment, Mr. Thomas agreed to testify against Mr. Rivera in exchange for a plea deal.

I. TRIAL

In the case at bar, Mr. Thomas was the Government's primary witness in support of its theory that Mr. Rivera was the mastermind of the criminal operation who supplied Mr. Thomas with transportation to, and the firearm used in, each robbery. However, Mr. Thomas was [NOT] a credible witness. And his inconsistent testimony, along with the other circumstantial evidence presented at trial, failed to establish that Mr. Rivera knew Mr. Thomas was going to commit the robberies, that Mr. Rivera did anything to facilitate the robberies after learning Mr. Thomas's plan, or that Mr. Rivera knew Mr. Thomas possessed a gun before any of the robberies. The jury agreed there was insufficient evidence to convict Mr. Rivera on any of the six charges stemming from the first three robberies. But the jury inexplicably convicted Mr. Rivera of the four charges arising out of the last two robberies. Although Mr. Rivera only appealed his convictions relating to two of the above mentioned robberies, he provides herein the

testimony and evidence presented at trial concerning [a]ll five robberies.

[A]. THE JURY DID NOT FIND MR. RIVERA GUILTY ON ANY CHARGES RELATING TO THE FIRST THREE ROBBERIES.

The first robbery occurred on January 4, 2017, at Taqueria Los Gallos. Mr. Thomas testified that Mr. Rivera drove them to the restaurant in a silver Honda Odyssey owned by Orlando Ortega, a relative of Mr. Rivera's girlfriend, Emily Zayas. According to Mr. Thomas, Mr. Rivera parked the van near the restaurant and handed Mr. Thomas a book bag containing clothes and a nickel-plated .9 millimeter Luger. Mr. Thomas then entered the restaurant and carried out the robbery using the firearm. Mr. Thomas then ran out of the restaurant and back to the van where Mr. Rivera waited. The jury **acquitted** Mr. Rivera of both counts relating to this robbery (Counts 1 and 2).

The second robbery occurred on January 5, 2017, at Taqueria Arandas. Mr. Thomas testified that Mr. Rivera again drove them to the restaurant in the silver Odyssey. According to Mr. Thomas, Mr. Rivera went into the restaurant first and ordered food. Mr. Thomas then entered, carried out the robbery with a firearm, and returned to the van. Mr. Thomas claimed that Mr. Rivera joined him in the van a few minutes later. The jury **ACQUITTED** Mr. Rivera of the firearm count for this robbery (Count 4) and **could not** reach a verdict on the robbery count. (Count 3).

The third robbery occurred on January 9, 2017, at a Subway

sandwich restaurant. Although Mr. Thomas claims that Mr. Rivera drove him in the silver Odyssey to the restaurant, Mr. Thomas testified that this robbery was his idea. Mr. Thomas testified that Mr. Rivera entered the restaurant first and ordered a sandwich. Mr. Thomas then entered, demanded money from the employees, and exited the restaurant while Mr. Rivera stood by the front door. Mr. Thomas claimed that the two men later met at the van parked nearby. The jury **could not reach a verdict** on either the robbery (Count 5) or the firearm (Count 6) count arising out of this incident.

[B]. THE JURY FOUND MR. RIVERA GUILTY ON THE CHARGES RELATING TO THE TWO DOLLAR STORE ROBBERIES.

Even though the jury did not believe Mr. Thomas's testimony on the first three robberies and did not find Mr. Rivera guilty on any of the charges relating to them, the jury found Mr. Rivera guilty on the robbery and firearm charges arising out of the fourth and fifth robberies. Mr. Thomas was again the primary source of evidence on these robberies.

(1). 13th Street Dollar Store (Counts 7 and 8)

The fourth robbery occurred on January 11, 2017, at a Family Dollar store located on 13th Street and Oklahoma. Mr. Thomas testified that Mr. Rivera drove them to the store in the silver Odyssey and parked off 14th Street. Mr. Thomas initially said he could not recall whether he and Mr. Rivera talked about anything before entering the store. But he twice swore on direct examination that the robbery was "**spontaneous.**"

According to Mr. Thomas, Mr. Rivera went into the store first while he waited in the van. Mr. Thomas testified that he then "put on the equipment that he gave me, the book bag, and I walked through the yard --through the alley and in the front door of the Family Dollar." Mr. Thomas **did not** clarify who gave him this equipment or book bag, whether it was the same equipment or book bag he purportedly received before the first robbery, or what was in the book bag. Although Mr. Thomas said he had the same gun that Mr. Rivera gave him, Mr. Thomas failed to indicate **when** Mr. Rivera gave him the gun (e.g., before the first robbery or before this robbery) or whether Mr. Rivera **KNEW** he had the gun in the moments before the robbery. No other evidence established either fact.

Upon entering the store, Mr. Thomas approached the cash registers with the gun and demanded the money. After receiving it, Mr. Thomas left the store and ran back to the van. Mr. Rivera came out two or three minutes later. Mr. Thomas testified that they then went home and split the money. There is no corroboration that Mr. Rivera received any money.

The Government asked Mr. Thomas whether he could "see where Mr. Rivera was while you were demanding the money from these cashiers." Mr. Thomas responded: "**No, ma'am.** He was somewhere in the aisles. I don't recall exactly where he was at." Mr. Thomas contradicted himself moments later when he speculated that Mr. Rivera kept customers in the back of the store so he could commit the robbery without interference. The Government sought to corroborate Mr. Thomas's claim with surveillance

videos. However, no portion of the videos show Mr. Rivera keeping customers in the back of the store. The video evidence merely shows Mr. Rivera walking up and down the aisles, making an ambiguous hand gesture on his way out of the store, and standing in the parking lot talking to other customers.

Mr. Thomas admitted on cross-examination that the videos do not show Mr. Rivera holding customers in the back. And Mr. Thomas said the reason he thought Mr. Rivera kept people in the back of the store was that "nobody [was] in the front of the store when I was robbing the place." Then, contrary to his prior testimony that he did not recall whether he and Mr. Rivera discussed anything before the robbery, he said: "That's what we talked about before we left... We discussed it in the car." He **contradicted** himself again a moment later when he confirmed that the robbery was "**spontaneous**" and that "**[they] didn't talk about it beforehand.**"

(2). 76th Street Dollar Store (Counts 9 and 10)

The last robbery occurred on January 17, 2017, at a Family Dollar store located in a strip mall on 76th Street and Hampton. Mr. Rivera drove himself, Mr. Thomas, and Ms. Zayas in the silver Odyssey to the strip mall. Mr. Thomas testified that he understood they were going there so Ms. Zayas could "steal[] some stuff for the house." Mr. Rivera parked the van behind the Save-A-Lot on 77th Street and Luscher. Ms. Zayas exited the van first, followed by Mr. Thomas. Mr. Rivera stayed in the van.

Mr. Thomas testified that he entered the store and saw the register unattended. He then pulled out a gun and demanded the money. After an employee placed the money in a bag, Mr. Thomas left the store and walked through the mall to the van parked on Luscher Street where Mr. Rivera waited. Mr. Thomas got in the van followed by Ms. Zayas. Mr. Thomas testified that they drove off as they were followed by police. Mr. Thomas said that Ms. Zayas then looked in the bag containing the money and noticed a tracking device. Ms. Zayas threw the tracker out the window as they entered the highway. Mr. Thomas testified that the proceeds were divided between himself and Mr. Rivera. No evidence corroborated that Mr. Rivera ever received any of the money.

Ms. Zayas also testified in exchange for dismissal of the charges against her for aiding and abetting this robbery. The charges against Ms. Zayas were dismissed on October 4, 2017, in consideration for her testimony. Ms. Zayas testified that they went to the store so she could "buy a comforter." After first exiting the van, she went to the Save-A-Lot but did not buy anything. She then went to the dollar store. Ms. Zayas saw Mr. Thomas commit the robbery while she was leaving the store. After leaving, she could not find the van, but eventually found it on the corner of the Save-A-Lot.

Mr. Thomas was already inside the van when Ms. Zayas entered. She testified that she then observed "a hysterical argument in the car. Me. and [Mr. Rivera] were confronting [Mr. Thomas] why

he did that. And [Mr. Rivera] was asking [Mr. Thomas] to get out the car." Ms. Zayas further testified: "[Mr. Rivera] wanted [Mr. Thomas] to get out the car and made a couple attempts to stop for him to get out the car; but because we could hear sirens everywhere, we kept driving." There is no evidence to the contrary. Ms. Zayas testified that the sirens ceased after she threw the tracker out of the van.

**II. MR. RIVERA'S MOTION FOR A JUDGMENT OF
ACQUITTAL OR FOR A NEW TRIAL**

After the jury rendered its verdict (and the district court declared a mistrial on Counts 3, 5, and 6), Mr. Rivera moved under Federal Rules of Criminal Procedure 29(c)(1) and 33(a) for a Judgement of Acquittal or, alternatively, for a New Trial on Counts 7 through 10.

Mr. Rivera argued there was **no evidence** demonstrating he had **advance knowledge** that Mr. Thomas was armed or was going to commit the robberies at the dollar stores. Mr. Rivera also explained that the evidence did not establish that he facilitated the robberies once he obtained such knowledge. Mr. Rivera stressed that Mr. Thomas was **NOT** a credible witness. Mr. Thomas had admitted lying multiple times and repeatedly contradicted himself between his direct and cross-examination. He also had a meltdown while on the stand, causing him to curse and use profanities in open court.

ON January 12, 2018, the district court denied Mr. Rivera's

motion. IN concluding there was sufficient evidence that Mr. Rivera aided and abetted both dollar store robberies and Mr. Thomas's use of a firearm, the court reasoned that Mr. Rivera must have known about the robberies because "how is it that they ended up in the same place at the same time four different times... Mr. Thomas, who doesn't have a Driver's License, who doesn't own a car, who doesn't have anywhere to live, happens to appear at the same location." The Court also stated that circumstantial evidence showed Mr. Rivera knew Mr. Thomas was going to rob the dollar stores with a gun "because he'd done it with a gun at every other robbery that had taken place up until that point at which Mr. Rivera had been present." The court also cited the circumstances surrounding Mr. Rivera's arrest. The court noted that there was "an extensive period of time in which the police were asking for access [to his home] and Mr. Rivera and Ms. Zayas were denying that access." The court relied on this evidence to show advance knowledge even though Mr. Rivera was arrested after the robberies.

The court then concluded there was evidence that Mr. Rivera facilitated the dollar store robberies based on a "pattern of conduct." According to the court, there was circumstantial evidence that "Mr. Rivera played a role in going in, checking the place out, seeing what the layout was and then being there, **I suspect**, in some ways to make sure that Mr. Thomas did what they had agreed he would do, given the fact that Mr. Thomas was a bit unpredictable." The court stated that this pattern continued at the dollar stores, where video "captured

Mr. Rivera walking up and down the aisles and kind of making a signal, a hand signal to the people who are in the store." The court did not acknowledge that Mr. Rivera **never entered** the 76th Street dollar store.

The court also denied Mr. Rivera's alternative request for a new trial. In doing so, the court agreed that "Mr. Thomas was untruthful," and that there were "parts of Mr. Thomas's testimony that weren't reliable." The court also acknowledged that Mr. Thomas "took prescription medication... for racing thoughts," that he "doesn't process information the same way perhaps that everyone else processes information," and that he became frustrated and angry during cross-examination in a manner that was "not normal courtroom decorum."

But the court concluded that none of these factors rendered Mr. Thomas's testimony incredible as to warrant a new trial. The court determined that Mr. Thomas's behavior was not, on its own, "sufficient to undermine his credibility **in its entirety.**" And the court ruled that Mr. Thomas's untruthfulness with police did not alone "indicate that one must discard **all** of [his] testimony as being incredible." Further, even though Mr. Thomas's testimony was "back and forth" on some issues, that was "not dispositive" of whether "his testimony was credible."

The court reasoned that Mr. Thomas's admission that he had lied to police actually sustained his credibility. And the court noted that some of his testimony was corroborated by other

evidence. For instance, video evidence corroborated that Mr. Rivera went into Taqueria Aranda, Subway, and the 13th Street dollar store. There was also corroborating evidence that Ms. Zayas got a comforter from the dollar store on 76th Street. In the end, the court concluded that "to wholesale discard Mr. Thomas's testimony would... be the sort of miscarriage of justice that... Rule 33 is designed to prevent."

Thus, the court sentence Mr. Rivera to 432 months' (thirty-six years) imprisonment.

Hence, this petition follows:

REASONS FOR GRANTING THE WRIT

[1] WHETHER ROSEMOND v. UNITED STATES, 134 S.Ct. 1240 (2014), WAS WRONGLY INTERPRETED AND APPLIED BY THE SEVENTH CIRCUIT COURT OF APPEALS WHEN IT UPHELD MR. RIVERA'S CONVICTIONS FOR AIDING AND ABETTING MR. THOMAS'S ARMED ROBBERIES OF THE TWO DOLLAR STORES EVEN THOUGH **NO EVIDENCE** WAS PRESENTED AT TRIAL THAT MR. RIVERA KNEW MR. THOMAS WAS GOING TO COMMIT THE ROBBERIES, THAT MR. RIVERA TOOK ANY ACT IN FURTHERANCE OF THE ROBBERIES, OR THAT MR. RIVERA HAD KNOWLEDGE THAT MR. THOMAS WAS GOING TO USE A GUN DURING THE ROBBERIES.

The question whether ROSEMOND was wrongly interpreted and applied by the Seventh Circuit, turns on whether there was sufficient evidence that Mr. Rivera had **advanced knowledge** that Mr. Thomas would rob the stores, and that he would do so using a hand-gun.

As properly held by this Honorable United States Supreme

Court, a person is guilty of aiding and abetting a crime only if he "takes an **affirmative act** in furtherance" of the offense "**with the intent of facilitating** the offense's commission." ROSEMOND v. UNITED STATES, 134 S.Ct. 1240, 1245 (2014) (emphases added); see 18 U.S.C. § 2(a). To aid and abet an 18 U.S.C. § 924(c) offense, the person must facilitate the use of the firearm or the underlying offense, **and intend** that both the firearm use and the predicate offense succeed. ROSEMOND, 134 S.Ct. at 1247-48. The person **MUST** have "advance knowledge" that his cohort has and is going to use a gun to carry out the underlying crime. *Id.* at 1249. Here in the case at bar, the district court erred when it ruled that sufficient evidence was presented at trial to uphold Mr. Rivera's convictions for aiding and abetting Mr. Thomas's robberies of the dollar stores. The evidence was wholly insufficient to show Mr. Rivera knew Mr. Thomas's **plan** to rob the stores, facilitated Mr. Thomas's commission of the robberies, or had advance knowledge of Mr. Thomas's gun possession.

Even if credited, the evidence concerning the 13th Street dollar store failed to show anything other than Mr. Rivera accompanied Mr. Thomas to the store and was present during the robbery. However, as the district court instructed the jury, neither association with the perpetrator nor presence at the scene of the crime is sufficient to find guilt, beyond a reasonable doubt. Mr. Thomas testified repeatedly that the robbery was spontaneous and that he and Mr. Rivera never discussed the robbery beforehand. There is also **no evidence** --testimonial or otherwise-- that Mr. Rivera did anything to facilitate the robbery.

The evidence merely shows Mr. Rivera walking up and down the aisles and signaling to other patrons over a minute after the robbery's completion that the coast was clear. The evidence also failed to establish that Mr. Rivera knew Mr. Thomas had a gun, or that Mr. Rivera gave him a gun, in the moments leading up to the robbery. Indeed, Mr. Thomas only began to arm himself for the robbery **after** Mr. Rivera had left the van and gone inside the store.

The evidence is even more scarce concerning the 76th dollar store. Although there is evidence that Ms. Zayas may have planned to steal a comforter, there is no evidence that Mr. Thomas planned to rob the dollar store and that Mr. Rivera knew about his plan. And contrary to the district court's ruling that Mr. Rivera acted in accordance with a purported pattern of conduct in each instance, Mr. Rivera **never even went inside** the 76th Street dollar store. Also, the uncontroverted evidence shows that Mr. Rivera was irate with Mr. Thomas after learning he had robbed the store, demonstrating that Mr. Rivera learned about the robbery and Mr. Thomas's gun possession only **after** the robbery had occurred and police were in pursuit. However, at that point, Mr. Rivera had "no realistic opportunity to quit the crime" or "walk away." See, ROSEMOND, 134 S.Ct. at 1249-50.

At a minimum, this Honorable Court should REVERSE the district court's denial of Mr. Rivera's motion for a new trial because his convictions rested primarily on Mr. Thomas's

incredible and uncorroborated testimony. Mr. Thomas demonstrated that there was nothing he would not say so long as it served his interest in the moment. For instance, Mr. Thomas said that he was putting on an act and lying to police while in custody because he did not want to take responsibility, and that he only changed his story once a plea was on the table. He also falsely accused police of sexually assaulting him during his arrest, and gave inconsistent and shifting testimony throughout his direct and cross-examination. He even had a meltdown while on the stand, prompting the Government to question whether Mr. Thomas even knew what he was saying. Despite recognizing that Mr. Thomas gave inconsistent and unreliable testimony, the district court declined to evaluate whether there was any other evidence showing that Mr. Rivera aided and abetted Mr. Thomas's robberies. If it had, the court would have seen that there was no other evidence demonstrating Mr. Rivera's knowledge of and participation in the crimes. Hence, the district court's failure, and that of the Seventh Circuit, to perform a complete analysis was an abuse of discretion.

Thus, as properly held by this Honorable Supreme Court, a person is guilty under § 2(a) of **AIDING** and **ABETTING A CRIME**, and is therefore punishable as a principal, **ONLY** if he (1) "takes an affirmative act in furtherance of that offense," and (2) acts "with the intent of facilitating the offense's commission." **ROSEMOND v. UNITED STATES**, 134 S.Ct. 1240, 1245 (2014). The affirmative act requirement necessary to convict a person of

aiding and abetting a § 924(c) offense --a so-called "combination crime"-- is met when the person facilitates either the use of the firearm **or** the underlying offense. *Id.* at 1243, 1247. As for the intent requirement, the person's state of mind must "extend[] to the **entire crime**" --the "predicate crime **plus** gun use." *Id.* at 1248 (emphasis added). Thus, to show aiding and abetting a § 924(c) offense, the "defendant's knowledge of a firearm must be **advance knowledge**" --i.e., "knowledge that enables him to make the relevant legal (and indeed, moral) choice." *Id.* at 1249. The defendant's knowledge must come at a time when he "can do something with it --most notably, opt to walk away." *Id.* at 1249-50.

In the case at bar, the district court instructed the jury it could convict Mr. Rivera of aiding and abetting the use of a firearm during a crime of violence under § 924(c) only if the Government proved beyond a reasonable doubt that Mr. Rivera (a) had "advanced knowledge of... **another person's** use of a firearm in relation to the robbery offense," and (b) "having such knowledge, intentionally facilitated the robbery once so informed." The jury **WAS NOT ASKED**, and thus **DID NOT FIND**, whether Mr. Rivera also facilitated Mr. Thomas's use or brandishing of a firearm.

Hence, this Honorable Court should GRANT this Certiorari, and conclude that the Government **failed to establish** either that Mr. Rivera had advance knowledge of Mr. Thomas's plan to carry out the robberies **or** that Mr. Rivera did anything to facilitate Mr. Thomas's commission of the robberies after learning about them.

SECOND QUESTION PRESENTED

[2] WHETHER THE COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO GRANT MR. RIVERA A NEW TRIAL EVEN THOUGH MR. THOMAS WAS [NOT] A CREDIBLE WITNESS AND NO OTHER EVIDENCE CORROBORATED THAT MR. RIVERA AIDED AND ABETTED MR. THOMAS'S ROBBERIES OF THE TWO DOLLAR STORES AND BRANDISHING OF A FIREARM DURING A CRIME OF VIOLENCE?

At a minimum, a new trial is warranted because Mr. Rivera's convictions were based primarily on the incredible testimony of Mr. Thomas, who not only admitted to lying to police, but also contradicted himself on the stand time and time again. And without his testimony, there was no other evidence that Mr. Rivera aided and abetted the dollar store robberies. The district court denied Mr. Rivera's motion for a new trial because it believed that each instance of untruthfulness alone was insufficient to "wholesale discard" all of Mr. Thomas's testimony. But the district court misconstrued and thus misapplied the test applicable to new trial motions. The court's error and that of the Seventh Circuit, was an abuse of discretion that requires reversal.

The district court recognized that Mr. Thomas "had some issues with truthfulness," and that his testimony "shifted back and forth." IN fact, Mr. Thomas demonstrated that he was willing to say anything so long as it was convenient for him to do so at the time. For example:

* Mr. Thomas admitted that he was "putting on an act" and "lying the whole time" when he talked to police because he "didn't want to take responsibility." He said he changed his story only once he realized he was going to do all these years in prison."

- * Mr. Thomas told police Mr. Rivera kidnapped him and forced him to commit the robberies. He admitted on direct examination that this was a lie. Yet he claimed on cross-examination that Mr. Rivera threatened him at gunpoint and threatened to kill his family.
- * Mr. Thomas accused police officers of sexually assaulting him during his arrest.
- * Mr. Thomas told police that Mr. Rivera kept the gun in a safe. This was a lie. Police found no guns at Mr. Rivera's home.
- * Mr. Thomas initially testified that he wanted to rob the Subway because he had no money but wanted to buy something for his son. He later admitted he still had money from the first two robberies and, really, he wanted to buy drugs for himself.
- * Mr. Thomas shifted between bragging about being in charge of the robberies and saying he was not in charge.
- * Mr. Thomas took prescription medication for racing thoughts, and he had a meltdown on the stand during which he used profanities and refused to testify. His behavior was so peculiar that Government openly questioned whether Mr. Thomas "knows what he's saying." The district court similarly observed that Mr. Thomas's behavior was "not normal courtroom decorum."

Given the overall unreliability of Mr. Thomas's testimony, the district court should have considered whether any other evidence introduced at trial supports Mr. Rivera's convictions. See WASHINGTON, 184 F.3d at 658. If it had, the court would have realized that **nothing else shows** Mr. Rivera knew that Mr. Thomas was going to rob the dollar stores, that Mr. Rivera took any act in furtherance of the robberies, or that Mr. Rivera had advance knowledge that Mr. Thomas was going to use a gun. The only other relevant evidence is surveillance

video of the 13th Street dollar store showing Mr. Rivera walking up and down the aisles, and Ms. Zayas's testimony that Mr. Rivera drove her and Mr. Thomas to and from the strip mall. This scant evidence not only leaves a "strong doubt" as to Mr. Rivera's guilt, --it is also "woefully inadequate" to support the convictions. *Id.* at 658.

Even though the district court recognized that "Mr. Thomas was untruthful," the court ruled that his testimony was not so incredible that it had to be discarded "in its entirety," or that it would be a miscarriage of justice for Mr. Rivera's convictions to stand. The court's analysis was flawed.

First, instead of analyzing whether "the **complete record**" of Mr. Thomas's lies and inconsistency left "a strong doubt" as to Mr. Rivera's guilt, see WASHINGTON, 184 F.3d at 657 (emphasis added), the district court narrowly inquired whether each instance of lying or inconsistency, on its own, required the court to "wholesale discard" Mr. Thomas's testimony. The court concluded that Mr. Thomas's odd behavior during trial, alone, did not "undermine his credibility in its entirety;" that Mr. Thomas's "back and forth" testimony was "not dispositive" of whether he was credible; and that Mr. Thomas's untruthfulness with police did not, by itself, "indicate that one must assess whether Mr. Thomas's testimony as a whole left a strong doubt as to Mr. Rivera's guilty, given the lack of corroborating evidence that Mr. Rivera had the requisite intent or took acts in furtherance of the robberies. Instead of undertaking a piecemeal

analysis, the court was required to examine more broadly whether the totality of Mr. Thomas's untruthful, inconsistent, and unreliable testimony undermined his credibility. See, WASHINGTON, 184 F.3d at 657; UNITED STATES v. MORALES, 902 F.2d 604, 606-08 (7th Cir. 1990), modified by UNITED STATES v. MORALES, 910 F.2d 467 (7th Cir. 1990).

SECOND, the court believed Mr. Thomas's testimony could be saved by the fact that some of it was corroborated. For instance, video evidence corroborated his testimony that Mr. Rivera went into three of the establishments and that Ms. Zayas obtained a comforter from the 76th Street dollar store. But neither fact was necessary or sufficient to convict Mr. Rivera. Mr. Rivera's mere presence at the 13th Street dollar store is not enough to show knowledge and active participation. See JONES, 371 F.3d at 366. And the court itself acknowledged that the video of that robbery **did not show** Mr. Rivera keeping any customers in the back of the store. Moreover, evidence that Ms. Zayas may have planned to steal bedding is not evidence that Mr. Rivera **knew** Mr. Thomas was going to rob the 76th Street dollar store with a gun. No other evidence corroborated whether Mr. Rivera had the requisite intent or took any act in furtherance of either robbery. The court stated during sentencing that it did not feel comfortable relying on Mr. Thomas's testimony to find a fact by a preponderance of the evidence unless his testimony on that fact was corroborated. It is inconceivable why the court was comfortable allowing Mr. Rivera's convictions to stand, where

the convictions **must be proven by a more demanding standard**--BEYOND A REASONABLE DOUBT-- and the only possible evidence on the essential elements of the crimes was Mr. Thomas's **uncorroborated testimony.**

Hence, the Seventh Circuit erroneously upheld the district court abuse of discretion, when the district court failed to consider Mr. Thomas's testimony as a whole; and further misinterpreted and misapplied the holding in **ROSEMUND v. UNITED STATES**, 134 S.Ct. 1240 (2014), in the case at bar, as no other evidence supported the conclusion that Mr. Rivera aided and abetted the robbery or firearm offenses.

Thus, allowing Mr. Rivera's convictions to stand on such thin evidence is **WRONG**. See, **UNITED STATES v. FERGUSON**, 246 F.3d 129, 131 (2nd Cir. 2001) ("No harm and only good can come to our system of justice where we require the government to supply competent, satisfactory[,] and sufficient evidence to prove an element of criminal liability. To let a verdict stand on anything **less** is indeed a manifest injustice."). Id. This Honorable Supreme Court should GRANT Certiorari, Vacate Mr. Rivera's Convictions, and Remand for further proceeding in a New Trial, so that the Government can come forward with competent, reliable, and sufficient evidence of Mr. Rivera's guilt before he is left to spend the next **THIRTY-SIX YEARS** of his life in a federal penitentiary.

CONCLUSION

For the foregoing reasons, Mr. Rivera respectfully requests that this Petition for Writ of Certiorari be Granted.

Respectfully submitted,



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