No.__

IN THE
SUPREME COURT OF THE UNITED STATES

JOE FERNANDEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

1. Whether the failure to give an instruction on aider and abetter liability for a violation of 18 U.S.C. § 924(c) that comported with this Court's decision in Rosemond v. United States, 572 U.S. 65, 134 S. Ct. 124, 188 L. Ed.2d 248 (2014), is subject to a harmless error analysis; whether the error can be overcome by a showing that the evidence would have been legally sufficient had a proper instruction had been given. This is a question that was intentionally and specifically left unaddressed by this Court when it decided Rosemond.

STATEMENT OF PARTIES

The Petitioner is Joe Fernandez.

The Respondent is the United States of America.

The parties were the same in the District Court and before the United States Court of Appeals for the Second Circuit.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is not published and does not appear in Westlaw. In its Opinion, dated December 4, 2018, the Second Circuit affirmed the judgment of the United States District Court for the Southern District of New York, denying Fernandez' Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255. See Appendix, p. 1a. Fernandez' Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Summary Order dated March 7, 2019.

The Government and the District Court conceded that the proper instruction had not been given. The District Court nevertheless held the jury could not have convicted Fernandez without finding all of the elements necessary to convict had an instruction in accordance with Rosemond been given. The Court of Appeals affirmed, finding that the evidence was legally sufficient to prove Fernandez guilty had the proper instruction been given.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S. C. § 1254. The Order of the Court of Appeals sought to be reviewed was filed on December 4, 2018. Thereafter, on March 7, 2019, the Second Circuit denied a Motion for Rehearing and Suggestion for Rehearing En Banc.

Accordingly, this Petition for a Writ of Certiorari is timely, pursuant to U.S. Sup. Ct. Rule 13, 28 U.S.C. § 1254.

Appellate jurisdiction in Second Circuit was founded on 28 U.S.C. §1291, as it was an appeal is from a final judgment of the district court entered on November 13, 2017. A notice of appeal was timely filed on December 30, 2017.

Jurisdiction in the District Court was pursuant to 28 U.S.C. § 2255.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be ... be deprived of life, liberty, or property, without due process of law; ...

U.S. Const. Amend V.

STATEMENT OF THE CASE

This Petition addresses a matter intentionally left undecided by this Court when it decided Rosemond v. United States, supra. Specifically, whether a harmless error analysis applies to the failure to give an instruction that accords with its requirements:

In Rosemond, this Court noted:

> ... the Government argues that any error in the court's aiding and abetting instruction was harmless, because the jury must have found (based on another part of its verdict, not discussed here) that Rosemond himself fired the gun. Those claims were not raised or addressed below, and we see no special reason to decide them in the first instance.

> See Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co., 549 U.S. 443, 455, 127 S. Ct. 1199, 167 L. Ed.2d 178 (2007). Accordingly, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

Rosemond v. United States, supra, 572 U.S. at 81. The existence of sufficient evidence for a conviction without regard to the erroneous instruction was not held by this Court to obviate a Rosemond error.

A. The District Court Proceedings.

Petitioner Joe Fernandez stood trial on Indictment (S5) 10 Cr. 863 (AKH) in the United States District Court for the Southern District of New York before the Honorable Alvin K. Hellerstein and a jury, from February 19, 2013, to March 7, 2013. After a nine-day trial, Appellant was convicted of conspiracy to use interstate commerce facilities in the commission of murder-for-hire (18 U.S.C. § 1958) ("Count One"), and the use of a firearm in furtherance of a crime of violence resulting in the death of two victims (18 U.S.C. §§ 924(j)(1) & 2 ("Count Two"). On October 7, 2014, Fernandez was sentenced to two consecutive life sentences, which he is serving.

The testimony of the government's witnesses at trial was rife with inconsistencies. The only "percipient witness" was Patrick Darge, a two-time cooperator who acknowledged lying in his prior cooperations in order to protect his younger brother Alain, by failing to tell the government about numerous shootings in which his younger brother had participated. He admitted that he did not tell the Government about 3 other murders-for-hired he'd committed (none of them with the assistance of Mr. Fernandez, some with a different cousin). Patrick Darge claimed to

have been the first shooter, but his gun jammed and he fled. He did not see the second shooter, who killed the second victim, and admitted that he could not rule out Alberto Reyes, a conspirator in the building at the time of the murders, as the second shooter. He testified that Louis Rivera was the driver who took him and Fernandez to the building where the murder would take place.

The forensic evidence made clear that there were two guns on the scene, but both were firing .380s. Patrick Darge testified he had a .380, but Fernandez had a much larger gun – two and a half or three feet long. Fernandez could not have been the second shooter. This raises reasonable doubt as to whether Fernandez was the second shooter or if he had any role at all in the offense.

Alain Darge, a/k/a "Boozer,"[1] the murderous younger brother, whom Patrick previously lied to protect, claimed Fernandez confessed to him ten years after the crime. In direct contradiction to his brother, Alain testified that Fernandez claimed he was the first shooter whose gun jammed; Patrick Darge took over the shooting. He claimed Fernandez told him that Alberto Reyes (a/k/a "Zak") was the driver, not Rivera. Fernandez' description of the crime, as alleged by Alain Darge, contradicted Patrick Darge's description in every critical respect, with the sole exception of the contention that Fernandez participated.

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[1] Jeffrey Minaya, the head of the drug organization and who paid for the murders, testified that when the murders occurred he thought Alain Darge, might be the second shooter.

Mendez testified that Fernandez, into whose cell Patrick Darge steered Fernandez, confessed to him during their brief five days together, that he was in jail because:

> A. He told me it was because of his participation with Patrick, and Patrick was the one who brought him into it.
>
> * * *
>
> That Patrick had called him so that they could get together in a certain area, and Patrick told him to bring a weapon, sir.

Tr. 705.[2] The prosecutor did not clarify what type of weapon Fernandez was asked to bring. Instead, the he asked Mendez to specify exactly what Fernandez said.

> Q. What exactly did the defendants (sic) say, Mr. Mendez?
>
> A. The defendant told me that he participated with Patrick and that his incarceration was due to the fact that he had participated with Patrick.

Tr. 706. Glaringly absent is testimony from Mendez that Fernandez knew Patrick would be armed or that Fernandez admitted he actually brought a weapon as requested. What is clear is that, when asked by the prosecutor for an exact recitation of what Fernandez had said, Mendez averred only that Fernandez said he participated with Patrick Darge.

The jury's requests for readbacks demonstrate that it relied upon Mendez' testimony when it convicted Joe Fernandez. The juries first note requested transcript excerpts, among which were Patrick Darge's testimony concerning his "conversation

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[2] Numbers preceded by "Tr." refer to the pages of the trial transcript where the testimony, evidence or colloquy may be located.

with Joe about murder plot" and the "conversation with Joe in prison." The jury also requested Jeffrey Minaya's testimony concerning "his understanding as to who the second shooter was," and Alain Darge's testimony concerning "when he met with Joe at Christian Guzman's apartment and Joe confessed to him." Tr. 1078-79.

The testimonies of Patrick Darge and Alain Darge were so diametrically opposed to one another in too many material facts that the jurors could not rely on them. They thus requested the transcripts of Alberto Reyes' and Yubel Mendez-Mendez' testimonies, as well as a copy of a photo of the crime scene. Tr. 1082-83. Reyes had testified that he was a member of the alleged murder-for-hire conspiracy, but was unable to identify Fernandez as the second shooter.[3] Tr. 77. Nothing in his testimony would have provided the jury with information as to Fernandez knowledge or participation in the murders.

It was Mendez' testimony that carried the day for the Government. He testified Fernandez admitted participating, and that was enough for the jury to convict under the instruction given by the Court. It would not have been enough under Rosemond. The jurors did not even have to weigh the absurd description of the weapon Fernandez allegedly was carrying in determining whether Fernandez agreed to participate. They did not have to decide if Alain Darge was the second shooter, as originally believed by Minaya. All they had to decide was that Fernandez was

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[3] Reyes testified that he drove the murder victims, Arturo Cuellar and Vivero Flores, to the apartment building and was waiting for the elevator with them when he heard the first shot. He turned around to see Patrick Darge with another man, whose face he did not see, and ran. Tr. 69-71.

"involved," which was the one consistent allegation from the Darge brothers and Mendez.

When petitioner was convicted on March 7, 2013, Rosemond had not yet been decided. This Court decided Rosemond on March 4, 2014. Fernandez' Brief-on-Appeal for his direct appeal was filed nine months later, on November 3, 2014. Rosemond, however, applies retroactively on collateral review. Farmer v. United States, 867 F.3d 837, 842 (7th Cir. 2017) ("Rosemond established a new substantive rule that is retroactive to cases on collateral review").

Mr. Fernandez' appellate counsel did not avail himself of the benefits of this change in law, rendering his performance deficient. Appellate counsel instead argued, instead, that the evidence at trial was insufficient to convict Mr. Fernandez, as it relied upon the testimony of Patrick Darge, a habitual liar. Although appellate counsel ignored a stronger argument in favor of one that had virtually no chance of succeeding under case law, his argument was not specious. Fernandez was not charged with being a member of the drug conspiracy that sanctioned the double homicide. He had nothing to do with that criminal enterprise. Fernandez' sole prior brush with the law was a charge of impaired driving several years ago. Of all the members of the narcotics conspiracy to testify, only the Darge brothers knew Fernandez, who was their cousin.

Fernandez' direct appeal was denied on May 2, 2016. United States v. Fernandez, 648 F. App'x 56, 59 (2d Cir. 2016), and the Supreme Court denied his

Petition for Writ of Certiorari. Fernandez v. United States, No. 17-5760, 2017 WL 4506869 (Oct. 10, 2017).

On June 27, 2017, Fernandez filed a timely pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255. That Petition argued that Fernandez received ineffective assistance of appellate counsel, as his appellate attorney failed to address the incorrect jury instruction given on aiding and abetting under Rosemond v. United States.

The District Court and the government agreed that the District Court's instruction comported with neither Rosemond nor the Second Circuit's pre-Rosemond instruction, which placed a high burden on the government to prove accomplice liability for a violation of 18 U.S.C. § 924(c). On November 13, 2017, the Honorable Alvin K. Hellerstein denied the Petition but granted a Certificate of Appealability, as his jury instructions were at issue. See Appendix at 16a.

B. Proceedings in the Court of Appeals for the Second Circuit.

The panel decision denied relief. Noting Fernandez had a nonfrivolous claim that his appellate counsel was ineffective for failing to raise the issue of the erroneous jury instruction (decision at 3, Appendix at 3a) the Court of Appeals held, in its memorandum decision:

> [B]ecause there was considerable evidence that Fernandez had advance knowledge of the use of a firearm in the commission of the murder-for-hire (and in fact brought a firearm to the murder site himself), we cannot say that Fernandez has shown that the erroneous jury instruction worked to his "actual and substantial disadvantage." United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 71

> L.Ed.2d 816 (1982); see also United States v. Prado, 815 F.3d 93,104-05 (2d Cir. 2016) (holding [1] that a defendant had not shown prejudice from a jury instruction that failed to comply with Rosemond where "[t]he evidence demonstrate[d] that, after the gun appeared, [the defendant] continued to play an active role in the crime" and [2] that a co-defendant was prejudiced by the erroneous instruction because "there [wa]s very limited evidence of advance knowledge of a gun or of [the co-defendant's] participation in the crime after the gun's appearance").

Panel decision at 4 (Appendix at 4a).

The Panel decision recast Fernandez' appellate argument, claiming:

> Fernandez argues that the jury could have found from the evidence that he was involved in the murder but that he was not carrying a firearm and lacked advance knowledge that Darge would have a firearm. According to Fernandez, the jury could have believed Darge's testimony that Fernandez was involved, but rejected Darge's testimony that Fernandez brought a firearm to the scene or knew that Darge intended to bring a firearm--a finding that would align Darge's testimony with the (otherwise inconsistent) testimony of the other two primary witnesses. Fernandez argues that he was prejudiced because, if the jury made such a finding, they would have found him innocent under the correct instruction.
>
> * * *
>
> But while it might have been possible for the jury to credit the testimony in such a way and make such a finding, a mere possibility that the jury could have done so is not enough. See United States v. Frady, supra, 456 U.S. at 170. Fernandez bears the burden of showing that the erroneous instruction actually disadvantaged him, not that prejudice was possible.

Panel decision at 5 (Appendix at 5a).

Fernandez' Brief-on-Appeal made no such argument.[4] It analyzed the jury's requests for readbacks to demonstrate that the District Court erred in finding there was no set of facts from which the jury could have convicted Fernandez without finding he knew in advance that a gun would be present.

[4] Petitioner also argued that he is actually factually innocent.

REASONS FOR GRANTING THE WRIT

In Rosemond v. United States, supra, this Honorable Court held the trial court's jury instructions erroneous because they failed to require that Rosemond know in advance that one of his cohorts would be armed. The Rosemond Court held that, for a defendant to be liable as an accessory to a 924(c) violation,

> ... the § 924(c) defendant's knowledge of a firearm must be advance knowledge - or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an armed offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun. As even the Government concedes, an unarmed accomplice cannot aid and abet a § 924(c) violation unless he has "foreknowledge that his confederate will commit the offense with a firearm." For the reasons just given, we think that means knowledge at a time the accomplice can do something with it - most notably, opt to walk away.

572 U.S. at 70, 134 S. Ct. at 1251 (citations omitted).

That decision, however, left open the question of whether harmless error would apply to a violation of the prior knowledge requirement. It language that evokes the situation at bar, the Court held:

> Second, the Government argues that any error in the court's aiding and abetting instruction was harmless, because the jury must have found (based on another part of its verdict, not discussed here) that Rosemond himself fired the gun.

Those claims were not raised or addressed below, and we see no special reason to decide them in the first instance. See Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co., 549 U.S. 443, 455, 127 S. Ct. 1199, 167 L. Ed.2d 178 (2007). Accordingly, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

Rosemond v. United States, supra, 572 U.S. at 81.[5] This Court has never held that the existence of legally sufficient evidence for the conviction had a proper instruction been given does not obviate a Rosemond error.

We contend that this error is not subject to harmless error analysis but, rather, requires reversal and remand for a new trial.

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[5] Under a harmless error analysis, Patrick Darge's testimony would be sufficient to convict Mr. Fernandez if it was not completely contradicted by the physical evidence. Darge claimed he carried a .380 pistol, while Fernandez carried a larger gun, with a barrel two the three feet long. Tr. 308. Patrick Darge testified he shot Cuellar in the head with a .380. That gun then jammed before he could fire a shot at Flores. Tr. 427. He ran and heard two or three shots. That testimony is completely and provably false.

Detective Salvatore LaCova testified that he examined 15 shell casings recovered from the crime scene. One was a .9 mm casing. The other fourteen were .380 auto caliber cartridge casings, all of which were fired by the same firearm. Tr. 772-73. That single .380 firearm, which Patrick Darge admitted shooting into the head of one victim, in fact killed both. Detective LaCova testified that all of bullets (three) recovered from the bodies of the victims following the autopsies came from the same .380 firearm. Tr. 774-75. One of the .380 caliber cartridges recovered from the crime scene was a "complete unit of ammunition," which had not been fired but showed evidence of a "firing pin strike," indicating that "there was an attempt for somebody to fire that cartridge." Tr. 770-73.

Thus, while there was indeed a misfire of the .380, the gun that misfired also killed both victims. Patrick Darge fired that gun not twice but 14 times, including the misfires. One perpetrator killed both victims, and that shooter was Patrick Darge (whom the trial court sentenced to 30 years incarceration despite his cooperation). This witness, whose perjury is provable, was the only person to put Fernandez on the scene or to put a gun in Fernandez' hand or within his prior knowledge. The gun he described Fernandez possessing and putting together simply did not exist. The physical evidence makes impossible Patrick Darge's testimony.

No evidence is sufficient to overcome physical impossibility. Fernandez is actually, factually innocent of the murders for hire.

ARGUMENT

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER GIVING AN INSTRUCTION ON CO-CONSPIRATOR LIABILITY UNDER 18 U.S.C. § 924(c) THAT FAILED TO COMPORT WITH ROSEMOND IS SUBJECT TO HARMLESS ERROR ANALYSIS.

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A. Legal Standards.

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law." U.S. Const. Amend 5. The Supreme Court has held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. United States v. Gaudin, 515 U.S. 506, 509-11, 115 S. Ct. 2310, 2313-14, 132 L. Ed. 2d 444 (1995) (citing Sullivan v. Louisiana, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 2080-81, 124 L. Ed.2d 182 (1993)).

Instructions that allow a jury to convict without finding every element of the offense violate In re Winship 's requirement that "every fact necessary to constitute the crime" must be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Due process "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, supra, 515 U.S. at 510. An instruction that relieves the Government of the burden of proving mens rea beyond a reasonable doubt contradicts the presumption of innocence and invades the function of the jury, violating the due

process clause. See Sandstrom v. Montana, 442 U.S. 510, 521-24, 99 S. Ct. 2450, 61 L. Ed.2d 39 (1979); United States v. Gaudin, supra 515 U.S. at 509-11, 115 S. Ct. at 2313-14 (the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged). Every federal court to consider the question since this Court decided In re Winship has agreed that a conviction procured without a jury instruction on an essential element of the offense is constitutionally invalid. Osborne v. Ohio, 495 U.S. 103, 122-24 & n. 17, 110 S. Ct. 1691, 109 L. Ed.2d 98 (1990) (omission of element from jury instructions violates due process).

B. Application of the Law to the Facts.

Here, the erroneous instruction provided the jury with a shortcut to returning a conviction without the necessity of finding every element of the offense. This permitted a conviction on a legally inadequate ground. Yates v. United States, 354 U.S. 298, 312, 77 S. Ct. 1064, 1073, 1 L. Ed.2d 1356 (1957) (citing Stromberg v. California, 283 U.S. 359, 367-68, 51 S. Ct. 532, 535, 75 L. Ed. 1117 (1931). This prejudice infected the entire trial as it deprived Joe Fernandez of due process of law.

In Stromberg v. California, supra, this Court set aside a conviction that could have been predicated on any one of three clauses of a statute because one of those possible bases punished conduct protected by the first Amendment. The Stromberg Court held: "The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside." Id. at 370, 51 S. Ct. at 536; see also Yates v. United

States, supra, 354 U.S. at 312, 77 S. Ct. at 1073 (conviction vacated where one of two possible bases for conviction violated the statute of limitations, applying Stromberg to a verdict in which one possible basis of conviction was not unconstitutional but, rather, was simply legally inadequate).

Because there was a clear due process violation to Fernandez as a result of the erroneous instruction, and because it is an open question as to whether harmless error applies to a Rosemond violation, it is respectfully requested that this Court hear this cause. Because it should be determined whether the mere possibility that the jury viewed the evidence in a manner that could have resulted in a conviction without finding prior knowledge of a gun (as acknowledged in the panel decision at 5) this Court should review whether that mere possibility requires remand for a new trial. We contend harmless error analysis does not apply to a Rosemond violation.

Thus, we move that this Court grant this Petition and grant the Writ.

CONCLUSION

The Petition should be granted.

JOE FERNANDEZ by his attorney

Dated: May 16, 2019

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CERTIFICATE OF SERVICE

Ruth M. Liebesman, an attorney-at-law duly authorized to practice law before this Court, hereby certifies that, on the date set forth below, she caused a copy of the foregoing brief-on-appeal to be served the following persons by causing copies to be mailed to them via first-class mail, postage prepaid, to:

Noel Francisco, Solicitor General
United States Department of Justice
Office of the Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Dated: May 16, 2019

/s/ Ruth M. Liebesman
Ruth M. Liebesman