No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 2019 TERM

DENNY REYES,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

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

BARCLAY T. JOHNSON
Assistant Federal Public Defender
Counsel of Record

MICHAEL L. DESAUTELS
Federal Public Defender
126 College Street, Suite 410
Burlington, Vermont 05401
802-862-6990
michael_desautels@fd.org
barclay_t_johnson@fd.org

QUESTIONS PRESENTED FOR REVIEW

Whether the intent element of 18 U.S.C. § 2(a) can, consistent with this Court's decision in *Rosemond v. United States*, 572 U.S. 65 (2014), be satisfied by a mens rea of recklessness in a prosecution for aiding and abetting a violation of 8 U.S.C. § 1324(a).

Whether, and to what extent, an aider and abettor must know the facts that make up the elements of the principal offense in advance of the crime.

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

Petitioner, Denny Reyes, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 20, 2019.

OPINIONS AND ORDERS ENTERED BY THE COURTS BELOW

The decision of the United States Court of Appeals for the Second Circuit was entered on November 20, 2019, in Docket No. 18-1745 and is attached to this petition as Appendix A. The Second Circuit's decision is not reported but is available at *United States v. Reyes*, 2019 WL 6170811 (2d Cir. 2019).

Mr. Reyes was tried for aiding and abetting alien smuggling offenses and sought to incorporate this Court's decision in *Rosemond v. United States*, 572 U.S. 65 (2014), into the aiding and abetting jury instructions. The district court's rulings on the jury instructions are attached to this petition as Appendix B and the final jury instructions are attached as Appendix C.

Mr. Reyes was convicted and sentenced to 3 years imprisonment, the mandatory minimum sentence for alien smuggling for financial gain. The judgment of the United States District Court for the District of Vermont in Docket No. 2:16-cr-069 was entered on May 30, 2018, and is attached as Appendix D. Mr. Reyes filed a timely appeal on June 11, 2018.

STATEMENT OF JURISDICTION

A writ of certiorari is sought from the decision of the United States Court of Appeals for the Second Circuit filed on November 20, 2019, that affirmed the

judgment of the United States District Court for the District of Vermont. *See* Appendix A.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the Supreme Court of the United States jurisdiction to review by writ of certiorari all final judgments of the courts of appeals.

The time for filing a petition for a writ of certiorari began to run on November 20, 2019. A petition for a writ of certiorari must be filed no later than February 18, 2019, pursuant to Supreme Court Rules 13.1, 13.2, and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. § 2(a) provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

8 U.S.C. § 1324, "bringing in and harboring certain aliens," is reproduced in relevant part at Appendix E.

STATEMENT OF THE CASE

Introduction and overview of the case

Denny Reyes was convicted after a jury trial of aiding and abetting alien smuggling for financial gain in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2 as well as aiding and abetting the transportation of aliens in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii) and 1324(a)(1)(B)(ii) as well as 18 U.S.C. § 2.

The charges in this case arose out of a border crossing event in Highgate Springs, Vermont. Most of the basic facts were undisputed. On the night of February 6-7, 2015, Border Patrol and Drug Enforcement Administration agents staked out a house on Ballard Road in Highgate Springs. This section of Ballard Road dead ends at the U.S.-Canadian border. Around midnight, agents observed four individuals cross the international border and wait near some trailers on the property. At approximately 12:30 am, a black SUV with New York plates drove onto the property and turned around. The four individuals who were waiting on the property ran to the SUV, at which time the agents deployed a flash-bang grenade, announced their presence, and attempted to apprehend the driver of the SUV and the four individuals. The SUV fled the scene with three of the individuals. The fourth individual ran back to Canada. The SUV was stopped a short distance away by a Vermont State Police officer who was supporting the operation. Upon arresting the individuals in the SUV, agents encountered the defendant, Denny Reyes, and three undocumented aliens.

Agents had staked out the location because one of the residents of the Ballard Road home, Ashley O'Neill, was in regular contact with Mr. Reyes. The two met on

December 29, 2014, when Ms. O'Neill observed an SUV arrive at the Ballard Road location at approximately midnight. Ms. O'Neill's recollection of her December 2014 conversation with Mr. Reyes was that he stated he was waiting for a friend to cross the border. Mr. Reyes offered her money to remain silent about his presence. Eventually, Mr. Reyes and the passenger in the car dragged a heavy duffel bag to the SUV and departed.

The inhabitants of the Ballard Road home were in close contact with the Border Patrol and Ms. O'Neill eventually reported the December 29, 2014 event to the authorities. Thereafter, Ms. O'Neill remained in contact with Mr. Reyes while working as a paid informant. Based on information from Ms. O'Neill, the authorities obtained a tracking warrant that enabled them to be in place for the February 6-7 crossing.

Following his arrest, Mr. Reyes made two statements to authorities. The statements, however, were not recorded and the parties disputed whether Mr. Reyes ever expressly acknowledged that he knew the smuggling event would involve undocumented aliens. Mr. Reyes also cooperated with the authorities and made two monitored calls to Chino, an individual thought to be one of two Canadian organizers of the smuggling. Chino was also thought to be the individual who fled back to Canada on February 7. While Mr. Reyes and Chino briefly mentioned "those people," neither individual expressly indicated that Mr. Reyes knew in advance they were undocumented. Eventually, Mr. Reyes was charged in a May 12, 2016 indictment with aiding and abetting alien smuggling for financial gain in

violation of 8 U.S.C. § 1324(a)2)(B)(ii) and 18 U.S.C. § 2. A superseding indictment added the allegation that Mr. Reyes—as a principal or aider and abettor—transported aliens in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii) and 1324(a)(1)(B)(ii) as well as 18 U.S.C. § 2. The jury trial commenced on December 18, 2017, and Mr. Reyes was convicted on December 21, 2017. On May 29, 2018, the District Court sentenced Mr. Reyes to 36 months imprisonment, the applicable mandatory minimum in this case. Mr. Reyes filed a timely notice of appeal on June 11, 2018. Mr. Reyes self-surrendered to serve his sentence on or about July 24, 2018, and is presently in the custody of the Bureau of Prisons at USP Lewisburg. His expected release date is March 1, 2021.

Proceedings in the District of Vermont, the nature of the dispute, and the district court's rulings on the jury instruction

Mr. Reyes' knowledge and intent were the central issue at trial. Accordingly, counsel sought a jury instruction that—consistent with *Rosemond*—instructed the jury that it could not find Mr. Reyes guilty of aiding and abetting the § 1324 offenses unless it concluded he knew in advance the facts that made up the elements of the crime itself. J.A. at 41.[1] The proposed jury instruction was based on Judge Sand's[2] pre-*Rosemond* instruction but included the requirement that "[t]o establish that defendant knowingly and willfully associated himself with the crime, the government must establish that the defendant knew of each of the facts that make up the elements of the crime itself."[3] These elements included knowledge that

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[1] Citations to "J.A." are to the Joint Appendix, docs. 37 & 38 in docket no. 18-1745 (2d Cir.).
[2] *See* Leonard B. Sand, et. al., *Federal Jury Instructions—Criminal* 11-1.
[3] More specifically, the proposed instruction specified that:

"(1) [name of alien] was an alien at the time alleged in the indictment [and] (2) [name of alien] had not received official authorization to come to, enter, or reside in the United States." The government opposed the instruction.

Ultimately, the District Court gave an instruction for aiding and abetting that mirrored Judge Sand's pre-*Rosemond* instruction but with some added language from *Rosemond*:

> THE COURT: The [instruction] is straight out of *Rosemond*. So I told you I would read it, and I agreed in part with what you were saying, and I took the language right out of *Rosemond* to make it clear that you have to kind of, as an aider and abettor, embrace the whole crime. And before we broke, I said *Rosemond's* not really a great example because it's a 924(c), and if you understand that you are aiding and abetting drug distribution but you don't know the person's carrying a firearm in furtherance, it's not a good case.
>
> We don't have that kind of breakdown in this case, to my knowledge, by way of the facts. So I included all of the language from *Rosemond* I thought was appropriate.

Appendix B at 11.[4] The District Court further explained that:

> THE COURT: All right. So this is straight out of *Rosemond*, so it's not my language. It's right out of the court's opinion. And they -- the Supreme Court talks about a state of mind extending to the entire crime. . . . A person participating in a scheme, knowing its extent and

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> To establish that defendant knowingly and willfully associated himself with the crime, the government must establish that the defendant knew of each of the facts that make up the elements of the crime itself; i.e., the defendant knew that: (1) [name of alien] was an alien at the time alleged in the indictment; (2) [name of alien] had not received official authorization to come to, enter, or reside in the United States; (3) the principal brought [name of alien] to the United States; (4) the principal acted for the purpose of financial gain; (5) that the principal was acting willfully to aid [name of alien] in [his/her] violation of the immigration laws.

J.A. at 41-41.

[4] The District Court's rulings are also reproduced at Appendix B.

character intends that scheme's commission, and the intent must go to the specific and entire crime charged. It's enough. It's covered. And I am going to stick with this modified instruction finding it sufficient under *Rosemond.*

Appendix B at 13-14.[5] In relevant part, the instruction explained that:

> In order to aid or abet another in the commission of a crime, it is necessary that the defendant knowingly associate himself in some way with the crime, and that he participate in the crime by doing some act to help make the crime succeed. That is, an aiding and abetting conviction requires not just an act facilitating one or another element of the crime, but also a state of mind extending to the entire crime. An intent to advance some different or lesser offense is not sufficient: instead, the intent must go to the specific and entire crime charged - so here, to the full scope of alien smuggling. So for purposes of aiding and abetting, a person participating in a criminal scheme knowing its extent and character intends that scheme's commission.
>
> To establish that defendant knowingly associated himself with the crime, the government must establish that the defendant acted with the knowledge that a crime was being committed. To establish that the defendant participated in the commission of the crime, the government must prove that the defendant engaged in some affirmative conduct or overt act with the specific intent of bringing about the crime. In other words, to aid and abet a crime, a defendant must not just in some way associate himself with the venture, but also participate in it as something he seeks to bring about and seeks by his acts to make succeed.

Appendix C at 27. Mr. Reyes reiterated his objection to the instructions after they were given.

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[5] *See also* Appendix B at 10 ("THE COURT: . . . . . I looked at *Rosemond*, and I added some language. . . . That was a 924(c) case, and the issue was knowing that there was going to be drug distribution but not knowing it was going to be armed. So it's a little bit different, but some of what Mr. Barth told me this morning I think should be included in the jury instructions, so I am going to address that. We will talk about that more, and we will have plenty of time to do it.").

In their closing statements, the parties continued to contest whether Mr. Reyes knew the smuggling event would involve undocumented aliens. By way of example, counsel for Mr. Reyes argued that:

> Again, it's perfectly clear that Mr. Reyes was up at the border on Ballard Road on February 7th, and he picked up three people. It's clear that he was up there about a month beforehand, and it's likely that he was there sometime in between there as well.
>
> Also want to be clear, we are not saying he was just there as an Uber driver. Uber had sent him up there to pick people up. We're not saying that. Be perfectly clear.
>
> He was clearly up at the border -- it's clear under the circumstances that he was at the border to smuggle something, some sort of contraband, *but what is contested is whether the government has proven beyond all reasonable doubt than he knew that what he was smuggling was three individuals who did not have permission to enter into the United States, three aliens who were undocumented and did not have permission to enter, and whether he acted with intent, with the willfulness, to violate the immigration laws.*

J.A. at 304 (tr. 12/21/17 at 203-204 (emphasis added)). The jury convicted Mr. Reyes on both counts and he filed a timely appeal.

Proceedings on Appeal

On appeal, Mr. Reyes challenged the District Court's jury instructions on aiding and abetting. He argued that the instructions failed to inform the jury that the government needed to prove beyond a reasonable doubt that Mr. Reyes knew (in advance) that it was undocumented aliens that were being smuggled across the border on February 7, 2015, as required under *Rosemond v. United States*, 572 U.S. 65 (2014). Mr. Reyes explained that *Rosemond* required actual, advance knowledge of the facts that made up the elements of the offense, including in this case the

crucial fact being that it was undocumented aliens being smuggled. In its decision, the Second Circuit rejected Mr. Reyes' claim that *Rosemond* required actual, advance knowledge of the facts that constitute the elements of the offense. In so doing, it broke with the decisions of the other courts of appeal that have required actual knowledge of the facts that constitute the elements of the offense, even where the principal offense had a lesser mens rea or was a strict liability offense. *See, e.g., United States v. Encarnacion-Ruiz*, 787 F.3d 581 (1st Cir. 2015) (requiring that that an individual charged with aiding and abetting the production of child pornography have actual knowledge of that the individual being depicted was a minor). The Second Circuit offered that "[n]othing in *Rosemond* requires that an aider and abettor have a higher degree of knowledge than that required of the principal." *United States v. Reyes*, 2019 WL 6170811 at *2 (2d Cir. Nov. 20, 2019).

REASONS FOR GRANTING THE PETITION

Denny Reyes' case presents an excellent vehicle for this Court to resolve important questions about the scope of this Court's decisions in *Rosemond v. United States*, 572 U.S. 65 (2014). The issues presented here were preserved and raised in the lower courts. The case is thus an ideal vehicle to resolve these issues and provide guidance to the lower courts on 18 U.S.C. § 2(a), which is a frequently charged offense.

The Second Circuit's ruling presents the question of whether the intent element of 18 U.S.C. § 2(a) can, consistent with this Court's decision in *Rosemond*, be satisfied by a mens rea of recklessness. This case also presents the question of whether an aider and abettor must know the facts that make up the elements of the principal offense in advance.

I. **This case presents the question of whether this Court's decision in *Rosemond v. United States*, 572 U.S. 65 (2014), applies beyond the case-specific context of that decision. Specifically, the case would permit the Court to explain whether *Rosemond*'s requirement that an aider and abettor know in advance the facts that constitute the elements of the principal offense can be satisfied by a mens rea of recklessness as well as whether and to what extent that knowledge must come in advance of the principal offense.**

In *Rosemond*, this Court provided a comprehensive overview of the federal aiding and abetting offense, 18 U.S.C. § 2(a), which specifies that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." The offense punishes those who, in addition to taking a step towards facilitating the offense, "intend[] to facilitate that offense's commission." *Rosemond*, 572 U.S. at 76. The

intent element requires not just that a defendant "associate himself with the venture, but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed." *Id.* (citation, internal quotations omitted). The *Rosemond* Court explained that this intent element requires the defendant possess "a state of mind extending to the entire crime." *Id.* Stated differently, the intent element may be satisfied "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id.* at 77. In so doing, the Supreme Court made it clear that the intent or mens rea element of an aiding and abetting offense under § 2(a) must embrace all elements of the underlying offense. The Court explained generally that liability for aiding and abetting attaches only when the defendant's intent extends "to the specific and entire crime charged"; "[a]n intent to advance some different or lesser offense is not, or at least not usually, sufficient." *Id.* at 76. Because crimes are comprised of elements, the individual's intent can only extend "to the specific and entire crime charged," *id.*, if it extends to all the elements of the principal offense. It is only by predicating liability on the elements of the principal offense that the law or a court is able to distinguish between liability for aiding and abetting the principal offense and "some different or lesser offense." *Id.*; *see also id.* at 77 ("So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission.").

In *Rosemond*, the Court applied the rule to a case involving a § 924(c) offense where a firearm was used in connection with a drug transaction. *Id.* at 68. That

offense has two elements, the commission of the drug trafficking crime and the firearm element. The Court made it clear that the aider or abettor must have knowledge of and intend to facilitate both the drug transaction and the firearm component, i.e., both elements of the principal offense:

> An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one. In so doing, he has chosen . . . to align himself with the illegal scheme in its entirety—including its use of a firearm. And he has determined (again like those other abettors) to do what he can to "make [that scheme] succeed." . . . . He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense—i.e., an armed drug sale.

Id. at 77–78 (citations omitted). The advance knowledge requirement is essential because a person with a lesser amount of knowledge may not have intended to aid and abet the principal offense. In the case of a § 924(c) offense involving a drug transaction, a potential aider and abettor without knowledge of the firearm simply has not formed the intent to aid or abet the § 924(c) offense. He or she may have intended to assist a drug transaction, but without advance knowledge that a firearm will be present, the individual has not embraced the more serious § 924(c) offense and may in fact have completed his or her association with the drug offense by the time he or she learn of the weapon:

> [T]he § 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.

Id. at 78 (citation omitted).

The rule articulated in *Rosemond* applies with equal force to other offenses, including alien smuggling. In federal law, the element that distinguishes aiding and abetting an alien smuggling offense from other smuggling offenses is knowledge of what is being smuggled. *Rosemond* requires "full knowledge of the circumstances constituting the charged offense." *Id.* at 77. Thus, to be guilty of aiding and abetting alien smuggling, an individual must know that it is aliens that are being smuggled. Otherwise, the individual has not embraced the whole offense and may in fact have completed his or her part in the offense before ever learning that the illicit cargo is human beings.

II. A circuit split exists and review by this Court is required to maintain uniformity in the lower courts.

Most circuits have applied *Rosemond* beyond the confines of the 18 U.S.C. § 924(c) offense. These courts have concluded that *Rosemond* requires that an aider

and abettor have actual knowledge of the facts that make up the elements of the principal offense even when the principal offense includes no mens rea requirement. By contrast, the Second Circuit concluded that an aider and abettor could be convicted with a mens rea of recklessness: "[n]othing in *Rosemond* requires that an aider and abettor have a higher degree of knowledge than that required of the principal." *Reyes*, 2019 WL 6170811 at *2. The Second Circuit's decision departs from *Rosemond* and the decisions of the other courts of appeal in two ways: it permits the defendant's conviction on a mens rea of recklessness and omits any requirement that the defendant have actual, advance knowledge of the facts that constitute the elements of the offense.

A. The Courts of Appeal have applied *Rosemond* to other offenses, do not permit conviction on a mens rea of recklessness, and require advance knowledge of the facts that constitute the elements of the offense.

Among the circuits addressing this issue, the First Circuit has most clearly held that an aider and abettor must have actual knowledge of the facts that constitute the elements of the offense, even where no knowledge is required of the principal or where the offense is a strict liability offense. Thus, in *United States v. Encarnacion-Ruiz*, 787 F.3d 581 (1st Cir. 2015), the First Circuit applied *Rosemond* to aiding and abetting the production of child pornography. An individual charged (as a principal) with producing child pornography need not know the age of the individual depicted. Yet, in a production of child pornography prosecution, it is the age of the person in the visual depiction that is crucial: "[p]roducing child pornography is illegal precisely because the person in the visual depiction was a

minor." *Id.* at 588. Accordingly, an individual's intent cannot embrace the "the specific and entire crime charged" in a prosecution for aiding and abetting the production of child pornography unless the defendant knew the individual was a minor. *Rosemond*, 572 U.S. at 76. It is only when the individual charged with aiding and abetting the offense knows the victim is a minor that the perpetrator acts with "full knowledge," *id.* at 77, and can "'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed,'" *Encarnacion-Ruiz*, 787 F.3d at 588 (quoting *Rosemond*, 572 U.S. at 76).

The First Circuit's decision in *United States v. Ford*, 821 F.3d 63 (1st Cir. 2016), applied *Rosemond* to a case where the defendant was alleged to have aided and abetted her husband's illegal possession of a firearm.[6] In *Ford*, the court reiterated that § 2's knowledge requirement meant that the government had to prove that the aider and abettor knew the facts that made the underlying offense illegal. *Id.* at 74 (explaining that the government must "prove beyond a reasonable doubt that the putative aider and abettor knew the facts that make the principal's conduct criminal. In this case, that means that the government must prove that Darlene knew that James had previously been convicted of a crime punishable by more than a year in prison."). Because the jury instructions failed to convey this

[6] In some respects the First Circuit's decision appears to anticipate this Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (holding that under 18 U.S.C. § 922(g), the government must show not only that the defendant knew he possessed a firearm, but also that the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm.").

requirement, the First Circuit vacated the defendant's conviction on the aiding and abetting charge.

Likewise, in *United States v. Rodriguez-Martinez*, 778 F.3d 367, 373 (1st Cir. 2015), the First Circuit reversed convictions in two aiding and abetting cases arising from the arrest of two individuals who had been riding in a car together. Upon being stopped by the police, the passenger got out of the car and waited a short distance away while the driver remained in the vehicle. *Id.* at 370. Once searched, the police discovered a firearm on the passenger and drugs on the driver. *Id.* The passenger was ultimately convicted of aiding and abetting an attempt to possess narcotics with intent to distribute based on the drugs possessed by the driver. *Id.* at 369-370. For his part, the driver was ultimately convicted of aiding and abetting the possession of a firearm in furtherance of a drug-trafficking crime based on the firearm possessed by the passenger. *Id.* Both convictions were reversed because the First Circuit concluded that the evidence established nothing more than the mere presence of each man in proximity to the offense. *Id.* at 372-373. The failure to prove the defendants' advanced knowledge was fatal to both cases, the court explained because "[t]he Supreme Court recently clarified that aiding and abetting liability requires the government to show that the defendant had 'advance knowledge' of the elements of the offense." *Id.* at 371 (quoting *Rosemond*, 572 U.S. at 78).

Rosemond's advanced-intent requirement has also been applied to a case where the charge was that the defendants aided and abetted the possession of a firearm

within a school zone. *United States v. Fernández–Jorge*, 894 F.3d 36 (1st Cir. 2018). In *Fernández–Jorge*, the First Circuit concluded that the jury instructions had not "adequately captured and impressed upon the jury *Rosemond*'s requirement that to be guilty of aiding and abetting an offense, a defendant must have had advance knowledge of each element of the offense" because the instructions did not make it clear that the defendant had to know in advance that the firearm would be possessed within a school zone. *Id.* at 52; *see also United States v. Tanco-Baez*, 942 F.3d 7, 27 (1st Cir. 2019) (applying *Rosemond* to aiding and abetting possession of a machine gun).

Other circuits have reached similar results. For example, in *United States v. Goldtooth*, 754 F.3d 763 (9th Cir. 2014), the Ninth Circuit applied *Rosemond* to a case in which the defendant was convicted of aiding and abetting a robbery in violation of 18 U.S.C. §§ 1153 and 2111. There, the Ninth Circuit concluded that *Rosemond*'s intent requirement meant that the defendant had to have advance knowledge that a taking would occur. *Id.* at 769 ("There was no evidence Appellants had drawn up plans or had discussions prior to the taking; no evidence Crawford or Davis thought the tobacco would be snatched; and no evidence the two non-snatchers had any idea the taking would occur, let alone that they had aided or encouraged it."). Because all the evidence suggested the offense was spontaneous, there was no possibility that the defendants knew in advance of the taking and therefore no possibility that they could have aided and abetted it. *Id.* ("At bottom, the government presented no evidence that the taking of Crawford's tobacco was

anything but a spontaneous act by the snatcher. . . . Put simply, one cannot know in advance what cannot be known in advance."). Without sufficient proof as to the defendants' advance knowledge, the Ninth Circuit vacated the convictions.

Rosemond has been applied in other circumstances as well. In *United States v. Outlaw*, 946 F.3d 1015, 1018 (8th Cir. 2020), the Eighth Circuit explained that in an a prosecution for aiding and abetting drug distribution "[t]he intent element required proof that Outlaw had advance knowledge of all the characteristics of the transaction that made it illegal." For its part, the Eleventh Circuit reversed an aiding and abetting a carjacking conviction because there was "no evidence that Reed knew of Tumer's plan to take Gist's car, much less that he acted affirmatively with the intent of facilitating the carjacking." *United States v. Reed*, 778 F. App'x 654, 660 (11th Cir. 2019). The Second Circuit's decision in this case stands apart from this line of cases that applies *Rosemond* in a consistent manner.

B. *Rosemond* requires actual, advance knowledge of the facts that make up the elements of alien smuggling and does not permit an aider and abettor to be convicted on a mens rea of recklessness.

There is no principled distinction between *Rosemond* and the cases applying it and Mr. Reyes' case. A defendant must know in advance that the drug sale is to be an armed one because while he may be comfortable selling drugs in the abstract, he may not wish to take his chances in an armed drug deal. Likewise, a defendant must know in advance that there will be an illegal taking in order to have aided and abetted a robbery. So too, a defendant must know that it is a minor that will be involved in the visual depictions in order for the defendant to aid and abet the

production of child pornography. Without knowledge of these facts proving these elements, a defendant has not acted with "full knowledge" of the facts that constitute the elements of the offense and so that individual's intent simply has not embraced "the specific and entire crime charged." *Rosemond*, 572 U.S. at 76.

The same logic applies here. Federal law punishes smuggling offenses differently based on what is being smuggled. At its base, a smuggling offense involves bringing something across the border outside of the established border control system. For example, 31 U.S.C. § 5332 punishes smuggling U.S. currency "with the intent to evade a currency reporting requirement." For its part, 18 U.S.C. § 545 punishes smuggling goods or merchandise "contrary to law." In the same way, § 1324 punishes bringing aliens into the United States "at a place other than a designated port of entry or place other than as designated by the Commissioner." It is the identity of the items smuggled that principally differentiates between the offenses. A defendant may be comfortable with smuggling some contraband across the border, but may be unwilling participate where the contraband consists of human beings. Without advance knowledge that the smuggling event will involve undocumented aliens, the potential aider and abettor's intent cannot "go to the specific and entire crime charged." *Id.* Instead, if the individual has no knowledge of what is being smuggled—or if the knowledge comes too late—it is possible that the aider and abettor did not act with "full knowledge" or that he or she in fact intended "to advance some different or lesser offense" and is not guilty of aiding and abetting the alien smuggling offense charged. *Id.*

C. **The jury instructions failed to inform jurors that in order to convict Mr. Reyes of aiding and abetting alien smuggling they had to conclude that Mr. Reyes knew of each of the facts that made up the elements of the crime, including advance knowledge of the individuals' alienage.**

The jury instruction (Appendix C at 27) approved by the Second Circuit does not comply with *Rosemond* in several respects. First, the instruction fails to expressly inform the jury that the putative aider and abettor must know that it is aliens that are being smuggled. That is, the instruction fails to incorporate the relevant knowledge element of the principal offense, as required by *Rosemond*. Even though the instruction mentions "the specific and entire crime charged" and "the full scope of alien smuggling," it does not explain what these phrases mean or otherwise expressly tell the jury that a defendant must know about the aliens' status. The instruction's use of these undefined terms is especially confusing because the instruction utilizes this language rather than speaking in terms of the "elements" of the offense. Thus, the instruction states that "the intent must go to the specific and entire crime charged - so here, to the full scope of alien smuggling" instead of expressly instructing, for example, that 'the intent must go to the *all the elements of the crime* charged—so here, to the *elements of alien smuggling*.' Given this undefined language, a jury is unlikely to infer that the aiding and abetting instruction requires the defendant's intent extend to all the elements of the offense as was clear in the proposed instruction.

The undefined language is also problematic because the jury instructions as a whole appropriately speaks in terms of the elements of the crimes charged. *See e.g.*, Appendix C at 17 (reasonable doubt: "it is always the government's burden to prove

each element of the crime charged beyond a reasonable doubt"); Appendix C at 34 (unanimous verdict: "your verdict must be unanimous regarding each essential element of each count"). This problem is clearly illustrated in the fact that the instructions that follow the aiding and abetting instruction expressly define the alien smuggling offense in terms of its elements. Appendix C at 27-29.

Given the consistent description of offenses as involving elements throughout the rest of the instructions, a jury simply would not understand that the undefined terms meant that a defendant accused of aiding and abetting alien smuggling must know each of the facts that made up the elements of the crime, including that it was aliens that were to be smuggled. Even more problematic is the fact that by defining the aiding and abetting offense as something other than elements that must be proved beyond a reasonable doubt, the instruction fails to ensure that a conviction for aiding and abetting is based on proof beyond a reasonable doubt.

Further, while the instruction in this case includes language from *Rosemond*, it also includes language that detracts from *Rosemond*. Thus, the instruction offers that in order "[t]o establish that defendant knowingly associated himself with the crime, the government must establish that the defendant acted with the knowledge that *a crime was being committed*." Appendix C at 27. Whatever specificity was achieved in the preceding paragraph containing language from *Rosemond* is lost in this later sentence where the jury is informed that the defendant need only have knowledge of "a crime." Yet, as already explained, it is the aliens' status—and

knowledge of that status—that defines the principal offense and that differentiates alien smuggling from bulk cash smuggling or some other border offense.

Second, the instruction also fails to inform the jury that the defendant must know of the aliens' status in advance. Again, while the instruction includes language from *Rosemond*, it nowhere expresses the advance-knowledge requirement. In fact, the jury charge contemplated that the defendant's knowledge of the facts encompassing the principal offense could arise during the course of the offense: "[t]o establish that defendant knowingly associated himself with the crime, the government must establish that the defendant acted with the knowledge that a *crime was being committed*." Appendix C at 27 (emphasis added). Yet, because it does not say when the defendant must have acted, the instruction contemplates that the act could have occurred during the commission of the principal offense. *Rosemond* makes it clear that for aiding and abetting under § 2(a), the knowledge must come before, and not during, the offense.

D. Aiding and abetting is a frequently charged offense. Review by this Court is necessary to ensure consistent application of this Court's decision in *Rosemond*.

Importantly, 18 U.S.C. § 2(a) is a frequently charged offense. Further clarification as to how *Rosemond* applies to principal offenses where the mens rea is recklessness or where the offense is strict liability is necessary to ensure defendants are treated uniformly across the federal criminal justice system.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that a writ of certiorari be issued.

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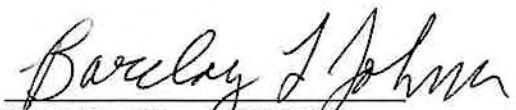
Respectfully Submitted,



BARCLAY T. JOHNSON
Assistant Federal Public Defender
Counsel of Record

MICHAEL L. DESAUTELS
Federal Public Defender
District of Vermont
126 College Street, Suite 410
Burlington, Vermont 05401
802-862-6990
michael_desautels@fd.org
barclay_t_johnson@fd.org