No. _____

In the

Supreme Court of the United States

ADAM LLOYD COOPER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To decide whether a firearm is possessed "in furtherance of" a drug trafficking crime, the Fifth Circuit utilizes a non-exhaustive list of factors found in the case of *United States v. Ceballos-Torres*. However, other circuits have adopted this test with qualification. In particular, the Seventh Circuit, in *United States v. Castillo*, questioned whether the *Ceballos-Torres* factors, standing alone, adequately address the issue of *mens rea* required by 18 U.S.C. § 924(c). And in this Court's recent decision in *Rosemond v. United States*, it specifically left open the question of whether one intends to aid and abet a Sec. 924(c) offense when one aids and abets a drug trafficking offense. Because the Fifth Circuit's decision below rules that, *a fortiori*, one will have the *mens rea* to commit a Sec. 924(c) offense if one party to an offense, unbeknownst to the other, possesses a firearm, this Court should review to answer the following question:

1. Whether Sec. 924(c) contains a specific *mens rea* requirement that requires one to know more than that firearms are "tools of the trade" for drug trafficking crimes and should therefore reasonably anticipate that any confederate in a drug trafficking crime will be armed sufficient to justify conviction under 18 U.S.C. § 924(c).

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Marriot et al.*, No. 7:18-CR-00191-DC (W.D. Tex.)

2. *United States v. Adam Lloyd Cooper*, No. 19-50119 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Adam Lloyd Cooper asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion in this case was selected for publication. It can be found at 979 F.3d 1084 (5th Cir. 2020) and is reprinted in the Appendix to this Petition. The district court's opinion is also reprinted in the Appendix.

JURISDICTION

The Fifth Circuit issued its judgment on November 9, 2020. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the application of 18 U.S.C. § 924(c) to crimes involving drug trafficking; specifically, the question posed here is the one left open by *Rosemond v. United States*, 572 U.S. 65 (2014): whether a Sec. 924(c) violation is a "natural and probable consequence" of simply drug trafficking.[1]

STATEMENT

Officers with the Odessa Police Department stopped the gray Chevrolet Impala driven by Petitioner, Adam Lloyd Cooper, for a traffic violation (ROA.78). Cooper gave consent to search the vehicle; officers found a scale containing narcotics residue and a

[1] *Rosemond*, 572 U.S. at 76, n.7.

syringe on Cooper's person (ROA.79). Officers also found marijuana in the center console of the Impala (ROA.79).

Cooper was not alone in the car; riding with him was Tracy Lynn Marriot, in the front passenger seat (ROA.79). Marriot had with him a black backpack, which officers also searched; inside, they found a Smith & Wesson nine-millimeter pistol (ROA.79). Marriot claimed the pistol was his; that he had traded a rifle for it earlier in the day (ROA.79).

Cooper pleaded guilty to the superseding indictment, which charged that he and Marriot "aided and abetted by each other, did intentionally and knowingly possess a firearm, to wit: a Smith and Wesson M&P 9mm in furtherance of the drug trafficking crime set forth in Count One" of the indictment (ROA.28).[2] The question is whether the District Court had before it sufficient evidence under Federal Rule of Criminal Procedure 11(b)(3) to find that Cooper committed a Sec. 924(c) offense.

[2] There was some confusion at the sentencing hearing as to which superseding indictment Cooper pleaded guilty to; at the plea hearing, the Assistant United States Attorney indicated that Cooper pleaded guilty to the first superseding indictment and that only Marriot would be charged by second superseding indictment (ROA.65-66). At sentencing, however, a different Assistant United States Attorney testified that Cooper pleaded guilty to the second superseding indictment and that the government would dismiss only the third count from that indictment (ROA.99-100). This is significant in that the charge from Count 2 differs in whether it includes aiding and abetting language. This discrepancy was corrected by the Fifth Circuit under Rule 36 (Appendix, Tab 1).

REASONS TO GRANT THE PETITION

1. THE DISTRICT COURT LACKED SUFFICIENT EVIDENCE TO HAVE FOUND THAT PETITIONER AIDED AND ABETTED THE POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING SCHEME.

In the Fifth Circuit, "furtherance" means "the act of furthering, advancing, or helping forward" the drug trafficking offense. *United States v. Ceballos-Torres*, 218 F.3d 409, 412 (5th Cir. 2000). Several other circuits have examined the "in furtherance of" language and come to a similar conclusion. *See United States v. Sparrow*, 371 F.3d 851, 852-54 (3d Cir. 2004); *United States v. Hamilton*, 332 F.3d 1144, 1149 (8th Cir. 2003); *United States v. Luciano*, 329 F.3d 1, 16 (1st Cir. 2003); *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002); *United States v. Basham*, 268 F.3d 1199, 1207-08 (10th Cir. 2001); *United States v. Mackey*, 265 F.3d 457, 462 (6th Cir. 2001); *United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001). The Ninth Circuit agreed with the core of the analysis but questioned the utility of some of the "*Ceballos-Torres* factors." *United States v. Krouse*, 370 F.3d 965, 967-68 (9th Cir. 2004). The Seventh Circuit, likewise, has "joined the core" of the analyses of its sister circuits but added its own elaboration of the meaning of "in furtherance of." *United States v. Castillo*, 406 F.3d 806, 813-14 (7th Cir. 2005).

In *Castillo*, the Seventh Circuit noted that the "negative implication of this definition" was that the mere presence of a weapon at the scene of a drug crime, "*without more*" does not meet the definition of "in furtherance of." *Castillo*, 406 F.3d at 814 (emphasis in original).

1.1. The Fifth and Seventh Circuits are not in harmony on this issue.

Explicating the *Ceballos-Torres* analysis, the Seventh Circuit held that the evidence must "establish a *specific* nexus between the *particular* weapon and the *particular* drug crime at issue." *Castillo*, 406 F.3d at 815 (emphasis in original).

The Fifth Circuit, in its opinion, stated that Cooper did not address "the fact that the backpack also contained drug paraphernalia and plastic baggies" and that Cooper "knew about the backpack itself." *United States v. Cooper*, 979 F.3d 1084, 1090 (5th Cir. 2020).

Under Fifth Circuit precedent and this Court's own precedent, there is a *mens rea* requirement that attaches to Sec. 924(c) offenses. *See Rosemond*, 572 U.S. at 76; *United States v. Smith*, 878 F.3d 498, 501 (5th Cir. 2017). While the Fifth Circuit states that Cooper "knew about the backpack itself," nothing in the record supports this contention.

When the Assistant United States Attorney read the factual basis into the record at the plea hearing, she stated that Cooper stepped out of the vehicle voluntarily to be searched (ROA.79). Marriot, the passenger, consented to a search and was also removed from the vehicle (ROA.79). The vehicle itself was searched, and that was when the backpack was found (ROA.79). The backpack, in addition to the firearm, contained syringes and multiple plastic baggies hidden inside the false bottom of a Monster energy drink can (ROA.79). When Marriot was read his rights, he claimed sole responsibility for the gun (ROA.79). It was only when Cooper's vehicle was being loaded onto the tow truck that officers found the black magnetic box, attached to the **outside bottom** of the Impala, that contained the methamphetamine and marijuana (ROA.79-80).

Cooper admitted that "he possessed with intent to distribute more than 50 grams of actual methamphetamine, and that he possessed a firearm in furtherance of that offense" (ROA.80). However, the District Court should not have, on the basis of those facts, accepted Cooper's plea pursuant to F.R.C.P. 11. The factual basis does not establish the *mens rea* required by *Rosemond* and *Smith*.

The Fifth Circuit attempted to elide around this fact by claiming that firearms are common "tools of the trade" in drug trafficking offenses. *Cooper*, 979 F.3d at 1090-91, *citing United States v. Zapata-Lara*, 615 F.3d 388, 390 (5th Cir. 2010). This, however, is the same problem confronted by the Seventh Circuit in *Castillo*. There, the Court of Appeals stated that "in furtherance of" theories "will often be outlined by a drug-trafficking expert who will testify broadly about how drug dealers *generally* use weapons as "tools of the trade" in various ways." *Castillo*, 406 F.3d at 815. Crucially, however, the Seventh Circuit stated that the government "cannot stop here; for a § 924(c)(1)(A) conviction based on possession to have merit, the evidence must establish a *specific* nexus between the *particular* weapon and the *particular* drug crime at issue." *Id.* Put another way, this is the same question this Court expressed no view on in *Rosemond*: is one guilty of aiding and abetting another in possession of a weapon in furtherance of a Sec. 924(c) crime when one intends to aid and abet them in furtherance of a drug trafficking crime?

The Government and Fifth Circuit in this case have stated their answer: yes. The Government contends that because this question is unsettled, the district court could not have plainly erred in failing to submit a *Rosemond*-style advance knowledge instruction regarding *mens rea*. Regardless of whether the question of whether a Sec. 924(c) is a natural

and probable consequence of a drug trafficking crime, however, the *mens rea* requirement of Sec. 924(c) is statutory. While the *Ceballos-Torres* factors are non-exclusive and can inform the inquiry, the inquiry itself must be based on the facts of each case. *Castillo*, 406 F.3d at 816.

1.2. This Court should answer the question left open in *Rosemond*.

In this case, neither the factual basis provided at the plea hearing or anything adduced at the sentencing hearing supported the theory of "in furtherance of" in a way that complied with either the statutory scheme of 18 U.S.C. § 924(c) or *Rosemond*. *See Castillo*, 406 F.3d at 816. Under the schema advanced by the Government in this case and the Fifth Circuit's opinion, the mere presence of a firearm at the scene of a drug trafficking crime, **absent some indication it was not being used**, is sufficient to show the *mens rea* required under Sec. 924(c).

This stands the Constitution on its head; as the Seventh Circuit observed in *Castillo*, the burden is on the Government to produce some evidence of particularity as to how this particular gun was used in furtherance of this particular drug crime, not merely as a "tool of the trade" for drug dealers.

Consider the facts of this case: at some point prior to being stopped, Petitioner placed a box containing over 50 grams of actual methamphetamine under his car with magnets. After that, he picked up Marriot. Both Petitioner and Marriot had on their persons proof of drug use and trafficking; but no evidence established any sort of common scheme or plan between Petitioner and Marriot. Petitioner pleaded guilty to possession with intent to

distribute the methamphetamine recovered from the box under his car, and, it must be admitted, to aiding and abetting in Count 2. But, as shown by Petitioner's statements during his sentencing, Petitioner never intended to claim that he knew about the gun or that he intended to utilize the gun in any fashion to further his methamphetamine distribution. This is the reason why this Court must act to answer the question left over from *Rosemond* and which the Fifth Circuit improperly decided against Petitioner in this case: where is the line between mere presence and "in furtherance of?" Are the *Ceballos-Torres* factors of general use, or do they fail to address, as the Seventh Circuit noted, the particularity requirements of *mens rea* inherent in Sec. 924(c)?

Because this question is one of Constitutional dimension and affects the substantial rights of Petitioner to be adjudged guilty only of offenses to which he has a sufficient *mens rea*, he asks this Court for a writ of certiorari to review the decision of the Fifth Circuit.

CONCLUSION

Petitioner asks that this Court grant the petition and set the case for a decision on the merits.

Respectfully submitted,

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Appendix

TAB 1 – Fifth Circuit Opinion

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 9, 2020
Lyle W. Cayce
Clerk

No. 19-50119

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ADAM LLOYD COOPER, *also known as* ADAM COOPER,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:18-CR-191

Before ELROD, DUNCAN, and WILSON, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:

Appellant Adam Cooper pleaded guilty to one count of possession with intent to distribute methamphetamine and one count of possession of a firearm in furtherance of a drug-trafficking crime. On appeal, Cooper contends that the facts do not support his guilt of the firearm offense. Because there is a sufficient factual basis to show Cooper possessed a firearm in furtherance of a drug-trafficking crime, we AFFIRM. Nevertheless, because the court's judgment erroneously indicates that Cooper pleaded guilty to the second superseding indictment—when in fact he pleaded guilty

to the superseding indictment—we REMAND for correction of the judgment under Federal Rule of Criminal Procedure 36.

I.

Cooper was driving a grey Chevrolet Impala down 42nd Street in Odessa, Texas with Tracy Marriott in the passenger seat when the Odessa Police Narcotics Unit stopped the vehicle for failing to signal a turn. Both Cooper and Marriott consented to a search. The search revealed drug paraphernalia, marijuana, methamphetamine, and a backpack. The backpack was "on the floorboard of the front passenger seat," where Marriott was sitting, and it contained drug paraphernalia, baggies, and a Smith and Wesson M&P, 9mm pistol. Marriott, after being advised of his Miranda rights, said "that the backpack was his and that he had traded an AR-15 rifle for a pistol the day before."

Cooper pleaded guilty to two counts arising from this incident: (i) possession with intent to distribute fifty grams or more of actual methamphetamine and (ii) possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c). With Cooper's consent, Magistrate Judge Ronald Griffin received Cooper's plea and conducted the Rule 11 plea colloquy. Fed. R. Crim. P. 11(b)(1); The magistrate judge read the charges to Cooper and asked Cooper if he understood the charges. Cooper replied "Yes, I do your Honor." The government read into the record the factual basis for the charges, which included the facts described above, as well as the statement, "The defendant admits and agrees that . . . he possessed a firearm in furtherance of" the drug-trafficking offense. Cooper affirmed that "the factual summary accurately state[d] what [he] did in this case." Cooper then pleaded guilty, and the district court accepted Cooper's plea "on Counts ONE AND TWO of the SUPERSEDING INDICTMENT"

At sentencing, Cooper continued to accept responsibility, but he briefly contested the fact that he knew about the firearm, claiming he knew only that Marriott had a backpack and not that there was a gun. Reading from the probation officer's pre-sentence report, the judge incorrectly stated that Cooper, "after being warned of [his] Miranda warnings, . . . admitted the backpack was [his] and the firearm belonged to [him]." In fact, it was Marriott, not Cooper, who made this admission. Cooper noted this to the court saying, "That's not from me. That's not the probation talking about me on there. I'm sorry but— . . . It wasn't in my backpack or in any of mine." The judge then replied "Well regardless— . . . you did plead guilty to both of these, right? Because you understand the law, it makes you guilty of them, right?" Cooper responded, "Yes, Your Honor." The district court subsequently entered judgment on what it described as Cooper's guilty plea "to Count(s) 1 and 2 of the Second Superseding Indictment."

Cooper timely filed notice of appeal, and this court appointed appellate counsel. Counsel then moved to withdraw by filing an *Anders* brief asserting that Cooper's appeal was without merit. *See Anders v. California*, 386 U.S. 738, 744 (1967). Because this case could present an issue of aiding-and-abetting liability for a § 924(c) offense, we carried that motion with the case and ordered counsel to file either a supplemental *Anders* brief addressing *Rosemond v. United States*, 572 U.S. 65 (2014) or "a brief on the merits addressing any nonfrivolous issues that counsel deems appropriate."

Cooper filed a brief on the merits arguing that the district court "failed to fully investigate whether the factual basis supported" Cooper's guilty plea to the firearm-possession count, as required by Federal Rule of Criminal Procedure 11(b). The core of Cooper's argument is that there is an insufficient factual basis to conclude that Cooper had the *mens rea* required by *United States v. Smith* to be guilty of possessing a firearm in furtherance of a drug-trafficking crime. 878 F.3d 498, 501 (5th Cir. 2017). Cooper does not

address or cite to *Rosemond*. Conversely, the government contends that the facts are sufficient to conclude that Cooper had the advance knowledge required by *Rosemond*, 572 U.S at 78, to be guilty of aiding and abetting a § 924(c) offense. The government further contends that the facts are sufficient to show that the possession of the firearm was in furtherance of a drug-trafficking crime.

II.

There is a conflict in the record as to whether Cooper pleaded guilty to the superseding indictment or the second superseding indictment. The government notes this conflict in its brief on appeal, but neither the government nor Cooper discuss the significance of the conflict.

At Cooper's plea hearing, only the superseding indictment was pending against Cooper. The government explained that it intended to file a second superseding indictment in order to add a conspiracy charge against Cooper's codefendant. It intended to then move to dismiss the second superseding indictment as to Cooper. The district court accepted Cooper's guilty plea to the superseding indictment.

At sentencing, however, the government told the district court that Cooper had pleaded guilty to the second superseding indictment. The government then moved to dismiss the indictment, the superseding indictment, and the conspiracy charge in the second superseding indictment; the district court granted the motion. After the hearing, the district court purported to enter judgment on the second superseding indictment.

Counts one and two of the superseding indictment are nearly identical to counts one and two of the second superseding indictment. Both indictments charge one count of possession with intent to distribute 50 grams or more of actual methamphetamine and one count of possession of a firearm in furtherance of a drug-trafficking offense. The indictments differ, however,

in one respect. Count 2 of the superseding indictment alleges that Cooper and Marriott "aided and abetted by each other" possessed a firearm in furtherance of a drug-trafficking offense. Count 2 of the second superseding indictment, however, excludes the words "aided and abetted by each other."[1] Both indictments cite to 18 U.S.C. § 2, the federal aiding-and-abetting statute.

Because aiding and abetting is a theory of liability, rather than a separate offense, the exclusion of "aided and abetted by each other" does not constitute a change in the offense charged. *See* 18 U.S.C. § 2; *United States v. Masson*, 582 F.2d 961, 963 (5th Cir. 1978). There is no meaningful difference, therefore, between the indictments. Nevertheless, a problem still remains because the district court dismissed the superseding indictment, to which Cooper pleaded guilty. As noted above, neither party briefed the court on a solution to this problem.

---

[1] The second count in the superseding indictment charged that Cooper and Marriott:

> aided and abetted by each other, did intentionally and knowingly possess a firearm, to wit: a Smith & Wessen M&P 9mm in furtherance of the drug trafficking crime set forth in Count One of this Indictment, which drug trafficking counts are incorporated by reference herein as if set forth in full, in violation of Title 18, United States Code, Section 924(c) and Title 18, United States Code, Section 2.

The second count in the Second Superseding Indictment, by contrast, charged Cooper and Marriott with:

> intentionally and knowingly possess[ing] a firearm, to wit: a Smith and Wesson M&P 9mm in furtherance of the drug trafficking crime set forth in Count One of this indictment, which drug trafficking count is incorporated by reference herein as if set forth in full; in violation of Title 18, United States Code, Section 924(c) and Title 18, United States Code, Section 2.

The proper remedy is to remand this case for correction of the judgment under Federal Rule of Criminal Procedure 36. Rule 36 allows the district court to "at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." Fed. R. Crim. P. 36. In several unpublished cases, we have previously used Rule 36 to correct errors in the judgment relating to dismissed indictments and to the offense underlying a plea. *See United States v. McCoy*, 819 F. App'x 262, 262 (5th Cir. 2020) (remanding to correct the judgment to reflect the crime to which the defendant pleaded guilty); *United States v. Stark-Fitts*, 802 F. App'x 845, 845 (5th Cir. 2020) (remanding to correct the amended judgment by adding a checkmark to clarify that the indictment, first superseding indictment, and second superseding indictment were dismissed); *United States v. Ulloa-Osorio*, 637 F. App'x 142, 143 (5th Cir. 2016) (remanding to correct the judgment by adding the dismissal of count two, which was omitted).

There is, of course, a limit to what Rule 36 can do. In *United States v. Ramirez-Gonzalez*, we held that the purpose of Rule 36 is "only to correct mindless and mechanistic mistakes. Where the record makes it clear that an issue was actually litigated and decided but was incorrectly recorded in or inadvertently omitted from the judgment, the district court can correct the judgment under" Rule 36. 840 F.3d 240, 247 (5th Cir. 2016) (internal quotation marks and citations omitted). Rule 36 does not cover deliberate drafting choices, such as the deliberate wording of a pre-sentence report. *Id.*

Here, the error in the judgment arose from the oversight of the parties and the district court at the sentencing hearing when the government incorrectly represented that Cooper had pleaded guilty to the second superseding indictment. The transcript of the plea hearing makes clear that Cooper pleaded guilty to the superseding indictment and that the parties intended to dismiss the second superseding indictment against Cooper; *i.e.*,

this issue was actually litigated. Moreover, there is no meaningful difference between counts one and two of the superseding indictment and counts one and two of the second superseding indictment. This error falls within both the literal reach of Rule 36 and the limitation imposed by *Ramirez-Gonzalez*. Therefore, we remand for correction of the judgment under Rule 36.

III.

We now turn to the merits of Cooper's appeal. Cooper makes two interrelated arguments on appeal: first, that the district court should have inquired as to whether there was a sufficient factual basis to support Cooper's guilty plea to count 2, the firearm count; second, that the factual basis is, in fact, insufficient to show that his possession of the firearm was in furtherance of the drug-trafficking offense because he did not know that the firearm was in the car.

Cooper's first argument that the district court should have inquired further is meritless. Cooper correctly states that the district court has a "duty to compare the factual basis to the elements of the offense to determine if the factual basis supports conviction before accepting the plea." *See* Fed. R. Crim. P. 11(b)(3); *United States v. Adams*, 961 F.2d 505, 511 (5th Cir. 1992). The district court, however, satisfied this duty through the Rule 11 colloquy conducted by the magistrate judge at the plea hearing. *United States v. Bolivar-Munoz*, 313 F.3d 253, 256–57 (5th Cir. 2002) (explaining that a district judge's delegation of authority to a magistrate judge is proper when the assigned duty is "'subject to meaningful review' by the district judge"). Cooper properly consented to the magistrate judge conducting the colloquy; the magistrate judge explored the factual basis for count two by comparing

the available facts to the elements of the offense alleged; and the district judge reviewed and accepted Cooper's guilty plea.[2]

Cooper's second argument that the factual basis was insufficient also fails. Because Cooper did not challenge the sufficiency of the factual basis for his guilty plea in the district court, this court reviews for plain error. *United States v. Ortiz*, 927 F.3d 868, 872 (5th Cir. 2019). To show plain error, Cooper must show a forfeited error that is clear or obvious and that affects his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). We may, in our discretion, correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

To determine if the facts support Cooper's guilty plea to count 2, we may consult all relevant materials in the record. *Adams*, 961 F.2d at 508. This includes the indictment itself, evidence available at the plea hearing, evidence "adduced after the acceptance of a guilty plea but before or at sentencing," the pre-sentencing report, *et cetera*. *United States v. Hildenbrand*, 527 F.3d 466, 475 (5th Cir. 2008); *see also United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010).

According to Cooper, his possession of the firearm could not have been "in furtherance" of the drug-trafficking offense in count 1 because he did not have any "prior knowledge of [the firearm] before Marriott entered the vehicle." Possession of a firearm is "in furtherance" of a drug-trafficking

[2] While district courts can delegate the Rule 11 colloquy to the magistrate judge, the better and more efficient practice may often be for the district court to conduct the Rule 11 colloquy itself. *See United States v. Dees*, 125 F.3d 261, 266 (5th Cir. 1997) (deciding that a magistrate judge may conduct a Rule 11 plea colloquy but registering our "concerns about the performance of such an important duty by non-Article III judges"). This practice would avoid double review of the record and decrease the chance for miscommunications like the one we resolve with Rule 36 in this case.

offense if the possession furthers, advances, or helps forward that offense.[3] *United States v. Ceballos-Torres*, 218 F.3d 409, 412 (5th Cir. 2000). This possession must be "knowing possession with a nexus linking the defendant and the firearm to the [drug-trafficking] offense." *Smith*, 878 F.3d at 502. Cooper points to the fact that the firearm was found in Marriott's closed backpack on the passenger side of the car as evidence that he did not know about the firearm. He does not, however, address the fact that the backpack also contained drug paraphernalia and plastic baggies commonly used in the distribution process. While Cooper claims he did not know about the contents of the backpack, he knew about the backpack itself, and he certainly knew about the methamphetamine he was transporting. Furthermore, firearms are common "tools of the trade" of drug trafficking. *United States v. Zapata-Lara*, 615 F.3d 388, 390 (5th Cir. 2010) (quoting *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990)). Together, this evidence is more than sufficient to support the conclusion that Cooper knew about the firearm and that the possession was in furtherance of the methamphetamine trafficking charged in count 1. *Ceballos-Torres*, 218 F.3d at 412; *see also Zapata-Lara*, 615 F.3d at 390 (discussing when a court may infer knowledge based on the facts of a drug-trafficking offense). Cooper does not show any plain error.

Finally, Cooper forfeited any argument he might have under *Rosemond* by not briefing the issue. *See Coleman v. United States*, 912 F.3d 824, 836 n.14 (5th Cir. 2019) (reaffirming that failure to adequately brief an issue on appeal

[3] "Some factors" that help establish possession in furtherance include "[1] the type of drug activity that is being conducted, [2] accessibility of the firearm, [3] the type of the weapon, [4] whether the weapon is stolen, [5] the status of the possession (legitimate or illegal), [6] whether the gun is loaded, [7] proximity to drugs or drug profits, and [8] the time and circumstances under which the gun is found." *Ceballos-Torres*, 218 F.3d at 414–15.

constitutes forfeiture of that argument); *see also United States v. Scroggins*, 599 F.3d 433, 449 (5th Cir. 2010) (distinguishing forfeiture from voluntary waiver of an argument). Our March 30 order instructed Cooper's counsel to either file a supplemental *Anders* brief addressing *Rosemond* or "a brief on the merits addressing any nonfrivolous issues that counsel deems appropriate." Consistent with that order, Cooper's counsel chose the latter route, filing a brief on the merits which does not address *Rosemond*. In *Rosemond*, the Supreme Court addressed the issue of the *mens rea* required to aid and abet the possession of a firearm in furtherance of a drug-trafficking offense in violation of 18 U.S.C. §§ 2 and 924(c). 572 U.S. at 75. Cooper does not cite to *Rosemond*, and he discusses instead the distinct *mens rea* issue of the knowledge required to directly commit—rather than aid and abet—a § 924(c) offense.[4] *See Smith*, 878 F.3d at 502; *Ceballos-Torres*, 218 F.3d at 412–15.

Assuming *arguendo* that Cooper did not forfeit a *Rosemond* argument, any *Rosemond* challenge would fail on this record. In *Rosemond* the Supreme Court explained that § 924(c) is a "combination crime" because it requires not just the possession of a firearm but also the commission a drug-trafficking crime. 572 U.S. at 71, 75. To show that the defendant intended to facilitate the commission of a § 924(c) offense—the intent requirement for aiding and abetting—the government must show that the defendant intended the commission of both aspects of § 924(c). *Id.* at 72, 76. This means that the government must show, at least, that the defendant had advance knowledge of the presence of a firearm. *Id.* at 78.

[4] The government incorrectly asserts that Cooper relies on *Rosemond* for his argument.

The record contains Cooper's own admission that he possessed the firearm:

> [THE PROSECUTOR:] The defendant admits and agrees that he possessed with intent to distribute more than 50 grams of actual methamphetamine, and that he possessed a firearm in furtherance of that offense.
>
> THE COURT: Mr. Cooper, do you agree with the factual summary as read by the government's attorney?
>
> THE DEFENDANT: Yes, your Honor.
>
> . . . .
>
> THE COURT: Okay. Mr. Cooper, is there anything that you disagree with in that factual summary that you would like to change, make objections to?
>
> THE DEFENDANT: No, your Honor.
>
> THE COURT: All right. Does the factual summary accurately state what you did in this case?
>
> THE DEFENDANT: Yes, your Honor.

It is well settled in this Circuit that an admission during a plea colloquy can support a guilty plea. *See United States v. Chandler*, 125 F.3d 892, 898 (5th Cir. 1997) (determining that defendant's admissions supported conviction). The record also contains circumstantial evidence supporting Cooper's advance knowledge, such as the presence of the firearm in Cooper's car and the proximity of the gun to paraphernalia of drug distribution. The district court did not plainly err in accepting Cooper's guilty plea.

* * *

For the foregoing reasons, we AFFIRM the judgment of the district court but REMAND the case for correction of the judgment under Rule 36 to reflect that Cooper pleaded guilty to the superseding indictment.

TAB 2 – Judgment & Mandate

United States Court of Appeals for the Fifth Circuit

No. 19-50119

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ADAM LLOYD COOPER, *also known as* ADAM COOPER,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:18-CR-191-2

Before ELROD, DUNCAN, and WILSON, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED, but the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

Certified as a true copy and issued as the mandate on Dec 01, 2020

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 01, 2020

Ms. Jeannette Clack
Western District of Texas, Midland
United States District Court
200 E. Wall Street
Room 222
Midland, TX 79701-0000

No. 19-50119 USA v. Adam Cooper
USDC No. 7:18-CR-191-2

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk
504-310-7675

cc:
Ms. Margaret Mary Embry
Mr. Joseph H. Gay Jr.
Mr. Lane Andrew Haygood