NO. _____

In The
Supreme Court of the United States

RONALD CENTENO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is a violation of the Fifth and Sixth Amendments to submit aiding and abetting to the jury when aiding and abetting is not charged in the indictment alongside a charge of violating of 18 U.S.C. § 924(c)?

II. What evidentiary showing is required to prove beyond a reasonable doubt that a criminal defendant had the requisite conditional intent to "cause death or serious bodily harm" under 18 U.S.C. § 2119?

PARTIES TO THE PROCEEDING

Petitioner Ronald Centeno was the defendant in the District Court and the appellant in the Fourth Circuit.

Respondent United States was the prosecution in the District Court and the appellee in the Fourth Circuit.

STATEMENT OF RELATED CASES

This case arises from and is related to the following proceedings in the U.S. Court of Appeals for the Fourth Circuit and the U.S. District Court for the Western District of North Carolina:

- *United States v. Centeno*, No. 3:12-cr-00385-FDW-1, U.S. District Court for the Western District of North Carolina. Judgment entered Aug. 14, 2014; Amended Judgment entered Sept. 23, 2015.
- *United States v. Centeno*, No. 15-4603, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Dec. 28, 2020.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals appears at Appendix 1a to this petition. It is not reported in the Federal Reporter but is available at 831 F. App'x 666 (4th Cir. 2020). The amended judgment without written opinion of the United States District Court for the Western District of North Carolina appears at Appendix 6a.

JURISDICTION

The Fourth Circuit entered judgment on December 28, 2020. App. 1a. Pursuant to an order dated March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth Amendment and Sixth Amendment to the United States Constitution, which read as follows:

FIFTH AMENDMENT:

No 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 offense 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.

SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This case presents the opportunity for this Court to address two important questions regarding the government's burden of proof which have caused significant confusion among the lower courts and deeply impacted the constitutional rights of criminal defendants by allowing for exceedingly harsh criminal convictions to be sustained where the government has altered or amended its own burden.

Under 18 U.S.C. § 924(c), a defendant who uses or carries a firearm in the commission of a violent crime is subject to an additional sentence. In *Rosemond v. United States*, 572 U.S. 65, 80 (2014), this court determined that in order to be fairly convicted of a Section 924(c) offense under accomplice liability, the would-be accomplice must have had advance knowledge that a firearm would be used. This unique "advance knowledge" requirement is not an element of a Section 924(c) offense when charged against a principal. Nevertheless, prosecutors fail to include in their indictments an aiding and abetting charge under Section 924(c); instead relying on 18 U.S.C. § 2 and past jurisprudence to do their work. What's more, prosecutors then assert aiding and abetting liability at the very last minute—after the government has concluded its case, or worse, right before jury instructions and closing argument—depriving defense counsel, and by dint of this, the defendant, of the ability to prepare in advance of trial, to effectively cross-examine the government's witnesses, to object to evidence, and to assert arguments during the prosecution's presentation of its case. It also often has the effect of depriving defense counsel of the time necessary to consider and prepare objections to what are often incorrect jury instructions and prejudicial closing arguments. In the context of Section 924(c), this last-minute ploy

functions as an impermissible constructive amendment to the indictment and deprives the defendant of his Fifth and Sixth Amendment rights. For its part, the government argues that the elements of an 18 U.S.C. § 2 are identical to those of the substantive offense, so there is no obligation to charge a violation of § 2 in the indictment. This argument ignores the prejudice to the defendant of being convicted on a theory of the case of which he or she had no notice and, specifically in the case of 18 U.S.C. § 924(c), writes the advance knowledge requirement—an essential element—out of the statute.

A second statute with a specific intent requirement, 18 U.S.C. § 2119, also has caused the circuit courts great confusion, with the result being a battery of disparate tests and the possibility that two defendants might be subject to different outcomes in a criminal trial based on the same evidence. This Court in *Holloway v. United States*, 526 U.S. 1 (1999) determined that a "conditional intent" to cause death or serious bodily harm to a victim in the commission of a carjacking can satisfy the intent requirement of Section 2119. However, this Court did not articulate a specific test for lower courts to use when instructing juries or assessing whether the government had met its burden of proof for establishing the *mens rea* of the defendant. This has resulted in the circuit courts splintering and using various forms of a "totality of the circumstances" test applied with varying levels of rigor. At the one end of the spectrum, courts in the Sixth Circuit deploy a formulaic test which requires that the carjacker brandish a weapon (often a firearm) coupled with threats and other indicia of intent—such as acts of violence or proof the firearm was loaded. At the other

end, courts in the Third and Fourth Circuits have found that the simple act of brandishing a firearm (whether or not loaded) and pointing it at the victim are sufficient proof of the intent to cause death or serious bodily harm. Thus, a criminal defendant who pointed an unloaded firearm at a victim could be found not guilty of carjacking in the Sixth Circuit, but guilty in either the Third or Fourth Circuit. This Court should reject the lenient standard applied by the Third and Fourth Circuit and enunciate a test that requires more than merely brandishing a firearm and making "empty threats" in the commission of a carjacking.

This is an excellent case in which to resolve these two important issues. The courts below erred by allowing the Government to constructively amend its Section 924(c) charge to include an aiding and abetting charge and then lowered the standard by which the jury could find Mr. Centeno guilty as an accomplice. Similarly, neither of the courts below enunciated any test for determining whether Mr. Centeno, who did not even touch a firearm in the presence of the victims, never mind brandish a firearm, had the requisite intent to cause death or serious bodily harm to the carjacking victims. This Court should grant certiorari and reverse the Fourth Circuit's decision.

A. Factual Background

On the evening of August 9, 2011, Ronald Centeno and Anthony Garcia arranged a transaction whereby Mr. Centeno intended to purchase a small amount of high-grade marijuana. App. 99a–104a. Michael Wallace, an acquaintance of Mr. Centeno's, testified that he had been with Mr. Centeno earlier that day and that Mr.

Centeno had mentioned he planned to rob Mr. Garcia of the marijuana. *Id.* at 139a–140a. However, Mr. Wallace did not mention that there was any discussion about a carjacking or a plan to injure or kill Mr. Garcia. Although Mr. Wallace testified that he saw a firearm early in the day in the possession of Brandon Covington and a taser in the possession of an unidentified individual, *id.*, Mr. Wallace did not testify that there were discussions to use the firearm in the robbery, in fact, Mr. Wallace testified that he got in the car with Mr. Covington and Mr. Centeno because he did not think the robbery was happening at that point in time. *Id.* at 140a.

Once both parties arrived at the agreed upon location, Mr. Garcia told Mr. Centeno to get in the back seat of his car so people would not see them. *Id.* at 110a. After some conversation about the marijuana, an unidentified male joined Mr. Centeno in Mr. Garcia's car. *Id.* at 110a–111a. Upon entering the car, the unidentified individual immediately drew a gun and pointed it at Mr. Garcia. *Id.* at 111a, 139a. Mr. Centeno then pulled out a "metallic" device, *id.* at 130a–131a, which the testimony indicated was a taser.[1] *Id.* at 63a–64a. The unidentified individual demanded the marijuana and the money, which Mr. White handed over in a backpack. The men also demanded that Mr. White remove his wristwatch. *Id.* at 56a–57a, 113a–114a.

[1] Of the individuals testifying who were present during the events, Mr. Garcia was the only witness who affirmatively indicated which person in the backseat held the firearm. Alan White was in the car, but he testified that he could not remember who possessed the gun but understood there to be one gun and one taser. App. 55a, 63a-64a. Mr. Wallace, who was not in the vehicle but accompanied Mr. Centeno to the scene testified that he had only seen one gun, which was in the possession of the unidentified male when he exited the car to go to Mr. Garcia's vehicle. *Id.* at 143a.

After taking possession of the marijuana, the unidentified individual then instructed Mr. Garcia to drive his car to the back of a nearby elementary school. *Id.* at 113a. No person testified that Mr. Centeno joined in this demand or threatened Mr. Garcia's life. *See id.* at 116a–117a. Rather than drive to the school, Mr. Garcia decided to jump out of the moving car. *Id.* at 117a. The car then veered off the road, down an embankment, and hit a house. *Id.* The three remaining individuals in the vehicle all exited the vehicle and left the scene of the crash. *Id.* at 43a.

Jalen Davidson, the Government's rule 403 witness, provided testimony about Mr. Centeno's alleged modus operandi. Even accepting Mr. Davidson's testimony that he had purchased marijuana from Mr. Centeno multiple times during a period in which Mr. Centeno was incarcerated, *id.* at 193a, Mr. Davidson's "MO" testimony amounted to a vague statement that at some indefinite point in time, Mr. Centeno told Mr. Davidson he obtained the marijuana by robbing drug dealers. *Id.* at 185a–186a. Mr. Davidson did not testify how many times Mr. Centeno had made this statement. Mr. Davidson did not testify that Mr. Centeno told him he used or brandished a firearm, or employed the help of others who would use or brandish firearms, in the commission of these robberies. When asked for the information Mr. Centeno had given him about robberies, Davidson simply said that he had been told by Mr. Centeno that he had committed the robbery and had some "weed for sale for cheap." *Id.*

B. Procedural History

On December 11, 2012, Mr. Centeno was indicted on four counts, including carjacking in violation of 18 U.S.C. § 2119 (Count One); possession of a firearm in furtherance of a crime of violence (carjacking) in violation of 18 U.S.C. § 924(c), in which it was further alleged that the firearm was brandished in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Two); Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Three); and use or carry of a firearm during and in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Four). App. 22a–24a. The Indictment did not charge—alternatively or otherwise—Mr. Centeno with aiding and abetting or a violation of 18 U.S.C. § 2. The indictment did not charge any other person and the indictment made no mention of any accomplice or conspirator or other actor.

The District Court had jurisdiction under 18 U.S.C. § 3231. Mr. Centeno stood trial beginning May 13, 2013. Only after the close of the Government's evidence did the Government announce its intention to request an aiding and abetting instruction on each of the Section 924 counts charged in the indictment. *Id.* at 215a–216a. The District Court gave the Government's requested instruction, and the jury convicted Mr. Centeno on all four counts of the Indictment, resulting in a 420-month sentence—despite the jury finding that Mr. Centeno did not brandish a firearm. *Id.* at 20a, 12a–13a.

After the Government dismissed Count Four, Mr. Centeno was re-sentenced on Count One to 125 months' imprisonment and three years' unsupervised release;

on Count Two to 60 months' imprisonment to run consecutively to Counts One and Count Three. And, on Count Three, 125 months' imprisonment and three years' supervised release to run concurrently with Count One. *Id.* at 339a.

Notice of Appeal was filed on October 6, 2015. *Id.* at 18a. The Fourth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. On December 18, 2020, the Fourth Circuit affirmed the trial court's ruling without argument. *Id.* at 1a. In its per curiam opinion, the Fourth Circuit did not address in any detail the grounds for appeal which Mr. Centeno sought.

REASONS FOR GRANTING THE PETITION

I. ALLOWING AN AIDING AND ABETTING INSTRUCTION TO BE SUBMITTED TO THE JURY WHEN IT IS NOT CHARGED IN THE INDICTMENT RESULTED IN A CONSTRUCTIVE AMENDMENT THAT VIOLATED MR. CENTENO'S CONSTITUTIONAL RIGHTS AND CAUSED SUBSTANTIAL PREJUDICE.

In 2014, this Court held that in order for a criminal defendant to be convicted on an aiding and abetting theory of liability under 18 U.S.C. § 924(c), the jury instructions must include that a would-be accomplice can be convicted only if he has ***advance knowledge*** of the use of a gun. *Rosemond v. United States*, 572 U.S. 65, 80 (2014). Despite this clear precedent, the District Court failed properly to instruct the jury of the requirement of advance knowledge and allowed the Government to misrepresent the standard without issuing any corrective instruction. What's more, the District Court did so over defense counsel's objection, when the aiding and abetting charge was not mentioned in the indictment and only substantively raised after the Government had concluded its case-in-chief. The result: a conviction

pursuant to a general verdict form which shows the jury relied on aiding and abetting liability.[2]

To allow Mr. Centeno's Section 924(c) conviction to stand would significantly broaden the scope of aiding and abetting liability under *Rosemond* and would provide a blueprint for prosecutors to sandbag defendants with last-minute charges that the defense did not have the opportunity to defend, permitting prosecutors to obtain an unfair conviction—denying defendants' substantial right to a fair trial and undermining the integrity of judicial proceedings by allowing lower courts to deviate from established precedent.

A. The Failure of the Government To Charge Aiding and Abetting in the Indictment Followed by Its Reliance on Aiding and Abetting at the End of the Trial Constituted a Constructive Amendment of the Indictment That Violated Mr. Centeno's Fifth and Sixth Amendment Rights.

It is longstanding precedent that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960); *see also Ex parte Bain*, 121 U.S. 1, 13 (1887). Where additional charges not approved by a grand jury are "neither trivial, useless, nor innocuous . . . that variation [] destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. This necessarily results in "fatal error." *Stirone*, 361 U.S. at 219; *accord*

[2] Even when challenges in the District Court are not properly preserved, Federal Rule of Criminal Procedure 52 provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Under the standard for applying this rule, appellate courts have the power to reverse a conviction where there has been a plain error that affects the substantial rights of the defendant and seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732-38 (1993).

United States v. Floresca, 38 F.3d 706, 713 (4th Cir. 1994) ("Because the *Stirone* Court held that the error occasioned by constructive amendments can never be harmless . . . it follows that such errors must affect substantial rights.").

To be constitutionally valid, an Indictment must indicate the elements of the offense and "fairly inform [Mr. Centeno] of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). This means the indictment must use words that "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Id.* (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)).

The Indictment against Mr. Centeno did not "fully, directly, and expressly, without any uncertainty or ambiguity" charge him with aiding and abetting possession of a firearm in connection with carjacking in violation of 18 U.S.C. § 2 either as a constituent element of Count Two (violation of 18 U.S.C. § 924(c)) or as an alternative offense. The Indictment makes no mention of another defendant or other participant. The Indictment contains no allegation that Mr. Centeno had advance knowledge of the unidentified individual's intent to use a firearm, nor does it otherwise plead an intent to aid a principal actor in the offense conduct. App. 22a–23a.

Under the terms of the Indictment, read in compliance with the Constitutional standard, Mr. Centeno could be convicted of a Section 924(c) offense only if he had been in possession of a firearm with the requisite intent at the time of the carjacking. And that was the theory on which the Government tried the case. That was the theory

on which defense counsel decided what cross-examination questions to ask or to forgo, what objections to make or to forgo, what arguments to the court to make or to forgo. However, that decidedly was ***not*** the theory on which the jury found Mr. Centeno guilty. Instead, the jury convicted Mr. Centeno under a theory of aiding and abetting, and we know this because the jury found that Mr. Centeno was guilty of the Section 924(c) offense ***without*** Mr. Centeno brandishing a firearm. Thus, Mr. Centeno was convicted on the theory that the Government asserted only after it had rested its case and Mr. Centeno had moved for acquittal. *Id.* at 215a–216a. Nor did the District Court inquire as to whether the Government had presented any, let alone sufficient, evidence upon which an aiding and abetting charge could rest. *Id.* at 216a–217a; *see United States v. Turner*, 674 F.3d 420, 442 (5th Cir. 2012) (rejecting aiding and abetting theory not present in indictment when trial evidence did not support such a theory).

There can be no debate: The Indictment does not "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary" to support a conviction for violation of Section 924(c) pursuant to 18 U.S.C. § 2. *See Hamling*, 418 U.S. at 117. Specifically, the Indictment does not give notice that Mr. Centeno can be convicted for a Section 924(c) crime if he himself did not use or carry a firearm. Further, the Indictment does not plead the essential element of intent for ***aiding and abetting*** the use of a firearm—advance knowledge of the principal actor's intent to use a firearm. There is no advance intent element for the principal in a Section 924(c) charge. Because the Government failed to charge Mr. Centeno with a violation

of 18 U.S.C. § 2, and failed to plead the essential advance knowledge element, Mr. Centeno was not given the Constitutionally required opportunity to prepare a defense to this charge, particularly to the element of whether or not Mr. Centeno had advance knowledge of the firearm's use.

The Fourth Circuit accepted the Government's argument, which is arguably the accepted wisdom as to all federal criminal offenses, that an aiding and abetting offense is legally indistinguishable from the associated substantive charge, so it need not be pleaded in an indictment. First, this ignores the fact that aiding and abetting a Section 924(c) charge carries a different *mens rea* from the associated charge as principal. Second, it ignores the impact of the failure to plead aiding and abetting on the way the case is tried and defended. When, as in this case, the Government provides no substantive notice of the aiding and abetting charge until after it rests its case, the tactical decisions, the cross-examinations, and the objections during the case-in-chief cannot be targeted to a charge the Government has not brought and is not pursuing. Doing so may confuse the jury and shift focus from what are—or what defense counsel believes to be based on the Government's prosecution tactics—the critical factual and legal issues, including in this case the issue of advance intent. Allowing the Government this breadth of charging flexibility further opens the door to the Government pivoting at the last moment to a theory of the case under which evidence was not presented on or defended against, to the detriment of defense counsel, who had no reason to prepare such a defense. Finally, it means, in circumstances such as a Section 924(c) charge, the grand jury never determined Mr.

Centeno had the requisite *mens rea* of advance knowledge to support an indictment on the aiding and abetting theory.

In this case, the way in which the Government, abetted by the District Court, circumvented the element of advance knowledge illustrates a critical flaw in the generally accepted policy that a Section 2 charge need not be pleaded in an indictment. It allows the Government to present evidence and make argument on a crime which carries a lower and more general *mens rea* requirement as a principal and use only this evidence to obtain a conviction on an aiding and abetting theory which requires a different and highly specific *mens rea* requirement. In the Section 924(c) context, this flaw is independently fatal.

B. The District Court's Jury Instructions and Government's Closing Argument Utterly Disregarded *Rosemond*'s Requirements for Aiding and Abetting a Section 924(c) Offense.

Both the jury instructions and the Government's closing argument contravene this Court's established principles for aiding and abetting liability under 18 U.S.C § 924(c). In *Rosemond*, also a "drug deal gone bad" case, this Court affirmed the well-trodden principle that "a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond*, 572 U.S. at 71. But this Court specified further that, within the specific context of Section 924(c), the accomplice's intent "must go to the ***specific and entire crime charged***—so here, to the full scope (predicate crime plus gun use) of § 924(c)." *Id.* at 76 (emphasis added). Put succinctly, the accomplice must know in advance of the principal's intent to use

or carry a firearm in connection with the underlying offense. *Id.* at 78. "Advance knowledge" is such a knowledge that would enable the defendant to make a relevant "legal (and indeed, moral) choice": whether or not to opt out of the conduct after knowing that a gun will be used. *Id.*; *see also United States v. Jones*, 761 F. App'x 210 (4th Cir. 2019). Importantly, this Court explicitly determined that

> 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.

Rosemond, 572 U.S. at 78.

Despite this clear mandate, lower courts continue to struggle with providing appropriate instructions about the advance knowledge requirement for aiding and abetting under Section 924(c). *See, e.g.*, *United States v. Prado*, 815 F.3d 93, 102 (2d Cir. 2016); *Turner*, 674 F.3d at 443. The District Court in this case similarly struggled. First, the District Court instructed the jury, in pertinent part:

> [Mr. Centeno] can also be found guilty on Count Two based on aiding and abetting, as I previously instructed. However, to satisfy [Mr. Centeno] knowingly associated himself with the crime, the Government must establish that [Mr. Centeno] knew that a gun would be used or carried during the commission of the offense.
>
> In addition to providing that [Mr. Centeno] knew that a gun would be used or carried during the commission, the Government must also prove that Mr. Centeno or encouraged the use, carrying or possession of that weapon in some way.

App. 276a. This instruction simply restates the language of the statute, rather than providing the jury with the relevant standard under *Rosemond*. *Compare id.* at 276a, *with United States v. Bailey*, 972 F.3d 1179, 1181–82 (4th Cir. 2020) (recapitulating

jury instructions which explicitly stated a requirement that "defendant knew in advance that the other person would use or carry a firearm" and that "element cannot be met" where "defendant knew nothing of the firearm until it appeared at the scene of the crime"). In the instant case, the District Court did not make clear that Mr. Centeno's knowledge must have been in advance of the commission of the crime, nor did the District Court inform the jury that the knowledge element must fail if advance knowledge had not been proven beyond a reasonable doubt.

Further, when the Government made its closing statement (which occurred ***after*** the jury instructions), it impermissibly expanded the aiding and abetting standard under Section 924(c) by saying:

> Even if you don't believe Michael Wallace, you know based on the testimony of the victims, that when the other individual pulled out the gun, ***[Mr. Centeno] pulled out some weapon in order to be assisting. That's sufficient to find him guilty on Counts Two and Four.***

App. 294a (emphasis added). This contention flouts the reasoning in *Rosemond*, which recognized one cannot aid and abet a Section 924(c) offense "when that knowledge comes too late for him to be reasonably able to act upon it." *Rosemond*, 572 U.S. at 81.

And like the mistaken prosecutor in *Rosemond*, the Government here believed that "the jury should convict such a defendant even if he became aware of the gun only after he realistically could have opted out of the crime," *id.* at 80, and further explained to the jury that

> with respect to each count in the indictment, the defendant doesn't have to do every act that constitutes the commission of that crime. So if he

> willing joins in with someone else, if he's acting in concert, the individuals become agents of one another and that's called aiding and abetting. They are aiding and abetting one another.
>
> So if this defendant set up a drug deal and knew it was going to be a robbery, and then went to that scene and got into a car with another individual, ***and even if he at that moment had a taser and the other individual had a pistol, they are aiding and abetting one another.*** They are acting in concert.

App. 303a (emphasis added). These remarks, which occurred after the jury instructions and for which no rehabilitating instruction was given, were incredibly prejudicial to Mr. Centeno in that they blatantly misstated and expanded the scope of aiding and abetting a Section 924(c) defense. Moreover, these errors unquestionably misled the jurors and constitute plain error because the jury relied on the improper aiding and abetting instruction when convicting Mr. Centeno under Count Two. *See id.* at 20a (finding Mr. Centeno guilty of Count Two but finding Mr. Centeno did not brandish a firearm). "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (*per curiam*); *see also Mills v. United States*, 164 U.S. 644, 646 (1897). This clearly resulted in significant prejudice to Mr. Centeno given that the result of the error was a conviction. *See Olano*, 507 U.S. at 736. Certiorari should be granted to correct the District Court's mistake and clarify the requirements for aiding and abetting liability under Section 924(c).

C. The Error Here Meets the Plain Error Standard for Reversal of the § 924(c) Conviction.

The Fourth Circuit reviewed these challenges under the plain error standard. The plain error standard requires the appellant to demonstrate that "(1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus,* 560 U.S. 258, 262 (2010) (citation omitted); *accord Olano*, 507 U.S. at 732-38.

In the instant case, the plain error standard is clearly met. In the general verdict form, the jury found that Mr. Centeno was guilty of both Counts One and Two, but specifically found that Mr. Centeno ***did not*** brandish a firearm during the commission of the crime. App. 20a. Thus, for purposes of the Section 924 offense, the jury could have ***only*** found that Mr. Centeno aided and abetted the unidentified individual in the commission of that crime. Because the District Court allowed the Government to constructively amend its Indictment, then provided an improper instruction, and finally allowed the standard to be impermissibly broadened by the Government's closing argument, the resulting standard that the jury took to deliberations was significantly more lenient than the standard set forth in *Rosemond* and required for aiding and abetting a Section 924(c) offense. That the jury convicted Mr. Centeno under this unconstitutionally lenient standard, despite the lack of any

evidence that Mr. Centeno had advance knowledge of the gun use, clearly "affected the outcome of the district court's proceeding" and constituted plain error.

II. THE LOWER COURTS CONSISTENTLY MISAPPLY THE SPECIFIC INTENT REQUIREMENT OF 18 U.S.C. § 2119 IN VIOLATION OF DEFENDANTS' FIFTH AND SIXTH AMENDMENT RIGHTS.

It is a growing trend in circuit caselaw that merely showing the presence of a firearm (whether or not loaded) plus a threat equals the conditional intent to kill or seriously harm. But this formula eradicates a substantial burden that the Government carries—proof beyond a reasonable doubt that the defendant ***actually*** intended to cause death or serious bodily harm to the victim, conditionally or otherwise. Under *Holloway v. United States*, 526 U.S. 1 (1999), and the text of 18 U.S.C. § 2119, mere use of force or intimidation cannot be enough to satisfy this specific intent requirement in the carjacking statute. Despite this being the case, lower courts have failed to develop a coherent, rigorous approach to ensuring that the evidence adduced to support carjacking convictions meets this strict standard, and the failure to do so has substantially decreased the prosecutorial burden set by Congress and this Court. The result is unjustified convictions for principals and accomplices alike when the government has submitted evidence tending to satisfy only the force or intimidation element, and not the specific intent to cause death or serious bodily harm. This is of particular moment when considering aider and abettor liability for which the intent must be in advance of the use of the firearm by the principal.

A. Both *Holloway* and 18 U.S.C. § 2119 Support a Strict *Mens Rea* Requirement.

In *Holloway*, this Court focused on the appropriate interpretation of the specific intent requirement under Section 2119. Although this Court held that a defendant's "conditional intent" to cause death or serious bodily harm to a vehicle owner in the commission of a carjacking sufficed to satisfy the specific intent requirement of Section 2119, it set strict *mens rea* requirements. For starters, addressing the intent of the principal actor, this Court noted that "the factfinder's attention" must be focused on "the defendant's state of mind at the ***precise moment*** he demanded or took control over the car 'by force and violence or by intimidation.'" *Holloway*, 526 U.S. at 8 (emphasis added). Moreover, this Court clarified that the specific intent element of Section 2119 must be distinct from "the statute's 'by force and violence or by intimidation' element." *Id.* at 11. In order to create the necessary space between the intent element and the force element, so as not to render either surplusage, this Court stated that "an empty threat, or intimidating bluff . . . is not enough to satisfy § 2119's specific intent element." *Id.* Indeed, this Court determined that "Congress' inclusion of the intent element requires the Government to prove beyond a reasonable doubt that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car." *Id.* at 11–12. The Court also specifically noted that "a threat to harm does not in itself constitute intent to harm or kill." *Id.* at 11 n.13.

The plain language and the legislative history of 18 U.S.C. § 2119 also make clear that Congress intended to make carjacking a crime that requires a clear and

unequivocal showing of a specific "intent to cause death or serious bodily harm." The statute, which originally became effective on October 25, 1992, applied to anyone who, "***possessing a firearm*** as defined in section 921 of this title, takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so . . . ." 18 U.S.C. § 2119 (1988 ed., Supp. V) (emphasis added). Just two years later, Congress struck from the statute "possessing a firearm as defined in section 921 of this title," and inserted "with the intent to cause death or serious bodily harm." H.R. Rep. No. 103-711, pt. 2 (1994) (Conf. Rep.). At the same time, the statute was amended to authorize the death penalty in subsection 3 when death results. *Id*. There is no ambiguity or contingent language in this clause.

In effect, the 1994 amendment shifts the focus of the carjacking statute to the ***mens rea*** of the defendant rather than the ***attendant circumstance*** of carrying a firearm. This makes sense considering the era when the statute was initially passed. *See Holloway*, 526 U.S. 1, 18–19 (Scalia, J., dissenting). As Justice Scalia explained, the carjacking statute was passed (and amended) during a time when not only were carjackings highly publicized, but many also involved acts of needless violence against the owners of the vehicles. *Id.* The 1994 amendment achieves this aim by both broadening the statute to cover carjackings committed with a weapon other than a gun (such as a knife) and honing in on the specific intent at which Congress aimed: deterring ***acts*** of violence against the victims. *Id.* Indeed, the fact that Congress intended to focus on the defendant's violent intent rather than whether the defendant carried a gun is further supported by the fact that it is entrenched in case law that a

Section 924(c) offense can be pleaded alongside a carjacking offense—providing an enhanced sentence for carjackings commissioned with a firearm as opposed to some other weapon. *See, e.g.*, *United States v. Moore*, 43 F.3d 568, 573 & n.4 (11th Cir. 1994); *United States v. Singleton*, 16 F.3d 1419, 1428 (5th Cir. 1994).

B. The Lower Courts Consistently Have Eroded *Holloway*'s Intent Requirement.

Despite the clear *mens rea* requirement that to be guilty of carjacking, a criminal defendant must 1) possess the specific intent to cause death or serious bodily harm; 2) evidenced by more than mere intimidation or threats; 3) at the precise moment the car is being taken, circuit courts have allowed far less to result in convictions under Section 2119. The upshot is that factual scenarios similar to Mr. Centeno's have and will continue to result in disparate outcomes for defendants. Corrective guidance from this Court is necessary to prevent defendants who are "actually innocent" of a violation of Section 2119 from being convicted in violation of their Fifth and Sixth Amendment rights.

For example, certain circuit courts deploy variations on a "totality of the circumstances" test when assessing whether the carjacking defendant had the requisite conditional intent. One example is the Sixth Circuit's two-step test. *See United States v. Fekete*, 535 F.3d 471, 480 (6th Cir. 2008). Under the first step, the court analyzes whether the defendant used or merely brandished the firearm. Coined the "brandishing-plus" test, the Government must "present additional direct or circumstantial evidence that supports a finding that the defendant would have killed or seriously harmed the victim if the victim had resisted where the *only* other

evidence of intent is that the defendant brandished a firearm." *Id.* At this initial stage, threats made by the defendant can be considered. *Id.* If the Government makes such a showing, then the jury is instructed to consider the "totality of the circumstances"—in which "[e]vidence as to whether a firearm was loaded remains highly relevant." *Id.* at 481. In *Fekete*, the totality of the circumstances showed that the defendant had purchased a loaded .40 caliber pistol and additional ammunition, which remained loaded during the carjackings. *Id.* at 481. Moreover, his co-conspirator testified that it was likely the defendant would have used the gun if necessary. *Id. Fekete* echoed the concerns of earlier Sixth Circuit opinions that a conviction based only on evidence that a defendant brandished a gun would be insufficient to sustain a Section 2119 conviction. *Id.*; *see United States v. Adams*, 265 F.3d 420, 425 n.2 (6th Cir. 2001). Other circuits have demanded far less.

Multiple circuit courts have expressed doubt that a carjacking conviction could stand absent an additional act of violence, or the introduction of proof that the firearm employed was loaded during the commission of the crime. However, ultimately they have not opined. *See, e.g.*, *United States v. Malone*, 222 F.3d 1286, 1291–92 (10th Cir. 2000); *United States v. Jones*, 188 F.3d 773 (7th Cir. 1999). For example, in *Jones*, the Seventh Circuit's analysis hinged on the fact that the defendants carried loaded guns. *Jones*, 188 F.3d at 776. The court noted that although the evidence that one of the defendants pointed a loaded gun at a truck driver and threatened to shoot him was sufficient for a carjacking conviction, "had the defendants made the same threats, but carried an unloaded gun, the intimidation element would be satisfied but the

intent element might not." *Id.* at 777. The Tenth Circuit, citing *Jones*, expressed a similar doubt, yet concluded that intent to seriously harm the victim was present when the defendant committed other violent acts, such as shoving the victim to the ground, dragging the victim into a house, physically restraining the victim's family, and then forcing the victim back to her car at gunpoint. *Malone*, 222 F.3d at 1291–92 (10th Cir. 2000).

Still other circuit courts, including the Fourth Circuit, have applied a much lower standard—apparently focusing on the criminal defendant's ***ability*** to inflict death or severe injury, rather than the defendant's ***intent***. *E.g.*, *United States v. Folse*, No. 19-2065, 2021 U.S. App. LEXIS 13187, at *34 (10th Cir. May 4, 2021) ("Indeed, a gun can readily be used to inflict serious bodily harm, and even death, even if it is not loaded."); *United States v. Lake*, 150 F.3d 269, 272 (3d Cir. 1998) (conflicting evidence a gun was real was sufficient with no proof or discussion of whether the gun, if real, was loaded). The Fourth Circuit recently held that "even if [the victim's] assailants carried an unloaded gun" they may possess the requisite conditional intent to cause death or serious bodily harm because they could potentially use the gun in other ways—such as pistol whipping. *United States v. Small*, 944 F.3d 490, 500 (4th Cir. 2019); *see also United States v. Foster*, 507 F.3d 233, 247 (4th Cir. 2007) (upholding conviction upon evidence that defendant pointed a gun at victim, told him to get out of car, and would not let him back in car). The Third Circuit has gone one step further and upheld a carjacking convictions when there was no evidence that the defendant possessed a gun, but rather evidence was

introduced that the defendant acted as if he had a gun and the victim "believed appellant was holding a gun, was afraid, and did not run away . . . ." *United States v. Jones*, 128 Fed. App'x 938, 940 (3d Cir. 2005). This approach contrasts even with the more lenient approach of other circuit courts, such as the Fourth Circuit. *See United States v. Bailey*, 819 F.3d 92, 97–98 (4th Cir. 2016) (vacating judgment where no evidence was introduced tending to show defendant possessed a gun).

The approaches to determining conditional intent adopted in cases such as *Folse*, *Small*, *Foster*, *Jones*, and *Lake* allow the "force or intimidation" element to control and renders the specific "intent to cause death or serious bodily harm" surplusage. Doing so not only significantly lowers the burden on the government to obtain a carjacking conviction, but it also completely ignores the legislative history by which Congress sought to impose a specific intent requirement to justify the death penalty and the clear directive enunciated in *Holloway*. Further, when viewed in the context of a carjacking offense charged in conjunction with a Section 924(c) offense, the constitutional problems with this more lenient approach are further exacerbated where, as here, the defendant lacks the advance knowledge that a firearm ***would even be carried by the principal***, let alone used in the commission of the offense.

This case presents a perfect example of why this Court needs to step in and enunciate a clear test for the circuits to follow when evaluating conditional intent. Here, the evidence at trial did not establish that Mr. Centeno brandished a firearm. App. 20a. The evidence at trial did not establish that Mr. Centeno commanded Mr. Garcia to drive to the elementary school, threatened his life, or instructed him in any

way about his movements in the automobile. *Id.* at 116a–117a. The evidence at trial did not establish that the unidentified individual's firearm was loaded at any point during the day or at the time it was brandished. No shots were fired. The evidence at trial established that neither Mr. Centeno nor the unknown individual brandishing the firearm physically harmed the victims. ***The evidence at trial did not even establish that Mr. Centeno had advance knowledge that the unidentified individual planned to carjack Mr. Garcia after taking his marijuana or brandish a firearm during the commission of either offense***. Indeed, one can ask if Mr. Centeno had known in advance a firearm would be used, why would he bother bringing a taser?

Instead, the evidence established only that Mr. Centeno carried a taser and attempted to rob Mr. Garcia of a small amount of marijuana. Nevertheless, Mr. Centeno was convicted of carjacking and his motion for acquittal was denied in conclusory fashion. Both the carjacking statute and the teachings of *Holloway* counsel against this result on a factual record presented in this case, and Mr. Centeno's conviction should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

This 27th day of May, 2021.

Respectfully submitted,

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