IN THE

SUPREME COURT OF THE UNITED STATES

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KENDALL WHITAKER,
PETITIONER,

v.

PATRICIA A. COYNE-FAGUE, Director/Warden, Adult Correctional Institution§,
RESPONDENT

_____

Petition for a Writ of Certiorari to the Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

I. The Petitioner seeks review of the denial of a certificate of appealability by the First Circuit which review of the decision of U.S. District Court for the District of Rhode Island and ultimately seeks direct collateral review of the decision of the Rhode Island Supreme Court reversing and vacating the decision of the trial justice of the Superior Court holding in a post-conviction relief action that the Petitioner was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendment to the United States Constitution where counsel failed to object and preserve for appeal jury instructions on the elements of a charge of aiding and abetting; specifically that they required on the accused part advanced knowledge that a firearm would be used in the offense and that he or she had a reasonable chance to disengage, leave or terminate his or her involvement in actions. Petitioner has exhausted all other manner of relief.

II. Where the Petitioner is possessed of due process rights under the 5th and Fourteenth Amendments to the United States Constitution and a new substantive rule is announced by this Court specifying the elements that must be present to be convicted as an aider and abettor, that rule applies retroactively to Petitioner's Case. The Rhode Island Supreme Court restrictive interpretation of the ruling

in Rosemond to only effecting a federal statute, namely 924(c), ought to be corrected by this Court as failing to afford due process.

III. Where the Rhode Island Supreme Court reversed the trial justice's post-conviction ruling that there was insufficient evidence presented by the prosecution at the Petitioner's trial to the beyond a reasonable doubt standard, on the critical elements of aiding and abetting liability, namely advanced knowledge of the plan to use a fire arm in the offense and a reasonable opportunity for the accused to quit the activity, a great injustice has occurred removing both the defendant's right to a jury trial with a properly instructed jury and a substitution of its judgment as to the trial facts of the 13th juror in frustration as well of the accused right to a fair trial.

IV. Where the Superior Court specifically found that the State had pursued several theories of guilt due to the dubious strength of its evidence, some versions of which were specifically found by the Superior Court justice to be based on the untrustworthy dubious statements of co-defendants clearly supports the trial court's post-conviction relief finding of insufficient evidence. The trial justice was convinced to the point that she opined that she ought to have been reversed for finding otherwise at trial. Having determined the witnesses not reliable she resolved as the thirteenth juror that she could not accept their unreliable testimony at all. In that finding

she properly discharged her role and upheld fundamental fairness; the reversal of that finding worked a manifest injustice, which cries out for correction.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties To the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

None.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

NO.

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KENDALL WHITAKER,
PETITIONER,

vs.

PATRICIA A. COYNE-FAGUE, DIRECTOR/WARDEN,
ADULT CORRECTIONAL INSTITUTION
RESPONDENT,§

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_____

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

This petitioner, Kendall Whitaker, respectfully prays that a Writ of Certiorari issue for Review of the Judgment of the United States Court of Appeals for the First Circuit denying a Certificate of Appealability.

OPINION BELOW

On December 9, 2021, the Court of Appeals for the First Circuit entered its judgment denying a Certificate of Appealability. The U.S. District Court denied the petition brought pursuant to 28 U.S.C. §2254, filing an opinion and order dated January 27, 2021 and denied a Certificate of

Appealability January 17, 2019, the Supreme Court of Rhode Island entered its judgment reversing the judgment of the Rhode Island Superior Court which had **granted** Post Conviction Relief to the Petitioner and vacated the consecutive two (2) life sentences that had been imposed on the Petitioner and corresponding sentences on other counts. A copy of the Opinion of the Court is attached hereto in the Appendix. This petition ultimately seeks direct collateral review of the erroneous findings of the Courts below, in essence, as would be available on 28 U.S.C. §1257, in the circumstances where petitioner pursued relief through the 28 U.S. C.§2254 process.

JURISDICTION

On December 9, 2021 the Court of Appeals for the First Circuit entered its Judgment denying a Certificate of Appealability. The U.S. District Court for the District of Rhode Island denied Petitioner's 28 U.S.C. §2254 petition. The Supreme Court of Rhode Island entered its the judgment reversing the judgment of the Rhode Island Superior Court sitting in the County of Providence granting relief to the Petitioner, Kendall Whitaker, to wit: vacating two consecutive life sentences that the same trial justice had imposed following his trial and other counts and sentences as well. The Petitioner here seeks that his Court will grant the Writ as prayed. This Court has jurisdiction pursuant to 28 USC § 1254 and as recognized in Rule 10 (c) of the United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS

The right to Due Process of the Fifth Amendment as applied to the States through the 14th Amendment to the United States Constitution, requires a fair trial before a fair and unbiased tryer of facts. Pursuant to the United States Constitution, the state, in a criminal trial has the burden of proving beyond a reasonable doubt *every element necessary* to constitute the commission of a crime with which a defendant is charged.

The Due Process Clause of the Fifth and Fourteenth Amendment to the United States Constitution denies the state the power to deprive the accused of liberty unless the state proves every element necessary to constitute the crime charged beyond a reasonable doubt. The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements. A jury instruction violates a person's due process rights if it relieves the prosecution of the weighty burden of proving beyond a reasonable doubt each element of the crime of which a defendant stands accused. The announcement of a substantive and new change declaring elements which must be found in the context of aiding and abetting convictions is of constitutional due process significance and import.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of the accused to effective assistance of counsel.

STATEMENT OF THE CASE

In this case the Petitioner prevailed in his state court action for Post-Conviction Relief before the same trial justice who had presided at his jury trial; *State of Rhode Island v. Kendall Whitaker*, P1/2004-0145. (Decision attached in the Appendix). The trial judge vacated the convictions in Counts 1, Murder in violation of R.l.G.L. §§ 11-23-1 and 11-23-2; 2, Robbery in the First Degree, in violation of R.l.G.L.§ 11-39-l{a); 7, Using a firearm in the commission of a crime of violence, in violation of R.l.G.L. § 1 l-47-3.2(a); (8) Discharging a firearm in the commission of a crime of violence, in violation of R.I.G.L. § 11-47-3.2(b)(3); and (9) Commission of a crime of my violence (robbery) while armed and having available a firearm, in violation of R.I.G.L. § 11-47-3 pursuant to its decision announced in Court on April 20, 2016. The State of Rhode Island appealed to the Rhode Island Supreme Court. The Supreme Court of Rhode Island reversed the Trial Court. *State v. Whitaker*, 79 A.3d 795 (R.I. 2013) attached in the Appendix. The Petitioner brought his claim to federal court pursuant to 28 U.S.C. 2254. The U.S. District Court for Rhode Island denied relief, deny a certificate of appealability. The First Circuit Court of Appeals denied Petitioner's request for a certificate of appealability.

Associate Justice Hurst's decision in the Providence County Superior Court of Rhode Island agreed with the Petitioner with regard to key problems with his convictions. She recognized that the State's attorneys were confused

about if and how aiding and abetting instructions should be applied to the various charges. (See page 24 starting at line 15 and thereafter of the trial judge's 4/20/16 decision. Appendix) The state prosecutor insisted on the instruction, but interestingly, the prosecutor arguing to the jury in closing arguments never raised the concept with them. Mr. Whitaker's attorney failed to object to the instructions and preserve his right to appeal from the instructions. On April 20, 2016, the Superior Court acting on Mr. Whitaker's Post-Conviction relief action vacated several of his convictions. The Superior Court Justice ruled that the Jury Instructions she rendered in the trial on the matter were inherently confusing and convoluted and counsel failed to object to them to give the trial Justice a chance to correct the error and further failed to preserve the objections on the record, so the Rhode Island Supreme Court could take the matter up and correct the error. The Court below rested its rulings on the petition for Post-Conviction Relief pursuant to R.I. General Laws 10-9.1-1et seq. The case is based on a Sixth Amendment Challenge under the United States Constitution for ineffective assistance of counsel in connection with failing to object to and preserve for appellate challenge jury instructions together with the failure of counsel to argue and again preserve for appellate review the lack of evidence with respect to aiding and abetting counts, as well as inherent fundamental fairness grounds and the due process clause of the 5th and 14th Amendments to the United States Constitution. The Trial Justice in her fifty-seven page, carefully considered

Bench Decision, detailed her analysis of the deficiency of each jury instruction challenged, moreover she articulated jury instructions which would have properly instructed the jury on what they would need to find. In the Court held in the Decision at page 29, Appendix: "Had defense counsel brought all of this to my attention, I would have instructed the jury differently. The State's competing theories of liability were confused and confusing. I was ill at ease with both the jury instructions and the jury verdict summary sheet questions. I remember that. Unfortunately, I just couldn't place what was wrong. Further along the Court stated: In addition, the jury instructions were confusing, misleading, and equivocal. Yet defense counsel failed to preserve his objections and urge the Court to clarify. Id. at 50. Further along the Court plainly stated: "Had defense counsel brought all of this to my attention, I would have instructed the jury differently. The State's competing theories of liability were confused and confusing. I was ill at ease with both the jury instructions and the jury verdict summary sheet questions. I remember that. Unfortunately, I just couldn't place what was wrong. The Trial Justice stated that she remembered this case very well: "I cannot begin to describe the mental gymnastics involved in writing and organizing the jury instructions and the jury verdict summary sheet. Compounding the problem was the State's evidence that it was Mr. Whitaker who intended to rob Joel Jackson, but it was his cohort, Brandon Robinson, who actually pulled the chain and medallion from Jackson's neck. In

addition, the evidence that Brandon Robinson's gun never discharged was shaky." Decision, Page 8. The charges which the State relied on an aiding and abetting theory were laid out as numbers 7 through 11 on the jury verdict summary sheet. Id. Here the Superior Court, referring to Mr. Whitaker, stated: "He correctly contends that this trial justice erred when charging the jury with respect to aiding and abetting as a theory of liability and, further, that his trial attorney failed to properly challenge the Court's jury instructions." Id. at 10. The trial Court noted that Mr. Whitaker's post-conviction relief action was triggered by the recent U.S. Supreme Court decisions in aiding and abetting *Rosemond v. United States*, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014) and the recently decided case of *United States v. Encarnacion- Ruiz*, 787 F.3d 581, 583 (1st Cir. 2015). The Superior Court focused as well on the additional ground that "Mr. Whitaker also contended that defense counsel's performance was constitutionally deficient because counsel failed to raise that there was insufficient evidence to convict Mr. Whitaker under an aiding and abetting theory and because counsel failed to have this Court consider the issue on the motion for new trial. The Court noted that Question 8 of the felony murder charge was based on liability as an aider and abetter , the Jury instruction for felony murder did not include any instruction on aiding and abetting. Id. at 9. and consequently was not challenged on appeal. In the merits appeal the Rhode Island Supreme Court held that our review of the record reveals that this issue was not raised

before the trial justice and that therefore this argument must fail in accordance with our well-settled waiver rule.. State v. Whitaker, 79 A.3d 795, 805 (R I. 2013). Defense counsel' s written motion for new trial contained no grounds and, during the hearing on the motion, counsel merely asked this trial justice to function as the thirteenth juror and assess the evidence and credibility of the witnesses." Decision, at 11. The Trial Justice on the Post-Conviction Action entered a Final Judgment that the Judgment of Conviction in Counts 1, 2, 7, 8 and 9 and the sentences imposed thereon in P1/2004-0145 were vacated for the reasons stated in the Decision. The trial judge observed that the State's competing theories were confused and confusing and acknowledged herself ill at ease and just could not place her misgivings. (See page 29 starting at line 15 of the trial judge's 4/20/16 decision.) Further the trial justice acknowledged that the State faced serious problems with its proof, and had the jury been properly charged, as the Petitioner argued they were not, the jury could well have decided to acquit. (See page 39 starting at line 15 of the trial judge's 4/20/16 decision.) The trial justice believed that her decisions on these matter in the trial were worthy of reversal by the Supreme Court and thought the Supreme Court should have done this; in response to Mr. Whitaker's argument that defense counsel failed to raise that there was insufficient evidence for the jury to convict if it had been instructed

pursuant to a Rosemond[1] analysis. (See page 51 starting at line 15 of the trial judge's 4/20/16 decision.)

REASONS FOR GRANTING THE WRIT

The trial judge, during the post-conviction relief action focused on the identity of the shooter and the importance of the aiding and abetting instruction in this case, and in that respect, the U.S. District Court as well agrees with her and Petitioner that it was likely Mr. Whitaker's co-defendant Brandon Robinson, who fired the fatal shot not Mr. Whitaker. See the U.S. District Court Judge's decision. Appendix. (Even though Brandon Robison entered a plea agreement acknowledging he was the shooter.) Pursuing these confusing claims, especially in the case of another claiming responsibility runs afoul of the 5th and 14th amendments. *Napue v. Illinois* 360 U.S. 264, 79 S.Ct. 1173 (1959), See *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) The Rhode Island Superior Court trial judge ruled that with the proper jury instructions on aiding and abetting the jury could well have voted to acquit Mr. Whitaker. (See page 13 starting at line 6 of the trial judge's 4/20/16 decision.)

Further the Trial Court stated: "Although now that *Rosemond* is decided, this principle seems self-evident and dictated by prior precedent. Id. At 9. The Court acknowledged the differing decisions that emerged in the

[1] *Rosemond v. United States*, 572 U.S. 65, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014)

immediate aftermath. With respect to the Rhode Island state precedent the Trial Justice in the Post-Conviction Relief case cited that their existed, long standing, case law requiring more than the basic instructions given in the instant matter. Our criminal act of aiding and abetting requires two elements; first, that the alleged aider and abettor share in the criminal intent of the principal, and second, that there exist a community of unlawful purpose. *State v. Gazerro*, 420 A.2d 816, 828 (R.I. 1980). Presence at the scene alone will not support a conviction for aiding and abetting, but it is a factor that must be considered in the determination of guilt. Id. Additional factors to be considered, also not dispositive on their own, include the association or relationship between the principal and the alleged aider and abettor, knowledge that an unlawful act was to be committed, and flight from the scene. Id. Each case, however, must be evaluated on its own facts. Id. *Curtin v. Lataille*, 527 A.2d 1130, 1132 (R.I. 1987) Justice Robinson writing in *State v. Delestre*, 35 A.3d 886, 895 (R.I. 2012) wrote: "In order to convict a defendant of a crime as an aider and abettor, "the circumstances must establish that a defendant shared in the criminal intent of the principal [and that there was] a community of unlawful purpose at the time the act [was] committed." *State v. Gazerro*, 420 A.2d 816, 828 (R.I.1980) (internal quotations marks omitted); see also Diaz, 654 A.2d at 1202; *Curtin v. Lataille*, 527 A.2d 1130, 1132 (R.I.1987). In addition, the prosecution must present some evidence that a defendant "participat[ed] in the criminal act in

furtherance of the common design, either before or at the time the criminal act is committed." Gazerro, 420 A.2d at 828 (internal quotation marks omitted); see also *State v. Evans*, 742 A.2d 715, 721 (R.I.1999); *State v. Brezinski*, 731 A.2d 711, 715 (R.I.1999)." State v. Delestre, 35 A.3d 886, 895 (R.I. 2012) Further our Court, as stated by Justice Flaherty, *noted Rhode Island has followed U.S. Supreme Court rulings on accomplice liability even where an accomplice is convicted of a more serious offense than the principle.* (Emphasis added.) "Our holding is consistent with the manner in which other jurisdictions have interpreted similar accomplice liability statutes. For example, the United States Supreme Court, which interpreted a similar federal statute, decided that an aider and abettor could be convicted even when the principal has been acquitted. See *Standefer v. United States*, 447 U.S. 10, 11, 19, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980). *Jaiman v. State,* 55 A.3d 224,.

The Superior Court declared the relief it was granting was pursuant to the Post Conviction Relief act and authority in *R.I. Gen. Laws. §* 10-9.1-1, subsection (a)(1) which permits the Court to vacate a conviction or sentence if either the conviction or sentence was in violation of the constitution or the laws of this State. Decision P. 56. The Superior Court found that with respect to Counts 1,2,7,8 and 9, Mr. Whitaker had demonstrated in-effective assistance of 234-235, 2012 R.I. LEXIS 137, 22-23 (R.I. 2012) Our Court has specifically reversed convictions where this mens rea or knowledge of an

alleged aider and abettor was not proven. In *State v. Gazerro*: the Court held: "Moreover, Demirjian's statement reveals nothing of Badessa's words or conduct before the shooting that would enlighten us on his state of mind or his knowledge of impending criminal activity. From the tape we learn that Gazerro told Demirjian that Cipriano had ordered the shooting; however, no reason is given and no connection between Badessa and Cipriano is offered. The court could not find the requisite knowledge. *State v. Gazerro*, 420 A.2d 816, 829, 1980 R.I. LEXIS 1820, 36 (R.I. 1980). Rhode Island clearly requires a defendant must share in the criminal intent of the principal and that there exist a community of unlawful purpose. The aiding and abetting law in Rhode Island requires that the accused had to participate in a common design. Here the Trial Justice ruled the evidence did not show that he did, nor that the Jury was properly instructed as to advanced knowledge and a meaningful opportunity to withdraw. And that counsel deficiency was of such proportions that it affected his right to a fair trial on each and every one of these Charges. The Trial Court Justice made her findings based on a methodical review of each jury instruction and how it should have been rendered. Id. at 14. In doing so the trial justice said that "…I should have instructed the jury in more detail to make it clear that an aider and abettor must be sufficiently aware of the principal's intentions such that there is support for the elements of the particular criminal offense at issue." Id. With respect to a proper charge the trial court stated: I should have instructed the

jury as follows: “Ladies and Gentlemen, let’s turn to the first degree robbery and murder charges. These offenses involve additional elements over and above Mr. Whitaker merely having advanced knowledge of Brandon Robinson’ general intention to rob Joel Jackson. In addition to proving that Mr. Brandon Robinson intended to rob Joel Jackson, the State must prove beyond a reasonable doubt that Mr. Whitaker not only knew about Bradon Robinson’s general intention to rob Joel Jackson, but that Mr. Whitaker also know about Robinson’s specific intentions concerning the manner in which Robinson would carry out the crime such that Mr. Whitaker fully understood the nature and character of the crime that he would be facilitating. In other words, the State must prove that Mr. Whitaker understood the proposed nature and character of the robbery, that is, an armed robbery. The State also must prove beyond a reasonable doubt that Mr. Whitaker knew about Brandon Robinson’s specific intentions far enough in advance such that Mr. Whitaker had a meaningful opportunity to bow out of the enterprise. Decision at P. 26 . Further on at P. 33 of the Decision, the Court states: Plainly however, in connection with the first degree robbery and murder charges, this Court should have instructed the jury that the State was required to prove that Mr. Whitaker had sufficient advance knowledge not only of Brandon Robinson’s general intention to rob Joel Jackson but, also his specific intentions concerning the nature and character of that robbery. More specifically, that Robinson would attempt to commit the robbery while armed

and to use the gun during that attempt. Id at 29. Further on the trial Court the Trial Court explains: Had defense counsel brought all of this to my attention, I would have instructed the jury differently. The State's competing theories of liability were confused and confusing. I was ill at ease with both the jury instructions and the jury verdict summary sheet questions. I remember that. Unfortunately, I just couldn't place what was wrong. Id. at 29. The trial Court followed that with a clear instruction she would have rendered. Id at 31-32. The Trial Court explained her view that the Rosemond opinion was based on upon common law principles that were in existence at the time of Mr. Whitaker's trial. In Rosemond, Justice Kagan simply extended those principles to the combination crime at issue in that case. The trial evidence in this case was rife with conflicts and each and every one of the witnesses had credibility problems. There's no telling what the jury would have done if properly charged. I find that Mr. Whitaker has satisfied both prongs of a Strickland analysis with respect to this particular charge. Id at 33. Turning her attention to the felony murder charges, count 1 the Trial Court Justice, held it too must be vacated. "Not only did the errors which permeated the first degree robbery instruction necessarily infect the first degree murder conviction, the instructions I gave for the felony 34 murder charge were flawed in and of themselves. The errors contained in the felony murder instructions compounded the errors contained in the first degree robbery instructions. And actually vise versa." Id. After reviewing the

multiple theories that could be contemplated the Trial Court explains: "Despite the fact that the question implicated scenario number 3 (question being the jury ballot or questionnaire), I did not provide the jury with any additional aiding and abetting instruction in connection with the felony murder charge. The only aiding and abetting instructions that the jury had were the primary or core instruction that I gave as part of the robbery instruction and any follow up or additional instructions that I gave in connection with the other charges. More specifically, for the Court 1, felony murder charge, I merely instructed the jury on the elements of common law murder …". Id. at 35. Further on the Trial Court clarified that the instruction were lacking: "Plainly where liability under the Rhode Island Felony murder rule is predicated on aiding and abetting, the relevant knowledge would have to include enough knowledge of the other's specific intent concerning the nature and character of the crime such that someone's death is a foreseeable, natural and probable consequence of the commission of that particular crime. The jury in Mr. Whitaker's case was not instructed on this essential element. Nor was it instructed on timing. Id. at 38. The Trial Court dealt with the State's overarching assertion there as here that Mr. Whitaker was the shooter. "As I have said, the evidence was conflicting and there were so many credibility issues that the State faced serious problems with its proof. Let's not forget Mr. Whitaker was acquitted of assault with a dangerous weapon in connection with George Toby having been shot. Therefore we cannot say "It

dosen't matter if the jury was asked to answer an equivocal question for which it was not given full and adequate instructions - after all, the trial evidence was that Mr. 35 Whitaker did the shootings." It's simply impossible to determine what the jury thought or what it might have found if it had been properly instructed. Id. at 40. The Trial Court with a view which can only be characterized as fundamental fairness reviewed her approach to the jury instructions: In addition, my initial approach to the jury instructions was to charge on robbery, conspiracy, first and second degree murder, and the weapons charges. Then when the State pressed for an aiding and abetting instruction, I had to retrofit that into my instructions which skewed everything. I don't know how many drafts of the instruction I ended up doing. I remember starring at the statute, General Laws 11-1-3, scratching my head. I knew there was something wrong with the picture but precisely what that was eluded me. …Had defense counsel properly explained this to me, I would have re-worded the jury verdict summary sheet questions number 8 and 15. Id at 41. The Trial Court moved on to describe with respect to the Felony murder instruction how in addition to the Rosemond type instructions she would have additionally instructed on the degree's of murder and the specific state of mind that the jury needed to find to hold the State to its burden. The Court stated that included in the Jury Verdict Summary sheet questions ought to have been a separate question on second degree murder, whether the State had proved beyond a reasonable doubt that Kendall

Whitaker had actually fired the shot that killed Joel Jackson and, further, that he did so with the definite intention of killing Jackson or doing serious bodily harm. The Trial Court as it did for each of the aiding and abetting count found that Mr. Whitaker was convicted of facilitating a murder in the absence of a jury instruction that permitted the jury to 36 find he lacked the requisite knowledge, intent and opportunity to withdraw from the crime. Therefore the State was relieved of its burden to prove these essential elements of the charge of felony murder by proof beyond a reasonable doubt. Id. at 45. Finally the defense counsel's failure to object to and preserve the issue for appeal deprived Mr. Whitaker of a fair trial with respect to that particular charge. Id. The Trial Court next turned its attention to the weapons charges, counts 7, 8 and 9. As to each of these offense the Trial Court identifies the same lack of jury instructions as to advanced knowledge and timing. Id. 48. "As a result of the faulty jury instructions, the State again was relieved of its burden to prove these essential elements of these charges by proof beyond a reasonable doubt. Defense counsel's failure to object deprived Mr. Whitaker of a fair trial in respect of these counts of the indictment. In addition, the jury instructions were confusing, misleading, and equivocal. Yet defense counsel failed to preserve his objections and urge the Court to clarify. The court finds prejudice flowing from these actions and a that both prongs of Strickland had met. Id . 50. Next the Trial Court turned to Mr. Whitaker's claim that he was denied effective assistance of counsel

where counsel did not argue that there was insufficient evidence for the jury to convict him under an aiding and abetting theory if the jury had been instructed pursuant to a Rosemond analysis.10 In this case the Court returned to the Petitioner's 10 While making a general remark offering her own take the ruling this court made in the merits appeal, where she dissented from the holding that there was sufficient evidence to instruct a jury on aiding and abetting, the Trial Court Justice made no ruling in the Post-Conviction case that ran contrary to this Court's finding in Whitaker. Rather, her careful ruling corrects each aiding and abetting instruction she would have given. The State's position that she violated the mandate rule really is meritless where the Trial Justice took pains to propose revised aiding and abetting instructions she determined she ought to have given. She never held that she should not 37 thesis that if the jury were properly instructed under a Rosemond analysis, the trial court, if it had been asked to, which it wasn't, ought to have found that the State failed to present sufficient evidence that Mr. Whitaker could have been convicted under the aiding and abetting counts because there we insufficient evidence to prove beyond a reasonable doubt that had advanced knowledge of Robinson's intentions. Sure, there was evidence that it was Mr. Whitaker who intended to rob Joel Jackson and was the one who shot him, but that puts us outside of an aiding and abetting theory. You can't have it both ways. If you're going to convict someone on an aiding and abetting theory, you have to prove the elements.

You can't cobble together elements of competing theories. In retrospect the state should have stuck with the more straightforward theories of conspiracy and attempted robbery. The problem was, however, that there was scant evidence to suggest that Mr. Whitaker did anything to effectuate his supposed intent to rob Joel Jackson. According to Brandon Robinson, all Mr. Whitaker did was to follow Mr. Robinson into the apartment and stand near Jackson. The next thing that happened was that Jackson flew across the room charging at Robinson. The court found as well that the defendant did not receive a fair trial and that here again there was ineffective assistance of counsel and that the two prongs of the Strickland test had been met. The Superior Court declared that counsel's for the defense performance was so deficient in regard to the jury instructions in this capital case and in preserving the issue for appeal that it deprived the Defendant, Kendall Whitaker a fair trial. The Superior Court specifically found have given them at all. The mandate rule is not implicated here as there was no violation of that principle. 38 that the two prong Strickland test for ineffective assistance of counsel was meet here and that was the basis for this court's ruling under the power granted to it by R.I. General Laws 10-9.1- 1 seq. 11 Asserted here as well is a violation of Mr. Whitaker's rights pursuant to Sixth Amendment of the United States Constitution and Article 1, Section 10 of the Rhode Island Constitution inasmuch as he was denied the effective assistance counsel. As noted supra, United States Government conceded that Rosemond

announced a substantive rule that is retroactively applicable to cases on collateral review, "because it defines aiding and abetting… in a manner that creates the risk that individual convicted prior to Rosemond were convicted of a non-existent offense". Sterling v. N'diane, No. RDB-15-1338, 2016 U.S. Dist. Lexis 9233, at *5-6 (D. Md. Jan. 22, 2016) In United States v. Greene, No. 14-C-431, 2015 U.S. Hist. Lexis 7871 at *2-3 (E.D. Wis. Jan. 23, 2015) , Green filed her motion on month after the Supreme Court held that in order to gain a conviction for aiding and abetting a section 924 (c) offense, the government must prove that the defendant, "actively participated in the underlying 11 "Pursuant to G.L.1956 10-9.1-1, a person may file an application for post-conviction relief if he or she believes that "the conviction violated [his or her] constitutional rights or that newly discovered facts require vacation of the conviction in the interest of justice." Powers v. State, 734 A.2d 508, 513-14 (R.I.1999) (quoting Mastracchio v. Moran, 698 A.2d 706, 710 (R.I.1997)). "We will not disturb a trial justice's findings on an application for post-conviction relief absent clear error or a showing that the trial justice overlooked or misconceived material evidence." State v. Thomas, 794 A.2d 990, 993 (R.I.2002) (citing Ouimette v. State, 785 A.2d 1132, 1135 (R.I.2001)). The Rhode Island Supreme Court was obligated to conduct de novo review any post-conviction relief decision involving questions of fact or mixed questions of law and fact pertaining to an alleged violation of an applicant's constitutional rights. See id. (citing Ouimette, 785 A.2d at 1135). However,

"[f]indings of historical fact, and inferences drawn from those facts, will still be accorded great deference by this Court, even when a de novo standard is applied to the issues of constitutional dimension." Id. (quoting Ouimette, 785 A.2d at 1135). *Bleau v. Wall*, 808 A.2d 637, 641-42 (R.I. 2002) drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond v. United States*, 134 S.Ct. 1240, 1243, 188 L. Ed. 248 (2014) . The government concedes that it cannot make this showing with respect to Ms. Greene. The government also concedes that Greene's procedural default must be excused because she is "actually innocent" of aiding and abetting the section 924 (c) violation in this case in light of Rosemond. See *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2 1 (2006) ..By contrast, the government herein actually agrees with Greene that Rosemond should apply retroactively. The Court concurs…Rosemond, just like Bailey, applies retroactively because it places conduct-planning a crime of violence without actual (as opposed to imputed or constructive) knowledge that a gun would be used - beyond the authority of the criminal law to proscribe. To hold otherwise would impose "a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose…." *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519 L. Ed 2d 442 (2004). The U.S. First Circuit Court of Appeals issued on April 13, 2016, decision vacating the conviction of a Massachusetts woman based on an aiding and

abetting instruction that failed both the implied scienter requirement of the charge and the Rosemond "moral choice" analysis aiding and abetting conviction *United States v. Ford*, 821 F.3d 63 (1st Cir. 2016). The Court in Ford specifically cited its own precedent requiring knowledge in an arms dealing, aiding and abetting case. U.S. v. Tarr, 589 F.2d. 55 (1st Cir. 1978). The First Circuit examined the question in U.S. v. Encarnacion-Ruiz, 787 f. 3D. 581 (1st Cir. 2015), a child pornography aiding and abetting case, where the key concern was whether the defendant knew that the person depicted was a minor. Ford at page 12. There the Circuit notes it applied Rosemond "to establish mens rea required to aid and abet a crime; the Government must prove that the defendant participated with advance knowledge of the elements that constitute this charged offense. Id at Page 12. In Darlene Ford's case, aiding and abetting her husband to be a felon in possession of a firearm, the issue of possession of the firearm by him was not in dispute. She let him borrow it. The issue was her knowledge of his prior convictions, his criminal history, as, in that case, knowledge was an implied element. The aiding and abetting statue at issue in Ford, the Federal Act, the general aiding and abetting provisions 18 U.S.C 2 "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal." 18U.S.C. 2(a) is virtually the same as the aiding and abetting statute charged here. RI General Laws 11-1-3. The Court in Ford rejected the notion that the state of

mind requirement of Section 2 (the aiding and abetting provision) is a chameleon, simply taking on the state of mind requirements of whatever the underlying crime is aided and abetted. Ford at page 18. The Ford court cites Staples at 511 U.S. at 610 for the proposition that "long tradition of widespread lawful gun ownership by private individuals" precludes any rejection of the background scienter presumption merely because the defendant knows that a firearm is involved. 501 U.S. at 610. (underling added) In Ford the Court specifically rejected what it terms basically a negligence test, the "had reason to know", page 22, holding that in order to establish criminal validity under 18 U.S.C. 2 for aiding and abetting a criminal's behavior, the government needs to prove beyond a reasonable doubt that the putative aider and abettor know the facts that make the principal's conduct criminal. Id, p 24. After reviewing the manners of proof that could be used, the Ford court focused on the instruction given the jury and found that it was not sufficient (the error was not 41 harmless). The government conceded in Ford that the evidence of Darlene's knowledge presented "credibility choice [that] was the jury's to make" The Ford court agreed. In *United States v. Figueroa-Ocasio*, 805 F.3d 360, 370 (1st Cir. 2015) the First Circuit reversed a plea entered in 2012 based on violation of Rosemond. There the district court also failed to offer any explanation of the Government's burden in proving the aiding and abetting counts. See Encarnaci n–Ruiz, 787 F.3d at 584 ("[T]he government must prove that an

aider and abettor of criminal conduct participated with advance knowledge of the elements that constitute the charged offense.") (citing Rosemond v. United States, —— U.S. ——, 134 S.Ct. 1240, 1248– 49, 188 L.Ed.2d 248 (2014)). In this respect, neither the Government nor the district court made any effort to distinguish between the proof necessary to convict Figueroa as a principal and that required to convict him as an aider and abettor. Thus, the record does not establish that Figueroa understood the difference between "possessing firearms" and "aiding and abetting others in possessing firearms."15 Rosemond was decided several years after the plea was taken. It should be noted that this Court decided the Petitioner's merits appeal while Rosemond was pending on Writ of Certiorari in the Supreme Court since Jan 16, 2013. Rosemond v. United States 134 S. Ct. 1240, 1249 (U.S. 2014) written by Justice Kagan certainly explained the law of aiding and abetting instruction in clear expository language. The Court in *Ford* specifically cited its own precedent requiring knowledge in an arms dealing, aiding and abetting case.; *U.S. v. Tarr*, 589 F.2d. 55 (1st Cir. 1978). Clearly helpful First Circuit case law existed at the time of trial in this matter and trial counsel here ought to have cited and brought to the trial court's attention. The principal argument brought in the state post-conviction relief case and the ensuing federal challenge was brought based on the requirements to adequately inform a jury about the elements of the aiding and abetting charges as articulated in *Rosemond v. United States*,134 S. Ct. 1240,

1249,188 L. Ed. 2d 248, 263,2014 U.S. LEXIS 1787, 24-25,82 U.S.L.W. 4178,24. In *Rosemond* this Court held in connection with aiding and abetting that "For all that to be true, though, the §924(c) defendant's knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime." Id. The Petitioner argued to the Rhode Island Supreme Court and subsequently to the U.S. District Court that a close review reveals the trial record is devoid of such advance knowledge and a realistic opportunity to quit the crime. The District Court held however that there is nothing in *Rosemond* that even hints of a Constitutional decision. (See page 5 of the U.S. District Court Decision, dated 1/27/21, page 5.). That holding is refuted by cited Circuit Opinions and this Court's prior holdings. Most recently, the Eleventh Circuit announced its Steiner v. United States, 940 F.3d 1282, 1284–85 (11th Cir. 2019), cert. denied, No. 19-8737, 2020 WL 5882934 (U.S. Oct. 5, 2020). "We have not yet addressed whether *Rosemond* applies retroactively to cases on collateral review. We hold today that it does.

The first question we address is whether Steiner is entitled to relief under *Rosemond*. In order to reach this question, we must first decide whether *Rosemond* applies retroactively to cases on collateral review. The government concedes that it does. We agree with the government. *Steiner v. United States*, 940 F.3d 1282, 1288–89 (11th Cir. 2019), cert. denied, No. 19-8737, 2020 WL 5882934 (U.S. Oct. 5, 2020). We conclude that *Rosemond* announced a new rule because it produced a result that was not dictated by pre-existing precedent. *See Teague*, 489 U.S. at 301, 109 S.Ct. 1060. Before *Rosemond*, the law of this Circuit, and others, did not require the government to prove that the defendant had advance knowledge that a co-conspirator would be armed. *See Williams*, 334 F.3d at 1232. Indeed, *Rosemond* addressed a split among the circuits regarding the requirements for aiding and abetting a § 924(c) conviction. *Compare United States v. Wiseman*, 172 F.3d 1196, 1217 (10th Cir. 1999) (holding that a defendant "knowingly and actively participated" in the underlying offense because he "knew that [the principal] was carrying [a] firearm"), *with United States v. Thompson*, 454 F.3d 459, 465 (5th Cir. 2006) (requiring that a defendant take some action to intentionally facilitate or encourage the principal's use of the firearm). We also conclude that the new rule announced in *Rosemond* is substantive, as it narrowed the scope of aiding and abetting a § 924(c) offense. *See Schriro*, 542 U.S. at 351–52, 124 S.Ct. 2519. In doing so, we reach the same conclusion as the Seventh Circuit, the only other circuit to consider whether *Rosemond* applies retroactively. *See*

Farmer v. United States, 867 F.3d 837, 841–42 (7th Cir. 2017) (explaining that *Rosemond* announced a new substantive rule and, thus, applies retroactively to cases on collateral review). Steiner v. United States, 940 F.3d 1282, 1290 (11th Cir. 2019), cert. denied, No. 19-8737, 2020 WL 5882934 (U.S. Oct. 5, 2020). Before *Rosemond*, "accomplice liability was possible even if the defendant learned of a coconspirator's use of the gun while the crime was underway—as long as the defendant continued to participate after learning about the gun." *Id.*; *see also Williams*, 334 F.3d at 1232 (stating the requirements for accomplice liability pre-*Rosemond*). *Rosemond*, however, limited aiding and abetting § 924(c) liability to instances where a defendant had advance knowledge that a firearm would be used in the commission of the underlying crime of violence. *See* 572 U.S. at 67, 134 S.Ct. 1240. While continued participation can support an inference of advance knowledge under *Rosemond*, the government must "prove that the defendant learned about the gun with enough time to try to change his confederate's plan or to remove himself from the venture altogether." *Farmer*, 867 F.3d at 841; *Rosemond*, 572 U.S. at 78 n.9, 134 S.Ct. 1240. Thus, because *Rosemond* "alters the range of conduct ... that the law punishes," it constitutes a new substantive rule that applies retroactively on collateral review. *See Schriro*, 542 U.S. at 351–53, 124 S.Ct. 2519. *Steiner v. United States*, 940 F.3d 1282, 1290–91 (11th Cir. 2019), cert. denied, No. 19-8737, 2020 WL 5882934 (U.S. Oct. 5, 2020). In *Farmer v. United States*, 867 F.3d 837, 842 (7th Cir. 2017) the Court in the

7th Circuit held that: "By requiring proof of the defendant's advance knowledge, *Rosemond* "alter[ed] the range of conduct ... that the law punishes." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519. *Rosemond* thus established a new substantive rule that is retroactive to cases on collateral review. *See Montana*, 829 F.3d at 783–84 (explaining that *Rosemond* addressed the requirements for criminal liability under § 924(c) and thus established a substantive rule). Farmer v. United States, 867 F.3d 837, 842 (7th Cir. 2017). In Montana v. Cross, 829 F.3d 775, 783–84 (7th Cir. 2016) the 7th Cirucit in 2016 held: "The parties correctly agree that *Rosemond*'s holding is retroactive." *Teague v. Lane*, 489 U.S. 288, 306–10, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and *Bousley v. United States*, 523 U.S. 614, 619–21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), teach that new rules are applied retroactively when they are substantive; procedural rules apply retroactively in much narrower circumstances. *Rosemond*, which addressed the requirements for criminal liability under § 924(c), is a substantive rule, and we therefore shall apply it retroactively to cases on collateral review. *Cf. Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). The other component of *Davenport*'s second condition is that the new, retroactive rule "could not have been invoked in [the petitioner's] first § 2255 motion." *Light v. Caraway*, 761

F.3d 809, 813 (7th Cir. 2014). Although our earlier case law had employed various formulations of this inquiry, our recent en banc decision in *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc), articulated that the second prong is satisfied if "[i]t would have been futile" to raise a claim in the petitioner's original "section 2255 motion, as the law was squarely against him." *Id.* at 1136. Montana v. Cross, 829 F.3d 775, 783–84 (7th Cir. 2016). The First Circuit has twice now followed that teaching in United States v. Ford, 821 F.3d 63, 74 (1st Cir. 2016) (1st, April 13, 2016) No. 15-13-3, Page 8 – 12. The Court in Ford specifically **cited its own precedent** requiring knowledge in an arms dealing, aiding and abetting case.; U.S. v. Tarr, 589 F.2d. 55 (1st Cir. 1978). The Rhode Island Supreme Court which has itself described itself to follow the federal case law on aiding and abetting it is respectfully would have had to overlook the First Circuit case law in Ford and Tarr. Those cases given their time frame were existing law that trial counsel here ought to have cited at the time of trial in arguments in opposition to the jury instructions as rendered. In U.S. v. Encarnacion-Ruiz, 787 f. 3D. 581 (1st Cir. 2015) the First Circuit applied Rosemond, even though it predated Rosemond, a conviction entered on 10-5-2011. It was a case involving a child pornography aiding and abetting charge where the key concern was whether the defendant knew that the person depicted was a minor. Ford at page 12. The Court in Ford notes it applied Rosemond v. United States, 134 S. Ct. 1240, 1250 (2014) "to establish *mens rea* required to

aid and abet a crime; the Government must prove that the defendant participated with advance knowledge of the elements that constitute this charged offense. Id at Page 12. It is clear that a new rule was announced, it was substantive and not procedural and further it was clear that in First Circuit trial counsel could have argued the law as stated in U.S. v. Tarr, 589 F.2d. 55 (1st Cir. 1978) as noted in Ford. Here the trial counsel did not do so. It cannot be gainsaid that the Constitution requires that the law upon which the defendant faces the bar of justice must be clearly explained as to all of its elements. As the trial judge here ruled that the jury was not so instructed. It is urge this Court must correct the R.I. Suprem court's holding that rt that the holding in Rosemond hints of no constitutional based decision. That holding constraining Rosemond to the federal statute flies in the face of its precedent following federal caselaw on aiding and abetting. It runs a foul as well of its own case law where the Rhode Island Supreme Court has rightly held that pursuant to the United States Constitution, the state in a criminal trial has the burden of proving beyond a reasonable doubt *every element necessary* to constitute the commission of a crime with which a defendant is charged. *State v. Hazard,* 745 A.2d 748, 751 (R.I.2000) (stating that "[t]he Due Process Clause of the Fourteenth Amendment to the United States Constitution * * * den[ies] the state the power to deprive the accused of liberty unless the state proves every element necessary to constitute the crime charged beyond a reasonable doubt"); *see also Sullivan v.*

Louisiana, 508 U.S. 275, 277–78, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (stating that "[t]he prosecution bears the burden of proving all elements of the offense charged * * * and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements" (internal quotation marks omitted)); *Leland v. Oregon,* 343 U.S. 790, 794, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (stating that the prosecution is required "to prove beyond a reasonable doubt every element of the crime charged"); *Sivo,* 925 A.2d at 915 (explaining that the United States Constitution requires the state to prove each element of the charged crime beyond a reasonable doubt); *State v. DelBonis,* 862 A.2d 760, 765 (R.I. 2004). The R.I. Court held as well: It follows that a jury instruction violates a person's due process rights if it relieves the prosecution of the weighty burden of proving beyond a reasonable doubt each element of the crime of which a defendant stands accused. *Hazard,* 745 A.2d at 751; *see also Sivo,* 925 A.2d at 915. State v. Delestre, 35 A.3d 886, 892–93 (R.I. 2012). It is unsupported for that Court to now hold that there is no constitutional issue raised by Rosemond. Effective assistance is crucial and was denied here. The sufficiency of the evidence argument was dismissed by the Supreme Court of Rhode Island, ruling that in the merits appeal the issue was waived because it was waived at the trial level. The Court held that trial counsel's failed to preserve it. The Supreme Court rejects that the Petitioner's argument that the sufficiency of the evidence ought to have been decided base on whether

the knowledge and opportunity argument set out in Rosemond's and Counsel failure to even raise was a gross failing of effectiveness. It is clear that the trial evidence does not support the notion of advanced knowledge and opportunity to quit and it is equally clear that counsel failed to raise it. The Supreme Court of Rhode Island pronounces that Rosemond is not a constitutional rule and therefore cannot compel a Rhode Island state court to interpret aiding and abetting criminal liability by that standard. The District Court adopted that viewpoint. This holding denies Petitioner his constitutional right to require counsel to have the jury properly instructed on the elements of aiding and abetting; where one of those elements must be prior knowledge and an opportunity to quit. His counsel failed to argue this. It is submitted here that Rosemond announced an essential definition of the knowledge and intent needed for that criminal liability and that is not the announcement of a procedural rule of any kind. The holdings above rest on a finding the new rule was substantive. The Rhode Island Supreme Court failed to address that. That pronouncement goes to the heart of guilt and was not limited to federal gun cases as noted by the multiple different offense areas raised in the cases cited. The Rhode Island Supreme Court reversal rests on its earlier findings, in the merits appeal, noting that the facts found there were not unreasonable and that even if Rosemond applied, the fact that the defendant was armed supplied sufficient evidence for a conviction of aiding and abetting. On the contrary, it is submitted that such a decision

could only be made by a properly instructed jury concluding that fact. Surely the jury was entitled to decide whether Robinson had evinced any intention to brandish the firearm and use it of which Mr. Whitaker had advance knowledge of and a reasonable opportunity to leave. Here no such opportunity for an answer to that question was given and to reach that conclusion by the asserted mere possession of a firearm invades the province of the jury, especially so when whether he did or not was not proven. At best the record depicts a chaotic result from Robinson's discharge of a firearm and nothing more.

Petitioner argues that this Court should correct sweeping legal conclusions made by the Rhode Island Supreme Court and for that matter the U.S. District Court and the denial of a certificate of appealability by the Circuit Court. This Court should support the holdings of the cited Circuit opinions and the consistent acknowledgement of the U.S. Government, as noted above, to that effect holding to the contrary, namely that a new rule was announced. This Court ought to make clear that the holding in Rosemond was indeed a substantive change and that it was not confined solely to 924(c) cases. Indeed, the Supreme Court holding in Teague v. Lane, 489 U.S. 288, 314–15, 109 S. Ct. 1060, 1077–78, 103 L. Ed. 2d 334 (1989) supports this result. The Circuit case noted above clearly would not have held the rule in Rosemond merely procedural, specifically holding otherwise, because in so holding that it was retroactively applicable on collateral review,

those Court's and the Government necessarily concluded that at least one or both *Teague* exceptions were met. Clearly the rule in Rosemond rests on the premises expressed in *Teague* that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. The principles of either, in absence of application of the rule, would undermine the fundamental fairness that must underlie a conviction or would secondly seriously diminish the likelihood of obtaining an accurate conviction. Teague v. Lane, 489 U.S. 288, 315, 109 S. Ct. 1060, 1078, 103 L. Ed. 2d 334 (1989).

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to allow Review of the judgment of the Circuit Court of Appeals for the First Circuit.

Respectfully Submitted,

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