IN THE SUPREME COURT OF THE UNITED STATES

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JUSTUS C. ROSEMOND, :

Petitioner : No. 12-895

v. :

UNITED STATES :

- x

Washington, D.C.

Tuesday, November 12, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN P. ELWOOD, ESQ., Washington, D.C.; on behalf of Petitioner.

JOHN F. BASH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 12-895, Rosemond v. United States.

Mr. Elwood.

ORAL ARGUMENT OF JOHN P. ELWOOD

ON BEHALF OF THE PETITIONER

MR. ELWOOD: Mr. Chief Justice, and may it please the Court:

It has long been a bedrock principle of American law that aiding and abetting liability requires proof that an accomplice acted with purposeful intent to facilitate or encourage the crime of conviction and that mere knowing assistance is insufficient.

JUSTICE KENNEDY: Do you agree that the jury could find the defendant guilty of the firearms charge under a proper instruction? In other words, was there sufficient evidence so that if a proper instruction were given, there could have been a conviction?

MR. ELWOOD: Even if the -- I think in this particular case, even if the jury had been given a proper instruction, it would have been a difficult charge to make out because the government never really argued facilitation after getting knowledge of the

firearm. There was never evidence of foreknowledge; the government never asserted evidence of foreknowledge.

JUSTICE KENNEDY: Well, I guess we can get into later to whether or not if you know a firearm is being carried and if you then facilitate the commission of the underlying felony by driving the car, participating in the transaction, whether that's sufficient.

But let me ask you this: Would the instruction that was given, which was at JA 196, would it be okay if Paragraph 1, "The defendant knew his cohort used a firearm," I think there is a real problem with that, because it's retrospective.

Would the instruction have been sufficient if the defendant knew his cohort would use or was carrying? Would that change it?

MR. ELWOOD: Well, I think at least that would have required foreknowledge. But I think it would still have been problematic because it would only have required knowing facilitation. And courts, traditionally, have required intentional facilitation, that is, they intend to further the crime.

JUSTICE SCALIA: You do not agree, then, that if you know that there's -- that there's a bank robbery afoot and you're cooperating in that, you're --

you're the wheelman, and you also know that the -- you know that the people who are conducting the bank robbery are carrying firearms, you say that there's no criminal liability for the firearms unless you intended them to use the firearms; is that your position?

MR. ELWOOD: It's our position that you could infer from the fact that you're assisting the transaction involving --

JUSTICE SCALIA: No, no.

MR. ELWOOD: Knowledge is not itself intent.

JUSTICE KENNEDY: Justice Scalia can -- his own question. But the question is: What -- what does the jury have to find? I know they can -- I know what they can infer, but the question from Justice Scalia is, you're the -- you drive -- you drive the car, you know firearms are there and might be used, is that sufficient? And that's his question.

MR. ELWOOD: I -- I think that that would be -- that would support a verdict. That would support a verdict. The only question --

JUSTICE SCALIA: Now, wait. It would support a verdict -- you're saying it would support a finding of -- of intent.

MR. ELWOOD: That's correct. But the question is whether you don't even have to instruct a

jury --

JUSTICE SCALIA: Let's assume there's a lot of evidence that he didn't really want them to use firearms, that there's no way you can say he intended them to use, but he knew that they had firearms.

MR. ELWOOD: And I think that you can conclude from that that his purpose in assuming that he's driving --

JUSTICE SCALIA: No. No, no, you can't. It's my hypothetical. And you cannot conclude from that. There is so much other evidence. This -- this man hates firearms. He does not like firearms. There is no way he could have intended them to use firearms. But he knew they had firearms.

MR. ELWOOD: You know, I hate to be accused of resisting the hypothetical, because in that -- in that case, I don't think it matters whether you have the subjective desire, like you think, boy, I sure wish those firearms weren't involved. But because at that point, your goal is to facilitate and make sure that this bank robbery --

JUSTICE SCALIA: Facilitate the crime.

MR. ELWOOD: -- with the gun succeeds. The whole thing with the gun.

JUSTICE SCALIA: So you don't have to -- you

don't have to --

MR. ELWOOD: But that is your -- we would say that that is the purpose in facilitating. And the question is not just that. The question is whether you --

JUSTICE SCALIA: Okay. So if you intend a crime -- if you intend a crime and you know that the crime is being conducted with firearms, that's enough.

MR. ELWOOD: I don't think that that -- I think that you have to have the fore -- the foreknowledge. And I think that there are certainly hypothesize --

JUSTICE SCALIA: Beforehand. Before -- you know beforehand that the crime is going to be perpetrated with firearms. That's all you do. You know beforehand, and you facilitate the crime.

MR. ELWOOD: I think that you -- the question is whether -- you can't even conceive of the circumstance where knowing -- that is, participation -- knowing that a firearm would be used or carried.

JUSTICE ALITO: Well, give me an example of that. Give us --

MR. ELWOOD: For example, if you agree to drive your neighbor to pick up drugs at some place in Philadelphia or -- let's make it Pittsburgh. And then

you drive him to West Virginia to spend the weekend dealing. On the way there he tells you, the guy who distributed these to me, you know, he always carries a Derringer in his boot.

And at that point, you don't facilitate his use or carriage of the gun with respect to the drug distribution offense. It has no role in -- in the crime. And so I think you can conceive of enough circumstances --

JUSTICE ALITO: And I don't -- I don't understand the example. The -- the alleged aider and abetter learns about this after it's happened? That's the idea?

MR. ELWOOD: Yes, but he's still facilitating the drug distribution offense at a time he knows that a gun is, you know, being carried in relation to it.

JUSTICE ALITO: Well, let me change -- let me -- maybe this is the same as Justice Scalia's hypothetical, but let me try it. Suppose that two guys have a meeting and it's -- it's in a place that's -- where there's an electronic eavesdropping device. In fact, there's a camera. So it's all recorded. So we know exactly what was said. And the principal says, here's the deal, I'm going to rob a convenience store

and I'm going to carry a gun.

And the aider and abetter says, well, all right. I'm in on the -- you know, I'm in on robbing the convenience store, but I don't want anything having to do with the gun. I think you should carry a baseball bat.

The principal says, no, that's the deal. I'm robbing the store. I'm carrying a gun. Take it or leave it. Are you going to drive me there?

And -- and the other guy says, I hate guns, I don't want to have anything to do with guns. I -- I hate this idea about the guns. They go back and forth.

And the -- the principal says finally, look, this is it. This is the deal. I'm robbing the store. I'm using a gun. Are you going to help me or not?

And the guy says, well, all right. I'm going to drive you, but I want it noted for the record that I'm opposed -- I'm opposed to the use of a gun.

(Laughter.)

MR. ELWOOD: And at that point, it's his purpose to facilitate a transaction and to, you know, help it succeed and it's at a time when he knows that a gun will be used and that -- I think you can conclude that that is his purpose.

JUSTICE ALITO: See -- so I don't really

see -- I can't -- I can't think of a situation where a person facilitates the crime, knows what the crime is going to be, knows that a gun is going to be used but doesn't intend for the gun to be used.

MR. ELWOOD: The question is --

JUSTICE ALITO: In those two situations, knowledge and intent, seem to me to be -- to be the same thing.

MR. ELWOOD: The question is whether there are -- because there are just no instances that are more like my hypothetical than like your hypothetical. So you don't even have to bother troubling the jury about whether they had the intent.

JUSTICE ALITO: Well, I don't understand your hypotheticals. If you could give it to us again.

MR. ELWOOD: Well, the point of it is that at a time when you are -- when you are still participating in the underlying offense, the drug trafficking offense, you know that a gun is being carried in relation to it. But you don't have any intent to facilitate it. You don't care one way or the other if it gets used. You don't intend to facilitate it, and you don't facilitate it. And the question is whether you --

JUSTICE ALITO: But you facilitate --

JUSTICE KENNEDY: Well, that's -- that's a conclusion. The jury, it seems to me, could say you do facilitate it if in these hypotheticals you drive the car --

MR. ELWOOD: But the thing is --

JUSTICE KENNEDY: -- with knowledge that the gun might be used.

MR. ELWOOD: No, but the gun is not going to be used in your act of facilitation. It may be used over in Philadelphia, and you aren't doing --

JUSTICE KENNEDY: Well, the submission is the jury can find otherwise.

MR. ELWOOD: And the question --

JUSTICE KENNEDY: The -- the gun would never have been used if you didn't drive the -- or carried if you didn't drive the car.

MR. ELWOOD: But I think the jury could equally well conclude that you did not intend to facilitate the use of the gun and you did not facilitate the use of the gun. And the question is whether you even need to trouble the jury with it. Because the government's instruction conclusively presumes both knowledge -- or conclusively presumes intent from knowledge alone and it conclusively presumes facilitation of the gun from facilitation of the

underlying offense.

JUSTICE ALITO: Or in my -- in my hypothetical, could a rational jury say he knew about it, but he didn't intend it?

MR. ELWOOD: I think that in your case with the foreknowledge and where he, you know, facilitates, he carries the gun and he carries the person to the offense, I think that that would be a tough slog. In a case -- but ours is a case where there isn't foreknowledge and the government never argued that he knew before the gun -- before the gun was fired that it was his associate who was the shooter.

JUSTICE ALITO: Well, in my case -- and I'll finish. I want to ask another question about this. But in my case, if the judge had given the instruction, it's enough that he knew about it. He facilitated the crime when he knew there was a gun. Would that be error?

MR. ELWOOD: I think it would be error because you're instructing them on the wrong elements. It might be harmless error. But the point -- both sides agree here that you have to facilitate the crime of conviction and you have to intend that the gun be used.

JUSTICE SCALIA: I don't think it's ever harmless error to not instruct the jury -- or to instruct the jury not to find one of the elements of the

crime. If, indeed, intent is necessary, it seems to me he has to instruct the jury to find intent. It's not up to the court to say, well, there surely was intent anyway so it's harmless error. The jury has to find intent.

MR. ELWOOD: I think -- you know what, I'm fine with it being a harmful error, too. But my point was merely to note that I think that it is something that you have to instruct the jury on as a proper element --

JUSTICE SOTOMAYOR: Excuse me. But what are we instructing --

MR. ELWOOD: -- even if it winds up not making a difference.

JUSTICE SOTOMAYOR: I think what we're driving at here, and I think this is the moment you're resisting, but to me, and as you can tell from my colleague's questions, if you know that someone's carrying a gun, and whether you want them to use it or not is irrelevant, if they take it out and use it and you have gone along with them in the crime, you're guilty. Okay? That -- that's what we're driving at.

Assume that I believe that. Assume that I believe that if you have knowledge of the gun, and that I am participating in the crime with your knowledge of

that gun, whether the knowledge is secured before the crime starts or during the crime, if I continue to participate in the crime knowing that you have a gun, then that's knowledge of the gun and intent to facilitate.

I thought the example that you were relying on here or the issue that got confused in the briefs was whether or not, from the sequence of facts in this case, you can actually discern that intent to facilitate the crime because the alleged shooter, which your client said was someone else, jumped into the car and the car took off before anybody could abandon the crime. That's what I actually thought this case was about: At what juncture do you instruct the jury to say that you have to be a participant with knowledge of the crime?

But you're saying something different right now. You're almost suggesting that there has to be a pre-knowledge that the gun will be used.

MR. ELWOOD: No, I don't think -- I don't think that there has to be pre-knowledge. My point is this: That there are circumstances I think where you can know of a gun and be participating in the underlying -- underlying predicate offense and not facilitate the use of the gun. And I --

JUSTICE SOTOMAYOR: I'm hard to imagine

that. Give me an example.

MR. ELWOOD: For example, if you -- your job, you're the lowest level guy in a drug organization. You stand on a street corner every night and you hand out drugs to anybody who comes up. You don't carry a gun. Nobody has ever carried a gun at that street corner. One night you're doing it and you see that the guy is -- that the guy who you work for, his enforcer is coming by and you know he always carries a gun. He walks behind you and, you know, he's present and around you for about 90 seconds, but during that time, you do exactly what you always did.

I think a jury could conclude -- and I'm not saying that they couldn't conclude otherwise, but they could conclude that he didn't facilitate the use or carriage of the gun. He was just --

JUSTICE SOTOMAYOR: What would the instruction look like?

MR. ELWOOD: It would just --

JUSTICE SOTOMAYOR: To -- to -- what would it look like to capture the difference you're trying to convey?

MR. ELWOOD: It would just say that the -- that the jury has to find that the defendant facilitated the use or carriage of a gun during and in relation to a

crime of violence or a drug trafficking offense --

JUSTICE SOTOMAYOR: Well, then you come --

MR. ELWOOD: -- and that they intended to do so.

JUSTICE SOTOMAYOR: -- you come up against the government's argument that you don't have to facilitate every element.

MR. ELWOOD: Right. But that's the thing. Those are what we think would be the proper instruction, that they just have to be instructed on the facilitation and on the intent.

JUSTICE SCALIA: I'm surprised to hear you say that you don't need prior knowledge. I think you need prior knowledge.

MR. ELWOOD: I think you have to have prior knowledge before you facilitate it. I think that --

JUSTICE SCALIA: Yes.

MR. ELWOOD: Right. Exactly.

MR. SCALIA: So what did you mean by -- by you don't need prior knowledge?

MR. ELWOOD: You don't need prior knowledge before the whole transaction happens. If you continue to -- if there's an act of facilitation after you learn of it --

JUSTICE SCALIA: After you know.

MR. ELWOOD: Right. Exactly. That's all I mean by the absence of prior knowledge. But I mean, everyone here agrees that you need to have knowledgeable or facilitation.

JUSTICE GINSBURG: Mr. Elwood, you're dealing with all kinds of hypotheticals. But in this case we had a jury determination that Rosemond was the person -- he was convicted of carrying ammunition, right? There were two counts of carrying -- possession of the ammunition. And couldn't one infer from that that he -- he possessed the ammunition, he was the gun carrier?

MR. ELWOOD: Two things, Justice Ginsburg. First, the government never raised this below and it wasn't pressed or passed on below, and so I think under Glover v. United States this Court wouldn't ordinarily consider that in the first instance, would leave it for remand.

But secondly, I think that it's not clear enough. I mean, you can't say beyond a reasonable doubt that the error didn't infect that, too, because the jury was instructed four times that you can possess something through constructive possession, through a confederate. And I think when the jury concludes that he is guilty of a possession offense, which is 924(c) as a possession

offense, as an aider and abetter, and they marked on the judge's instruction that he used the gun, he carried the gun, that the jury could have believed that they were -- that he constructively possessed the gun and thereby constructively possessed the ammunition.

JUSTICE GINSBURG: What was the evidence that the jury had on whether he possessed the ammunition?

MR. ELWOOD: I think the only evidence of possession was that it was inside the gun that was fired. And I think the jury rejected the idea that he was the shooter because the two eyewitnesss said that the shooter was someone else, that the shooter was the guy in the backseat, who was Ronald Joseph.

JUSTICE KENNEDY: I just didn't -- you said the only evidence was that it was inside the gun?

MR. ELWOOD: The ammunition was inside the gun. And the only evidence of his --

JUSTICE KENNEDY: And what was the evidence? I thought there was evidence that he possessed cartridges.

MR. ELWOOD: No. The only evidence was that the evidence was inside the gun -- or I'm sorry, the evidence -- that the ammunition was inside the gun.

JUSTICE KENNEDY: And was there any evidence

that he had the gun?

MR. ELWOOD: The evidence that he had the gun was the -- the guy who was the other shooter --

JUSTICE KENNEDY: I mean, was the evidence that he had the gun and the evidence of the cartridges are exactly the same?

MR. ELWOOD: They are exactly the same. The only evidence was that the cartridges were inside the gun. And the evidence -- the two eyewitnesss who were at the scene said that the person got out of the driver's side, and the evidence suggests that Mr. Rosemond was on the passenger side, and that he got out of the backseat, and he was in the front seat.

So the -- the evidence, I think, is that he was -- he was merely in the car, not that he was a shooter. And the jury, remember, asked: Do we have to answer question 3, which was the -- all the different ways you can use the gun -- if we find him guilty on an aiding and abetting theory? Which certainly suggests they did not believe he was the shooter.

JUSTICE SCALIA: Did -- did he facilitate the crime after the shots were fired?

MR. ELWOOD: The government did not ever argue facilitation after the shots were fired, I suspect because -- they only argued that he -- that what

happened afterwards was evidence he was the shooter. I suspect because they appreciated that the offense was over with. He was only charged with possession of marijuana with intent to distribute. When Mr. Gonzales took off with the marijuana and they lost control, you know, they went around afterwards looking for him, which, you know, there's not even very much evidence of that.

JUSTICE KENNEDY: But do we have cases that say that assisting flight immediately after the crime is not aiding and abetting the crime? The crime is over? So everybody says the crime's over. Let's -- let's walk home.

MR. ELWOOD: I -- I am not aware and the government hasn't cited any. I mean, there's -- there's -- for different crimes, you know, there's -- there's different law about whether flight is part of the offense.

But in any event, the question is whether that would be aiding and abetting that crime, the possession offense or some distinct crime, or whether that would be being an accessory after the fact. And that was never charged.

CHIEF JUSTICE ROBERTS: Is it -- is it just flight? I thought there was evidence that they were

chasing the people who robbed them.

MR. ELWOOD: There was no evidence that that intent to chase them was ever communicated to Mr. Rosemond.

CHIEF JUSTICE ROBERTS: Well, he jumps in the car and, you know, they're going after them.

MR. ELWOOD: That itself was disputed. But the question is, even if they're chasing him, that might be attempt to possess the marijuana to get it back. It might be conspiracy to possess the marijuana, but that wasn't -- wasn't charged. The only thing was possession.

CHIEF JUSTICE ROBERTS: Well, it might be -- it might be an effort to continue the crime of -- in other words, it might make a difference whether the people who are being chased look and see two guys in the car or three guys in the car. If somebody says -- and I realize you dispute these facts -- let's go get them and the guy jumps in the car, it seems to me that that's aiding and abetting the underlying illegal activity with knowledge, of course, that guns were used.

MR. ELWOOD: I agree. But first, that's not a theory that the government ever espoused. They never argued that facilitation.

And secondly, I don't know that that would

be facilitation of possession of marijuana with intent to distribute it. That ended under the court's instructions when they lost control of the marijuana when Mr. Gonzales disappeared.

JUSTICE ALITO: I understand your argument about intent, but are you also arguing that the -- that the actus reus instruction was insufficient? The instruction about what your client did?

MR. ELWOOD: Yes.

JUSTICE ALITO: Do you think it's necessary for an aider and abetter to facilitate every element of a criminal offense?

MR. ELWOOD: We're not saying that. We are saying that when you -- you have to instruct them did he facilitate the actual crime of conviction. Because what the government is doing here, what their instruction does is it conclusively presumes that he facilitated the distinct offense, which this Court has said, the entirely new crime of 924(c), from the fact that they did the underlying offense.

Their favorite example in the brief is a mail fraud example. But under the government's theory, because you engage in an act of mail fraud, you could be convicted of racketeering without any additional actus reus because that is a predicate crime to RICO. And

that's the thing is we're just saying you can't presume the full offense -- facilitation of the full offense from the fact that you just facilitated one element.

JUSTICE ALITO: So if there were not -- if the -- the drug offense were not illegal, there -- there wasn't a drug offense and then the -- the additional firearm element, it wouldn't be necessary for him -- for the defendant to facilitate every element of that offense. It's dependent on the fact that there's this other criminal conduct.

MR. ELWOOD: We're just saying that they have to be -- the jury just has to be instructed to ask, did he facilitate the crime of conviction? And they're asking a different -- they're asking a different question, essentially. And it wouldn't present the same risk that you would convict someone twice and they'd serve two consecutive sentences under the hypothetical you suggest, but we still say they should be asked whether they facilitated the right crime.

JUSTICE SCALIA: Well, but the crime of conviction was -- was a drug offense with the use of a firearm, right?

MR. ELWOOD: It was 924(c), a crime with the long name.

JUSTICE SCALIA: And so I thought -- I

thought that the law is pretty clear that if you -- if you facilitate an offense, you do not have to facilitate each element of that offense, so long as you have knowledge that that element existed.

MR. ELWOOD: And our submission is just that the jury still has to be asked, did he facilitate the crime. This is -- both sides agree that you have to ask -- that one of the elements is whether they facilitated the crime.

JUSTICE SCALIA: But -- but more precisely, they could be asked did he facilitate the drug deal knowing that a firearm was going to be used in the drug deal. Would that satisfy you?

MR. ELWOOD: No. We think they're asking both the wrong questions then. But -- is there --

JUSTICE SCALIA: I don't understand what your position is. He has to use the gun himself?

MR. ELWOOD: No. His -- our only position is that they have to ask the jury, did he facilitate the 924(c) offense.

JUSTICE KENNEDY: No. I think it would help if you told us what the definition of the crime is. We'll talk about the jury instructions later. Justice Scalia is asking whether or not if you facilitate the drug crime knowing that a weapon is being

carried, if that is sufficient for aiding and abetting as a legal matter? Forget the jury instructions.

MR. ELWOOD: And it's our submission that you have to both facilitate the 924(c) offense and that you have to have the intent that the gun be used or carried during and in relation to the crime.

JUSTICE GINSBURG: Does that -- does that have to do with the additional 120 months? The underlying crime is 48 months and then the -- the gun makes it 120 months more consecutive?

MR. ELWOOD: That's right. But it's -- I think our -- the reason why we think it makes a difference is because it's a different crime. And the government is trying to get the jury to conclusively presume from the fact that you did the one crime, that you must also have facilitated the other. And we just don't think that that is something that you can say with 100 percent certainty so you can remove it from jury determination.

JUSTICE KAGAN: Isn't criminal law -- isn't criminal law replete with crimes which have lesser included offenses as part of them? So wouldn't your rule be a very difficult one to apply because it would suggest that the person had to facilitate some part of the crime that was not a part of a lesser included

offense?

MR. ELWOOD: There are some courts that apply this, our rationale to lesser included's as well. But lesser included crimes are the same crime for Blockburger purposes. You can't be sentenced to both the greater and the lesser. And I think most courts require that you show the intent that the gun be used. They don't as often require that you facilitate the discreet use of or carriage of a gun.

JUSTICE ALITO: Well, let me go back to my earlier hypothetical about the taped conversation. Suppose that the alleged aider and abetter there says, I intend for you to use the gun. I have that intent. However, I'm not going to do one thing to help you get the gun or use the gun. I don't want to -- I'm not going to. There's an actus reus problem there because he doesn't facilitate the use of the gun?

MR. ELWOOD: Well, he may say that he is not going to facilitate it, but, depending on what his actions are, he may -- very well may facilitate it. If he drives the gun and the person to the -- the crime, you know, that is an act of facilitation. And so, you know, it doesn't depend on what the person says. It depends on what the person does.

JUSTICE KENNEDY: I just want to make clear,

and we'll get back to the bank robbery hypothetical. Driving the car, knowing a gun is being carried and might be used, is or is not sufficient facilitation to make you an aider and abetter in the drug -- in the gun aspect of the crime?

MR. ELWOOD: I think that that would be enough, because you are carrying the gun as well as the person.

If I could reserve --

JUSTICE KENNEDY: But you are not carrying. Your -- your cohort is carrying the gun.

MR. ELWOOD: Oh. Yes, you're carrying -- you're -- by carrying -- the gun is in your car.

JUSTICE KENNEDY: You are driving the car, the cohort has the gun, the cohort is going to rob the bank. Are you or are you not aiding and abetting because you're facilitating it by driving the car, yes or no?

MR. ELWOOD: We would say that, yes, that is certainly enough to go to the jury and that -- I think that that would be enough to show that, because you're carrying both the gun on your cohort and you're carrying the cohort, that that would be enough to facilitate that.

I would like --

JUSTICE SCALIA: But only -- you say it's enough to go to the jury and what you would ask the jury to find is intent, right?

MR. ELWOOD: That's correct. You would still have --

JUSTICE SCALIA: Not just to find those facts that were stated by Justice Kennedy.

MR. ELWOOD: That's correct. Intent and facilitation.

JUSTICE SCALIA: In addition, the jury would have to find intent.

MR. ELWOOD: That is correct.

JUSTICE SCALIA: Okay.

MR. ELWOOD: I'd like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bash.

ORAL ARGUMENT OF JOHN F. BASH

ON BEHALF OF THE RESPONDENT

MR. BASH: Mr. Chief Justice, and may it please the Court:

I'd like to start by defining exactly what the government contends the mens rea requirement is for aiding and abetting, and then give the Court an example -- two examples to show how it differs both from

what Mr. Elwood is saying and how it differs from a knowledge standard.

Aiding and abetting requires an intent to facilitate or encourage the commission of an offense. And I think that breaks down into two constituent parts: One, an intent to make some action easier or to encourage some action by the principal; two, the knowledge that the principal intends to commit a crime of which that action is a constituent part.

What Mr. Elwood is saying is something quite different. It's that you have to intend that the crime succeed. If that's true, all paid accomplices are out if they don't intend that the crime succeed. If the -- if the bank robbers say, hey, can you look the other way, security guard, while we go into the bank, we'll give you a thousand dollars if you do it, that's not aiding and abetting under his theory if the security guard says, well, I only wanted a thousand dollars; I didn't care whether you ultimately succeeded in the bank.

We give an example in our brief: If the person actually gives the gun so it meets the actus reus requirement that Mr. Elwood has proposed, he actually gives the gun to somebody, not because he cares if that person commits the crime, which he knows he intends to

commit, but as a favor for his friend --

CHIEF JUSTICE ROBERTS: That's a very fanciful hypothetical, because the one thing the guard is going to know, that if the robber gets caught, he's in great jeopardy of -- of being caught himself and convicted. Of course he wants the crime to succeed because he doesn't want the people to be there and being pressured by investigators or whatever to say, okay, you know, who was in on -- who was in on this with you?

So if you're -- if you're being paid for a crime, to assist in the commission of the crime, you want it to succeed.

MR. BASH: Well, if your payment is not coming from the loot, I don't think that's really true. But let's take that as true as given. I mean, go back to my example about the guy that's just doing a favor for somebody. Sure, you can use my gun to commit a robbery. I don't have any stake in it. If you decide tomorrow that you don't want to commit the robbery, that's fine with me.

CHIEF JUSTICE ROBERTS: He has a stake in it. If the guy is caught, the police are going to say, where did you get the gun? He may turn him in or not, but it's certainly a danger, a danger that wouldn't be there if the crime succeeded.

MR. BASH: I don't -- I don't think that's the sort of intent requirement that Mr. Elwood is talking about. I mean, I think he's talking about an intent that's abstracted from the idea that if you get caught, everybody might go to jail. I mean, that sort of seems to beg the question of whether you're actually going to be liable for the gun.

JUSTICE GINSBURG: Well, why don't we just take it that we have a crime, the underlying crime, it's a 48-month crime, and then if you have a gun in connection with that crime, it becomes 120 months consecutive. And your position seems to be that all you have to prove is facilitation of the underlying drug offense. And it seems to me to -- to get 10 years of your life for the government proving no more than the 48-month charge is a bit much.

MR. BASH: It's not proving no more than the 48-month charge. And I'll just -- as a footnote, it's 10 years only if the gun is fired. It's 5 years if it's carried or used, and which obviously creates a much greater danger to people's lives and property if it's fired.

But it's not only proving that you facilitated the drug offense. It's facilitating the drug offense with the foreknowledge that a gun was going

to be involved in it.

JUSTICE KENNEDY: But this instruction at J196 says that the defendant "knew his cohort used a firearm." It really should say that "knew his cohort would carry a firearm."

MR. BASH: Justice Kennedy, two points.

JUSTICE KENNEDY: Because as I -- when I read this, I thought, well, given these confusing facts, a jury might think that there's liability if he knew that a firearm was used, which is a very odd interpretation, but that's -- the instruction lends itself to that interpretation.

MR. BASH: Justice Kennedy, that is an odd interpretation and it's wrong and we do not contend that liability could be imposed if you learned of the gun only after your participation ended. A couple points on that.

JUSTICE KENNEDY: But do you agree that, taken by itself, that one could be read that way?

MR. BASH: Well, I don't think read in the context of the full instruction. If you look at --

JUSTICE KENNEDY: I said taken by itself.

MR. BASH: Oh, so not the instruction taken by itself, but one phrase in the instruction taken by itself?

JUSTICE KENNEDY: Yes.

MR. BASH: I think it's possible, but I think if you read it in the context of the full charge and what reasonable jurors would think, you have the formulation right above that on page 196 that mirrors exactly the Peoni standard. And I don't think reasonable jurors reading that in conjunction with the more specific instruction on count 2 could think that he could be liable if his participation ended only after the firearm was used.

And, Justice Kennedy, nobody below thought that, because Petitioner never objected on the grounds that the particular wording of this instruction allowed conviction if you gained knowledge only after your participation. So at minimum --

CHIEF JUSTICE ROBERTS: Well, he proposed -- he proposed a different instruction that departed from the instruction that was given on that point.

MR. BASH: Mr. Chief Justice, first of all, under Rule 30 it is not enough to propose an alternative instruction that does not contain the defect. You have to lay out the specific grounds for your objection. He did not do that here, so it should be plain error review.

That is doubly true here where his

instruction had its own error. His instruction would have required intentional facilitation of the gun, which is the question on this Court granted certiorari. His instruction had --

CHIEF JUSTICE ROBERTS: Two -- two wrongs don't make a right.

MR. BASH: Two wrongs don't make a right, but he certainly did not comply with the Rule 30 standard for raising the objection with respect to foreknowledge that he -- that he's proposing now. So, at minimum, that should be reviewed for plain error.

In addition, even if the Court believes that we waived the harmless error argument by not raising it below with respect to his primary argument, the Court should certainly hear our plain error -- or harmless error argument with respect to the ammunition counts, with respect to the instructional error that he did not raise below. We should have the opportunity --

JUSTICE KENNEDY: Look at his -- look at his instruction and think about the bank robbery hypothetical with the driver of the car. His number 2 is that they intentionally took some action to facilitate or encourage the use of the firearm. I think that would be an okay instruction in the bank robbery hypothetical.

MR. BASH: It would be --

JUSTICE KENNEDY: He drove the car. Principal object was to rob the bank, not to use the firearm, but he facilitated the use of a firearm. I can see that a judge could give that instruction.

MR. BASH: I think the only way Petitioner fits that instruction into his view of the law is because the driver started out driving the people to the bank, so he says, oh, well, you are satisfying my actus reus requirement because you actually transported the guns to the bank.

But tweak the hypothetical a little bit. Suppose the getaway driver is paid only to show up at the end and to, you know, ferry the bank robbers away. He knows all along that it's going to be a firearm offense. I'm pretty sure Mr. Elwood would say: Because you took no act facilitating the gun in that case, you only sort of showed up at the end, even though you knew a gun would be used, that that's not facilitation.

So I take your point, Justice Kennedy, that in a wide swath of cases it may not matter, but I think in some cases it is going to matter. And -- take his intent requirement. I mean, the person that lends the gun just to be a good guy, not because he cares about the offense, I'm pretty sure he is out. And if the jury

is convinced, hey, I knew he was going to commit a robbery or assault but I just did not care, if the jury is convinced by that, he is acquitted, and that can't possibly be right. He would not be guilty of any 924(c) offense at all. I mean not only the ten-year --

JUSTICE SOTOMAYOR: Could you talk practically about what the difficulties are for the government in this scenario? It's nice to put hypotheticals in where you know, where you say someone knew X, Y and Z. The reality is in most cases you don't. Occasionally you get a co-conspirator that will tell you, but in most cases you have just the actor. A defendant is present during a crime, a gun is pulled, and he leaves with his cohorts. You don't know if he had advance knowledge that the gun would be used because he wasn't carrying it and he may have done nothing but be present during the crime, left, and got a split of the money later, correct?

MR. BASH: If he continued participating after he learned of the gun, yes.

JUSTICE SOTOMAYOR: That's your point, right?

MR. BASH: Yes.

JUSTICE SOTOMAYOR: That's your --

MR. BASH: If he learned of the gun and

said, hey, I'm out of this, he's not guilty.

JUSTICE SOTOMAYOR: So isn't this really an argument about how you define facilitation? You are not arguing that -- that some form of participation in the crime with knowledge that the gun is being used is required. You are really arguing about how far the proof has to go.

MR. BASH: Well, I --

JUSTICE SOTOMAYOR: Because your adversary keeps saying mere knowledge of the gun's being used is not enough.

MR. BASH: I think it's more qualitative than that and the question suggests it's purely quantitative. It's qualitative in the sense that the facilitation can relate to either element. So it can relate to the gun in particular or -- and this could be the guy that set up the drug deal knowing that a gun would be involved, or set up the robbery knowing that a gun would be involved.

I think you see in the courts of appeals cases here the practical difficulties that come in because, although most court of appeals, I think eight, have technically adopted the position that you have to facilitate the gun in a direct way, if you look a the actual holdings of the cases it doesn't differ in

practical application from our approach.

It's -- there is one case, I think it's Price out of the Third Circuit, where the guy may have learned of the gun -- I may have the case name wrong, but the guy learned of the gun only as the robbery was -- was taking place, but he continued to participate in the robbery while his confederate brandished the gun, he collected the money and so forth.

And as far as your question about the practical problems, I think explaining to a jury what does it mean to facilitate the gun in a specific way during a crime like that is incredibly difficult. I mean, we say in the brief: What if you are exchanging the money while the other person is brandishing the firearm? Maybe that person --

JUSTICE SOTOMAYOR: What is so hard about saying, did you have knowledge that the gun would be used, either -- and you facilitate -- but you continue to facilitate the crime?

MR. BASH: We --

JUSTICE SOTOMAYOR: -- the underlying crime.

MR. BASH: We agree that that is law.

JUSTICE KAGAN: Well, Mr. Bash, what about this case? Suppose that there are two guys and they are talking about committing a crime, and they have the same

kind of conversation that Justice Alito was referencing, you know, one guy says I want to bring a gun, the other says, no, I think that's a really bad idea. But this time, the guy says: Okay, you've convinced me, it's a bad idea to bring a gun, I won't bring a gun.

And so then they go out and they rob whatever they are robbing, and in the middle of it, you know -- or they do a drug transaction, and in the middle of that drug transaction the guy who said don't bring a gun looks over and he realizes that, notwithstanding the promise, his confederate did bring a gun. But there they are, they are in the middle of their drug transaction.

So the guy, you know, they're right -- they are handing the money to each other and the guy keeps on doing it, all right? Is -- is that enough, even though, you know, there's foreknowledge, there's acts after he -- he realizes that the guy has a gun? Is that sufficient?

MR. BASH: If the gun is drawn and the person continues to facilitate the drug crime or the violent crime, that is enough.

JUSTICE KAGAN: Well, what exactly would you want him to do at that point to not be convicted of this, of this offense? Would you want him to just say,

you know, sort of like drop everything, I'm out of there? Is that the idea?

MR. BASH: Yeah. Take this case. This is an $800 marijuana deal. It's a small-scale drug deal that happens all the time without firearms. As Mr. Elwood says, usually this kind of deal is not done with a firearm; only 5 percent of marijuana offenses have a firearm.

Yes, if you are on that kind of small-scale deal and all of a sudden it becomes an armed offense, you do have an obligation to withdraw. Now, of course, I think you might have a duress defense if you felt like if I withdraw I'm going to get shot, or something like that.

JUSTICE KAGAN: Right. I mean, I guess that's the question: Is there always a reasonable opportunity to withdraw after you see that there's a gun in the offense that you didn't expect to be there? And do you think that there has to be a reasonable opportunity to withdraw, or would you say, no, everybody has a reasonable opportunity to withdraw all the time; you can just leave?

MR. BASH: Two points on that. First, I think a lot of that would come in through the duress defense. I mean, if you really feel like, oh, my God,

this guy has a gun and he might shoot me if I withdraw, it can give a pretty solid duress defense.

The other point I would say which is maybe a little tangential to the hypothetical, is there's a traditional doctrine of aiding and abetting law. This is at 2.06 of the Model Penal Code. It's in the LaFave Treatise and the Wharton Treatise, that if you countermand your assistance after you have assisted but before the crime is accomplished or completed -- for example, if your assistance was only encouraging and you start discouraging, or if you take all actions possible to prevent the crime -- for example, you assisted, you have a change of heart, you call the police to prevent the crime, you are not liable for aiding and abetting.

And I think that reflects a broader point, which is that the traditional common law contours of aiding and abetting work pretty well with the contemporary purposes and problems that this statute was designed to solve. I mean, this is a statute about the mix of guns and drugs or guns and violence. And I don't see why Mr. Elwood contends that if you assist one side of that equation or the other it is a different result. I think if you assist either side of that equation, knowing that the equation is going to happen, by the principle, that is aiding and abetting. It's aiding and

abetting under the historical test, I think it's aiding and abetting under this Court's cases, and I don't see why it would be a different result here.

JUSTICE GINSBURG: Mr. Bash, would you explain why in this situation the guy abetted a drug deal when there was no drug deal? It had been thwarted. The drugs were stolen. They were not engaged in any attempt to sell the drugs. That was a failed attempt. So how is this done, abetting a drug deal, when the deal failed?

MR. BASH: Well, of course, the prosecution's principal theory was that he was the gunman; he brought it along to facilitate his drug deal. But assuming the theory of the facts that the gun was fired after Gonzales absconded with the drugs, I mean, I think one way to think about it is like this: Suppose that what had happened is that Gonzales had gotten ten paces, and Petitioner or Joseph had tackled him and immediately snatched the drugs back. I don't think this Court or courts generally would expect the government to charge two counts of possession with intent to distribute for that brief period in which someone snatches possession away and you get it. That wasn't certainly what the prosecutor thought here, and it's obviously not the issue in this case.

The only way that question comes into this case is that Mr. Elwood is trying to say that the prosecutor understood that -- that you didn't need foreknowledge of the gun. And that's not what the prosecutor understood. The prosecutor understood that this offense could continue for at least some period after in which the Confederates gave chase to -- to reclaim the drugs.

And that may have been a wrong theory, but no one below ever understood that you could be convicted if you didn't know of the gun until your participation ended. That's why Petitioner never objected on that ground, and that's why, of course, we submit that it should be reviewed for plain error.

JUSTICE KENNEDY: And -- and you agree that for aiding and abetting, you must -- the gun offense, you must have knowledge that the gun is being carried by the cohort.

MR. BASH: Yes.

JUSTICE KENNEDY: You agree with that.

MR. BASH: Carried or used, yes.

JUSTICE ALITO: Could the defendant here have -- could the defendant here have been convicted of possession of the ammunition on the theory that -- under the instructions -- would the instructions have allowed

that conviction on the theory that the defendant aided and abetted somebody else's possession of the ammunition?

MR. BASH: I don't think so, because the judge never instructed that if you aid and abet, that's is the equivalent of constructive possession of -- of the bullets. And, in fact, I mean, what constructive possession means is that you have the ability to exercise control over this -- over the ammunition. So it doesn't gel with his theory that, oh, I didn't know about the gun until after the shots were fired.

I mean, I don't think anyone thought that you could get a conviction because the shells were on the ground or something and you could pick them up after they were fired. The obvious view was that he was -- the person who shot the gun -- and at minimum, I think those convictions, because there were no aiding and abetting instructions on them, show that he must have known about the gun ahead of time if he could exercise, at minimum, constructive possession over the ammunition fired from --

CHIEF JUSTICE ROBERTS: What -- what's the point of charging him with possession of the gun and possession of the bullets in the gun? It would seem to me that the proof would be pretty much the same.

MR. BASH: The proof -- the proof was the same in this case. They didn't charge him with possession of the gun. They charged him with use or carrying during and in relation to the drug trafficking offense. And then there were two counts of possession of the ammunition, which were linked to his felony status and his alien -- unlawful alien status.

CHIEF JUSTICE ROBERTS: Well, I guess, then, the question is: What's the point of charging him with possession of the bullets if you're not charging him with possession of the gun?

MR. BASH: It -- we could have charged him with possession as a felon. We didn't. It's not totally clear to me why we didn't. But we certainly could have charged him with being a felon in possession of a firearm in this case.

JUSTICE KAGAN: Mr. Bash, you know, what sticks in my craw a little bit about your position is this: Usually, we want punishments to -- two people and they do very different things and they have very different intents, we want them actually to be punished differently.

And what you're suggesting is that there is -- let's say a crime, two people are involved in it. One person does almost everything. You know, he does

90 percent of the stuff. And the other person does just a little thing, but something, you know, that goes to the offense that helps facilitate the offense. But it's really pretty small compared to the overall crime.

And then in addition to that, that person does not have really full-fledged intent, just has a kind of knowledge that this other person with real purpose of intent is going to bring a gun.

So -- so, you have a lesser act and a lesser intent, and notwithstanding that, you're saying that the person ought to be punished in the exact same way as his confederate.

MR. BASH: We are saying that. I think that -- that -- that gels with the historic law of aiding and abetting, which, as Judge Friendly said in a case we cite in our brief, Garguilo, assistance of even slight moment counts. And --

JUSTICE KAGAN: But I just add, what I would have thought was that the actus reus can be very small, but almost to compensate for that, you have to have full-fledged intent. You have to have a really kind of purpose of -- a -- a purpose that the crime succeed as opposed to just knowledge of -- of what will happen.

MR. BASH: Justice Kagan, I don't think that can be right for the examples I gave, paid accomplices

that don't have a stake or the person who lends the gun to be a good guy. And let me contrast that -- I never got to this example -- with what a pure knowledge standard would look like.

Suppose there was looting, and the defendant breaks into the -- a store to facilitate his own entry in the store to steal goods. But he knows there's 20 people coming behind him, and he has now facilitated their entry into the store, too. That is not aiding and abetting under our theory because he did not even bear the intent to facilitate, by which we mean the intent to make some step in another person's crime easier. He knew it would do that, but that was incidental to an intent to facilitate his own crime.

So I do think the mens rea is significantly ratcheted up from what a pure knowledge standard would look like.

JUSTICE KENNEDY: Would you agree that in order to show aiding and abetting -- and I'll just quote from a California case here -- that, "The aider and abetter has to have knowledge of the criminal purpose of the perpetrator and the intent to facilitate it"?

MR. BASH: Yes. I think what that formulation masks is exactly what intent to facilitate means, and I think that might be part of the

disagreement among the parties. And what we say is that it means an intent to make some step in what you know is a crime that he intend -- the principal intends to do easier. And we think it's got to be that.

That's also the formulation in the historical sources we cite at page 47 at Footnote 10 of our brief. It's either the intent to commit the crime yourself or knowledge that the other person has that intent. And I don't see how it can be anything else.

I mean, if -- if you assist someone in a -- just to be a good person, not because you care if the crime succeeds, and if you ask them in -- with the truth serum, do you want the crime to succeed, you say, well, I'm totally indifferent to the crime.

JUSTICE KENNEDY: Would you -- would you agree that the statement -- that the first part of the instruction that the district court gave, "defendant knew his cohort used a firearm," is inaccurate? Is incomplete?

MR. BASH: Not --

JUSTICE KENNEDY: Potentially misleading?

MR. BASH: In isolation, potentially misleading. I think in context, how reasonable jurors would understand this and how the parties understood it, because nobody raised an objection to this below, I

think they understood that your knowledge had to arise before your completion --

CHIEF JUSTICE ROBERTS: You would --

MR. BASH: -- of your participation in the offense.

CHIEF JUSTICE ROBERTS: You would never -- if you got a call from the U.S. -- assistant U.S. attorney in the field said, this is the instruction I'm going to use, you would tell him, no, don't do that.

MR. BASH: We -- we wouldn't. But the reason this Court has -- or the reason courts generally have objection rules is when questions about particular verb tenses and phrasings arise, the defendant or one of the parties is supposed to actually object to that in the district court. That didn't happen here.

CHIEF JUSTICE ROBERTS: No, I know you have arguments about failure to object and harmless error. But on the substance of it, you think the instruction -- you would never counsel someone to give that instruction.

MR. BASH: Well, I think as we said in the brief, it would have been clearer to say "would use" or something that -- that makes absolutely clear that you required foreknowledge. I think if the Court has questions about this sort of case-specific issue along

with the forfeiture and waiver and harmless error and plain error issues, it could do this, and this would be a sensible result, it could clarify, one, facilitation with respect to either conduct element is enough as far as actus reus. Two, the intent to facilitate means an intent to make some step in that crime easier combined with knowledge that the principal bears the intent to complete the crime. And then it could remand to the court of appeals to say, sort out whether this instruction was wrong, whether that objection was forfeited, whether harmless error or plain error concepts come in here.

JUSTICE SCALIA: Why -- why do you say -- you say in context, it was okay. What -- what context?

MR. BASH: The -- Justice Scalia, the instruction -- or part of the same instruction, the paragraph immediately before just mirrored --

JUSTICE SCALIA: That's it? Just that? "In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associated himself in some way with the crime."

MR. BASH: Well, to help make the crime succeed. And I think a reasonable person reading that would not think I helped make -- helped make the 924(c) crime succeed if I didn't even know about the gun until

I was after doing -- I was done doing whatever I was going to do.

And I also point the Court to page 194, which makes clear that "knowingly," in that second part of the instruction, is defined as voluntarily and intentionally. So you certainly had to intentionally participate in the drug trafficking crime. And that -- part of the context, as this Court has said, is also just --

JUSTICE SOTOMAYOR: Knowing that a gun would be used. You had to intentionally participate knowing that a gun would be used.

MR. BASH: Basically a slight tweak, which is knowing that the principal bore the intent to use a gun. Obviously, you can't know the future. It's that you know that the principal bore that intent, which is a little bit different, but I think we're saying the same thing.

CHIEF JUSTICE ROBERTS: I -- I don't see how "make the crime succeed" helps you because you would say the crime that he has to help make succeed is the underlying drug offense, not the use of the firearm.

MR. BASH: No, Mr. Chief Justice, we wouldn't say that. This umbrella instruction applied to Count 1 and 2. The crime you're help making succeed is

924(c). What I was saying earlier was that, what does it mean to help make a crime succeed? It makes -- it means intent to make one -- at least one step in that crime easier, knowing the other person bore the intent to do the crime.

And I think that's how we normally think about it. If there's an armed robbery, and you say, well, I'll drive the getaway car, I think you would naturally say in ordinary English you intended to help make that crime succeed even if you didn't bear a specific intent with respect to the gun.

I certainly think on -- you know, if this had been objected to below, it might be a different matter with Mr. Elwood, but he did not object to this below. He didn't -- he didn't raise this -- this wording issue even in the court of appeals. He raised a sufficiency challenge with respect to foreknowledge. But he -- even in his court of appeals brief, he didn't say that the instructions in this case were wrong because it said "used" versus "would use."

So I don't think the issue is properly here, but I think it would be a sensible resolution if the Court were to remand these case-specific issues after clarifying the basic standard of aiding and abetting to the court of appeals to work through the forfeiture and

waiver of harmless error and so forth.

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Elwood, you have four minutes remaining.

REBUTTAL ARGUMENT OF JOHN P. ELWOOD

ON BEHALF OF THE PETITIONER

MR. ELWOOD: Thank you, Mr. Chief Justice.

One point that I want to emphasize is a point made by Justice Kagan, which is that traditionally because the actus reus is relatively small for aiding and abetting cases, that is exactly why courts have adopted a standard of purposeful intent. And they have said that because the act of an accomplice tends to be less harmful and tends to be more equivocal than that of the principal, that they ordinarily require purposeful intent.

And as Professor Wayne LaFave said, who obviously doesn't have a stake in the case: "Liability has seldom been imposed on the basis of knowing assistance. The background rule is that it has to be purposeful intent."

JUSTICE BREYER: What cases should I look up for that?

MR. ELWOOD: I think --

JUSTICE BREYER: That is to say, I thought

generally in the criminal law a person who commits an illegal act is liable for the known consequences of that act. That is the general rule. I can't think -- I mean, people use all kinds of terminology, different kinds of terminology, but I thought that's the basic principle.

MR. ELWOOD: The standard for accomplice liability requires purposeful intent. It's generally --

JUSTICE BREYER: When you say "purposeful intent," He didn't want it, but he knew it would happen.

MR. ELWOOD: It was his purpose --

JUSTICE BREYER: And moreover, he helped to produce the occasion on which it would happen.

MR. ELWOOD: It was his purpose for doing it. And the cases you can look at are Nye & Nissen --

JUSTICE BREYER: Would you just tell me where in the brief they are, or whatever's easier.

MR. ELWOOD: I mean, Nye & Nissen, the -- Nye & Nissen, which is a case of this Court from 1949, where the Court adopted the standard from the Learned Hand Peoni, that adopted the purposeful intent standard. And Peoni is obviously a very important case as well.

But Hicks. In Hicks, in 1893 this Court reversed a conviction because the jury instruction did not require proof of intent to encourage the crime.

JUSTICE BREYER: You use the word "intent." Some people used it in order to encompass the situation --

MR. ELWOOD: Right.

JUSTICE BREYER: -- of the known but undesired consequence.

MR. ELWOOD: Right. But the Court went on to say that action for any other purpose, even if with the -- even if it had the effect of encouraging --

JUSTICE BREYER: It's language. I am sure you will find language. I want really an instance where the holding of the case is that a person who commits an unlawful action with knowledge that the other unlawful action will occur is not liable for it.

MR. ELWOOD: I would --

JUSTICE BREYER: You know, blowing up the carriage and you kill the maid, who you didn't want to kill. You are liable.

MR. ELWOOD: I would point you --

JUSTICE BREYER: Which one is it?

MR. ELWOOD: I'm sorry to LaFave -- I'm sorry, I don't have a case off the top of my head. I know that they state the principal. But LaFave in Chapter 13.2 collects cases and he makes the point there that liability has seldom been imposed on the basis of

knowing assistance for aiders and abetters. You have to have purposeful intent --

JUSTICE BREYER: LaFave.

MR. ELWOOD: LaFave, Wayne LaFave.

JUSTICE BREYER: LaFave.

CHIEF JUSTICE ROBERTS: Counsel, do you have anything for us on Rule 30?

MR. ELWOOD: You know, on Rule 30, I won't pretend that it was a model of clarity in preserving the error about after-arising intent. But I will say that there is no contrast. I mean, that is to us just a sign of how messed up the jury instructions are. But we did preserve, we say, our objection both with respect to the absence of facilitating the right offense, and the intent to commit the crime as opposed to knowledge that the gun would be used. And so --

CHIEF JUSTICE ROBERTS: How did you preserve that objection?

MR. ELWOOD: With respect to intent, by objecting to their instruction on the basis that it didn't include intentional facilitation of the 924(c) offense.

And if there are no further questions, we will rely on our submission.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 10:57 a.m., the case in the above-entitled matter was submitted.)