No. 15-585

In the Supreme Court of the United States

JUSTUS CORNELIUS ROSEMOND, PETITIONER

v.

UNITED STATES OF AMERICA

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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Petitioner has filed a supplemental brief calling to the Court's attention the Second Circuit's recent decision in *United States* v. *Prado*, No. 13-2894-cr, 2016 WL 723350 (Feb. 24, 2016). *Prado*, however, does not conflict with the nonprecedential decision below and does not support petitioner's arguments in his certiorari petition.

Prado addressed whether two defendants convicted under 18 U.S.C. 924(c) with an aiding-and-abetting instruction were entitled to relief under this Court's prior decision in this case, *Rosemond* v. *United States*, 134 S. Ct. 1240. See *Prado*, 2016 WL 723350, at *1. The Second Circuit first held that the trial court's aiding-and-abetting instructions were plainly erroneous under *Rosemond*. See *id.* at *5-*7. The Second Circuit then concluded, after an examination of the trial evidence, that the instructional error affected the

substantial rights of only one of the two defendants. See *id.* at *7-*10.

Neither of those holdings conflicts with the decision below. First, in this case, the government did not contest that the aiding-and-abetting instruction was plainly erroneous, Pet. App. 7a, and the court of appeals did not hold that the error was not plain. The Second Circuit's conclusion that the instructional language at issue in *Prado* was plainly erroneous therefore does not conflict with the Tenth Circuit's decision in this case. Second, the Tenth Circuit concluded here that petitioner's separate convictions on the ammunition counts demonstrated that the jury necessarily found that he was the shooter, not an accomplice, so no reasonable probability existed that, but for the instructional error, the outcome of the proceeding would have been different. See *id.* at 7a-10a; see also U.S. Br. in Opp. 20-22. The Tenth Circuit's reliance on the jury's separate convictions (not, as petitioner asserts, mere "ammunition evidence," Pet. Supp. Br. 3) does not conflict with *Prado*'s case-specific analysis of the trial evidence in determining whether the instructional error affected each defendant's substantial rights.

Petitioner's certiorari petition challenges (i) the court of appeals' conclusion that petitioner did not preserve an objection to the instructions and so the plain-error standard applied; and (ii) the court of appeals' conclusion that the instructional error did not affect his substantial rights in light of his convictions on the ammunition counts. *Prado* does not support either of those arguments. *Prado* did not address any question about the adequacy of an objection to jury instructions; indeed, it applied plain-error review. See

2016 WL 723350, at *5. And as discussed above, *Prado*'s factbound prejudice determination is fully consistent with the prejudice determination in this case, which relied on petitioner's separate convictions. Although petitioner asserts (Pet. Supp. Br. 2-3) that *Prado* conflicts with a different Tenth Circuit decision on the question whether particular instructional language is plainly erroneous, that question is not implicated by this case, in which the government did not contest that the instruction was plainly erroneous. Pet. App. 7a. Petitioner further states (Pet. Supp. Br. 4, 6) that "*Prado* itself recognized" that its "analysis cannot be reconciled" with the Tenth Circuit's holding in this case, citing a paragraph in the Second Circuit's opinion contrasting the facts of *Rosemond* with the facts pertaining to one of the defendants there. But *Prado* did not mention the court of appeals' decision in this case or the fact of separate convictions that was pivotal to the Tenth Circuit's finding of no reversible error, and it in no way suggested a conflict between the two decisions.

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For the foregoing reasons and those stated in our principal brief, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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