No. 12-895

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a defendant may be convicted of aiding and abetting the use or carrying of a firearm during and in relation to a drug trafficking offense, 18 U.S.C. 924(c) and 2, if the defendant actively participated in a drug trafficking offense and knew that an accomplice used or carried a firearm in the commission of that offense.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Bazemore v. *United States*, 138 F.3d 947 (11th Cir. 1998) 11, 12
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 7, 9
Hedgpeth v. *Pulido*, 555 U.S. 57 (2008) 13, 15
Muscarello v. *United States*, 524 U.S. 125 (1998) 9
Nye & Nissen v. *United States*, 336 U.S. 613 (1949) 7
Skilling v. *United States*, 130 S. Ct. 2896 (2010) 13
Smith v. *United States*, 508 U.S. 223 (1993) 8
United States v. *Bennett*, 75 F.3d 40 (1st Cir.), cert. denied, 519 U.S. 845 (1996) 6, 11
United States v. *Bowen*, 527 F.3d 1065 (10th Cir.), cert. denied, 555 U.S. 930 (2008) 6, 13
United States v. *Broadwell*, 870 F.2d 594 (11th Cir.), cert. denied, 493 U.S. 840 (1989) 8
United States v. *Daniels*, 370 F.3d 689 (7th Cir. 2004) 11, 12
United States v. *Gardner*, 488 F.3d 700 (6th Cir. 2007) 11
United States v. *Green*, 254 F.3d 167 (D.C. Cir. 2001) 15
United States v. *Harrington*, 108 F.3d 1460 (D.C. Cir. 1997) 11

Cases—Continued: Page

United States v. *Isaacs*, 257 Fed. Appx. 704 (5th Cir.), cert. denied, 549 U.S. 1015 (2006) 11
United States v. *Jefferson*, 674 F.3d 332 (4th Cir.), cert. denied, 133 S. Ct. 648 (2012) 14
United States v. *Medina*, 32 F.3d 40 (2d Cir. 1994) 12, 14
United States v. *Powell*, 929 F.2d 724 (D.C. Cir. 1991) 11
United States v. *Price*, 76 F.3d 526 (3d Cir. 1996)..10, 12, 15
United States v. *Rolon-Ramos*, 502 F.3d 750 (8th Cir. 2007)..12
United States v. *Vallejos*, 421 F.3d 1119 (10th Cir. 2005) 6, 10
United States v. *Wilson*, 135 F.3d 291 (4th Cir.), cert. denied, 523 U.S. 1143 (1998)...8
United States v. *Wiseman*, 172 F.3d 1196 (10th Cir.), cert. denied, 528 U.S. 889 (1999)...6

Statutes:

18 U.S.C. 2 ....1, 2
18 U.S.C. 2(a) 7
18 U.S.C. 922(g)(1)..2
18 U.S.C. 922(g)(5)(A) 2
18 U.S.C. 924(c)...2, 5, 6, 7, 8, 10
18 U.S.C. 924(c)(1)(A) 8
18 U.S.C. 924(c)(1)(A)(iii) 5
18 U.S.C. 924(c)(1)(D)(ii) 5
21 U.S.C. 841(a)(1)...1, 2

Miscellaneous:

114 Cong. Rec. 22,231 (1968)...9

In the Supreme Court of the United States

No. 12-895

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 695 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2012. On December 4, 2012, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 16, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of possessing marijuana with intent to distribute it and aiding and abetting, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 1); one count of using, carrying, brandishing, and discharging a firearm and

aiding and abetting, in violation of 18 U.S.C. 924(c) and 2 (Count 2); one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 3); and one count of possession of ammunition by an illegal alien, in violation of 18 U.S.C. 922(g)(5)(A) (Count 4). Pet. App. 28a-30a; 1 C.A. App. 17-19. He received concurrent sentences of 48 months of imprisonment on Counts 1, 3, and 4 and a consecutive sentence of 120 months of imprisonment on Count 2, to be followed by five years of supervised release. Pet. App. 15a, 18a. The court of appeals affirmed. *Id.* at 1a-11a.

1. On the evening of August 26, 2007, petitioner attempted to sell one pound of marijuana to Ricardo Gonzales. Pet. App. 2a. Accompanied by two other individuals, petitioner drove to meet Gonzales and Gonzales's "wingman" Cory Painter, and Gonzales entered their vehicle to inspect the marijuana. *Ibid.* At some point during the transaction, Gonzales punched petitioner and absconded with the marijuana, while Painter ran in the opposite direction. *Ibid.* As Gonzales fled, one of the three occupants of the vehicle fired several shots from a nine-millimeter handgun at him. *Ibid*.

Petitioner and his two accomplices then set out after Gonzales in the vehicle, but they were stopped a short time later by a state trooper. Pet. App. 2a-3a. After obtaining consent, the trooper searched the vehicle but did not find a firearm. *Id.* at 3a.

2. a. Petitioner was indicted in the United States District Court for the District of Utah on one count of possessing marijuana with intent to distribute it and aiding and abetting, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count 1); one count of using, carrying, brandishing, and discharging a firearm and aiding and abetting, in violation of 18 U.S.C. 924(c) and 2 (Count 2);

one count of possession of ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) (Count 3); and one count of possession of ammunition by an illegal alien, in violation of 18 U.S.C. 922(g)(5)(A) (Count 4). 1 C.A. App. 17-19.

During trial, one of petitioner's accomplices testified that petitioner had been the one who had fired shots at Gonzales. Pet. App. 3a. The other accomplice, who had driven the vehicle, testified that she was not sure which of the other two men had fired the gun. That individual, however, had given a written statement shortly after the incident identifying petitioner as the shooter. *Ibid.* One of the accomplices also testified that the state trooper had not found the firearm after stopping the vehicle because petitioner had concealed it, and the trooper testified that petitioner had been "moving around a lot in the vehicle," in contrast to the other two occupants of the car, who had remained still. 2 C.A. App. 151; see also *id*. at 150; *id.* at 164 (testimony regarding Gov't Ex. 18, a video recording of the stop showing petitioner turning toward the back seat).

b. Petitioner and the government proposed different jury instructions with respect to aiding and abetting the Section 924(c) offense (Count 2). Petitioner's requested instruction stated that "[t]he defendant may be liable for aiding and abetting the use of a firearm during a drug trafficking crime, if (1) the defendant knew that another person used a firearm in the underlying drug trafficking crime, and (2) the defendant intentionally took some action to facilitate or encourage the use of the firearm." 1 C.A. App. 21. The government proposed an instruction that would require the jury to find that "the defendant knew his cohort used a firearm in the drug trafficking crime" and "the defendant knowingly and active-

ly participated in the drug trafficking crime"—but not necessarily that he had taken action to facilitate or encourage the use of the firearm specifically. *Id.* at 26.

The district court adopted the government's instruction. It accordingly instructed the jury in relevant part:

> 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, and that he willfully and knowingly seeks by some act to help make the crime succeed.
>
> As to Count II, to find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find that:
>
> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime.

1 C.A. App. 73-74; Pet. App. 7a.

Consistent with the indictment, the district court did not instruct the jury on aiding-and-abetting liability with respect to Counts 3 and 4, which charged petitioner with unlawful possession of ammunition. See 1 C.A. App. 75-84.

c. In its summation, the government argued principally that "the evidence establishes beyond a reasonable doubt that it was [petitioner] who fired at least seven rounds from a 9 millimeter semi-automatic handgun the evening of August 26, 2007." Pet. App. 32a. It also advanced the "alternative legal theory" that the jury could convict petitioner for aiding and abetting the Section 924(c) offense. *Id.* at 33a. Under that theory, the government explained, if one of petitioner's accomplices had "fired the gun, [petitioner is] still guilty of the crime

* * * based on the evidence before you." *Ibid.* Petitioner "certainly knew and actively participated" in a drug trafficking offense, the government argued, and "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." *Id.* at 33a-34a.

With respect to the two counts for unlawful possession of ammunition, the government argued that because the evidence established that petitioner had possessed the firearm, "he had to have also possessed the cartridge cases that were inside the 9 millimeter." 11/16/11 Trial Tr. 24.

d. The jury found petitioner guilty on all four counts. The verdict form, however, did not require the jury to indicate whether it found petitioner guilty under an aiding-and-abetting theory on Count 2. Pet. App. 28a-30a.[1]

The district court imposed a sentence of concurrent terms of 48 months of imprisonment on Counts 1, 3 and 4. It also imposed a mandatory consecutive 120-month sentence on the Section 924(c) offense, to be followed by five years of supervised release. See Pet. App. 15a, 18a; see 18 U.S.C. 924(c)(1)(A)(iii) and (D)(ii).

3. The court of appeals affirmed. Pet. App. 1a-11a. The court rejected petitioner's argument that the dis-

---

[1] During deliberations, the jury sent a note to the judge asking whether "aiding and abetting appl[ied] to Question Three" on the verdict form, 3 C.A. App. 24 (capitalization altered), which set forth four sub-questions asking the jury to determine whether petitioner had "used," "carried," "brandished," or "discharged" a firearm, Pet. App. 29a. The court instructed the jury to answer Question 3 if the jury found petitioner guilty of Count 2 under any theory. 3 C.A. App. 25. The jury found all four of the alternatives listed in Question 3. Pet. App. 29a.

trict court's instruction on aiding and abetting the Count 2 offense was erroneous. *Id.* at 6a-10a. Based on its prior decisions approving the relevant language, the court of appeals concluded that the district court's instruction was correct. See *ibid.* (citing *United States* v. *Bowen*, 527 F.3d 1065, 1078-1079 (10th Cir. 2008), cert. denied, 555 U.S. 930 (2008); *United States* v. *Vallejos*, 421 F.3d 1119 (10th Cir. 2005); *United States* v. *Wiseman*, 172 F.3d 1196 (10th Cir.), cert. denied, 528 U.S. 889 (1999)).

The court of appeals acknowledged that other circuits "require jurors to find * * * that the defendant took some action to facilitate or encourage his cohort's use of the firearm" to convict a defendant of aiding and abetting a Section 924(c) offense. Pet. App. 9a. But it explained that under those courts' precedents, "[l]ittle is required to satisfy the element of facilitation." *Id.* at 10a (quoting *Bowen*, 527 F.3d at 1079).

ARGUMENT

The court of appeals correctly rejected petitioner's argument that the district court's aiding-and-abetting instruction was erroneous. Petitioner contends (Pet. 9-25) that review is warranted because the circuits are divided over whether aiding and abetting a Section 924(c) offense requires proof that the defendant facilitated or encouraged the principal's use of a firearm. But whatever technical disagreement exists among the circuits on that question appears at this time to have little practical significance. Even in those circuits requiring proof of facilitation, "once knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element." *United States* v. *Bennett*, 75 F.3d 40, 45 (1st Cir.), cert. denied, 519 U.S. 845 (1996).

In any event, this is an unsuitable vehicle to address the question presented, because it is clear beyond a reasonable doubt that petitioner would have been convicted even if the jury had received the instruction adopted by other circuits. Most clearly, the jury found petitioner guilty on Counts 3 and 4, which charged him only as a principal with unlawfully possessing the ammunition that was loaded into the discharged firearm. The government's only theory for those counts was that petitioner had possessed the firearm (and so had necessarily possessed the ammunition fired from the gun). That would qualify as aiding and abetting under any circuit's standard. Accordingly, further review is not warranted.

1. The court of appeals correctly concluded that a person can be guilty of aiding and abetting a Section 924(c) offense without having encouraged or facilitated the use of a firearm, so long as he actively participated in the underlying offense and knew of the principal's use or carrying of a firearm in the commission of that offense.

The federal aiding-and-abetting statute, 18 U.S.C. 2(a), provides that "[w]hoever commits an offense against the United States or aids [or] abets, counsels, commands, induces or procures its commission, is punishable as a principal." This Court has explained that the statute "requires proof that the defendant 'in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed.'" *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) (quoting *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949)) (brackets in original).

Accordingly, as the district court instructed the jury in this case, in order to find a defendant guilty of aiding and abetting an offense, a jury must find that the defendant "willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly [sought] by some act to help make the crime succeed." 1 C.A. App. 73-74; see, *e.g.*, *United States* v. *Broadwell*, 870 F.2d 594, 608 (11th Cir.), cert. denied, 493 U.S. 840 (1989). But importantly, "[t]o be convicted of aiding and abetting, participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result." *United States* v. *Wilson*, 135 F.3d 291, 305 (4th Cir.) (citation omitted), cert. denied, 523 U.S. 1143 (1998).

In light of those principles, the district court's instruction on aiding and abetting the Section 924(c) offense was correct. Section 924(c) subjects to criminal punishment "any person who, during and in relation to any crime of violence or drug trafficking crime[,] * * * uses or carries a firearm." 18 U.S.C. 924(c)(1)(a). That offense has two elements: "First, the prosecution must demonstrate that the defendant 'use[d] or carrie[d] a firearm.'" *Smith* v. *United States*, 508 U.S. 223, 228 (1993). "Second, it must prove that the use or carrying was 'during and in relation to' a 'crime of violence or drug trafficking crime.'" *Ibid.* When a person actively participates in the underlying crime of violence or drug trafficking offense, he facilitates the principal's completion of the second element of the Section 924(c) offense. And when he does so with the knowledge of the principal's use or carrying of a firearm during the commission of the crime, he has plainly "participate[d] in [the Section 924(c) offense] as in something that he wishe[d] to

bring about." *Central Bank of Denver*, 511 U.S. at 190 (citation omitted; brackets in original).

Petitioner's contention (Pet. 24) that the decision below "[e]viscerates" the link between culpability and punishment has no basis. Petitioner has offered no persuasive reason why those who actively participate in drug deals, robberies, or other violent crimes with the knowledge that an accomplice has brought along a firearm are not "equally deserving of punishment as principals" under Section 924(c). *Ibid.* Given that the chief legislative objective of principal liability under Section 924(c) is "to persuade the man who is tempted to commit a Federal felony to leave his gun at home," *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998) (quoting 114 Cong. Rec. 22,231 (1968)), it only makes sense that his accomplices in the commission of the felony should also be deterred from participating in the criminal enterprise when they know of their confederate's use or carrying of a firearm. And petitioner simply misstates the holding below in asserting that "there was no requirement that petitioner have any involvement besides 'kn[owing] his cohort used a firearm in the drug trafficking crime.'" Pet. 25. To the contrary, the government was required to prove that petitioner "knowingly and actively participated in the drug trafficking crime." Pet. App. 7a (quoting 1 C.A. App. 73-74). That conduct, in conjunction with knowledge of an accomplice's use or carrying of a firearm, amply supports aiding-and-abetting liability.

Petitioner suggests (Pet. 11-12) that the Tenth Circuit has adopted a rule allowing conviction on an aiding-and-abetting theory even where the defendant has no "advance knowledge" of the firearm. But the absence of *advance* knowledge does not defeat a defendant's culpability. A defendant cannot be convicted under the court

of appeals' rule unless he had knowledge of the firearm before the underlying crime was *completed*. The Tenth Circuit has upheld convictions for aiding and abetting a Section 924(c) offense only where the defendant continued to participate in the underlying drug trafficking offense or crime of violence after learning of the firearm,[2] and no decision of that court has suggested that a defendant could be convicted if he does not learn of the use or carrying of a firearm until after the underlying crime is completed. Accord *United States* v. *Price*, 76 F.3d 526, 529-530 (3d Cir. 1996) (holding that even if defendant did not have "advance" knowledge that his codefendant was going to use a gun during the robbery, he could be convicted of aiding and abetting a Section 924(c) offense if he "was aware that the gun was being used while he continued to participate in the robbery").

2. Petitioner is correct (Pet. 14-17) that other circuits have required the government to prove that the defendant encouraged or facilitated the principal's use of a firearm in order to obtain a conviction for aiding and abetting a Section 924(c) violation. But because "[l]ittle is required to satisfy the element of facilitation" under those precedents, Pet. App. 10a (citation omitted), the

---

[2] Here, for example, it is clear that petitioner continued to participate in the drug trafficking offense after the discharge of the firearm through his subsequent pursuit of Gonzales, who had just fled with petitioner's marijuana without paying for it. Similarly, in *United States* v. *Vallejos*, 421 F.3d 1119 (10th Cir. 2005), the court of appeals determined that the defendant was liable for aiding and abetting a Section 924(c) offense because he had continued to participate in a carjacking after the principal had brandished a firearm. See *id.* at 1126.

difference between the formulations appears to have minimal practical significance at this time.[3]

As the Eleventh Circuit explained in *Bazemore* v. *United States*, 138 F.3d 947 (1998) (cited Pet. 14), "once knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element." *Id.* at 950 (citation omitted). That understanding has been echoed by other circuits. See *Bennett*, 75 F.3d at 45 ("[O]nce knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element."); *United States* v. *Isaacs*, 257 Fed. Appx. 704, 708 (5th Cir.) (same), cert. denied, 549 U.S. 1015 (2006); *United States* v. *Daniels*, 370 F.3d 689, 691 (7th Cir. 2004) (per curiam) (same). In *Bazemore*, for example, the Eleventh Circuit held that the evidence of facilitation was sufficient because the defendant was "the owner and driver of the automobile which carried both [the principal] and the gun to the drug deal" and had "exited the vehicle to inspect the marijuana * * * under the watchful eye of his armed coconspirator." 138 F.3d at 950. The court concluded

---

[3] At least two other courts of appeals appear to apply the same instruction as the court below. See Pet. 12-13; see also *United States* v. *Gardner*, 488 F.3d 700, 712 (6th Cir. 2007) (explaining that the "government can meet" its burden of demonstrating aiding-an-abetting liability for a Section 924(c) offense "by showing that the defendant both knew that the principal was armed and acted with the intent to assist or influence the commission of the underlying predicate crime"); *United States* v. *Harrington*, 108 F.3d 1460, 1471 (D.C. Cir. 1997) (explaining that a conviction for aiding and abetting a Section 924(c) offense may stand "only if the jury was presented with evidence showing that the defendant 'kn[ew] to a practical certainty' that the principal would 'use' a weapon in the ways prohibited by section 924(c)") (quoting *United States* v. *Powell*, 929 F.2d 724, 729 (D.C. Cir. 1991)).

that a person "cannot knowingly benefit from the protection afforded by the firearm carried by his companion and then subsequently evade criminal liability for its presence." *Ibid.*

The Seventh Circuit has enumerated "several examples of conduct that will satisfy the facilitation element, including transporting the principal and firearm to the scene of the crime, encouraging others to use a gun in the commission of the underlying crime, and benefitting from the use of a gun." *Daniels*, 370 F.3d at 691. Thus, courts of appeals adopting petitioner's preferred instruction have found facilitation based on such conduct as holding a bag and obtaining cash after an accomplice brandishes a weapon, *Price*, 76 F.3d at 529-530; handing drugs to a buyer and collecting payment after an armed accomplice leads the buyer to the defendant and stands nearby during the transaction, *Daniels*, 370 F.3d at 691-692; and locking a door to prevent a victim from leaving with the knowledge that an accomplice is carrying a firearm, *United States* v. *Rolon-Ramos*, 502 F.3d 750, 758 (8th Cir. 2007).

Petitioner places significant weight on the Second Circuit's decision in *United States* v. *Medina*, 32 F.3d 40 (1994). But in that case, the court deemed it critical that the defendant, unlike petitioner, was not present during the underlying crime of violence (a robbery), but rather had served in only a planning role in which he did not encourage the use of the specific firearms that were employed in the robbery. See *id.* at 42, 45-47. The Second Circuit made clear that had he actually been present during the robbery, it would have been required to "consider whether his conduct at the scene facilitated or promoted the carrying of a gun, or whether he benefit-

ted from the gun's use so that he could be said to constructively possess the weapon." *Id.* at 46.

Thus, in practice, the facilitation element required by other circuits is generally met by a defendant's participation in the underlying crime with knowledge that the principal is armed, so long as the defendant somehow benefitted from the use of the weapon. Where a defendant actively participates in a drug deal or other planned criminal activity with the knowledge that an accomplice is armed, that standard will generally be satisfied. See *United States* v. *Bowen*, 527 F.3d 1065, 1080 (10th Cir.) (concluding with "no difficulty" that other circuits' facilitation requirement would have been met), cert. denied, 555 U.S. 930 (2008). At this time, therefore, the division of authority appears to be largely academic and does not merit this Court's intervention.

3. Even if the question presented were worthy of this Court's review, this case would not be a suitable vehicle in which to resolve it, because it is clear beyond a reasonable doubt that the jury would still have convicted petitioner on Count 2 if the trial court had given his favored instruction. See *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61 (2008) (per curiam) ("[H]armless-error analysis applies to instructional errors so long as the error at issue does not categorically 'vitiat[e] *all* the jury's findings.'") (citation omitted); accord *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 & n.46 (2010). Indeed, in arguing that this case presents a proper vehicle to consider the question presented (Pet. 20), petitioner does not contend the jury's verdict would have been different had the alleged instructional error not occurred.

a. Assuming that the jury did not find that petitioner was the shooter (but see p. 15, *infra*), there is no doubt that the jury would have concluded that petitioner "di-

rectly facilitated or encouraged the use or carrying of a firearm" by one of his accomplices. *Medina*, 32 F.3d at 45. The jury found petitioner guilty on Counts 3 and 4, which charged him with unlawful possession of ammunition based on his possession of shell casings matching the firearm that was fired at Gonzales. See Pet. App. 29a-30a; 1 C.A. App. 18-19. Because neither of those counts relied on an alternative aiding-and-abetting theory, the jury necessarily concluded that petitioner had personally possessed the ammunition. And the government's only argument to the jury on those counts was that because the evidence established petitioner's "possession of the 9 millimeter firearm," it necessarily "establishe[d] beyond a reasonable doubt that he had to have also possessed the cartridge cases that were inside the 9 millimeter that he possessed." 11/16/11 Trial Tr. 24; see also *ibid.* ("So based on the government's evidence regarding the defendant's possession of the firearm and, therefore, his necessary possession of the cartridge cases, * * * I would ask you also to return a verdict of guilty on Counts Three and Four."). That conduct—possession of the firearm and the ammunition discharged from it—would qualify as facilitation of the use of the firearm even if petitioner was not the one who ultimately pulled the trigger. The jury's guilty verdict on Counts 3 and 4 therefore demonstrates that the alleged instructional error on Count 2 was harmless beyond a reasonable doubt. See, *e.g.*, *United States* v. *Jefferson*, 674 F.3d 332, 362 (4th Cir.) ("[T]he jury's guilty verdict on Counts 3 and 4—the two substantive bribery offenses—demonstrates beyond a reasonable doubt that Jefferson was guilty under the valid bribery theory underlying Counts 1, 6, 7, 10, and 16, and that the *Skilling* error in the jury instructions was necessarily

harmless."), cert. denied, 133 S. Ct. 648 (2012); *United States* v. *Green*, 254 F.3d 167, 170 (D.C. Cir. 2001) ("In numerous cases we have found *Bailey* errors to be harmless * * * where, although there was instructional error as to the 'using or carrying' charge, a conviction on another statutory count assured us that the jury had necessarily found the element as to which the jury had been mischarged.").

Moreover, it is undisputed at this stage that after Gonzales fled with the marijuana, petitioner or one of his accomplices fired shots at Gonzales, and then all three of them pursued Gonzales in the vehicle before being stopped by the state trooper. See Pet. 4; see also Pet. C.A. Br. 17 ("[I]t is clear that after the marijuana was taken, whoever fired the gun immediately got out of the car and commenced shooting.").[4] At minimum, therefore, petitioner continued pursuing Gonzales, who had just stolen marijuana from him, with the knowledge that his accomplice had already fired shots at Gonzales. Petitioner thereby "benefit[ed] from the use of a gun" in the same sense as other defendants for whom courts of appeals have found the facilitation element satisfied. *Daniels*, 370 F.3d at 691. Cf., *e.g.*, *Price*, 76 F.3d at 529-530 (finding evidence of facilitation "overwhelming" where defendant put stolen money into a bag while principal pointed a firearm).

b. In any event, the trial evidence established beyond doubt that petitioner was the shooter, and thus any error in the aiding-and-abetting instruction was harmless for that reason as well. See *Hedgpeth*, 555 U.S. at 61. Petitioner was the only person identified by any

---

[4] Petitioner's trial counsel argued that Gonzales or Painter may have fired the gun, see 11/16/11 Trial Tr. 29, but the jury's guilty verdict on Count 2 necessarily rejected that theory.

witness as the shooter. The jury found beyond a reasonable doubt that petitioner had possessed the ammunition that was discharged from the firearm, and the only basis for that finding urged by the government was that petitioner had possessed the firearm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
SANGITA K. RAO
Attorney

APRIL 2013