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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether plain-error review applies to petitioner's claim of instructional error.

2. Whether the district court's error in instructing the jury on the knowledge requirement for aiding and abetting a violation of 18 U.S.C. 924(c) affected petitioner's substantial rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter, but is reprinted at 615 Fed. Appx. 480. A prior opinion of the court of appeals (Pet. App. 11a-21a) is reported at 695 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2015. A petition for rehearing was denied on August 6, 2015 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on November 3, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on one count of possessing marijuana with intent to distribute it, 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 during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c) and 2 (Count 2); one count of possession of ammunition by a convicted 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. 13a, 24a-26a; No. 12-895 J.A. 11-13. Petitioner 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. 27a, 30a. The court of appeals affirmed. *Id.* at 11a-21a.

This Court granted a petition for a writ of certiorari (No. 12-895), found error in the aiding-and-abetting instruction on the Section 924(c) count, vacated the judgment, and remanded for the court of appeals "to consider the appropriate consequence, if any, of" the jury-instruction error that the Court identified. See 134 S. Ct. at 1252. On remand, the court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1a-10a.

1. On August 26, 2007, Vashti Perez brokered a deal for the sale of one pound of marijuana to Ricardo Gonzales and Coby Painter. 134 S. Ct. at 1243. She told Gonzales and Painter that the marijuana belonged to two men looking to dispose of it before returning home to Texas. No. 12-895 J.A. 79-80.

That evening, Perez drove to a park in a blue Mazda Protegé to conduct the transaction. No. 12-895 J.A. 102. With her in the car were two men. *Ibid.* The first was petitioner, a Texan visiting town with his

brother, a friend of Perez's boyfriend. *Id.* at 100, 118-120. The second was Ronald Joseph, the nephew of Perez's boyfriend. *Id.* at 115, 118. At least one man sat in the backseat, but witnesses later had different recollections about which man sat where.

Gonzales and Painter arrived at the park around 9:00 p.m. No. 12-895 J.A. 80. While Painter waited outside, Gonzales entered Perez's car through a back-door. 134 S. Ct. at 1243. A man sitting in the back-seat of the vehicle then allowed Gonzales to examine the marijuana. *Ibid.* Instead of paying for it, however, Gonzales punched that man in the face and fled with the marijuana. *Ibid.* As Gonzales and Painter ran away, one of the two male occupants of the car fired several shots from a 9-millimeter semiautomatic handgun. *Ibid.*

Petitioner, Joseph, and Perez then set out after Gonzales in the car. 134 S. Ct. at 1243. They were stopped by a state trooper a short time later, however, after a police dispatcher announced that shots had been fired in the park and that a blue vehicle carrying three passengers had driven away from the scene of the shooting. *Ibid.*; No. 12-895 J.A. 44, 56-57. As the trooper walked up to Perez's stopped car, petitioner, who was sitting in the front passenger seat, was recorded by the trooper's video camera turning around and making movements. No. 12-895 J.A. 58. After obtaining Perez's consent, a second trooper searched the car but did not find a firearm. Pet. App. 13a; No. 12-895 J.A. 57, 62-63. The troopers therefore did not make an arrest at that time. Pet. App. 13a.

In the weeks immediately after the shooting, the police conducted a further investigation. They discov-

ered seven 9-millimeter shell casings in the park near the scene of the shooting. No. 12-895 J.A. 45-47. Officers interviewed Perez, who identified petitioner as the shooter and explained that he had concealed the gun in the car during the traffic stop and retrieved it later. *Id.* at 105-108, 111-114. The police also ultimately learned that petitioner was a convicted felon and an alien in the country illegally. See *id.* at 199.

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, in violation of 21 U.S.C. 841(a)(1) (Count 1); one count of using, carrying, brandishing, and discharging a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c) (Count 2); one count of possession of ammunition by a convicted 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. 13a, 24a-26a; No. 12-895 J.A. 11-13. Counts 1 and 2 charged petitioner as a principal and as an aider and abettor under 18 U.S.C. 2; Counts 3 and 4 did not charge an aiding-and-abetting theory.

The government argued that petitioner had been the man sitting in the backseat of Perez's car and that, after Gonzales absconded with his marijuana, petitioner had discharged the semiautomatic handgun. At trial, Perez and Joseph both testified that the marijuana had belonged to petitioner and that he was the man Gonzales had punched. No. 12-895 J.A. 99-100, 104-105, 117, 122. Joseph testified that petitioner had fired the shots at Gonzales. Pet. App. 13a; No. 12-895 J.A. 123-124. Perez, who had signed a declaration im-

mediately after the incident stating that petitioner "did the shooting," testified that she did not directly "see [petitioner] fire the gun but in my mind that's what I thought happened," likely because the drugs belonged to him. No. 12-895 J.A. 105-108. Both said that everyone had exited the vehicle when the firing started and then had reentered the vehicle to pursue Gonzales, with petitioner at that point sitting in the front seat. *Id.* at 109, 124. Painter testified that a man most closely matching petitioner's description ("bald and wearing glasses") had been the person Gonzales punched. *Id.* at 61, 83. Gonzales, however, testified that the man matching Joseph's appearance ("in an Indianapolis Colts jersey") had been the person in the backseat, *id.* at 92-95, while Joseph said that he thought that both he and petitioner had been sitting in the backseat, *id.* at 122.

Joseph also testified that the state trooper had not found the firearm during the search of the vehicle because petitioner had concealed it under the backseat of the car. No. 12-895 J.A. 128. Perez claimed not to remember petitioner's concealment of the firearm and subsequent retrieval of it. *Id.* at 111-112. Consistent with the video recording, which was introduced into evidence, the trooper who had stopped Perez's car testified that, at the time of the stop, petitioner was the only occupant who was "moving around a lot inside the vehicle." *Id.* at 57-59, 68-69.

b. Count 2 charged petitioner with violating 18 U.S.C. 924(c). The "use or carry" prong of that provision subjects to a mandatory-minimum sentence of five years "any person who, during and in relation to any crime of violence or drug trafficking crime * * *

uses or carries a firearm," with seven- and ten-year minimums, respectively, if a firearm is brandished or discharged. 18 U.S.C. 924(c)(1)(A). In this case, the underlying drug-trafficking crime was the charge of possession of marijuana with intent to distribute it set forth in Count 1.

Consistent with the indictment, the government sought aiding-and-abetting jury instructions for Counts 1 and 2. Petitioner and the government, however, proposed different instructions with respect to aiding and abetting the Section 924(c) offense. 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." Pet. App. 54a-55a. The government proposed an instruction that, while materially identical to petitioner's instruction on the first element, differed on the second element: (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." *Id.* at 57a-59a. Thus, the government's proposed instruction, unlike petitioner's proposed instruction, did not require the jury to find that petitioner had intentionally assisted in the use of the firearm; his knowing and active participation in the drug-trafficking offense was sufficient for conviction.

The district court adopted the government's instruction on accomplice liability for the Section 924(c) offense. Pet. App. 16a-17a. Consistent with the in-

dictment, however, the district court did not instruct the jury on accomplice liability with respect to Counts 3 and 4, which charged petitioner with unlawful possession of ammunition. *Id.* at 7a.

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. 44a. The government also advanced the "alternative legal theory" that the jury could convict petitioner for aiding and abetting the Section 924(c) offense. *Id.* at 45a. Under that theory, the government explained, if one of petitioner's accomplices had "fired the gun, [petitioner is] still guilty of the crime." *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 45a-46a.

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." No. 12-895 J.A. 159.

d. During deliberations, the jury asked the court whether it should answer Question 3 on the verdict form—which set forth four sub-questions asking the jury to determine whether petitioner had "used," "carried," "brandished," or "discharged" a firearm—if it found petitioner guilty on Count 2 under an aiding-and-abetting theory. See Pet. App. 9a, 41a.

The court instructed the jury to answer Question 3 if it found petitioner guilty on Count 2 under any theory. See *id.* at 9a.

The jury found petitioner guilty on all four counts and found all four of the alternatives listed in Question 3. Pet. App. 9a, 40a-42a. The verdict form, however, did not require the jury to indicate whether it had found petitioner guilty under an aiding-and-abetting theory on Count 2. *Id.* at 40a-42a. The district court imposed a sentence of concurrent terms of 48 months of imprisonment on Counts 1, 3, and 4. *Id.* at 27a. It also imposed a mandatory consecutive 120-month sentence on Count 2, to be followed by five years of supervised release. *Id.* at 27a, 30a; see 18 U.S.C. 924(c)(1)(A)(iii) and (D)(ii).

3. The court of appeals affirmed. Pet. App. 11a-21a. Relying on its precedent, the court rejected petitioner's argument that the aiding-and-abetting instruction for the Section 924(c) offense should have required the jury to find that he "took some action to facilitate or encourage his cohort's use of the firearm." *Id.* at 19a; see *id.* at 16a-20a.

4. This Court granted certiorari "to resolve the Circuit conflict over what it takes to aid and abet a [Section] 924(c) offense." 134 S. Ct. at 1245. Although the Court "disagree[d] with [petitioner's] principal arguments," *ibid.*, it identified a different error in the district court's instructions and elected to "send this case back to the Tenth Circuit to consider the appropriate consequence, if any, of [that] error," *id.* at 1252.

a. This Court first rejected petitioner's contention that to be convicted of aiding and abetting a Section 924(c) offense, a defendant must have taken some

affirmative act "directed at the use of the firearm." 134 S. Ct. at 1247 (quoting No. 12-895 Pet. Br. 33). The Court held that "an act relating to drugs, just as much as an act relating to guns, facilitates a § 924(c) offense." *Id.* at 1248. Petitioner had further argued that the *mens rea* element of aiding and abetting a Section 924(c) offense is satisfied only if the defendant "affirmatively *desire*[*d*] one of his confederates to use a gun." *Id.* at 1250 (emphasis added) (citing No. 12-895 Reply Br. 8-11). The Court rejected that argument as well, holding that "[w]hat matters for purposes of gauging intent, and so what jury instructions should convey, is that the defendant has chosen, with full knowledge, to participate in the illegal scheme—not that, if all had been left to him, he would have planned the identical crime." *Ibid.*

At the same time, the Court rejected the government's contention that the knowledge requirement for accomplice liability is satisfied "whenever the accomplice, having learned of the firearm, continues any act of assisting the drug transaction." 134 S. Ct. at 1250-1251 (citing No. 12-895 U.S. Br. 48). The Court held that if the defendant's knowledge of the firearm "comes too late for him to be reasonably able to act upon it" because of a "risk of gun violence," the "jury is entitled to find that the defendant intended only a drug sale," not "a drug deal carried out with a gun." *Id.* at 1251.

b. Applying those principles to the instructions in this case, the Court held that the district court had correctly instructed the jury that the affirmative-act element of aiding and abetting a Section 924(c) offense is satisfied if "the defendant knowingly and actively

participated in the drug trafficking crime," even if the defendant did not intentionally assist in the carrying or use of a firearm. 134 S. Ct. at 1251 (quoting instruction). But the Court held that the district court's "description of th[e] knowledge requirement" was incomplete because it did not specify that petitioner could be liable as an accomplice only if he had *advance* knowledge of the confederate's use of a firearm. 134 S. Ct. at 1251-1252. "In telling the jury to consider merely whether [petitioner] 'knew his cohort used a firearm,'" the Court explained, "the [district] court did not direct the jury to determine *when* [petitioner] obtained the requisite knowledge." *Ibid.* The instruction therefore "failed to convey that [petitioner] had to have advance knowledge, of the kind [the Court's opinion] described, that a confederate would be armed." *Id.* at 1252.

In determining the appropriate disposition of the case in light of that error, the Court noted that the government had presented two arguments that the error did not require vacatur of petitioner's conviction. 134 S. Ct. at 1252. First, the government had argued that petitioner had "failed to object specifically to the part of the trial court's instructions [the Court] found wanting," and so "a plain-error standard should apply to his claim." *Ibid.* Second, the government had argued that "any error in the court's aiding and abetting instruction was harmless, because the jury must have found (based on [petitioner's convictions as a principal for possessing ammunition]) that [petitioner] himself fired the gun." *Ibid.* The Court remanded to the court of appeals to consider those arguments in the first instance. *Ibid.*

5. On remand, the court of appeals affirmed petitioner's Section 924(c) conviction. Pet. App. 1a-10a. The court first concluded that the plain-error standard applied because petitioner "did not object at trial to * * * the part of the instruction that the Supreme Court found objectionable"—*i.e.*, the description of the knowledge requirement for aiding and abetting a Section 924(c) offense, on which the parties agreed in the district court. *Id.* at 6a. The court added that it "probably also could find that [petitioner] invited the error in the first part of the aiding-and-abetting instruction, because he requested that the district court give jurors essentially the same language that the Supreme Court later found objectionable" and "never withdrew his requested language after the district court ruled it was not going to give the second part of [petitioner's] requested instruction." *Id.* at 10a n.6.

The court of appeals, however, ultimately found it unnecessary to decide "whether [petitioner] invited that error," Pet. App. 10a n.6, because it concluded that petitioner did not satisfy the third prong of the plain-error standard, which asks "whether [the] plain error affected [the defendant's] substantial rights," *id.* at 7a-10a. The court explained that "[p]lain error affects the defendant's substantial rights if 'there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different'" and further made clear that "'[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 7a (quoting *United States* v. *Hale*, 762 F.3d 1214, 1221 (10th Cir. 2014), cert. denied, 135 S. Ct. 1464 (2015)). The court concluded that petitioner could not meet that standard

because his convictions on the ammunition counts—which did not include an aiding-and-abetting instruction—demonstrated that the jury "necessarily found that he was the actual shooter," not an accomplice. *Ibid.* "The only evidence at trial of ammunition," the court explained, "was the spent nine millimeter shell casings found in the parking lot where the shots were fired," and "[t]here was no evidence that anyone but the shooter possessed the firearm that contained the ammunition." *Id.* at 7a-8a. The court rejected petitioner's arguments that the jury might have been confused about what legally qualified as possession for the ammunition counts and that the jury's note indicated that it convicted him under an aiding-and-abetting theory. See *id.* at 8a-9a. The court therefore held that because the jury necessarily concluded that petitioner was the shooter, not an accomplice, petitioner "cannot show that the error in instructing jurors on the aiding-and-abetting theory affected the outcome of the trial." *Id.* at 10a.

ARGUMENT

Consistent with this Court's direction "to consider the appropriate consequence, if any, of [the] error" that the Court identified in the jury instructions, 134 S. Ct. at 1252, the court of appeals correctly held that petitioner was not entitled to relief because the verdict form indicates that the jury necessarily concluded that he was the principal of the Section 924(c) offense, not an accomplice. Pet. App. 7a-10a. Petitioner contends that the court of appeals erred in applying the plain-error standard because (i) he adequately preserved an objection to the jury instructions with respect to the knowledge element of accomplice liability under Sec-

tion 924(c) (Pet. 12-30); and (ii) the court of appeals misapplied the third prong of the plain-error standard (Pet. 30-34). Neither of those contentions is correct, and the court of appeals' case-specific application of the plain-error standard does not conflict with any decision of this Court or another court of appeals. Accordingly, this Court's review of the court of appeals' nonprecedential decision is not warranted.

1. Petitioner first contends (Pet. 12-30) that the court of appeals erred in holding that because petitioner did not object to the knowledge element in the jury instructions—indeed, because he affirmatively proposed that element—it would apply the plain-error standard. He further contends that the court's holding conflicts with a decision of the First Circuit. Both arguments lack merit.

a. i. Under this Court's prior decision in this case, a jury may convict a defendant of aiding and abetting a Section 924(c) offense if it finds two elements: that the defendant (i) assisted in the underlying drug-trafficking offense or crime of violence (ii) with advance knowledge that a confederate would use a firearm in the commission of that offense. See 134 S. Ct. at 1251-1252.[1] At trial, petitioner and the government

[1] The instruction in this case referred to the "use" prong of Section 924(c) because the firearm was fired, see Pet. App. 17a, but the same elements of aiding and abetting would apply under the "carry" and "possess" prongs of the statute. For simplicity, this brief refers only to the "use" prong.

Although the Court's opinion in this case had no occasion to address the question, under the Court's analysis presumably an act of assistance directed at the firearm with advance knowledge of the drug-trafficking offense or crime of violence—for example, supplying a firearm to another person for use in a robbery—would

proposed nearly identical instructions with respect to the knowledge element: "the defendant knew his cohort used a firearm in the drug trafficking crime" (the government's proposed instruction) and "the defendant knew that another person used a firearm in the underlying drug trafficking crime" (petitioner's proposed instruction). Pet. App. 55a, 59a. The district court adopted a knowledge instruction that was consistent with the parties' proposals. 134 S. Ct. at 1244.

The parties, however, proposed different instructions for the affirmative-act element. The government proposed: "the defendant knowingly and actively participated in the drug trafficking crime." Pet. App. 59a. Petitioner proposed: "the defendant intentionally took some action to facilitate or encourage the use of the firearm." *Id.* at 55a. Petitioner cited circuit precedents (which this Court's subsequent opinion overruled) holding that a defendant's affirmative act of assistance must be directed at the firearm for him to be guilty of aiding and abetting a Section 924(c) offense. Petitioner also submitted a short written objection in which he quoted the government's instruction and argued that "the second prong of this test [*i.e.*, the affirmative-act prong] is incorrect." *Id.* at 61a. He said nothing about the knowledge element—understandably, since he had proposed a materially identical description of that element. The district court adopted an affirmative-act instruction that was consistent with the government's proposal, 134 S. Ct. at 1244, which this Court ultimately approved, *id.* at 1251.

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also meet the requirements for aiding and abetting a Section 924(c) offense.

Petitioner's objection and proposed instruction were insufficient to preserve the error that he pressed on remand from this Court. Under Federal Rule of Criminal Procedure 30(d), a party who objects to a proposed jury instruction must "inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Cf. Fed. R. Crim. P. 51(b) (general rule). That contemporaneous-objection requirement gives the district court the opportunity to "correct or avoid the mistake" before it is too late. *Puckett* v. *United States*, 556 U.S. 129, 134 (2009). Here, petitioner's objection to the instructions sufficiently informed the district court of the argument that accomplice liability under Section 924(c) requires an affirmative act of assistance directed at the confederate's use of the firearm—the issue that was the subject of a circuit conflict and that petitioner litigated up to this Court, where he lost on that issue. But petitioner's argument did not inform the district court of the distinct argument that he advanced on remand from this Court: that even if an affirmative act of assistance directed at the firearm is not required, accomplice liability requires a defendant to at least have had advance knowledge that an accomplice would use a firearm in the course of the underlying drug-trafficking offense or violent crime. The district court therefore had no notice of that claim of instructional error.

Because petitioner failed to object to the instructions' description of the knowledge element of aiding-and-abetting liability, that objection was subject to, at most, plain-error review. See Fed. R. Crim. P. 52(b). The court of appeals therefore correctly considered petitioner's argument on remand under the plain-error standard. See Pet. App. 7a-10a.

ii. Petitioner contends (Pet. 28-30) that the court of appeals erred in applying the plain-error standard because his proposed instruction "necessarily communicate[d] the foreknowledge requirement that this Court announced" in its subsequent opinion. Pet. 18. That argument is unsound.

It is true that if the district court had instructed the jury (contrary to this Court's ultimate ruling) that accomplice liability under Section 924(c) requires an intentional act of assistance directed at the use of the firearm, the instructions necessarily would have required the jury to find that petitioner had knowledge of the firearm before he acted. A person cannot intentionally assist in the use of a firearm without advance knowledge of the firearm.[2] But that does not demonstrate that petitioner sufficiently informed the district court of the alternative argument that he presses now: that even if an affirmative act of assistance directed at the firearm is not required, liability at least requires that he had advance knowledge of the firearm before committing an act of assistance directed toward the drug-trafficking offense. That is a fundamentally different argument—as this Court recognized in treating the two questions separately in its opinion, see 134 S. Ct. at 1245-1248, 1248-1251—and it was not intelligibly conveyed to the district court by petitioner's objection or proposed instruction.

Petitioner readily could have preserved that distinct argument by stating that even if the government were correct about the affirmative-act element of the

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[2] As is generally true in criminal law, willful blindness would also satisfy that knowledge requirement. See *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2068-2071 (2011).

aiding-and-abetting instruction, the government's proposal on the knowledge element would be incorrect. That would have given the district court or the government an opportunity to avoid a dispute on appeal over the issue by phrasing the knowledge element of the instruction in a different way. But he did not do so.

A hypothetical example illustrates the flaw in petitioner's argument. Suppose that in instructing a jury on the elements of an offense, a district court stated that the jury must find that the defendant had used a "weapon," and the defendant objected that under the applicable statute the weapon had to be a "shotgun." If a reviewing court were to reject the defendant's argument but hold that the instruction was incomplete by failing to specify that the weapon had to be a "firearm" of some type, rather than a weapon generally, that error would be reviewed only under the plain-error standard—even though, had the defendant's proposed instruction been given, the statutory "firearm" requirement would have been satisfied by the narrower, erroneous element of a "shotgun." In that situation, the defendant's objection would not have informed the district court of the distinct argument that even if the statute did not require a "shotgun," it would at least require a "firearm."

The situation here is analogous. Although petitioner's proposed instruction, which this Court held to be unduly narrow, would necessarily have required the jury to find that he had advance knowledge of a firearm to convict him, he did not inform the district court that he believed that advance knowledge was required even if an affirmative act of assistance directed to the

firearm was not. The court of appeals' application of the plain-error rule here therefore was not "hyper-technical" (Pet. 2, 13, 22, 24). Rather, it furthered the basic purpose of the contemporaneous-objection rule to ensure that a district court is on notice of every asserted flaw in the instructions before sending a case to the jury. See *Puckett*, 556 U.S. at 135.

Petitioner objects (Pet. 24-25) to what he sees as the court of appeals' artificial division of the aiding-and-abetting instruction into its two elements—even though this Court itself analyzed the two elements separately. See 134 S. Ct. at 1251 ("We agree with that instruction's second half."). That division is not artificial. The only argument that petitioner preserved in the district court related exclusively to the affirmative-act element of the government's proposed instruction: that liability required an intentional act of assistance directed at the firearm. He did not make the analytically distinct argument that if he was wrong about the affirmative-act element, the government's proposed knowledge element did not accurately describe the *mens rea* traditionally required for accomplice liability. See 134 S. Ct. at 1248-1251. And because he failed to lodge any objection to that part of the instruction or otherwise intelligibly convey his current knowledge-element argument, he did not sufficiently inform the district court of the error in time for the district court to address it.[3]

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[3] Petitioner objects (Pet. 11 n.2) to the court of appeals' observation that this Court's remand order related to the portion of the instruction to which petitioner did not object (*i.e.*, the knowledge element). See Pet. App. 5a-6a. But it is indisputable that petitioner did not expressly object to that element; indeed, he proposed

b. Petitioner contends that the court of appeals' application of plain-error review conflicts with the First Circuit's post-*Rosemond* decision in *United States* v. *García-Ortiz*, 792 F.3d 184 (2015). Petitioner's claim of a circuit conflict, however, rests on the same logical flaw as his argument on the merits. *García-Ortiz* considered and rejected a sufficiency-of-the-evidence challenge to a conviction under an aiding-and-abetting instruction similar to the one that petitioner proposed in the district court (while deeming any claim of instructional error waived). *Id.* at 190-191 & n.9. The First Circuit held that the jury had necessarily found that the defendant had advance knowledge of the firearm when it convicted him under that instruction. *Id.* at 190. Accordingly, *García-Ortiz* stands at most for the proposition that a conviction under petitioner's proposed instruction would have been sufficient to satisfy *Rosemond*'s advance-knowledge requirement. That is not disputed because, as discussed above, if a defendant had intentionally committed an affirmative act of assistance directed at the firearm, he would necessarily have had advance knowledge of the firearm. See p. 16, *supra*.

But as also explained above, the fact that the instruction that petitioner proposed would have itself complied with the advance-knowledge requirement

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the same description of that element as the government. The argument that petitioner advances now is instead that his objection to the other, affirmative-act element necessarily encompassed the substantive argument that the district court's instruction as a whole failed to adequately convey the *mens rea* for accomplice liability. That argument is wrong for the reasons given above, but in any event petitioner's criticism of the court of appeals' description of the procedural posture of this case is without merit.

(while misdescribing the affirmative-act requirement) does not establish that merely proposing that instruction sufficed to inform the district court of the argument that he presses now: that even if his proposed instruction were wrong, the government was at least required to prove his advance knowledge of the firearm. See pp. 16-18, *supra*. *García-Ortiz* did not address that very different issue-preservation question. Petitioner's claim that *García-Ortiz*'s "rationale and result" demonstrates that petitioner "flagged the instructional error here" (Pet. 16) is thus incorrect.[4]

2. Petitioner briefly argues (Pet. 30-34) that the court of appeals erred in applying the third prong of the plain-error standard, *i.e.*, whether the error affected petitioner's substantial rights. That case-

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[4] Petitioner cites (Pet. 16-18) nonprecedential decisions from two other circuits. Like *García-Ortiz*, those decisions at most stand for the proposition that conviction under an instruction similar to the one that petitioner proposed would have been sufficient to satisfy the advance-knowledge requirement. See *United States* v. *Lanier*, 623 Fed. Appx. 768, 782 (6th Cir. 2015), petition for cert. filed, No. 15-6889 (Nov. 9, 2015); *United States* v. *Young*, 561 Fed. Appx. 85, 92 (2d Cir.), cert. denied, 135 S. Ct. 387, and 135 S. Ct. 388 (2014). Neither decision addressed whether merely submitting such an instruction to the district court would be sufficient to preserve the claim of instructional error that petitioner advanced on remand from this Court. (The United States has filed a memorandum in *Lanier* recommending that the petition be held for *Taylor* v. *United States*, cert. granted, No. 14-6116 (Oct. 1, 2015). See U.S. Mem., *Lanier* v. *United States*, No. 15-6889 (Dec. 10, 2015).) Petitioner's reliance (Pet. 18-21) on the government's position in *United States* v. *Harper*, No. 11-20188, 2014 WL 4978663 (E.D. Mich. Oct. 6, 2014), suffers from the same mistaken reasoning, and none of the unpublished district-court decisions that he cites addressed the preservation question at issue here.

specific claim of error does not warrant this Court's review, and it is incorrect in any event.

The court of appeals' prejudice conclusion was straightforward: Because petitioner was convicted on two counts of possessing the ammunition that was discharged from the firearm held by the shooter, without an aiding-and-abetting instruction on those counts, the jury necessarily must have found that he was the shooter, not an accomplice. Accordingly, any error in instructing the jury on the elements of accomplice liability for the Section 924(c) count was irrelevant, because the jury found that he was the principal. See Pet. App. 7a-10a.

Petitioner suggests that the court of appeals misstated the governing legal standard for the third prong of the plain-error standard by using the word "establish" at one point in its opinion. See Pet. 31-32. But the court of appeals recited precisely the standard that petitioner acknowledges to be correct: whether "there is a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." Pet. App. 7a (citation and internal quotation marks omitted); see Pet. 31-32 ("a reasonable probability that the error affected the outcome of the trial") (emphasis omitted; citation and internal quotation marks omitted). The court used the word "establish" only in concluding that the jury's note to the judge did not overcome the obvious implication of the jury's verdict on the ammunition counts. See Pet. App. 9a. The court nowhere suggested that it was applying a different legal standard than the one that it recited at the outset of its analysis.

In any event, this case would be an unsuitable vehicle to address application of the plain-error standard because, as the government argued below and as the court of appeals strongly suggested, petitioner *invited* the error by proposing an instruction with a description of the knowledge element materially indistinguishable from what the district court adopted and by failing to amend his proposal or raise any other objection once the district court adopted the government's description of the affirmative-act element. See Pet. App. 10a n.6 ("We probably could find that [petitioner] invited the error."); see also U.S. C.A. Supp. Br. 22-23. Under the invited-error doctrine, a court "will not engage in appellate review [if] a defendant has waived his right to challenge a jury instruction by affirmatively approving it at trial." *United States* v. *Cornelius*, 696 F.3d 1307, 1319 (10th Cir. 2012). As this Court explained in *United States* v. *Olano*, 507 U.S. 725 (1993), "[t]he first limitation on appellate authority under Rule 52(b) is that there indeed be an 'error,'" and a court's deviation from a legal rule is not an error if "the rule has been waived" through an "'intentional relinquishment or abandonment of a known right.'" *Id.* at 732-733 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Were review granted, the government would renew its invited-error argument as an alternative ground to affirm the judgment below. If the Court accepted that argument, it would have no occasion to reach the plain-error-standard question that petitioner presents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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