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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

6 Mr. Elwood.

7 ORAL ARGUMENT OF JOHN P. ELWOOD

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

9 JUSTICE SCALIA: No, no.

10 MR. ELWOOD: Knowledge is not itself intent.

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

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

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

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

1 jury --

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

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

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

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

22 JUSTICE SCALIA: Facilitate the crime.

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

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

1 don't have to --

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

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

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

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

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

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

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

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

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

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

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

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



1 and I'm going to carry a gun.

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

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

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

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

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

19 (Laughter.)

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

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

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

5 MR. ELWOOD: The question is --

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

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

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

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

25 JUSTICE ALITO: But you facilitate --

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

5 MR. ELWOOD: But the thing is --

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

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

11 JUSTICE KENNEDY: Well, the submission is

12

13 MR. ELWOOD: And the question --

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

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

1 underlying offense.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: I'm hard to imagine

1 that. Give me an example.

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

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

17 JUSTICE SOTOMAYOR: What would the  
18 instruction look like?

19 MR. ELWOOD: It would just --

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

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

1 crime of violence or a drug trafficking offense --

2 JUSTICE SOTOMAYOR: Well, then you come --

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

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

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

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

14 JUSTICE KENNEDY: I am too.

15 JUSTICE SCALIA: I think you need prior knowledge.

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

18 JUSTICE SCALIA: Yes.

19 MR. ELWOOD: Right. Exactly.

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

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

26 JUSTICE SCALIA: After you know.



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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE KENNEDY: And was there any evidence

1 that he had the gun?

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

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

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

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

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

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

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

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

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

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

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

1 chasing the people who robbed them.

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

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

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

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

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

25 And secondly, I don't know that that would

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

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

9 MR. ELWOOD: Yes.

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

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

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

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

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

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

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

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

25 JUSTICE SCALIA: And so I thought -- I

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

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

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

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

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

18 MR. ELWOOD: No. His -- our only position  
19 is that they have to ask the jury, did he facilitate the  
20 924(c) offense.

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



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

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

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

11 MR. ELWOOD: That's right. But it's -- I  
12 think our -- the reason why we think it makes a  
13 difference is because it's a different crime. And the  
14 government is trying to get the jury to conclusively  
15 presume from the fact that you did the one crime, that  
16 you must also have facilitated the other. And we just  
17 don't think that that is something that you can say with  
18 100 percent certainty so you can remove it from jury  
19 determination.

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

1 offense?

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

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

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

25 JUSTICE KENNEDY: I just want to make clear,

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

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

9 If I could reserve --

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

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

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

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

25 I would like --

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

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

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

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

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

12 MR. ELWOOD: That is correct.

13 JUSTICE SCALIA: Okay.

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

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 Mr. Bash.

18 ORAL ARGUMENT OF JOHN F. BASH

19 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

1 commit, but as a favor or as a friendly gesture --

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

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

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

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

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

8           JUSTICE GINSBURG:       Well, why don't we just  
9 take it that we have a crime, the underlying crime, it's  
10 a 48-month crime, and then if you have a gun in  
11 connection with that crime, it becomes 120 months  
12 consecutive. And your position seems to be that all you  
13 have to prove is facilitation of the underlying drug  
14 offense. And it seems to me to -- to get 10 years of  
15 your life for the government proving no more than the  
16 48-month charge is a bit much.

17          MR. BASH:           It's not proving no more than the  
18 48-month charge. And I'll just -- as a footnote, it's  
19 10 years only if the gun is fired. It's 5 years if it's  
20 carried or used, and which obviously creates a much  
21 greater danger to people's lives and property if it's  
22 fired.

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

1 to be involved in it.

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

6 MR. BASH: Justice Kennedy, two points.

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

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

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

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

22 JUSTICE KENNEDY: I said taken by itself.

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



1 JUSTICE KENNEDY: Yes.

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

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

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

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

25 That is doubly true here where his

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

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

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

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

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

1 MR. BASH: It would be --

2 JUSTICE KENNEDY: He drove the car.

3 Principal object was to rob the bank, not to use the  
4 firearm, but he facilitated the use of a firearm. I can  
5 see that a judge could give that instruction.

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

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

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

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

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

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

21 JUSTICE SOTOMAYOR: That's your point,  
22 right?

23 MR. BASH: Yes.

24 JUSTICE SOTOMAYOR: That's your --

25 MR. BASH: If he learned of the gun and

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

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

8 MR. BASH: Well, I --

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

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

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

1 practical application from our approach.

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

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

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

20           MR. BASH:           We --

21           JUSTICE SOTOMAYOR:           -- the underlying crime.

22           MR. BASH:           We agree that that is law.

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

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

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

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

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

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

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

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

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

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

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



1 this guy has a gun and he might shoot me if I withdraw,  
2 I think you have a pretty solid duress defense.

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

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

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

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

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

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

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

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

19           MR. BASH:           Yes.

20           JUSTICE KENNEDY:           You agree with that.

21           MR. BASH:           Carried or used, yes.

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

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

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

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

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

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

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

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

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

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

1 90 percent of the stuff. And the other person does just  
2 a little thing, but something, you know, that goes to  
3 the offense that helps facilitate the offense. But it's  
4 really pretty small compared to the overall crime.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. BASH: Not --

21 JUSTICE KENNEDY: Potentially misleading?

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



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

3 CHIEF JUSTICE ROBERTS: You would --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 924(c). What I was saying earlier was that, what does  
2 it mean to help make a crime succeed? It makes -- it  
3 means intent to make one -- at least one step in that  
4 crime easier, knowing the other person bore the intent  
5 to do the crime.

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

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

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

1 waiver of harmless error and so forth.

2 If there are no further questions.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Elwood, you have four minutes remaining.

5 REBUTTAL ARGUMENT OF JOHN P. ELWOOD

6 ON BEHALF OF THE PETITIONER

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

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

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

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

24 MR. ELWOOD: I think --

25 JUSTICE BREYER: That is to say, I thought

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

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

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

11 MR. ELWOOD: It was his purpose --

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

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

16 JUSTICE BREYER: Well just tell me  
17 where in the brief they are, or whatever's easier.

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

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

Official

1 JUSTICE BREYER: They used the word "intent."  
2 Some people used it in order to encompass the  
3 situation --

4 MR. ELWOOD: Right.

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

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

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

15 MR. ELWOOD: I would --

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

19 MR. ELWOOD: I would point you --

20 JUSTICE BREYER: Which one is it?

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

1 knowing assistance for aiders and abettors. You have to  
2 have purposeful intent --

3 JUSTICE BREYER: LaFave.

4 MR. ELWOOD: LaFave, Wayne LaFave.

5 JUSTICE BREYER: LaFave.

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

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

17 CHIEF JUSTICE ROBERTS: How did you preserve  
18 that objection?

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

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.



Official

1 The case is submitted.

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

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