No. 12-895

IN THE

Supreme Court of the United States

JUSTUS CORNELIUS ROSEMOND, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Brief *Amicus Curiae* of Gun Owners Foundation, U.S. Justice Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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August 9, 2013

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc. is a nonprofit social welfare organization, exempt from federal income tax under IRC section 501(c)(4).

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this and other courts.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Because the federal government is one of enumerated powers, there is no common law of crimes against the United States. Thus, the federal government has no power to punish criminal conduct, except in accordance with statutes enacted pursuant to the Constitution. Although petitioner has raised no constitutional issue in this case, he is urging this Court to construe the federal aiding and abetting statutory provision according to the plain text of 18 U.S.C. § 2(a), as applied to the firearms offense defined in 18 U.S.C. § 924(c)(1)(A).

As petitioner ably argues, the text of Section 2(a) embraces the common law historic requirement that Rosemond may not be convicted of aiding and abetting an the firearms offense, the violation of which he had been charged, unless he purposely facilitates the commission of that offense. The courts below rejected petitioner's argument, erroneously affirming a jury instruction that permitted a conviction of aiding and abetting a firearms offense solely because Rosemond aided and abetted a drug trafficking offense, knowing that the firearms offense was taking place.

The scope of inquiry in this case, however, should not be limited to the question whether the jury instruction and conviction were warranted in this case. Rather, the question must be examined in light of Alleyne v. United States, decided on June 17, 2013, just 20 days after the Court granted certiorari review of this case. Alleyne overruled Harris v. United

States, construing Section 924(c)(1)(A) to define three firearms offenses instead of only one.

Under Harris, Section 924(c)(1)(A) defined the single offense of the unlawful use, carry or possession of a firearm. Under Section 2(a), a charge of aiding and abetting such use, carry or possession would be sufficient to trigger a sentence of seven years upon evidence that the firearm was brandished, or a sentence of ten years if the firearm was discharged, regardless of whether the aider and abetter purposely facilitated the brandishing or the discharge.

Such will not be the case under Alleyne, which ruled that Section 924(c)(1)(A) defines three separate and distinct offenses — (i) unlawful use, carry, or possession; (ii) brandishing; and (iii) discharge. In order for a defendant to be charged with aiding and abetting a violation of Section 924(c)(1)(A) by "brandishing" or by "discharge" of a firearm, would require evidence that the defendant purposed that the firearm brandished and/or discharged. Even under the Government's aiding and abetting theory, the prosecution would be required to prove that the aider and abetter "knew" the firearm was brandished or discharged, not just unlawfully used, carried or possessed.

These *amici* urge this Court to examine the question raised in this case in light of Alleyne's new interpretation of 924(c)(1)(A) on the further ground that, if the Government's theory of aiding and abetting is affirmed in this case, it will unwisely and unnecessarily expand prosecutorial discretion in the

administration of the mandatory minimum sentence structure of Section 924(c)(1)(A) and undermine the role of the jury envisioned in Alleyne.

ARGUMENT

At the time that Rosemond was charged with, and tried for, aiding and abetting a violation of 18 U.S.C. § 924(c)(1)(A), that section had been interpreted by this Court to have defined a "single offense," one that could be proved by evidence of the use or carrying a firearm "during and in relation to a crime of violence or drug trafficking crime" or possession of a firearm "in furtherance of any such crime." *See* Harris v. United States, 536 U.S. 545, 550 (2002). While Rosemond also had been charged with "discharging" a firearm, that charge was not based upon a separate offense defined in Section 924(c)(1)(A)(iii) requiring proof of an additional element. Rather, under Harris the "discharge" provision, like the "brandishing" provision of subsection (ii), was ruled to be only a sentencing factor, increasing the mandatory minimum sentence of five years for unlawful use, carry or possession, as provided in subsection (i) to the ten-year minimum set by subsection (iii). *Id.* at 552-54. Such was the state of the law on May 28, 2013, when the petition for certiorari was granted herein.

Twenty days later, on June 17, 2013, this Court overruled Harris, holding that "brandishing ... constitutes an element of a separate ... offense." Alleyne v. United States, __ U.S. __, 133 S.Ct. 2151, 2162 (2013). Under Alleyne, Section 924(c)(1)(A) now contains three distinct offenses, instead of one. In Part

II of this brief, *amici* address the issue presented by the petition in light of this significant change in federal law. In Part I, however, *amici* first elaborate on the issue under the Harris ruling that Section 924(c)(1)(A) defines a single offense of unlawful use, carry or possession, as set forth in Petitioner's merits brief.

I. THE TRIAL COURT'S JURY INSTRUCTION ON WHETHER ROSEMOND AIDED AND ABETTED A VIOLATION OF 18 U.S.C. § 924(C)(1)(A) WAS ERRONEOUS.

A. 18 U.S.C. § 2(a) Governs the Aiding and Abetting of a Federal Crime.

At issue in this case is a question of accomplice liability as provided for in Section 2(a) of Title 18 of the United States Code, and as applied to the firearms offense defined in 18 U.S.C. § 924(a)(1)(A). Because the federal government is one of enumerated powers, "[t]here are no common-law crimes against the United States...." W. Clark, Handbook of Criminal Law, p. 26 (West: 1915). "It can punish no offenses that have not been expressly defined, and made punishable by an act of Congress." *Id.*

This does not mean that the common law is irrelevant in the interpretation and application of a federal criminal statute. Oftentimes, Congress employs the language of the common law to describe a congressionally-enacted offense. *See* Brief for the Petitioner ("Pet. Br.") at 24.

Such is the case with 18 U.S.C. § 2(a), which provides, in pertinent part, that "[w]hoever commits an **offense** against the United States or **aids, abets,** counsels, commands, induces or procures **its** commission, is punishable as a principal." (Emphasis added.) *See* Pet. Br. at 13-14. While these "[s]everal terms have been employed by courts and legislatures in describing the kinds of acts which will suffice for accomplice liability,"[2] historically the foremost are "aiding" and "abetting." *See* Clark's Criminal Law at 113-15. For example, Clark's 1915 handbook states that "[t]o abet a crime is to incite or set another on to commit it, and includes procuring, counseling, and commanding its commission." *Id.* at 119.

It is not enough, however, that a person act in such a way as to facilitate the commission of an offense; he must also "purpose[ly] encourage or assist another in the commission of [the] crime...." LaFave and Scott's Criminal Law at 506. Or, as Clark puts it, "there must ... be a community of unlawful purpose at the time the act is committed; for one is not responsible for the act of another unless he expressly or impliedly authorized the other to do that act."[3] Clark's Criminal Law at

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[2] W. LaFave & A. Scott, Jr, Criminal Law at 502 (West: 1972) ("LaFave & Scott's Criminal Law").

[3] "Aiding" and "abetting" is thus a far cry from "strict liability." Rather, it is based upon the principle of individual fault stated in Deuteronomy 24:16 that "every man shall be put to death for his own sin," and applied by King Amaziah in 2 Chronicles 25:1-4. *See* Clark's Criminal Law at 25 ("Morality and the teachings of Christianity have had an influence on the formation of the common law, as well as on legislators.")

115. Even more transparently, as LaFave and Scott have written:

> Under the usual requirement that the accomplice must intentionally assist or encourage, it is **not** sufficient that he intentionally engaged in acts which, as it turned out, did give assistance or encouragement to the principal. Rather, the accomplice must **intend** that his acts have the effect of assisting or encouraging another. [LaFave & Scott's Criminal Law at 506 (emphasis added).]

To be sure, LaFave and Scott have acknowledged that there is some authority for the proposition that "aid with knowledge" that another is engaged in an unlawful act is sufficient to prove accomplice liability. *Id.* at 508. But they go on to point out that:

> [T]he traditional definition[] of accomplice liability ... "demand[s] that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used — even the most colorless 'abet' — carry an implication of purposive attitude towards it." [*Id.*]

By employing the traditional language of aiding and abetting, Section 2(a) is best understood to require not just that a person "know" that the one whom he is aiding is committing the unlawful act, but that the accomplice's purpose be that the other succeeds in its commission. *See* Pet. Br. at 2-5, 12-14, and 24-26.

B. The Instruction As To Whether Rosemond Was Guilty of Aiding and Abetting the Charged Firearms Offense Was Clearly Erroneous.

Applying these common law principles to the aiding and abetting charge against Rosemond, there is no question that the jury instruction did not comply with the textual command of 18 U.S.C. § 2(a). Rosemond was **charged** with aiding and abetting the **discharge of a firearm**, during and in relation to a federal drug trafficking crime, in violation of 18 U.S.C. § 924(c)(A)(i) and (iii). He was **not** charged with aiding and abetting the federal **drug trafficking** crime itself. *See* Pet. Br. at 6-7. However, the trial court rejected Rosemond's proposed instruction that he "may be liable for aiding and abetting the use of a firearm during the drug trafficking crime," if (i) he "knew that another person used a firearm in the underlying drug trafficking crime" and (ii) he "intentionally took some action to facilitate or encourage the use of the firearm." *See id.* at 9. Instead, the trial court instructed the jury to find Rosemond guilty if (i) he only "knew his cohort used a firearm in the drug trafficking crime," so long as (ii) he "knowingly and actively participated in the drug trafficking crime." *See id.*

According to the plain text of 18 U.S.C. § 2(a), one must first identify the "offense," the commission of which is the object of the aiding and abetting charge. In Rosemond's case the targeted offense was the firearms crime defined in Section 924(c)(1)(A), not the drug trafficking crime defined by 21 U.S.C. § 841(a)(1). As applied to Section 924(c)(1)(A), then, Section 2(a)

would require more than evidence that Rosemond "knew" that one of his confederates had a firearm in his possession; rather, to prove aiding and abetting a violation of 924(c)(1)(A), Section 2(a) requires evidence that Rosemond purposely encouraged or facilitated the unlawful use of the firearm. Without such proof, there would be no "community of purpose" as to the firearms offense.

II. THE GOVERNMENT'S INTERPRETATION AND APPLICATION OF 18 U.S.C. § 2 TO 18 U.S.C. § 924(c)(1)(A) CONFLICTS BOTH WITH ALLEYNE v. UNITED STATES AND WITH SOUND FEDERAL PROSECUTORIAL POLICY.

Although the question before the Court is not the constitutionality of either 18 U.S.C. § 924(c)(1)(A) or 18 U.S.C. § 2(a), but rather their interrelation and application, it is important to reiterate the foundational principle that "[t]he United States Congress has ... only such power as is expressly or by implication conferred by the Constitution." *See* Clark's Criminal Law at 27-28. Conspicuously absent from those "few and defined" powers[4] vested in the federal government is a general police power, including the power to enact and enforce a generally applicable criminal code — a power reserved by the Tenth

[4] *The Federalist No. 45*, The Federalist at 241 (G. Carey and J. McClellan, eds., Liberty Fund: 2001) ("The powers delegated by the proposed constitution to the federal government, are few and defined. Those which remain in the state governments, are numerous and indefinite.")

Amendment to the States. *See* The Federalization of Criminal Law 5-6 (ABA Task Force on the Federalization of Criminal Law: 1998) ("ABA Task Force Report").

"[G]enerally premised on an assertion of Congressional power to regulate interstate commerce" (*id*. at 6), Congress's initial foray into the criminal law was limited to prohibiting actual movement across state lines, such as the interstate transportation of lottery tickets. *See, e.g.,* Champion v. Ames, 188 U.S. 321 (1903). However, this intrusion was soon expanded to "subjects clearly ... within the ambit of the states' police powers." ABA Task Force Report at 6. By the middle of the Twentieth Century, Congress had dropped all pretense of protecting the criminal pollution of interstate commerce. Instead, using the Commerce Clause only as a hook to establish jurisdiction, Congress justified its encroachment upon the powers reserved to the States on the ground that the States were unable, without federal help, to fight crime. *See, e.g.,* S. Rep. 1097 to accompany S. 917 (Omnibus Crime Control and Safe Streets Act of 1968), reprinted in 2 U.S.C.C.A.N. 2113-14 (90th Cong., 2d Sess. 1968). In particular, Congress decided that the States needed "Federal controls over interstate and foreign commerce in firearms [in order] to enable the States to effectively cope with the firearms traffic within their own borders through the exercise of their police power." *Id.* at 2114.

While the major thrust of federal involvement came in the form of the licensure of persons engaged in the business of importing, manufacturing and dealing in

firearms, the Gun Control Act of 1968 added a slew of federally-enforceable crimes involving firearms, including the forerunner of 18 U.S.C. § 924(c)(1)(A), the current version of which is before this Court in this case. This is not the first time that a question of construction of this Act has come to the attention of this Court. As Duke Law Professor, Sara Sun Beale, has noted, "the volume of litigation concerning the definition of 924(c) has been extraordinary":

> The Supreme Court has decided eight cases involving different facets of construction of 924(c) since its passage in 1968, and many other issues have been litigated extensively in the lower courts. This unusual volume of litigation results, at least in part, from especially aggressive efforts by federal prosecutors to impose harsher penalties in cases at — or beyond —the outer limits of the statute, as defined by the statutory terms enacted by Congress. [S. Beale, "The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors," 51 *Duke L. J.* 1641, 1666-67 (2002) ("Unintended Consequences").]

Indeed, as noted in the introduction to this argument, less than a month after granting certiorari review to assess the legitimacy of the Government's expansive use of the aiding and abetting provision of 18 U.S.C. § 2, as applied to Section 924(c), this Court shortened the reach of prosecutorial discretion under Section 924(c)(1)(A) in Alleyne v. United States.

A. 18 U.S.C. § 924(c)(1)(A) Defines Three Different Crimes, Not Just One.

The original version of Section 924(c) was relatively simple and straight-forward. It imposed a mandatory minimum sentence of one year on any person who "use[d] a firearm to commit" a federal felony, or "carrie[d] a firearm unlawfully during the commission of any" federal felony. That mandatory minimum was increased to five years upon a "second or subsequent conviction." Public Law 90-618, 82 Stat. § 624 at 1224 (Oct. 22, 1968). This original provision, however, was soon amended by Congress, and subjected to a number of court decisions through the years:

> In 1984, the statute was amended to require at least five years imprisonment to be served consecutive to the sentence for the underlying offense, if a defendant "uses" or "carries" a firearm "during and in relation to "any crime of violence." In 1986, drug trafficking offenses were added, and sentences of up to thirty additional years were mandated for more dangerous weapons, such as assault rifles or machine guns. Further amendments in 1988, 1990, and 1994 required sentences of twenty years to life imprisonment without parole for offenders with prior convictions. [P. Hofer, "Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement," 37 AM. CRIM. L. REV. 41, 41-42 (2000).]

Thereafter, following a 1995 decision by this Court narrowing the "'uses' provision in the statute, ... Congress re-expanded the statute's scope to all forms of possession of a firearm 'in furtherance of'" a predicate crime. *Id.* at 42. And, at the same time, Congress passed legislation establishing "a regime of even higher mandatory penalties for 'brandishing' or 'discharging' a weapon, and increased penalties for repeat offenders and those that use certain types of dangerous guns." *Id.*

In 2002, this Court ruled that Section 924(c)(1)(A) defined a single crime, and that "brandishing" a firearm during and in relation to a predicate offense (and presumably so "discharging" a firearm) was a sentencing factor, not an element of a separate offense. *See* Harris, 536 U.S. at 553-54. Under Harris, all the prosecution was required to prove beyond a reasonable doubt was whether a defendant used or carried a firearm during and in relation to any crime of violence of a drug trafficking crime, or possessed a firearm in furtherance of such crime. *See id.* at 552-53. Applying this interpretation of Section 924(c)(1)(A) to a charge of aiding and abetting its violation under 18 U.S.C. § 2, most federal courts determined that, unless the prosecution proved that a defendant had "facilitated or encouraged" the use, carrying or possession of a firearm in the way prohibited by Section 924(c)(1)(A), he could not be convicted of aiding and abetting the commission of the single "offense" defined in that subsection. *See* Pet. Br. at 31-35. Upon conviction, the defendant could be sentenced to five, seven, or ten years, depending upon the whether, by only a preponderance of the evidence, the firearm had just

been unlawfully used, carried, or possessed, or had been brandished or discharged.

On June 17, 2013, however, this Court overruled Harris, determining that subsections (ii) and (iii) of Section 924(c)(1)(A) constitute elements of two separate offenses in addition to the single crime of use, carrying or possession of a firearm. *See* Alleyne, 133 S. Ct. at 2155-56. By a five-to-four vote, the Court found that "brandishing" was an element of the offense described in Section 924(c)(1)(A)(ii) because, by raising the mandatory minimum sentence from five years to seven, it is a "fact [that] increases the punishment above what is otherwise legally prescribed." *Id.* at 2158. Presumably, for the same reason, "discharg[ing] the firearm" is also an element of a separate crime because the fact that a firearm is discharged "during and in relation" to the predicate crime would raise the mandatory minimum sentence from five years to ten, thereby increasing the punishment above what is otherwise legally prescribed. *See id.* at 2160-61.

The question before the Court, then, has become more complicated since granting the Petitioner's writ. Under Harris, Section 924(c)(1)(A) defined only a single offense and, thus, under Petitioner's view, Section 2 required only evidence that a defendant aided and abetted the unlawful use, carry, or possession of a firearm. Under Alleyne, Section 924(c)(1)(A) defines three offenses. While the use, carry, or possession is a lesser included offense to the

brandishing and discharging offenses,[5] under Petitioner's view of Section 2, the prosecution would be required to charge and prove that a defendant facilitated or encouraged the brandishing of a firearm under subsection (ii), or the discharging of a firearm under subsection (iii). Even under the Government's view, this complication could not be avoided, the prosecution having to prove not just knowledge that the principal unlawfully used, carried, or possessed a firearm, but knowledge that the principal brandished or discharged that firearm, unless the prosecution chose to limit the indictment to the single charge of unlawful use, carry, or possession.

B. The Government's View of Prosecutorial Discretion, as Applied to the Enforcement of 18 U.S.C. § 2 and 18 U.S.C. § 924(c)(1)(A), Should Be Rejected.

As Professor Beale has argued in her article on the unintended consequences of enhancing gun penalties,

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[5] "When a greater and lesser offense are charged to the jury, the proper course is to tell the jury to consider first the greater offense, and to move on to consideration of the lesser offense only if they have some reasonable doubt as to guilt of the greater offense. A jury that finds guilt as to the greater offense does not enter a verdict concerning guilt of the lesser offense. The reason for this absence of consideration is not any inconsistency between the offenses. It rather reflects the very 'inclusion that defines the lesser offense as one 'included' in the greater. A lesser included offense is one which is necessarily established by proof of the greater offense and which is properly submitted to the jury, should the prosecution's proof fail to establish guilt of the greater offense charged, without necessity of multiple indictment." Fuller v. United States, 407 F.2d 1199, 1227-28 (D.C. Cir. 1967).

the pressure on Congress to increase such punishments comes primarily from prosecutors. Beale, "Unintended Consequences," 51 DUKE L. J. at 1666. This pressure has especially been felt in the ongoing battle over "the line defining the elements of the offenses defined by 18 U.S.C. §924(c)." *Id.* at 1666. While Congress has been responsible for "ratchet[ing] up the penalties" under 924(c), federal prosecutors have taken advantage of the harsher minimum penalties mandated by law to be served consecutively to all other sentences by "aggressively seeking to broaden its reach through expansive interpretation of its terms." *Id.* at 1675.

This aggressive stance has spilled over to this case. The prosecution is seeking an expansive reading of 18 U.S.C. § 2, thereby easing its burden to bring a defendant within the mandatory minimum sentencing scheme of Section 924(c). As Professor Beale has observed of the general practice of prosecutors, "Section 924(c) ... operates as a kind of super-enhancement statute...." *Id.* at 1670.

Indeed, in a very careful study of the impact of statutes mandating minimum penalties, when placed in the hands of federal prosecutors in the current sentencing guidelines system, St. John's law professor Michael Simons has documented that "there is no question that mandatory sentences shifted enormous sentencing authority to prosecutors." M. Simons, "Prosecutors as Punishment Theorists: Seeking Sentencing Justice," 16 GEO. MASON L. REV. 303, 324 (2009). Professor Simons has observed that because statutory minimum sentences trump the Sentencing

Guidelines, the prosecutor establishes a statutory floor below which the sentencing judge may not go. *See id.* at 327.

With respect to the mandatory minimums set by Section 924(c), Professor Simons has pointed out that Congress has vested the prosecutor with even greater sentencing powers: "the mandatory sentences of five, seven, or ten years (depending on whether the gun was possessed, brandished, or discharged) must be served consecutively, with any sentence imposed for the underlying drug crime or crime of violence...." *Id.* at 330. Such enhancements apply only if the prosecutor includes violation of Section 924(c) as a separate charge which, now under Alleyne, must be proved beyond a reasonable doubt.

If the standard of proof is mere knowledge of unlawful use, carry, or possession of a firearm, or knowledge of its "brandishment" or "discharge" in order to convict a defendant of aiding and abetting another's violation of Section 924(c), as the Government contends, this would exacerbate an already largely established "charge-based system in which prosecutorial decisions determine the sentence." *Id.* at 330. As Professor Simons has demonstrated, such a system of sentencing, portend "a very real danger ... that prosecutorial charging decisions will result in both unwarranted disparity (where similarly situated defendants receive vastly different sentences) and unwarranted uniformity (where defendants with widely varying degrees of culpability receive similar sentences)." *Id.* at 330-31.

Additionally, if the Government's view of the application of 18 U.S.C. § 2 were adopted, it would confer upon prosecutors in every case an even wider berth to employ Section 924(c) as a "bargaining chip," making its mandatory minimum and sentence enhancements "applicable in more cases."[6] *See* Beale, "Unintended Consequences," at 1677. As Professor Beale has observed:

> [O]verbroad mandatory minimum penalties ... create special hazards to accuracy in a plea bargaining regime, insofar as super-enhanced penalty provisions give prosecutors an unchecked opportunity to overcharge and generate easy pleas. This excessive plea leverage reduces the prosecutors' incentive to separate innocent from guilty defendants at the charging stage, increasing the chance that innocent defendants will be convicted. [*Id.* at 1680.]

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[6] Instead of making it easier for a prosecutor the prove aiding and abetting a violation of Section 924(c), courts ought to be very wary of adding yet another prosecutorial advantage because "[t]he machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps, DNA tests, bulldog prosecutors, pretrial detention, broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, it can nail anybody. There is some truth to this, since there are literally thousands of federal criminal laws, many of them at once broad, vague, obscure, and under enforced." *See* R. Posner, An Affair of State, Harvard Univ. Press, p. 87 (1999).

C. The Government's Attempt to Minimize the Difference Between Knowing that a Firearm is Being Used, and Intentionally Facilitating its Use, Is Unpersuasive.

In its brief filed in opposition to granting this petition for review, the Government contended that because so "'[l]ittle is required to satisfy the element of facilitation'" of the use of a firearm in order to sustain a charge of aiding and abetting a violation of 18 U.S.C. § 924(c)(1)(A), the difference between "facilitation" on the one hand, and "knowledge," on the other "appears to have minimal practical significance at this time." Brief of the United States in Opposition, at 10-11 ("Govt. Opp. Br."). The issue treated dismissively by the Government is certainly significant for Mr. Rosemond who will spend an extra 10 years in prison based on what the Government considers "little."

Although, the difference between "knowledge" of use of a firearm, and "facilitation" of the use of a firearm may seem paper thin in the hands of appellate judges (*see, e.g.,* Govt. Opp. Br. at 11-12), the distinction may loom much larger when the issue is submitted to a jury. Indeed, as this Court emphasized in Alleyne, the distinction between "brandishing" and "discharging" as a sentencing factor, on the one hand, and as an element of the offense, on the other, is that, construed as an element, it "preserves the historic role of the jury as an intermediary between the State and criminal defendants." *Id.*, 133 S.Ct. at 2161.

While prosecutors would rather this Court construe Sections 2(a) and 924(c)(1)(A) more liberally in favor of

their having greater discretion, the nation's constitutional diffusion of power between federal and state governments, and of specified limits on the enforcement of the criminal law, support a narrower reading, reducing the scope and impact of prosecutorial discretion, not enlarging it. *See generally* Beale, "Unintended Consequences."

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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August 9, 2013