

SCOTUS: *Rosemond v. United States*:
Intent Requirement For Aiding and Abetting Offenses Clarified

On March 5, 2014, in *Rosemond v. United States*, the Supreme Court of the United States held that in order to establish the intent to aid and abet the violation of a federal criminal statute, which prohibits using or carrying a firearm during and in relation to any crime of violence or drug trafficking, an accomplice must have actively participated in the underlying violent crime or drug trafficking with advance knowledge that a confederate would use or carry a gun during the crime's commission. Justice Kagan wrote the opinion for the majority; two justices dissented.¹

I. Background and Procedural History

The dispute focused on what the government must show when accusing a defendant of aiding or abetting an offense and arose from a “drug deal gone bad.” In August 2007, Vashti Perez, accompanied by two confederates Ronald Joseph and petitioner Justus Rosemond, headed to a local park to sell a pound of marijuana to two buyers. Perez drove while Joseph and Rosemond occupied the front passenger seat and the backseat (witnesses dispute who was in which seat). After allowing one of the buyers to inspect the drugs, the buyer punched the backseat passenger in the face, grabbed the drugs without paying, and ran. As both buyers fled, either Joseph or Rosemond (again, it was contested which one) exited the car and fired several shots at them from a semiautomatic handgun and then re-entered the vehicle. Perez, Joseph, and Rosemond then chased after the buyers by car but were pulled over by a police officer.

Rosemond was charged with violating 18 U.S.C. §924(c) by using a gun in connection with a drug trafficking crime or, because the identity of the shooter was disputed, aiding and abetting that offense under 18 U.S.C. §2. Section 924(c) imposes a mandatory minimum five-year sentence for its violation. At trial in Utah federal court, the district court judge instructed the jury to convict Rosemond if ““(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime.””² This was contrary to the instructions Rosemond had offered, asking to convict only if he ““intentionally took some action to facilitate or encourage the use of the firearm’ as opposed to the predicate drug offense.””³ Pursuant to the district court judge’s instructions, the jury found Rosemond guilty of violating §924(c) and the trial court imposed the mandatory minimum sentence of five years’ imprisonment for the violation. The Tenth Circuit affirmed, rejecting Rosemond’s argument that the jury instructions were incorrect.

II. The Court’s Decision

The Supreme Court found that the district court erred in instructing the jury and thus vacated the judgment. First, the Court disposed of Rosemond’s argument that his conduct was insufficient to satisfy the aiding and abetting charge. Even though Rosemond claimed not to have taken action with respect to any firearm, it was undisputed that he actively participated in the drug transaction. As the Court noted, almost every court of appeals has held that a “defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense.”⁴ Thus, advancing one element of the two-element crime under §924(c)

¹ *Rosemond v. United States*, No. 12-895, slip op. at 1 (Mar. 5, 2014) available at http://www.supremecourt.gov/opinions/13pdf/12-895_3d9g.pdf.

² *Id.* at 3.

³ *Id.*

⁴ *Id.* at 8 (quoting *United States v. Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987)).

satisfied the conduct requirement because “[i]n helping to bring about one part of the offense... [Rosemond] necessarily helped to complete the whole.”⁵

Next, the Court addressed the intent requirement of the aiding and abetting charge. It is well settled that a person aids and abets a crime when he or she “intends to facilitate that offense’s commission.”⁶ The intent to aid and abet a crime “must go to the specific and entire crime charged,” meaning both the predicated crime and gun use of §924(c).⁷ Previously, the Court had held that the intent requirement had been satisfied for aiding and abetting mail fraud in *Pereira v. United States*⁸ where defendant took part in aiding the deception of documents but was not involved in mailing the fraudulent documents, because he took part in the fraud knowing the documents would be mailed. Similarly, the Court had found that the intent requirement was satisfied for aiding and abetting the evasion of liquor taxes in *Bozza v. United States*⁹ where defendant operated a secret distillery knowing the business was set up in order to violate those laws.

Drawing from its reasoning in those cases, the Court found that the same principle held in Rosemond’s case. A defendant who participates in a criminal scheme must know the extent and character in order to intend the scheme’s commission. Thus, “an active participant in a drug transaction has the intent needed to aid and abet a §924(c) violation when he knows that one of his confederates will carry a gun” and has thus chosen “to align himself with the illegal scheme in its entirety.”¹⁰ The Court further elaborated that the defendant’s knowledge of a firearm must be “advance knowledge” occurring “at a time the accomplice can do something with it” not “after he can realistically walk away.”¹¹ That is, the knowledge must “enable [the accomplice] to make the relevant legal (and indeed, moral) choice.”¹² It was noted that the jury is free to infer that a defendant had such knowledge if he continues to participate in a crime after a gun is displayed or used by a confederate. As a result, the Court held that the district court had erred in its jury instructions, which did not explain that Rosemond needed advance knowledge of a firearm’s presence.

Notably, the Court explicitly declined to comment on whether an exception should exist to the rule that intent must go to the specific and entire crime charged when another crime is the “natural and probable consequence” of the crime the defendant intended to abet.¹³ Also, the Court expressed no view on defendants who incidentally facilitate a criminal venture rather than actively participate in it.¹⁴ Thus, even though this decision clarifies the timing and type of knowledge necessary for intent in an aiding and abetting charge, it leaves open the question of what level of culpability may suffice. As Justice Alito pointed out in his dissent, there exists a tension in Supreme Court cases on whether an aider and abettor must act purposefully or knowingly. However,

⁵ *Id.* at 6-7, 9.

⁶ *Id.* at 11.

⁷ *Id.*

⁸ 347 U.S. 1 (1954).

⁹ 330 U.S. 160 (1947).

¹⁰ *Id.* at 12-13.

¹¹ *Id.* at 13, 16 n.10. In doing so the Court rejected both Rosemond and the government’s interpretations of the intent requirement. Rosemond had argued that intent was only present if he “affirmatively desire[d]” one of his confederates to use a gun, whereas the government found the intent requirement satisfied if the accomplice, having learned of the firearm, continued to act as an accomplice during the transaction.

¹² *Id.* at 13.

¹³ *Id.* at 11 n.7.

¹⁴ The Court gave as an example of incidental facilitation a gun store owner who sells a gun to a criminal knowing but not caring how the gun will be used.

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his primary concern was what he calls the “realistic opportunity” standard.¹⁵ Justice Alito’s view is that this standard conflates intent and motive by engaging in an analysis similar to that of the affirmative defense of necessity, and he takes issue with it because necessity does not negate *mens rea* while the new standard may.¹⁶

III. Significance of the Decision

The Court’s decision in *Rosemond* serves as a reminder that a defendant can be convicted as an aider and abettor without proof that he participated in each and every element of an offense. As for the intent requirement for an aiding and abetting charge, the Court’s decision requires a defendant to have had advance knowledge of all the elements of the entire crime. The jury is left to decide on the facts whether a defendant had that advance knowledge and thus whether he intended to commit each aspect of the crime.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Cynthia Smuzynska at 212.701.3832 or csmuzynska@cahill.com.

¹⁵ *Id.* at 1 (Alito, J. dissenting).

¹⁶ *Mens rea* is Latin for “guilty mind.”