RECORD NOS. 08-8191(L); 09-6001

In The
United States Court of Appeals
For The Fourth Circuit

TIMOTHY A. RICE,

Petitioner – Appellant,

v.

M. L. RIVERA, Warden,

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2241. The judgment from which this appeal is taken was entered by the United States District Court for the District of South Carolina on September 24, 2008. Petitioner Timothy Rice filed a Motion to Alter or Amend the Judgment or For Reconsideration on October 3, 2008. While that motion was pending, Petitioner filed a timely Notice of Appeal on October 6, 2008. The district court denied the Motion for Reconsideration on December 2, 2008. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Petitioner was convicted under 18 U.S.C. § 924(c)(1) for "using" a firearm "during and in relation to . . . [a] drug trafficking crime" based on evidence that he reached instinctively toward a handgun lying on the night stand next to his bed when police officers kicked in his bedroom door and awakened him. Following his conviction, the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995). Petitioner subsequently sought *habeas corpus* relief from his conviction under § 924(c)(1) on the ground that he had not actively employed the firearm as required by *Bailey.* Respondent agreed that Petitioner was entitled to the relief sought. Did the district court err in denying the petition?

2. The district court also found that Petitioner's conviction could be upheld under the "carry" prong of 18 U.S.C. § 924(c)(1) based on the same evidence. Did the district court err in light of the Supreme Court's construction of that provision in *Muscarello v. United States*, 524 U.S. 125 (1998)?

STATEMENT OF THE CASE

On October 17, 1990, a federal jury convicted Petitioner Timothy Rice of several offenses, including the "use" of a firearm in violation of 18 U.S.C. § 924(c)(1). J.A. 28. On February 1, 2008, Petitioner filed a *pro se* petition for a writ of *habeas corpus*, challenging his conviction and sentence under 28 U.S.C. § 924(c)(1). J.A. 12–19. Respondent also filed a Motion to Vacate Petitioner's conviction under § 924(c)(1). J.A. 49–50. This is an appeal from the September 24, 2008, order and judgment of the United States District Court for the District of South Carolina dismissing the *habeas* petition and denying Respondent's motion to vacate Petitioner's conviction under § 924(c)(1). J.A. 55–68.

Petitioner claimed that he was entitled to relief from his conviction under the "use" prong of § 924(c)(1) pursuant to the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). J.A. 17. Respondent agreed, conceding that "the facts and evidence do not support a

conviction under § 924(c)." J.A. 33. The United States Magistrate Judge who reviewed the petition and motion to vacate recommended that the district court grant both. J.A. 52–53.

The district court declined to adopt the Report and Recommendation of the magistrate judge. J.A. 69. Instead, the court denied the motion to vacate and dismissed the petition on the ground that there was sufficient evidence presented at Petitioner's 1992 trial to sustain his conviction under the "use" prong of § 924(c)(1), even after considering the Supreme Court's decision in *Bailey*. J.A. 65, 68. The court found in the alternative that the evidence was also sufficient to uphold Petitioner's conviction under the "carry" prong of § 924(c)(1). J.A. 66–68.

Petitioner filed a timely motion to reconsider on October 3, 2008. J.A. 70–76. The district court denied the motion on December 2, 2008. J.A. 78–81. Petitioner filed a Notice of Appeal on October 6, 2008.[1] J.A. 72. Petitioner is currently incarcerated at the Ashland Federal Correctional Institution in Kentucky. Respondent is the warden of that facility.

[1] Because Petitioner filed his Notice of Appeal while his Motion to Reconsider was still pending with the district court, it became effective when the order disposing of that motion was entered. Fed. R. App. P. 4(a)(4).

STATEMENT OF FACTS

1. Petitioner's Trial and Conviction Under 18 U.S.C. § 924(c)(1)

On May 3, 1990, police officers executed search warrants at Petitioner's home in Spartanburg, South Carolina. Those officers suspected Petitioner and members of his family of conspiring to distribute crack cocaine. Petitioner and his brother were the alleged ringleaders of the conspiracy; they purportedly used the homes and yards of other members of their family to distribute the cocaine.

When armed officers entered Petitioner's home, he was sleeping in the second-floor bedroom of his home, in bed with an unidentified woman and her child. The officers quickly mounted the stairs and, without warning, kicked in the door to Petitioner's bedroom. When the door crashed open, the woman and child ran screaming from the room. At that moment, while still in bed, Petitioner instinctively reached toward a night stand next to his bed. A nine-millimeter handgun lay on top of the table. One of the armed officers ordered Petitioner to pull back his hand, which Petitioner immediately did. Petitioner then rolled over in bed and submitted to arrest without resistance. Petitioner never touched or moved the handgun.

On July 28, 1990, a federal grand jury indicted Petitioner and eight others. J.A. 5–11. The indictments charged the defendants with conspiracy

to distribute crack cocaine, possession of crack cocaine with intent to distribute, and maintaining a location for the sale of crack cocaine in violation of various federal statutes. J.A. 8–10. The indictment also charged Petitioner with using or carrying a firearm "during or in relation to [a] . . . drug trafficking crime" in violation of 18 U.S.C. § 924(c)(1). J.A. 11.

At Petitioner's trial, the only evidence the government offered to show that Petitioner had violated § 924(c)(1) was the testimony of Officer Ramses Newman, one of the officers who had crashed into Petitioner's bedroom. Officer Newman testified as follows:

> Q: And did you have occasion to go into the bedroom of that residence?
>
> A. Yes, sir, I did.
>
> Q: And tell us what happened when you went in.
>
> A: When we finally got in the door, a woman and some children came out of the bedroom screaming. I ran into the bedroom and Tim Rice was laying in the bed. At that time he reached over to a table over next to his bed and there was a nine millimeter handgun laying on the table. And then I - - -
>
> Q: What did you do then?
>
> A: I told him that I'd kill him if he didn't, you know, reach back from the gun. And he rolled back in the bed and laid down.
>
> Q: You were armed?

A: Yes, armed with a shotgun.

* * *

Q: Okay. Did you examine that handgun at that time?

A: Yes, sir.

* * *

Q: And was the weapon loaded?

A: Yes, sir, it was. It had a full clip of nine millimeter ammunition in it.

J.A. 34–35. None of the other officers who entered Petitioner's bedroom testified about the gun.

At the close of Petitioner's case, the court instructed the jury as to the elements of the § 924(c)(1) offense:

> The crime of using or carrying a firearm during and in relation to a drug trafficking crime has two essential elements which are as follows: That the Defendant committed the crime of conspiring to possess with intent to distribute cocaine. Two, that during and in relation to the commission of those crimes, the Defendant knowingly used or carried a firearm.
>
> The phrase "used a firearm" means having a firearm available to aid in the commission of the drug trafficking crimes described above in the indictment. To establish the portion of element two which uses the phrase "in relation to," the Government must prove that the firearm had some relation to or some connection to the underlying crime. A firearm can be considered used in relation to a felony involving drug trafficking if the person possessing it intended to use the gun as a contingency arose. For example, to protect himself or to make escape possible.

J.A. 41–42. The court did not instruct the jury further on what it meant to "carry" a firearm in violation of § 924(c)(1). During deliberations, the jury asked the court to clarify the elements of the § 924(c)(1) charge. In response, the court essentially repeated its original instruction.[2] J.A. 45–46.

The jury convicted Petitioner on all counts of the indictment, including the charge under § 924(c)(1). On February 7, 1991, the district court sentenced Petitioner to life in prison for conspiracy to possess with intent to distribute crack cocaine, 480 months for possession with intent to distribute crack cocaine, and 240 months for maintaining an establishment for the purpose of distributing crack cocaine. All three sentences were to be served concurrently. The court sentenced Petitioner to an additional five years for his conviction under § 924(c)(1), that time to be served consecutively to the other sentences. On October 1, 1997, the court reduced the sentence for conspiracy to 360 months. That adjustment brought Petitioner's total sentence for conspiracy and the drug offense to 480 months, all of which he had to serve before his sentence under § 924(c)(1) ever begins.

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[2] At that time, Petitioner asked the court to give the additional instruction that Petitioner "does have the right to bear arms under the Constitution. And the mere fact that he had a gun in his house, if they don't find that it was in connection with the drug trafficking, then he was in lawful possession and should not be found guilty under [§ 924(c)(1)]." J.A. 46–47. The court refused to give such an instruction. J.A. 47.

Petitioner appealed his convictions to this Court, challenging only the sufficiency of the evidence used to convict him of the three drug trafficking offenses. This Court affirmed the convictions, holding that "[t]he evidence that Timmy Rice was involved in a drug conspiracy clearly was sufficient to support the jury verdicts against him." *United States v. Rice*, No. 91-5402, 1992 WL 240686, at *1–3 (4th Cir. Sept. 29, 1992) (*per curiam*) (unpublished opinion). Petitioner did not challenge his conviction under § 924(c)(1) at that time.

2. Petitioner's Subsequent Post-Conviction Proceedings

Petitioner has filed three *habeas corpus* petitions challenging various aspects of his convictions and trial. On July 6, 2001, Petitioner filed a *habeas corpus* petition under 28 U.S.C. § 2255, broadly challenging his drug trafficking convictions. J.A. 30. The district court found that the petition was barred by the one–year statute of limitations under the Anti–Terrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214 (1996). J.A. 30. This Court declined to review the decision. Petitioner filed a second habeas petition on May 12, 2003, claiming ineffective assistance of trial counsel. J.A. 30. The district court dismissed that petition as a mislabeled and unauthorized second or successive petition under 28 U.S.C. § 2255. J.A. 30. This Court again declined to review the decision.

On April 9, 2008, Petitioner filed the current *habeas* petition under 28 U.S.C. § 2241. His sole claim was that he was "serving an illegal sentence in accordance with *Bailey v. U.S.*, 133 L. Ed. 472." J.A. 17. On July 7, 2008, Respondent answered the petition and conceded that "the action is properly brought and that Petitioner is entitled to the relief that is sought, to wit, the United States agrees that Petitioner's conviction for violation of 18 U.S.C. § 924(c)(1) must be vacated in that the conduct of Petitioner that was used as a basis for such conviction does not meet the definition of the offense as set forth in *Bailey v. United States*, 516 U.S. 137 (1995)." J.A. 27. On July 9, 2008, Respondent formally moved to vacate Petitioner's § 924(c)(1) conviction on the same ground. J.A. 49–50.

On August 4, 2008, the United States Magistrate Judge issued his Report and Recommendation, adopting the position shared by both Petitioner and Respondent, that Petitioner was actually innocent under § 924(c)(1) and therefore entitled to *habeas* relief under 28 U.S.C. § 2241. J.A. 52–53. Neither party objected to the Report and Recommendation. J.A. 56–57.

The district court declined to adopt the magistrate judge's Report and Recommendation. J.A. 69. Instead, the court denied Respondent's motion to vacate and dismissed the *habeas corpus* petition. J.A. 69. In doing so,

the court held that, although the petition was properly brought under § 2241, Petitioner's action in reaching toward the night stand on which the handgun was resting constituted "use," even under the construction of "use" adopted in *Bailey*. J.A. 65, 68. In the alternative, the court concluded that Petitioner's conviction was proper under the "carry" prong of § 924(c)(1) based on the presence of the gun in Petitioner's bedroom. J.A. 66–68.

Petitioner filed a motion to reconsider on October 3, 2008, challenging the district court's finding that he was properly convicted under both the "use" and "carry" prongs of § 924(c)(1) as the statute is explained in *Bailey v. United States*. J.A. 27–33. The district court denied the motion to reconsider on December 2, 2008. J.A. 78–81. In relevant part, the court stated:

> The evidence was sufficient to uphold the conviction under the use prong or the carry prong of the statute and it was in relation to the drug trafficking crime. A jury could find that the gun was used during the crime when he reached toward the gun <u>or</u> that it was carried due to the availability of the gun in an establishment used to traffic drugs. The gun was in plain view and could have been used to facilitate the crime.

J.A. 80.

SUMMARY OF THE ARGUMENT

Petitioner Timothy Rice's 1992 conviction under 18 U.S.C. § 924(c)(1) must be vacated. Petitioner and Respondent agreed that the facts

underlying Petitioner's conviction did not constitute "use" under § 924(c)(1). Nor do the underlying facts support a finding that Petitioner "carried" the firearm within the meaning of § 924(c)(1). Moreover, even if Petitioner used or carried the firearm, he did not do so "during and in relation to" any predicate drug trafficking offense as required by § 924(c)(1).

First, Petitioner did not actively employ the firearm as required by *United States v. Bailey*. The only action Petitioner took related to the firearm was to reach instinctively in its direction when he was suddenly awakened by police kicking in his bedroom door. He did not touch or move the gun in any way. Respondent's Motion to Vacate admitted that the act of reaching for the gun was a reflex action, and did not meet the *Bailey* standard of active employment. Because it was a reflex action, this instinctive reach did not amount to a "reference" to the firearm as that term is used in *Bailey*. As Respondent conceded, Petitioner's action simply did not constitute "use."

Second, Petitioner did not carry the firearm. According to *Muscarello v. United States*, carrying a firearm requires either that Petitioner have the firearm on his person, or that he convey it in some fashion. Petitioner clearly did not have the gun on his person—it was lying on a bedside table. Petitioner did not touch the gun, let alone move or convey it in any fashion.

In addition, the facts do not demonstrate that Petitioner had borne or conveyed the firearm at any relevant earlier time. The district court's reliance on the "carry" prong of § 924(c)(1) as an alternative justification for the conviction is misplaced.

Finally, even if Petitioner's actions could be construed as "using" or "carrying" the firearm, none of his actions occurred "during and in relation to" any predicate drug trafficking offense as required by § 924(c)(1). Petitioner was not engaged in a drug transaction at the time police entered his bedroom—he was asleep. There was, in fact, no cocaine anywhere in the house. Respondent conceded that there was no nexus between Petitioner's reflexive reach toward the gun and his drug crimes, and there was no evidence that the firearm itself had any connection to the drug trafficking activities. The firearm was neither used nor carried during and in relation to the predicate trafficking offense.

As Respondent acknowledged, the facts of this case do not support a conviction for "use" under § 924(c)(1). Nor do they support a conviction under the "carry" prong of the statute. The Government also failed to show that any "use" or "carrying" of the firearm occurred "during and in relation to" Petitioner's drug trafficking offense. Accordingly, as Respondent

requested in the district court, Petitioner's conviction under § 924(c)(1) should be vacated.

ARGUMENT

STANDARD OF REVIEW

This court reviews the district court's order denying relief under 28 U.S.C. § 2241 *de novo*. *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 530 (4th Cir. 2005).

I. PETITIONER'S CONVICTION UNDER 18 U.S.C. § 924(c)(1) FOR "USE" OF A FIREARM "DURING AND IN RELATION TO" A DRUG TRAFFICKING OFFENSE IS UNLAWFUL UNDER *BAILEY V. UNITED STATES*.

In *Bailey v. United States*, the Supreme Court mandated that, in order to establish "use" of a firearm in violation of § 924(c)(1), the government must prove that a defendant "actively employed" the weapon "during and in relation to" a drug trafficking offense. 516 U.S. 137, 150 (1995). As Respondent conceded below, the government failed to carry that burden at Petitioner's 1992 trial. J.A. 33. Prosecutors presented no evidence that Petitioner had ever handled the firearm resting on his bedside table or that Petitioner had "referenced" the handgun to threaten or intimidate those persons with whom he dealt in the course of his drug crimes. J.A. 32. Instead, the government's evidence established *only* that Petitioner reflexively reached in the direction of that handgun after several armed

police officers burst into his bedroom and startled him awake. J.A. 32. Accordingly, Petitioner's conviction for "use" of a firearm under § 924(c)(1) is unlawful and should be vacated by this Court. *See Bailey*, 516 U.S. at 148–49.

A. In *Bailey v. United States* the Supreme Court Interpreted "Use" Under 18 U.S.C. § 924(c)(1) to Require "Active Employment" of a Firearm.

In *Bailey*, the Supreme Court held that "use" of a firearm within the meaning of 18 U.S.C. § 924(c)(1) requires that the defendant "actively employ" the weapon "during and in relation to" the underlying drug trafficking offense. *Id.* at 143. "Active employment" necessarily involves such conduct as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." *Id.* at 148. None of the evidence presented at Petitioner's 1992 trial suffices to prove that Petitioner engaged in any one of these required acts. J.A. 32. Thus, even taking into consideration Petitioner's unconscious movement towards the firearm, Petitioner's mere possession of that handgun—a fact inferred solely from its presence on Petitioner's night stand—is insufficient to sustain the § 924(c)(1) conviction now challenged in this Court. *See Bailey*, 516 U.S. at 148–49.

The *Bailey* decision resolved a conflict among the circuit courts concerning the conduct necessary to establish "use" of a firearm under § 924(c)(1). *See id.* at 142. The Supreme Court reviewed the cases of two defendants who were convicted in the United States District Court for the District of Columbia under the statute as then in effect. *Id.* at 139–41. In one case, the defendant had been convicted for "use" of an unloaded .22 caliber Derringer pistol that police officers discovered in a locked trunk in the defendant's bedroom closet. *Id.* at 140–41. The defendant had previously retrieved drugs from that bedroom and sold them to an undercover agent. *Robinson v. United States*, 36 F.3d 106, 109 (D.C. Cir. 1994) (*en banc*), *rev'd sub nom. Bailey v. United States*, 516 U.S. 137 (1995). In the second case, the defendant was convicted for "use" of a loaded firearm kept in the trunk of his car. *Bailey*, 516 U.S. at 139. In that case, the government claimed the defendant kept the gun for protection during drug transactions conducted in and around his car. *Id.*

The *en banc* Court of Appeals of the District of Columbia Circuit consolidated the two cases and affirmed both convictions. *Id.* at 141. The circuit court held that a defendant violates § 924(c)(1) "whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when it is needed to facilitate a drug crime."

Robinson, 36 F.3d at 115. Furthermore, the circuit court found that in both cases that "the gun was sufficiently accessible and proximate to the drugs or drug proceeds that the jury could properly infer that the defendant had placed the gun in order to further the drug offenses or to protect the possession of drugs." *Bailey*, 516 U. S. at 141–42.

The Supreme Court reversed, holding that "§ 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.* at 143 (emphasis in original). Although the D.C. Circuit acknowledged that § 924(c)(1) required more than the mere possession of a firearm, the Supreme Court determined that the circuit court had failed to articulate a standard for "evaluating whether the involvement of a firearm amounted to something more than mere possession." *Id*. In the Court's opinion, "[r]ather than requiring actual use, the District of Columbia Circuit would criminalize 'simpl[e] possession with a floating intent to use.'" *Id*. at 144 (quoting *Robinson*, 36 F.3d at 121 (Williams, J., dissenting)). As such, the Court concluded that "[t]o sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate offense." *Id*. at 150.

The Fourth Circuit has consistently interpreted this "active employment" language to require more than mere possession of a firearm, even one in plain view and within reach of a defendant charged with a drug trafficking offense. *See United States v. Mitchell*, 104 F.3d 649, 652–53 (4th Cir. 1997); *cf. United States v. Hastings*, 134 F.3d 235, 238 (4th Cir. 1998). Similarly, this Court has never held that storage of a gun nearby drugs or drug proceeds is enough to satisfy the "use" prong of § 924(c)(1). *See United States v. Hayden*, 85 F.3d 153, 161–62 (4th Cir. 1996).

In *Mitchell*, for example, this Court considered a case in which police officers discovered a loaded handgun on the "hump of the floorboard" of a car in which the defendant dealt cocaine. 104 F.3d at 651. Before trial, the defendant entered a guilty plea to the § 924(c)(1) charge of "using or carrying a firearm during an in relation to a drug trafficking offense." *Id.* After the Supreme Court's decision in *Bailey*, the defendant appealed, challenging the sufficiency of the evidence supporting his conviction. *Id.* The Government conceded that the defendant had not "actively employed" the handgun, and, despite the fact that the firearm was in sight of the undercover officer who purchased the cocaine and within reach of the defendant, this Court held that the evidence was "insufficient to support a conclusion that he 'used' a firearm within the meaning of § 924(c)(1)." *Id.*

at 652–53. Proximity and availability are not sufficient to establish "active employment." *See id.*

B. The Government Has Not Shown that Petitioner Ever "Actively Employed" the Firearm in Question.

The evidence presented at Petitioner's 1992 trial demonstrates that Petitioner "merely possessed a firearm," an act Respondent agrees fails to meet the *Bailey* standard for "use" under § 924(c)(1). J.A. 33 (citing *Bailey*, 516 U.S. at 143). The firearm was resting on the table adjacent to the bed in which Petitioner was sleeping. J.A. 58. There was no evidence of an ongoing drug transaction at moment police officers crashed into Petitioner's bedroom and arrested him. *See* J.A. 28–29. There was no testimony presented at trial addressing how long the gun had lain on the table or even who had placed it there. J.A. 29. Indeed, the only evidence presented at Petitioner's trial confirmed that Petitioner's movement was a reflexive, automatic, and unconscious act upon being suddenly awakened. J.A. 28–29, 58. In short, the Government failed to demonstrate that Petitioner "actively employed" the firearm in question "during and in relation to" his drug crimes. *See Bailey*, 516 U.S. at 148–49. As such, he did not "use" the handgun within the meaning of § 924(c)(1) as that provision has been construed by the Supreme Court. *See id.* at 143.

The district court attempted to distinguish the instant case from *Bailey* by noting that:

> [The] gun in petitioner's case was lying on the bedside table readily accessible in plain view. It was available for use at any moment as evidence by the petitioner's reaching for the gun. This reaching for the gun is analogous to an offender's reference to a firearm in furtherance of a drug trafficking crime which is 'use' according to the Court.

J.A. 64–65. According to the district court, "this reaching for the loaded gun in plain view on the bedside table within reach of the petitioner in a house . . . known for its drug distribution with significant amount of drug proceeds inside is enough to uphold a conviction under the 'use' prong of the statute." J.A. 65. Essentially, the district court found that Petitioner's reflexive reach in the direction of the nearby gun when the officers broke down his door was sufficient to constitute "use."

Despite the district court's repeated references to the "active employment" standard, its analysis of the evidence does not square with *Bailey*; at best, it is incomplete. *See Bailey*, 516 U.S. at 143. Although, as the district court correctly noted, the Supreme Court has observed that "use" under § 924(c)(1) may include "an offender's reference to a firearm in his possession," the district court neglected to put that fragment in context. The complete text of the relevant language from *Bailey* states that "a reference to a firearm *calculated to bring about a change in the circumstances of the*

predicate offense is a 'use.'" *Id.* (emphasis added). This crucial qualification is not acknowledged by the district court. *See* J.A. 61.

In this case, Petitioner's reflexive movement in the direction of the gun cannot be characterized as calculated in any respect; certainly it was not calculated to "bring about a change in the circumstances" of Petitioner's drug crimes. In the district court, Respondent agreed with this characterization of the facts: Petitioner's conduct did not constitute "use" of the firearm because he "appears to have instinctively reached for a firearm on his night stand . . . [; t]his is closely akin to a reflex action and not active employment." J.A. 32.

This Court's unpublished opinion in *United States v. Mingo*, 237 Fed. Appx. 860 (4th Cir. 2007), is consistent with *Bailey* and highlights the differences between Petitioner's action and those that comprise "use" under *Bailey*. In *Mingo*, armed police officers confronted the defendant in a motel room where he had gone "to conduct a drug deal with an undercover police officer." 237 Fed. Appx. at 862. The defendant had a quantity of crack cocaine in his possession. *Id.* When the defendant saw the officers, his "initial reaction was to reach for a gun concealed in the back of his waistband." *Id*. This Court held that his conduct was sufficient to find that the defendant "used" his concealed weapon during and in relation to his

illegal drug activities, "however briefly."[3] *Id.* at 865. In doing so, the Court reasoned that the defendant had "displayed" or "disclosed" the weapon, both of which the Supreme Court identified as "uses" under *Bailey*. *Id*. (citing *Bailey*, 516 U.S. at 149).

Notably, the court did not construe the defendant's conduct as a "reference" to the firearm. *See id.* Furthermore, to the extent that the defendant's reaching for the gun could be considered a reference, it was not instinctive in the same sense that Petitioner's conduct was instinctive. Rather, in *Mingo*, the defendant's reach for his concealed gun was likely "calculated to bring about a change in the circumstances of the predicate offense." *Bailey*, 516 U.S. at 143. As this court noted, "drug dealers carry guns for protection and [the] defendant instinctively reached for his gun when confronted by the police . . . ." *Mingo*, 237 Fed. Appx. at 865. There was no such calculation in the instant case; and, as discussed below, Petitioner's conduct was, in any case, not "during and in relation to" any drug activity. *See infra*, Part III.

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[3] Two cases in other circuits have held that reaching for a gun can constitute a "reference" and therefore "use." Those decisions are consistent with *Mingo*. In both cases, the defendants were awake, aware of the situation, and their efforts were specifically calculated to bring about a change in the circumstances. *See United States v. Johnson*, 87 F.3d 133, 138 (3d Cir. 1996); *United States v. Anderson*, 89 F.3d 1306, 1315 (6th Cir. 1996).

Furthermore, *Bailey* requires that, to constitute a "use" under § 924(c)(1), the "reference" to a firearm must be for the purpose of bringing about a "change in the circumstances of the predicate offense." *Id.* at 148–49. The evidence presented at Petitioner's trial shows that Petitioner made no reference to the nearby firearm for this purpose. *See* J.A. 28–33. Petitioner was asleep. J.A. 28. The only illegal drugs found in Petitioner's house were a single "joint" of marijuana (not crack cocaine), and the only other relevant evidence seized from Petitioner's home was $18,000 in cash. J.A. 32–33. As Respondent conceded, there was "no testimony that the firearm was used in relation to either" of these discoveries. J.A. 33. Therefore, even if this Court were to find Petitioner's instinctive movement to have been "calculated," there is no evidence that the firearm in question bore any relation to the predicate drug offenses for which Petitioner was convicted., that is possession of cocaine with intent to distribute or maintenance of a location for the sale of cocaine.

In sum, as Respondent argued in its Motion to Vacate Petitioner's sentence, "[Petitioner] merely possessed a firearm during the execution of the warrant on the premises. As he was awakened, he instinctively reached for the firearm that was discovered on the night stand. He never actively employed the firearm in relation to the predicate drug trafficking offense." J.A. 33.

II. PETITIONER DID NOT "CARRY" A FIREARM WITHIN THE MEANING OF 18 U.S.C. § 924(c)(1).

The Supreme Court has identified three circumstances in which a defendant "carries" a firearm within the meaning of 18 U.S.C. § 924(c)(1): (1) when the defendant physically possesses the firearm in his hand or on his person; (2) when the defendant knowingly causes the firearm to be moved from one place to another, such as when the defendant has the gun in a car he is driving; and (3) when the circumstances under which the weapon is seized permit the inference that it was moved to the location where it was found specifically in connection with the defendant's illegal drug activity. *See Muscarello v. United States*, 524 U.S. 125, 128–31 (1998). Petitioner did not "carry" the handgun that was lying on the table next to his bed under any circumstance that the Supreme Court has recognized as "carrying" under § 924(c)(1). Accordingly, the district court erred in finding that Petitioner could have been convicted for "carrying" the gun.

A. The Supreme Court Defined "Carry" for Purposes of § 924(c)(1) in *Muscarello v. United States* to Require Knowing Possession and Conveyance of the Firearm.

According to the Supreme Court, the purpose of the "carry" prong of § 924(c)(1) is to "persuad[e] a criminal 'to leave his gun *at home*.'" *Id.* at 132 (emphasis added). In *Muscarello*, the Court concluded that Congress intended the term "carry" to have its ordinary meaning. *Id.* at 128. Thus, generally speaking, any conveyance of a firearm, whether on the defendant's person or in his vehicle, may constitute "carrying" under § 924(c)(1). *Id.* at 126–27. As with "use," however, "carrying" a firearm requires more than mere possession of a gun. *See id.* at 137. In order to "carry" a firearm, the defendant must have the weapon on his person, hold the weapon, support the weapon, or otherwise move the weapon from one place to another. *See id.* at 128–32.

Even before *Muscarello*, this Court held that "the plain meaning of the term 'carry' as used in § 924(c)(1) requires knowing possession and bearing, movement, conveyance, or transportation of the firearm in some manner." *United States v. Mitchell*, 104 F.3d 649, 654 (4th Cir. 1997) (citing *United States v. Miller*, 84 F.3d 1244, 1258–60 (10th Cir. 1996)). Such "carrying" occurs, for example, when someone has "(1) actually possessed (2) on his person, (3) a firearm, (4) during and in relation to a drug transaction."

United States v. Hudgins, 120 F.3d 483, 487 (4th Cir. 1997) (citing *Bailey*, 516 U.S. at 147). Although the possession aspect of carrying also may be constructive, the requirement of bearing, holding, or moving the gun requires specific conduct on the part of the defendant that goes beyond mere possession. *See Mitchell*, 104 F.3d at 653–54.

B. The Government Cannot Establish that Petitioner Knowingly Possessed and Conveyed the Firearm.

There is no dispute that Petitioner did not have a firearm in his hand or on his person. *See* J.A. 28–29, 58. The handgun seized by police was lying on a bedside table. J.A. 28–29. Petitioner did not touch, move, or physically handle the gun in any way; nor did he cause the gun to be moved. J.A. 28–29. His only conduct, the reflexive movement of his hand in the direction of the night stand, merely put Petitioner in closer proximity to the weapon. *See* J.A. 28–29. While such evidence may be sufficient to find that Petitioner had possession of the gun, it is not enough to sustain a conviction under the "carry" prong of § 924(c)(1). *See Muscarello*, 524 U.S. at 128–32, 139. The district court's decision to the contrary is simply wrong.

The district court found that Petitioner was "carrying" the handgun lying on the table next to his bed based solely on the physical proximity of the gun to him:

> The petitioner admits he was in the bed next to the gun that was located on the bed side table. In the Fourth Circuit, under *Hayden*, the presence of the gun next to the defendant meets the 'readily available' test. . . . The reaching for the gun, although it may have been in reflex, is further evidence of the possibility of 'potential facilitation' of the firearm during or in relation to the crime. The petitioner had the gun at his disposal in the event he needed to utilize it.

J.A. 66. This analysis not only is inconsistent with *Muscarello*, as discussed above, it is also inconsistent with *Hayden*, on which the district court relied.

Hayden involved two separate charges under § 924(c)(1). 85 F.3d at 161–162. The circuit court upheld one of the convictions where evidence showed that the defendant had the gun on his person. *Id.* In contrast, this Court reversed the second conviction where evidence only showed the defendant was in the same room as the gun while "cooking and distributing crack cocaine." *Id.* at 162. Furthermore, the district court's reliance on language from *Hayden* that § 924(c)(1) might be satisfied because the gun had been "within [defendant's] reach and available for immediate use," *id.*; *see* J.A. at 68, is directly contrary to this Court's repudiation of the "readily accessible" factor one year later in *Mitchell*, *see* 104 F.3d at 653 (noting that, while other circuit courts have applied a "readily accessible" test, "[w]e do not agree that this additional factor is included within the plain meaning of the term 'carries'").

The district court also erroneously relied on the unpublished opinion in *Fleming v. Olson*, No. 97-cv-0660, 1998 WL 34093762 (S.D. W.Va. Oct. 14, 1998)). There, the court found that keeping a loaded gun in a house used for selling drugs would be sufficient for a reasonable jury to convict under the "carry" prong of § 924(c)(1) if the defendant had the gun on his person during the relevant time period. *Id.* at *3–5. However, there was no such evidence presented in this case to suggest that Petitioner ever carried the gun on his person at a relevant time.

Finally, the district court relied on *United States v. Hall*, 110 F.3d 1155 (5th Cir. 1997), a decision from the Fifth Circuit. In *Hall*, the circuit court held that, within the context of a moving vehicle, the defendant was "carrying" a firearm for purposes of § 924(c)(1) by having a gun within his reach. 110 F.3d at 1161. By ignoring the circumstances under which the defendant was transporting the gun, and focusing solely on the fact that the gun was "within reach," the district court below improperly concluded that proximity constitutes "carrying." *See* J.A. at 62. That conclusion was specifically rejected by the Supreme Court in *Muscarello* and is inconsistent with the decisions in this Circuit. *See Hudgins*, 120 F.3d at 487; *Mitchell*, 104 F.3d at 653. Furthermore, in *Hall* itself, the circuit court focused on the notion that either transportation or possession on the defendant's person is

required to find that a firearm has been "carried" under § 924(c)(1). *Hall*, 110 F.3d at 1161. *Hall*'s subsequent history in the Fifth and Eleventh Circuits confirms this narrower interpretation of its holding. *See United States v. Smith*, 481 F.3d 259, 264 (5th Cir. 2007) (agreeing with *Hall* that personal possession or transportation of the firearm is required to sustain a conviction under the "carry" prong of § 924(c)(1)); *United States v. Mount*, 161 F.3d 675, 679 (11th Cir. 1998) (same). Consequently, the trial court's reliance on *Hall* to support its decision is misplaced; *Hall* counsels that Petitioner did not carry the gun, as he neither held nor moved it.

In contrast, the district court did not cite this Court's more relevant decision in *United States v. Harris*, 183 F.3d 313 (4th Cir. 1999). That case makes clear that "carrying" for purposes of § 924(c)(1) turns on more than the proximity of the gun to defendant. *See Harris*, 183 F.3d at 318. In *Harris*, the defendant was trafficking in drugs out of a hotel room, and his gun was stored in the bedside table. *Id.* at 315–316. This Court upheld the conviction for "carrying" a firearm under § 924(c)(1) because the evidence showed that the defendant had brought his gun to the hotel room in connection with his drug trafficking activities. *Id.* at 318.

In the present case, the gun in question was seized from Petitioner's own bedroom. J.A. 58. There is no evidence he had moved it there in

connection with his illegal drug activities. *See* J.A. 29. As the Supreme Court noted in *Muscarello*, the very purpose of the carry prong of § 924(c)(1) is to "persuad[e] a criminal to leave his gun *at home*." 524 U.S. at 132 (emphasis added). Under *Muscarello* and Fourth Circuit precedent, Petitioner's proximity to the gun lying on the bedside table does not constitute "carrying" under 18 U.S.C. § 924(c)(1).

III. PETITIONER DID NOT USE OR CARRY THE FIREARM "DURING AND IN RELATION TO ANY . . . DRUG TRAFFICKING CRIME."

Even if the evidence supported a finding that Petitioner "used" or "carried" the firearm under § 924(c)(1), the Government must also prove that he did so "during and in relation to" a drug trafficking crime. *See Muscarello*, 524 U.S. at 139; *Bailey*, 516 U.S. at 150. This limitation is intended to ensure that a person is not "punished under § 924(c)(1) . . . even though the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Smith v. United States*, 508 U.S. 223, 237–238 (U.S. 1993) (quoting *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985)). The phrase "in relation to" requires proof that the "firearm must facilitate, or potentially facilitate, the drug trafficking offense." *Mitchell*, 104 F.3d at 654. This direct relationship between the gun and the drug offense is necessary to uphold a conviction under § 924(c)(1). *See Smith*, 508 U.S. at 237–38.

Respondent has conceded that there was no nexus between Petitioner's reflexive reach towards the gun and the Petitioner's drug trafficking activities. J.A. 33. At trial, there was no showing that the gun was being used "in relation to" a drug crime at the time that police entered Petitioner's bedroom. There was no evidence that Petitioner conducted drug transactions in his bedroom, or that the firearm was in the bedroom for the purposes of facilitating such transactions. *See* J.A. 28–29. The Government presented no evidence that the firearm facilitated or was intended to facilitate any drug transaction, or that it in any way related to Petitioner's predicate drug offenses. *See* J.A. 29; *cf. Mingo*, 237 Fed. Appx. at 862 (noting evidence that defendant, who was conducting an illegal drug transaction with an undercover police officer, reached for his gun when the police appeared to arrest him). There were no drugs in the bedroom, and the only drugs discovered in the entire house consisted of a single marijuana joint (not crack cocaine). J.A. 32. As in *Smith*, "the firearm's presence [was] coincidental or entirely 'unrelated' to the crime." 508 U.S. at 237–38. As such, even if Petitioner used or carried the firearm when he reached toward it, he did not do so "in relation to" any drug trafficking offense.

CONCLUSION

The petition for *habeas corpus* should be granted and Petitioner's conviction under 18 U.S.C. § 924(c)(1) should be vacated.

REQUEST FOR ORAL ARGUMENT

Appellant-Petitioner respectfully requests that this Court hear oral argument in this case.

Respectfully submitted,

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Dated: November 9, 2009

/s/ James E. Coleman, Jr.
James E. Coleman, Jr.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of November 2009, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 9th day of November, 2009, the required number of bound copies of the foregoing Brief of Appellant and Appendix were hand-filed with the Clerk of this Court, and one copy of the same was served, via UPS Ground Transportation, upon Counsel for Appellee at the above-listed address.

/s/ James E. Coleman, Jr.
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