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

REPLY BRIEF OF APPELLANT

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I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 2241 TO DETERMINE WHETHER PETITIONER IS ACTUALLY INNOCENT AND THEREFORE ENTITLED TO RELIEF UNDER *BAILEY V. UNITED STATES*, 516 U.S. 137 (1995).

Petitioner Timothy Rice claims he is actually innocent of the offense for which he was convicted under 18 U.S.C. § 924(c), and that he is therefore entitled to relief from his unlawful conviction in accordance with *Bailey v. United States*, 516 U.S. 137 (1995).[1] A petition under 28 U.S.C. § 2241 is the proper means by which to pursue such a claim, if the petitioner is procedurally barred from pursuing the claim under 28 U.S.C. § 2255. *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Smith v. Murray*, 477 U.S. 527, 537 (1986)); *United States v. Harris*, 183 F.3d 313, 317 (4th Cir. 1999).

Indeed, Respondent conceded jurisdiction in the court below because it believed the record supported a finding that Petitioner is actually innocent. *See* J.A. 31. According to Respondent, "[i]n light of the United States' view of [Petitioner's] claim of actual innocence . . . it would forego any objection

[1] Petitioner does not dispute that the jurisdictional basis established by *In re Jones*, 226 F.3d 328 (4th Cir. 2000), is inapplicable to Petitioner's current § 2241 petition. *See* Br. of Appellee 8–9. However, as discussed below, the district court exercised jurisdiction under 28 U.S.C. § 2241 based on Petitioner's claim of actual innocence of any § 924(c) violation. *See* J.A. 57. This Court has jurisdiction to review the district court's resolution of that claim. 28 U.S.C. § 1291.

to this matter being considered pursuant to § 2241 and asks that the Court issue a ruling on the merits." *Id.* Respondent does not contest that § 2241 is the proper avenue for Petitioner to raise his actual innocence claim. *See* Br. of Appellee 6–10.

The Magistrate Judge and district court both exercised jurisdiction under § 2241 to consider the threshold issue of whether Petitioner was actually innocent of the § 924(c) charge and therefore entitled to relief under *Bailey*. *See* J.A. 52, 57. The Magistrate Judge's Report and Recommendation noted that "[t]he Petitioner challenges on claims of actual innocence his conviction under 18 U.S.C. § 924(c)(1)," concluding that Petitioner was innocent of the § 924(c) offense and recommending both that the petition be granted and Petitioner's conviction vacated. J.A. 52–53. The district court also exercised jurisdiction under § 2241, but concluded that "[t]he Petitioner is unable to establish actual innocence under the statute." J.A. 57. Notwithstanding that the *Bailey* claim was procedurally defaulted and cannot not be raised under § 2255, this Court has jurisdiction to review whether Petitioner is actually innocent of the § 924(c) charge and therefore entitled to relief under *Bailey*. *Bousley*, 522 U.S. at 622.

II. RESPONDENT IS BOUND BY ITS PRIOR CONCESSIONS OF FACT AND CANNOT NOW RE-CHARACTERIZE THE RECORD IN A MANNER MATERIALLY INCONSISTENT WITH ITS POSITION BEFORE THE DISTRICT COURT.

Respondent acknowledges in a footnote that its current characterization of the trial record squarely conflicts with its concessions in the district court. Br. of Appellee 11 n.6. However, Respondent drastically understates the magnitude and the legal significance of that about-face when it argues that "Rice will not be prejudiced by the Government's change of position." *Id.* That argument is untenable. Both Respondent and this Court are bound by Respondent's concessions made below.[2] *Richardson v. Director, Office of Worker's Compensation Programs, United States DOL*, 94 F.3d 164, 167 (4th Cir. 1996) (citing *Hagan v. McNallen* (*In re McNallen*), 62 F.3d 619, 625 (4th Cir. 1995) (holding concession made before bankruptcy court binding on appeal)); *Lucas v. Burnley*, 879 F.2d 1240, 1242 (4th Cir. 1989) ("[A] party is bound by the admissions of his pleadings.").

Petitioner does not dispute that Respondent is entitled to defend the district court's interpretation of the trial record, Br. of Appellee 11 n.6, but Respondent cannot now re-characterize the facts it once conceded or contest

[2] Petitioner does not argue that this Court is bound by Respondent's *legal* position below, only that the *facts* conceded are foreclosed from challenge on appeal.

the accuracy of those prior concessions, *Burnley*, 879 F.2d at 1242. Rather, Respondent is bound by its description of the evidence presented at Petitioner's trial and its declarations as to what factual circumstances that evidence either established or failed to establish. *See Richardson*, 94 F.3d at 167.

First, in its Answer, Respondent conceded that the evidence established Petitioner was in bed and awakened only "as the officers entered his bedroom."[3] J.A. 32. Second, Respondent conceded that Petitioner's movements were instinctual, something "akin to a reflexive action and not active employment." *Id.* Respondent concluded that a fair interpretation of those facts is that Petitioner never "used" the firearm as that term is understood post-*Bailey*. J.A. 32–33. For that reason, Respondent argued below that Petitioner is actually innocent of any § 924(c) violation. *See id.*

Respondent has also conceded "that the record is unclear on whether the bedroom where the safe was found was the same [room] in which

[3] The district court left open as a question of fact whether Petitioner actually reached for the gun. J.A. 65–66 (observing that, while Officer Newman claimed Petitioner reached for his weapon, Petitioner adamantly denied having done so). Instead, the district court decided that the reflexive or deliberate nature of any reach was "irrelevant" because Petitioner also "carried" the weapon under § 924(c). J.A. 65–67. Because Respondent apparently does not contest that Petitioner's conduct did not meet the requirements of the "carry" prong of § 924(c), this Court must now interpret the trial record to determine whether Petitioner's instinctive movement constituted "active employment." *Bailey*, 516 U.S. at 505.

Petitioner was located in bed and reached for a weapon."[4] J.A. 29. Based on that concession, Respondent concluded there was no nexus between Petitioner's possession of a weapon and the drug trafficking charge:

> The Government must also prove that Rice actively employed the firearm in relation to a drug trafficking crime. Again, a weak argument could be made that Rice was protecting the drug proceeds on the premises by attempting to use the firearm on the night stand. *The facts do not appear to support such a contention.* A single marijuana "joint" was the only drug found on the premise [sic]. The only other item found was a large sum of cash in the amount of $18,000. There was evidence that drugs were being sold from the home, but no testimony that the firearm found was used in relation to any of these activities.

J.A. 32–33 (emphasis added). Respondent, which initiated the prosecution of Petitioner under § 924(c), is bound by the facts it conceded at trial. *See Burnley*, 879 F.2d at 1242. Respondent cannot just blithely abandon those admissions on appeal. *Burnley*, 879 F.2d at 1242.

[4] The district court characterized the cash found as "drug proceeds," but also noted a question of fact as to the origin of that money: "The police found drug proceeds in the safe located in the petitioner's house. The petitioner contends that the money came from his proceeds from his pool hall business and a night of gambling. (Tr. 2–44, 2–50). However, the petitioner did not produce any tax returns or accounting records from the pool hall to corroborate his testimony." J.A. 64.

III. PETITIONER IS ACTUALLY INNOCENT OF THE OFFENSE UNDER § 924(C) BECAUSE HE DID NOT "USE" A FIREARM "IN RELATION TO" A DRUG OFFENSE.

"To establish actual innocence, [the] petitioner must demonstrate that, 'in light of all the evidence, [. . .] it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995)) (internal quotations omitted). Petitioner therefore must show that he is factually innocent of the charge on which he was convicted and not merely that the evidence presented against him was legally insufficient. *See id.* at 623–24. As Respondent agreed below, Petitioner is actually innocent of violating § 924(c) under the standard articulated in *Bailey* because no reasonable juror would find that he "used" a gun "in relation to" any drug trafficking offense.

A. Respondent's Argument that the Mere Presence of the Gun on a Bedside Table Constitutes "Use" is Contrary to *Bailey*.

Respondent now argues that the presence of the gun on the nightstand alone is enough to sustain the § 924(c) conviction. Br. of Appellee 12. However, *Bailey* specifically rejected the argument that "mere possession of a firearm by a drug offender, at or near the site of a drug crime or its proceeds or paraphernalia, is a 'use' by the offender." 516 U.S. at 149. The "inert presence" of the gun in the room is simply not enough to establish "use" under § 924(c). *Id.*

The "silent but forceful presence" language Respondent relies on has generally been interpreted to refer to the deliberate placement of a firearm in plain sight during an on-going drug transaction to intimidate other participants or to otherwise facilitate the transaction. *Compare United States v. Hall*, 110 F.3d 1155 (5th Cir. 1997) (holding that no "use" occurred where a gun was on the floor in a room used for a drug transaction, but was never displayed, disclosed, or mentioned by defendant) *and Stanback v. United States*, 113 F.3d 651, 656 (7th Cir. 1997) (holding that no "use" occurred where a gun was on a coffee table while drugs were cut and packaged on the same table, but there was no "evidence from which one might reasonably infer that the placement of the gun on the coffee table was anything more than fortuitous") *with United States v. Ramos*, 147 F.3d 281, 285 (3d Cir. 1998) (holding that the intentional placement of guns on a table after being handled by dealers during a drug transaction was "use" under *Bailey*).

Here, the presence of the gun on the nightstand was simply fortuitous. Nothing in the record suggests otherwise. The facts do not support a "silent but forceful presence" characterization under § 924(c).

B. Respondent's Argument that Petitioner's Alleged Instinctive Reach for the Gun Constitutes "Use" is Contrary to *Bailey*.

Respondent next argues that Petitioner's alleged instinctive reach for the gun as he was awakened by the police suddenly breaking into his bedroom was a "reference calculated to bring about a change in the circumstances of the predicate offense." Br. of Appellee 12 (quoting *Bailey*, 516 U.S. at 148). However, Respondent conceded before the district court that Petitioner in fact was awakened by the officers' sudden and unannounced entry into his room, and that his reach for the gun was "closely akin to a reflex action and not active employment." J.A. 32.

Respondent now asserts that "this is not the only inference one can draw from the facts," Br. of Appellee 12, but Respondent's current contention is foreclosed by its concession in the district court:

> A loose argument could be made that Rice satisfied active employment when he reached for the firearm from his bed. . . . *The facts do not support such a contention*. The facts state that Rice was lying in bed when police executed the search warrant on the premises. As the officers entered his bedroom, Rice was awakened and appears to have instinctively reached for the firearm . . . .

J.A. 32 (emphasis added). The facts as Respondent presented them to the district court establish that Petitioner was not fully aware of the circumstances when he was suddenly awakened and did not make a

calculated decision to reach for the gun. Rather, whatever motion Petitioner made was, as Respondent has conceded, in the nature of an involuntary reflex. *Id.*

Respondent now focuses on the fact that officers had to force their way through the bedroom door and that Petitioner's girlfriend ran screaming from the room. Br. of Appellee 13. However, even given the time and noise involved with breaking through the door, when officers entered the room, Petitioner was still lying in the bed and had not touched the gun. J.A. 35. It was only after officers entered the room that Petitioner even moved; although Petitioner denies it, one of the officers interpreted his movement as the start of a reach toward the gun. *Id.* The uncontested facts that Petitioner never touched the gun and ceased any movement as soon as the officers identified themselves show that whatever movement occurred was almost certainly an involuntary act. *See* J.A. 32.

The gun at issue was lying on a bedside table within arm's reach. J.A. 28. If Petitioner was awake and the police officers' entry into his bedroom was noisy and delayed, it defies reason to suggest, as Respondent does, that Petitioner would not have armed himself by the time the officers entered. The only reasonable inference from the facts as described by Officer Newman at trial is that Petitioner was not awakened until the door burst

open. J.A. 28–29. Any movement that he may have made had to have been in reaction to the manner in which the police entered, not to the fact that the intruders were police officers there to arrest him. Even assuming there was some perceptible movement, it stopped by the time the police officers identified themselves. On these facts, there is no reasonable basis to conclude that Petitioner reached for the gun as a conscious reaction to his imminent arrest or specifically to protect the proceeds of any drug activity.

Because Petitioner had no awareness of what was happening when the police burst into his room, he was not acting in a calculated manner. This case is clearly distinguishable from the cases cited by Respondent. In *United States v. Johnson*, 87 F.3d 133 (5th Cir. 1996), the defendant reached for a gun on the floor of his car after he had been surrounded by police officers. *Id.* at 137–38. Similarly, in *United States v. Anderson*, 89 F.3d 1306 (6th Cir. 1996), the defendant was standing in a back room when police officers entered. *Id.* at 1313. Upon seeing the police, he reached for a hidden weapon. *Id*. In the only Fourth Circuit case Respondent cites, *United States v. Mingo*, 237 F. App'x 860 (4th Cir. 2007) (unpublished), the defendant was standing in a room preparing to engage in a drug transaction when he reached for his gun. *Id.* at 862. Notably, that action was held to be a display or disclosure, rather than a reference. *Id*.

Finally, Respondent also cites *United States v. Campbell*, 95 F.3d 52 (5th Cir. 1996) (unpublished).[5] In that case, the police yelled out "Freeze. Police," as they broke down the door. *Id.* at *1. The defendant then stood and reached toward a nearby gun. *Id*. In *Campbell*, as in all of the cases relied upon by Respondent, the defendant was fully aware of what was happening and acted in response to that knowledge. *Id*.

Petitioner's reach, if it occurred, was quite different; it was an instinctive reaction to the invasion of his home and bedroom by unknown individuals. As soon as it was clear that the entering individuals were police officers, Petitioner submitted peacefully to arrest. J.A. 35. Petitioner's immediate compliance once the identity of the officers became known is another distinction between this case and those cited by Respondent. While Petitioner's reaction, if he reacted at all, was to the unknown cause of a commotion in his bedroom, J.A. 35, the defendants in every case cited by Respondent clearly were reacting to their awareness of a police presence. *See Johnson*, 87 F.3d 133 at 135; *Anderson*, 89 F.3d 1306 at 1313; *Mingo*, 237 F. App'x 860 at 862; *Campbell*, 95 F.3d 52 at *1. If Petitioner moved reflexively toward the gun, it is more likely than not that no reasonable juror

[5] *Campbell* is an unpublished opinion issued between Jan. 1, 1996 and Jan. 1, 2007. As such, it has no precedential value, even in the Fifth Circuit. 5th Cir. R. 47.5.4.

would have found this instinctive act calculated to avoid arrest or to protect the proceeds of drug activities. His reach for the gun was not a "reference" under *Bailey*.

C. Respondent's Argument that Petitioner's Alleged "Use" of a Gun was "During and in Relation to" a Drug Trafficking Offense is Contrary to *Bailey*.

Even if this Court were to hold that Petitioner's involuntary action constituted "use" under 18 U.S.C. § 924(c), there is no evidence that the use was in relation to a drug crime. Respondent conceded below that the facts show no "nexus" between Petitioner's movement in relation to the firearm and Petitioner's drug activities. J.A. 33. That concession is one of fact. *See, e.g., United States v. Garnett*, 243 F.3d 824, 829 (4th Cir. 2001); *United States v. Mahan*, 586 F.3d 1185, 1187 (9th Cir. 2009). Respondent is now bound by that fact. *See, e.g., Richardson*, 94 F.3d at 167.

Here, Petitioner's alleged movement toward the gun, it if occurred, can be construed only as an instinctive act of self-defense when suddenly awakened by unknown parties breaking down his bedroom door. As soon as he was aware that the entering parties were police officers, Petitioner stopped any movement and, still lying in his bed, submitted peacefully to arrest. J.A. 35. These facts closely mirror the scenario contemplated by the First Circuit in *United States v. Currier*, 151 F.3d 39 (1st Cir. 1998), in

which the court stated that if the defendant "was using his gun only for self-defense, and had formed no intent to evade or escape arrest, or to facilitate his drug trafficking in any other way, then his conviction under § 924(c)(1) might well be improper."[6] *Id*. at 41. Assuming Petitioner made a momentary conscious move toward his gun when the unknown intruders forced their way into his bedroom by breaking down the door, all of the evidence is consistent with Petitioner having done so only in self-defense.

Respondent now speculates, contrary to its position below, that Petitioner reached for his gun to protect drug proceeds. Respondent's argument that the money recovered from Petitioner's house was drug proceeds relies solely on evidence that, on one occasion, Petitioner may have dealt drugs from the property around his house.[7] There is no credible evidence that the money found in this safe was connected to any drug

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[6] In *Currier*, police officers announced themselves before breaking through the door of the defendant's house, where they found the defendant holding a gun. 151 F.3d at 40–41. At trial, the defendant argued that he had not heard the officers identify themselves and intended only to use the gun in self-defense. *Id.* at 41. The court recognized the validity of this defense, but did not credit his testimony. *Id.*

[7] Although Respondent has argued that the money confiscated from Petitioner's house was in a safe in his bedroom, Respondent admitted before the district court that the evidence was not clear: "The United States would concede that the record is unclear on whether the bedroom where the safe was found was the same in which Rice was located in bed and reached for a weapon." J.A. 29.

activities; in fact, the only evidence related to the source of the money was Petitioner's testimony that the money came from his pool hall business and a night of gambling. J.A. 64.

The district court rejected that testimony because Petitioner did not produce corroborating tax returns. *Id*. In any event, it was Respondent's burden to prove beyond a reasonable doubt that the money was drug proceeds, not Petitioner's burden to prove it was not. Respondent offered no evidence at Petitioner's trial, and cites no evidence in its brief to this Court, to connect the money found in the safe to Petitioner's drug activities. In Respondent's own words, "a weak argument could be made that Petitioner was protecting the drug proceeds on the premises by attempting to use the firearm on the night stand. *The facts do not appear to support such a contention*." J.A. 32 (emphasis added).

The facts of this case do not show any nexus between the gun on the nightstand and the underlying drug crime. Petitioner was not conducting a drug transaction at the time—he was asleep in his bed. If Petitioner moved reflexively toward the gun, it could only have been in reaction to a sudden intrusion into his bedroom. There was no evidence he was attempting to escape or protect drug proceeds; there was no evidence he was aware of the

need to do either. And there was no evidence that the money in the house was, in fact, drug proceeds.

The Supreme Court has made clear that mere use of a gun is not sufficient for an 18 U.S.C. § 924(c) conviction; the use must be "during and in relation to" the underlying drug crime. *See Muscarello*, 524 U.S. at 139; *Bailey*, 516 U.S. at 150. There is no evidence that the gun on Petitioner's nightstand had any relation to the underlying drug offense. Again, as Respondent conceded below, "[t]he facts do not appear to support such a contention." J.A. 32. Consequently, any use of a firearm that occurred as a result of Petitioner's instinctive movement was not during and in relation to any drug crime.

CONCLUSION

Under the *Bailey* standard, no reasonable juror could find that Petitioner used a gun during and in relation to the drug trafficking offense. Because Petitioner is actually innocent, his petition for *habeas corpus* should be granted and his conviction under 18 U.S.C. § 924(c) should be vacated.

Respectfully submitted,

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Dated: January 22, 2009

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

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of January, 2010, I caused this Reply 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 this 22nd day of January, 2010, the required number of bound copies of the foregoing Reply Brief of Appellant 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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