
IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 08-8191 (L); 09-6001

TIMOTHY A. RICE,

Appellant,

vs.

M.L. RIVERA, Warden,

Appellee.

BRIEF OF APPELLEE

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

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. <u>This Court should dismiss Rice’s appeal for lack of jurisdiction because his petition is outside the scope of § 2241 and is untimely and successive under § 2255.</u>	6
A. <u>Standard of Review</u>	6
B. <u>Discussion of Issue</u>	7
II. <u>The district court correctly held that Rice’s reaching for a loaded gun in the presence of officers and in a room where drug proceeds were stored constitutes “use in furtherance of a drug trafficking crime” under the Supreme Court’s holding in <i>Bailey</i>.</u>	10
A. <u>Standard of Review</u>	10
B. <u>Discussion of Issue</u>	11
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

<u>FEDERAL CASES</u>	<u>PAGE</u>
<u>Abdullah v. Hedrick</u> , 392 F.3d 957, 960 (8th Cir.2004)	9
<u>Bailey v. United States</u> , 516 U.S. 137 (1995)	1,4-6, 8, 9, 11-13, 16-18
<u>Bender v. Williamsport Area Sch. Dist.</u> , 475 U.S. 534, 541 (1986)	7
<u>Bennett v. Spear</u> , 520 U.S. 154, 166 (1997)	11
<u>Hammit v. U.S. Probation Office</u> , 235 F. App'x 129 (4th Cir. 2007) (unpublished)	10
<u>Houston v. Lack</u> , 487 U.S. 266, 276 (1988)	5
<u>In re Davenport</u> , 147 F.3d 605, 609-11 (7th Cir.1998)	9
<u>In re Dorsainvil</u> , 119 F.3d 245, 251 (3rd Cir.1997)	9
<u>In re Vial</u> , 115 F.3d 1192, 1194 & n.5	7, 10
<u>In re Jones</u> , 226 F.3d 328, 333-34 (4th Cir. 2000)	8-10
<u>Reyes-Requena v. United States</u> , 243 F.3d 893, 903 (5th Cir.2001)	9
<u>Rice v. Maldonado</u> , 117 F. App'x 879 (4th Cir. 2004)	4
<u>Rider v. United States</u> , 207 F. App'x 315 (4th Cir. 2006) (unpublished)	10
<u>Ruhrgas AG v. Marathon Oil Co.</u> , 526 U.S. 574, 583 (1999)	7
<u>Selgeka v. Carroll</u> , 184 F.3d 337, 342 (4th Cir. 1999)	11
<u>Smith v. United States</u> , 508 U.S. 223, 237 (1993)	18

<u>Stephens v. Herrera</u> , 464 F.3d 895, 898 (9th Cir. 2006)	9
<u>Summey v. Haynes</u> , 276 F. App'x 357 (4th Cir. 2008) (unpublished)	10
<u>Triestman v. United States</u> , 124 F.3d 361, 363 (2nd Cir.1997)	9
<u>United States v. Anderson</u> , 89 F.3d 1306, 1313-14 (6th Cir. 1996)	15
<u>United States v. Campbell</u> , 95 F.3d 52 (5th Cir. 1996) (unpublished)	15
<u>United States v. Combs</u> , 218 F. App'x 483, 485-86 (6th Cir. 2007) (unpublished)	20
<u>United States v. Coor</u> , 226 F. App'x 267 (4th Cir. 2007) (unpublished)	10
<u>United States v. Cotton</u> , 535 U.S. 5625, 630 (2002)	7
<u>United States v. Hartwell</u> , 448 F.3d 707, 715 (4th Cir. 2006)	7
<u>United States v. Johnson</u> , 87 F.3d 133, 137-38 (5th Cir. 1996)	13
<u>United States v. Lipford</u> , 203 F.3d 259, 266 (4th Cir. 2000)	18
<u>United States v. Mingo</u> , 237 F. App'x 860, 865 (4th Cir. 2007) (unpublished) . .	16
<u>United States v. Mitchell</u> , 104 F.3d 649, 654 (4th Cir.1997)	18
<u>United States v. Poole</u> , 531 F.3d 263, 270 (4th Cir. 2008)	6
<u>United States v. Rice</u> , 976 F.2d 728 (4th Cir. 1992)	3
<u>Wofford v. Scott</u> , 177 F.3d 1236, 1244 & n. 3 (11th Cir.1999)	9
<u>Yi v. Fed. Bureau of Prisons</u> , 412 F.3d 526, 530 (4th Cir. 2005)	11

FEDERAL STATUTES

18 U.S.C. § 856	2
18 U.S.C. § 924(c)	1-6, 8,9,11-14, 16,17
18 U.S.C. § 924(c)(1)	12,18
18 U.S.C. § 924(c)(1)(D)(4)	18
21 U.S.C. § 846	1
21 U.S.C. §§ 841(a)(1)	2
21 U.S.C. §§ 841(b)(1)(B)	2
28 U.S.C. § 1291	1
28 U.S.C. § 2241	1,3-8
28 U.S.C. § 2255	1,3,5-10
28 U.S.C. § 2255(e)	8
28 U.S.C. § 2255(f)(3)	9

FEDERAL RULES

Federal Rule of Civil Procedure 59(e)	10
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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

On February 1, 2008, Timothy A. Rice filed the present application for a writ of habeas corpus under 28 U.S.C. § 2241. J.A. 12-19. As set forth in more detail in the argument section of this brief, the district court lacked jurisdiction to entertain the application because Rice challenged only the imposition — not the execution — of his sentence under 18 U.S.C. § 924(c). Rice’s claim is cognizable under § 2241 only if 28 U.S.C. § 2255 affords inadequate relief. Under this Court’s holding in In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000), § 2255 is not inadequate merely because a petitioner is procedurally barred under that section. Because the Supreme Court issued its decision in Bailey v. United States, 516 U.S. 137 (1995), six years before Rice’s first §2255 motion, Rice cannot rely on the narrow exception to § 2255’s gatekeeping provision this Court articulated in Jones. This Court has appellate jurisdiction over the limited question of subject matter jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

Whether the district court had jurisdiction to entertain Rice’s application for habeas corpus under 28 U.S.C. § 2241.

Whether the district court correctly held that Rice used a firearm in furtherance of a drug trafficking crime when he reached for a loaded gun in the presence of

officers and in the room where drug proceeds were stored.

STATEMENT OF THE CASE

Indictment, Trial, and Direct Appeal

On July 26, 1990, a federal grand jury in the District of South Carolina returned a multiple-count indictment against Timothy A. Rice and eight other individuals. Rice was charged with: conspiracy to possess with intent to distribute and to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846 (Count 1); possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) (Count 2); knowingly and intentionally maintaining an establishment for the purpose of distributing cocaine, in violation of 18 U.S.C. § 856 (Counts 3 and 4); and willfully using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count 5). J.A. 5-11. A jury convicted Rice on all counts, and the district court sentenced him to concurrent terms of: life for the conspiracy conviction, 480 months for the possession-with-intent-to-distribute conviction, and 240 months for the maintaining-an-establishment convictions. The court imposed a consecutive five-year term of imprisonment for the § 924(c) conviction.¹ Rice appealed to this Court but did not raise any issue concerning his §

¹On October 1, 1997, the district court reduced Rice's sentence for the conspiracy conviction to 360 months, bringing his total sentence to a term of 540 months, including the 60-month consecutive sentence on the § 924(c) conviction.

924(c) conviction or the resulting consecutive sentence. See United States v. Rice, 976 F.2d 728 (4th Cir. 1992).

Prior Collateral Attacks

On July 6, 2001, Rice, acting *pro se*, filed a petition under 28 U.S.C. § 2255 in the District Court for the District of South Carolina, complaining of issues unrelated to his § 924(c) conviction. On July 18, 2001, the district court dismissed the petition because it was filed outside the one-year statute of limitations. Rice unsuccessfully appealed this ruling.

On May 12, 2003, Rice, again acting *pro se*, filed a habeas corpus application under 28 U.S.C. § 2241 in the District Court for the District of South Carolina. He claimed incompetent counsel and also indicated that he was claiming either actual innocence or that his conduct was no longer viewed by the court as criminal. Although Rice attached a detailed memorandum of law concerning the incompetence-of-counsel claim, he did not further address his second claim. On July 11, 2003, the district court ruled that Rice's § 2241 application was actually a misnamed § 2255 petition and dismissed it as an unauthorized second or successive petition. Rice appealed, and this Court affirmed. Rice v. Maldonado, 117 F. App'x 879 (4th Cir. 2004).

The Current Application

On February 1, 2008, Rice filed another *pro se* application for a writ of habeas

corpus under § 2241 in the District Court for the District of South Carolina. J.A. 12-19. This time, Rice contended that he was “serving an illegal sentence in accordance with” Bailey v. United States, 516 U.S. 137 (1995). J.A. 17. On July 7, 2008, the Government filed its Answer, in which it supported Rice’s argument and asked that Rice’s § 924(c) conviction be vacated. J.A. 27-33. On July 9, 2008, the Government filed a Motion to Vacate Conviction, in which it further emphasized that Rice’s § 924(c) conviction violated the Supreme Court’s holding in Bailey. J.A. 49-50. On August 4, 2008, the United States Magistrate Judge issued a Report and Recommendation in favor of granting both Rice’s habeas corpus application and the Government’s motion. J.A. 52-53.

The district court, however, declined to adopt the Report and Recommendation, denied the Government’s Motion to Vacate, and denied Rice’s § 2241 application. J.A. 55-68. Although the district court found that Rice could proceed under § 2241 because Rice argued that a change in the law had made his sentence non-criminal, J.A. 57, the court nonetheless held that the facts submitted to the jury supported Rice’s conviction under either the “use” or “carry” prong of § 924(c) and that Rice’s use and carrying of the gun was “in furtherance” of a drug trafficking crime, J.A. 65-67.

The district court entered its judgment on September 24, 2008. J.A. 69. On September 29, 2008, Rice filed a Motion for Reconsideration and Motion to Alter or

Amend Judgment under Federal Rule of Civil Procedure 59(e).² J.A. 70-76. Then, on October 6, 2008, Rice filed a Notice of Appeal from the court's initial judgment. J.A. 77. On December 2, 2008, the district court denied Rice's Motion for Reconsideration and Motion to Alter or Amend Judgment. J.A. 80-81. Rice entered a Notice of Appeal from that order on December 18, 2008. J.A. 82.

SUMMARY OF ARGUMENT

The district court should have dismissed Rice's § 2241 application for lack of jurisdiction. Because Rice challenges the legality of his conviction, he may bring an application under § 2241 only if § 2255 is inadequate or ineffective to resolve such a challenge. The Supreme Court decision on which Rice relies, Bailey v. United States, 516 U.S. 137 (1995), was decided several years before he filed his first § 2255 petition. Because Rice could have raised his Bailey argument had he brought a timely petition after that decision, § 2255 is not an inadequate or ineffective vehicle for relief. Therefore, Rice cannot proceed under § 2241. Moreover, this Court cannot exercise jurisdiction over Rice's application for a writ of habeas corpus by construing it as a § 2255 petition: It is an untimely, successive petition submitted without prior authorization from this Court.

²The filing dates provided herein for Rice's submissions to the court are those indicated on the filed documents as the dates Rice submitted them to prison officials for mailing. See Houston v. Lack, 487 U.S. 266, 276 (1988).

Even if this Court were to find that the district court had jurisdiction over Rice's petition, Rice's claim fails on the merits. Rice's conviction under 18 U.S.C. § 924(c) is not deficient. Rice's act of reaching for his gun when officers entered his room to execute a search warrant constitutes "use" of a firearm under the Supreme Court's holding in Bailey. Additionally, this use was in furtherance of a drug trafficking crime because Rice was acting to effect his escape or protect the drug proceeds in the room.

ARGUMENT

I. This Court should dismiss Rice's appeal for lack of jurisdiction because his petition is outside the scope of § 2241 and is untimely and successive under § 2255 .

A. Standard of Review

This Court reviews de novo the district court's assumption of jurisdiction over a habeas petition brought under 28 U.S.C. § 2241. United States v. Poole, 531 F.3d 263, 270 (4th Cir. 2008).

B. Discussion of Issue

“[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.” Poole, 531 F.3d at 270 (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)). In the proceedings below, the Government erroneously conceded

that the district court had jurisdiction to entertain Rice’s application under 28 U.S.C. § 2241. Subject-matter jurisdiction, however, can “never be forfeited or waived” because “it involves a court’s power to hear a case.” United States v. Hartwell, 448 F.3d 707, 715 (4th Cir. 2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). “[A]ny action by a court without subject-matter jurisdiction is ‘ultra vires’ and therefore void.” Id. (citing Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999)).

Here, the district court should have considered Rice’s § 2241 application as a successive § 2255 petition submitted without prior authorization from this Court, and should have dismissed the application for lack of jurisdiction. As a general rule, a prisoner may use a § 2241 habeas corpus petition only to challenge the *execution* of his sentence or the conditions of his confinement — not the legality of his conviction or the *imposition* of his sentence. See In re Vial, 115 F.3d 1192, 1194 & n.5 (4th Cir. 1997 (en banc)) (“Those convicted in federal court are required to bring collateral attacks challenging the validity of their judgment and sentence by filing a motion to vacate sentence pursuant to 28 U.S.C.A. § 2255[,] while “attacks on the execution of a sentence are properly raised in a § 2241 petition.”). Otherwise, § 2241 is the proper vehicle only when § 2255 proves “inadequate or ineffective to test the legality

of . . . detention.” Id.³ And “the remedy afforded by § 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision, or because an individual is procedurally barred from filing a § 2255 motion.” Id. (citations omitted).

In In re Jones, 226 F.3d 328 (4th Cir. 2000), this Court considered a federal prisoner’s claim that he could challenge his 18 U.S.C. § 924(c) conviction through a § 2241 petition. The prisoner initially sought permission to file a second or successive § 2255 petition to argue that his conviction for use of a firearm during a drug trafficking offense was invalid in light of Bailey v. United States, 516 U.S. 137 (1995). But because his Bailey claim did not rest on newly-discovered evidence or a new rule of constitutional law, the prisoner could not satisfy the requirements for filing a successive § 2255 petition. Jones, 226 F.3d at 330. The Court held that § 2255 was inadequate and ineffective to test the legality of a conviction where: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the petitioner’s direct appeal and first §

³“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [section 2255], shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e).

2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law. Id. at 333-34. The Court held that the prisoner's situation satisfied these conditions and allowed him to proceed under § 2241. Id. at 334.⁴

Here, Bailey was decided after Rice's direct appeal but *before* his first § 2255 petition. Rice could have challenged his § 924(c) conviction had he brought a timely petition — within one year of the Supreme Court's decision in Bailey.⁵ Rice's situation is thus unlike the prisoner's circumstances in Jones. Although Rice cannot now bring a § 2255 petition because it would be both time-barred and successive, §

⁴Other circuits likewise have held that § 2255 is inadequate to test the legality of a prisoner's conviction, thus allowing the prisoner to challenge his conviction under § 2241, only where the prisoner both: (1) can assert a claim of actual innocence; *and* (2) has not had an "unobstructed procedural shot" at making that claim. Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006); *see also* Abdullah v. Hedrick, 392 F.3d 957, 960 (8th Cir.2004); Reyes-Requena v. United States, 243 F.3d 893, 903 (5th Cir.2001); Wofford v. Scott, 177 F.3d 1236, 1244 & n. 3 (11th Cir.1999); In re Davenport, 147 F.3d 605, 609-11 (7th Cir.1998); Triestman v. United States, 124 F.3d 361, 363 (2nd Cir.1997); In re Dorsainvil, 119 F.3d 245, 251 (3rd Cir.1997).

⁵See 28 U.S.C. § 2255(f)(3): "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . . the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]"

2255 is not inadequate for those reasons. See In re Vial, 115 F.3d at 1194 n.5 And because Rice’s § 2241 application challenged the substance of his conviction, it was in effect an improper § 2255 petition which the district court was without jurisdiction to consider. See generally Summey v. Haynes, 276 F. App’x 357 (4th Cir. 2008) (unpublished) (affirming district court’s dismissal of prisoner’s § 2241 petition on jurisdictional grounds where prisoner claimed § 2255 was inadequate but did not meet the standards articulated in In re Jones); see also Hammit v. U.S. Probation Office, 235 F. App’x 129 (4th Cir. 2007) (unpublished) (same); United States v. Coor, 226 F. App’x 267 (4th Cir. 2007) (unpublished) (same); Rider v. United States, 207 F. App’x 315 (4th Cir. 2006) (unpublished) (same).

II. The district court correctly held that Rice’s reaching for a loaded gun in the presence of officers and in a room where drug proceeds were stored constitutes “use in furtherance of a drug trafficking crime” under the Supreme Court’s holding in *Bailey*.

A. Standard of Review

This Court reviews de novo a district court’s order denying a habeas petition under 28 U.S.C. § 2241. Yi v. Fed. Bureau of Prisons, 412 F.3d 526, 530 (4th Cir. 2005) (citing Selgeka v. Carroll, 184 F.3d 337, 342 (4th Cir.1999)).

B. Discussion of Issue

Even if this Court were to find no jurisdictional impediment to Rice’s petition, his conviction under 18 U.S.C. § 924(c) is sound. Rice’s act of reaching for the gun

when confronted by officers executing a search warrant was a use in furtherance of a drug trafficking crime.⁶

1. Rice’s act of reaching for the gun constitutes a “use” under Bailey.

Title 18 of the United States Code, Section 924(c)(1) provides in relevant part: “[A]ny person who, during and in relation to any . . . drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses . . . a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—(i) be sentenced to a term of imprisonment of not less than 5 years[.]”

In Bailey v. United States, 516 U.S. 137 (1995), the Supreme Court interpreted “use” in § 924(c) to mean “active employment” and stated that this “understanding of ‘use’ certainly includes brandishing, displaying, bartering, striking with, and, most

⁶The Government acknowledges that this position conflicts with the position it took before the district court in these proceedings. This Court should not consider the argument set forth in this section of the brief as waived, however. The Government is entitled to defend the the district court’s judgment on any ground supported by the record. Bennett v. Spear, 520 U.S. 154, 166 (1997). Moreover, this particular issue — whether Rice’s actions constituted a “use” under Bailey — was addressed by Rice before the district court, was the main issue the district court considered in its orders (in the first instance and upon Rice’s Motion to Reconsider), and is the primary issue analyzed by Rice in his opening brief before this Court. Given that Rice raised this issue before the district court and has ample opportunity to brief and argue the point before this Court, Rice will not be prejudiced by the Government’s change of position.

obviously, firing or attempting to fire a firearm.” Id. at 148. The Court noted “that this reading compels the conclusion that even an offender’s reference to a firearm in his possession could satisfy § 924(c)(1)” and that “a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a ‘use,’ just as the silent but obvious and forceful presence of a gun on a table can be a ‘use.’” Id.

Here, Rice had a 9 mm handgun on his bedside table. J.A. 35. When officers executing a search warrant in Rice’s home forced their way into his bedroom, Rice reached for the gun — until an officer ordered him to put his hand down or be killed. Id. These facts constitute “use” under the Supreme Court’s definition. The Court specifically noted that “the obvious and forceful presence of a gun on a table can be a ‘use.’” Bailey, 516 U.S. at 148. In this case, the gun’s presence was obvious and indeed forceful, as it nearly precipitated a shootout.

Moreover, Rice’s reaching for the gun was “a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense.” Id. The jury reasonably could have interpreted Rice’s action as a calculated move to get the officers to back off, or to secure the firearm so he could escape capture or protect the drug proceeds located in the room. Although Rice’s counsel characterizes his movement towards the gun as the “instinctive” reaction of a startled sleeper, this is not the only inference one can draw from the facts. The officers had to force their way

into the bedroom because the door was bolted and reinforced. J.A. 36; S.J.A. 28. When the officers finally kicked in the door, Rice's girlfriend and a child ran screaming from the room. J.A. 35-36; S.J.A. 29. Officer Ramses Newman testified that Rice was not asleep when officer entered the room. S.J.A. 30. The evidence supports a finding that Rice was alert enough to know what was occurring and made a deliberate, conscious decision to reach for the gun in the officers' presence.

Several federal Courts of Appeals have held, after Bailey, that a defendant's reaching for a firearm in response to officers' attempts to apprehend the defendant constitutes "use" under § 924(c). In United States v. Johnson, 87 F.3d 133, 137-38 (5th Cir. 1996), the defendant Johnson was the passenger in a car officers stopped for a traffic violation. After the driver exited the car in an apparent attempt to flee, one of the officers shone his flashlight through the open driver's-side door and saw a pistol protruding from a black zipper case lying on the transmission hump in the front floorboard. As the officer reached into the car to remove the gun, Johnson also reached for it with his left hand while placing something between his legs with his right hand. Another officer yelled three times for Johnson to raise his hands; when Johnson finally complied, the officers secured the gun and found a bag containing crack cocaine between his legs. The Fifth Circuit held that these facts supported Johnson's conviction for "use" of a firearm under § 924(c). The court explained:

We believe that . . . a firearm changes the circumstances of the underlying drug transaction when it serves the immediate purpose of bringing to fruition a drug transaction without impediment from law enforcement officers or others. A firearm serves such a purpose when it elevates the stakes involved during a defendant's arrest by apprehending law enforcement officials, such as when the firearm is displayed to apprehending law enforcement officers *or when the defendant reaches for the weapon while being apprehended*. A weapon in this instance does not simply embolden or comfort a drug trafficker during a drug sale, as may a concealed weapon "placed at ready." It inexorably alters the likelihood of arrest for the underlying drug offense by creating a threat of harm to the apprehending officers. . . . *Johnson plainly changed the stakes involved during his arrest for a drug offense by reaching for a weapon clearly on display to apprehending law enforcement officers. Such use of a firearm constitutes "active employment" of a firearm in connection with an underlying drug trafficking offense.*

Id. (emphasis added).

In a case even more similar to the facts here, United States v. Campbell, 95 F.3d 52 (5th Cir. 1996) (unpublished), officers executing a search warrant used a battering ram to break through the door of the residence. As the officers entered, one of the officers observed the defendant Campbell rise from a couch and reach for a gun. The officer immediately pushed Campbell down and handcuffed him. The Fifth Circuit held that "Campbell's visible movement toward the pistol hidden in the couch constituted active employment of the weapon. . . . Under the circumstances present in this case, Campbell used the firearm when he reached for it." Id. at *5.

United States v. Anderson, 89 F.3d 1306, 1313-14 (6th Cir. 1996), is similarly instructive. When officers entered Anderson's apartment to execute a search warrant, the first officer to enter found Anderson in a back bedroom. The officer saw Anderson attempting to reach for what looked like a handgun: "He was in the process of reaching down from right next to the bed towards the bed." Id. at 1313. The officer was able to stop Anderson and secure him in a different room; the officer then found a 9 mm pistol "in the exact position where Mr. Anderson was standing and where he was reaching." Id. When the officer asked Anderson why he had reached for a weapon, Anderson explained that he thought a "rip off" was about to occur and did not think that the officers really were the police. Id.

The Sixth Circuit found that Anderson's actions constituted "use" under § 924(c) and Bailey's narrowing definition:

If defendant had merely placed his gun under the mattress, Bailey would prevent a finding of use. But here, evidence disclosed defendant reached for the gun as the police entered his apartment; his act of reaching for the gun was "calculated to bring about a change in the circumstances of the predicate offence," Bailey, 516 U.S. at ----, 116 S.Ct. at 508. Securing the gun would influence the actions of people entering the apartment. Indeed, reaching for the gun is more threatening than merely referring to it. We can be confident that an act of reaching for the gun provides a generally reliable manifestation of defendant's intent to use the gun in much the same way that "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" a gun provides such a similarly

accurate manifestation of intent to use. For these reasons, we hold that a defendant who reaches for a gun, whether the gun is visible or hidden, uses that gun for purposes of 18 U.S.C. § 924(c).

Id. at 1315.

This Court addressed this issue in United States v. Mingo, 237 F. App'x 860, 865 (4th Cir. 2007) (unpublished). The defendant, Mingo, arrived at a motel room in response to a confidential informant's request for drugs. When police officers hiding in the bathroom emerged with their guns drawn, "Mingo's initial reaction was to reach for a gun concealed in the back of his waistband." Id. at 862. The court held that this fact was sufficient to support a finding that Mingo had "used" the gun. Specifically, the court noted that under Bailey "a gun is actively employed if displayed or 'disclosed . . . by the offender'" and that Mingo "however briefly, 'used' the gun for the purposes of § 924(c)." Id. at 865.

The analysis of these courts is persuasive. When Rice reached for the handgun on his night stand, he was not merely attempting to use the gun: The act of reaching was itself a "use" under § 924(c). The Supreme Court explicitly has held that "a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a 'use,' just as the silent but obvious and forceful presence of a gun on a table can be a 'use.'" Bailey, 516 U.S. at 148. Rice's reaching for the gun was a "reference" to the gun and was designed to change the circumstances of his

offense: i.e., to intimidate or hinder the officers so he could escape with his drug proceeds. No doubt, had Rice merely pointed to the gun with the same intent (to intimidate or hinder), that would have been a “reference” under Bailey.⁷ It is no less a reference because Rice was actually reaching to secure the weapon.

2. Rice’s use of the gun was “during and in relation to” a drug trafficking crime because it was designed either to effect escape or protect the drug proceeds in the room.

Just as the evidence at Rice’s trial was sufficient to prove that he used the firearm, the evidence was sufficient that he did so in furtherance of a drug trafficking crime. A firearm is used “in relation to” a drug trafficking crime when the firearm has “some purpose or effect with respect to the drug trafficking crime[.] . . . [T]he gun at least must ‘facilitate or have the potential of facilitating,’ the drug trafficking offense.” United States v. Lipford, 203 F.3d 259, 266 (4th Cir. 2000) (quoting Smith v. United States, 508 U.S. 223, 237 (1993)). “[I]t is enough for § 924(c)(1) purposes

⁷Such an action would even have qualified as “brandishing”, which is defined in subsection (D)(4):

For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

18 U.S.C. § 924(c)(1)(D)(4).

if the firearm was present for protection or to embolden the actor.” Id. (citing United States v. Mitchell, 104 F.3d 649, 654 (4th Cir.1997)).

The evidence at trial demonstrated that Rice, along with his parents and others, participated in a crack-distribution conspiracy headquartered at adjoining properties on Beacon Street in Spartanburg, South Carolina. See S.J.A. 6-7, 44-45. Timothy Rice's house was located at 449 Beacon Street; his parents lived at 453 Beacon Street. S.J.A. 44-45. When police officers executed search warrants at these addresses, they did not find any powder cocaine or crack cocaine in Timothy Rice's house. Harold Robinson, a lower-level dealer working for the Rice family, explained that the Rice family usually did not keep their drugs indoors but kept them in the yard of Timothy Rice's parents' home, a short distance from Timothy Rice's residence. S.J.A. 5, 7, 24, 26. On the day they searched the residences of Timothy Rice and his parents, officers did find crack cocaine in the parents' yard. S.J.A. 18-19, 21-22.

Robinson testified that although he normally did not deal directly with Timothy Rice, he once delivered drug proceeds he owed Reggie Rice, Timothy's brother, to Timothy at Timothy's residence. S.J.A. 8-9. Robinson also testified that he had seen crack cocaine inside Timothy Rice's home on one occasion. S.J.A. 11-12, 15. Jerry Lee Lewis Smith testified that he twice accompanied his brother to Timothy Rice's house, where his brother bought crack cocaine from Rice. S.J.A. 33-43. John Anthony Gist testified that he once sold crack cocaine for Timothy Rice and reported to Timothy Rice's house to account for the fact that he had made only \$900 on the

package he had sold. S.J.A. 47-52. Rice told Gist to come back later; when Gist returned about an hour later, he spoke to Rice in Rice's living room. S.J.A. 53. Rice instructed his sister to retrieve \$200 for Gist from "his [Timothy Rice's] back room", and she did so. *Id.* Gist also identified himself on a video recording and explained that the footage showed him walking to Timothy Rice's house to deliver drug proceeds. S.J.A. 56.

Officers found approximately \$18,000 in cash inside a safe in Timothy Rice's bedroom. J.A. 38-39; S.J.A. 44-45. While some of the money was loose, most of it was bundled in denominations of twenties, tens, fives, and ones. J.A. 38-39.

Based on these facts, the jury could find that Rice used the firearm during and in relation to a drug trafficking crime. Given the testimony at trial that the Rices' procedure was to keep drugs hidden in locations in Timothy's parents' yard, it was unsurprising that officers found crack cocaine in the parents' yard but not in Timothy's house. The testimony about Rice's drug dealing from in and around the house, along with the amount of money and the way it was packaged, supports an inference that the \$18,000 in Rice's bedroom constituted drug proceeds. And the fact that Rice used the firearm in the same room in which the money was located supports a finding that he used the gun to protect himself from capture and to protect his drug proceeds. See United States v. Combs, 218 F. App'x 483, 485-86 (6th Cir. 2007)

(unpublished) (defendant's reaching for a firearm in his pocket when approached by officers suggested that he did so in an effort to evade arrest, and was thus a use during and in relation to drug trafficking).

CONCLUSION

For all of the above reasons and arguments and based upon the entire record, the Government respectfully argues that Appellant's appeal should be dismissed. In the alternative, if this Court finds jurisdiction to be proper, the Government respectfully asks that the decision of the district court be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-5179 Caption: United States of America vs. Timothy A. Rice

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Dated: January 5, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,) NO. 08-8191(L); 09-6001
)
Appellee,)
v.)
)
TIMOTHY A. RICE,)
)
Appellant.) CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2009, I electronically filed the attached Brief of Appellee, with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit using the CM/ECF System. The CM/ECF System will send notice of this electronic filing to the following user and I further certify that I mailed the required copies to him:

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