

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SAMSON ADEYEMI,	)	
Petitioner,	)	Civil Action No. 15-301 Erie
	)	
v.	)	
	)	District Judge Barbara Rothstein
UNITED STATES OF AMERICA,	)	Magistrate Judge Susan Paradise Baxter
Respondent.	)	

**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

**I. RECOMMENDATION**

It is respectfully recommended that the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 by federal prisoner Samson Adeyemi (the "Petitioner") be denied.

**II. REPORT**

**A. Relevant Background**

In October of 2006, the Petitioner was tried before a jury in the United States District Court for the Eastern District of Pennsylvania (the "Eastern District Court") for several crimes related to the robberies of two fast food restaurants located in Philadelphia, Pennsylvania. In relevant part, at Counts 3 and 5 he was charged with using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). According to the Petitioner, both Counts 3 and 5 of the Indictment included "aiding and abetting" as a theory of liability.

The jury found the Petitioner guilty on all charges. On January 8, 2007, the Eastern District Court sentenced him to the mandatory minimum term of 7 years' imprisonment on Count 3, and to a consecutive term of 25 years' imprisonment on Count Five.

In the answer, the Respondents provide a detailed recitation of the relevant facts. Because, as explained below, this Court must determine if the Petitioner has met his burden of showing that he is "actually innocent" of Counts 3 and 5, it is worthwhile to quote that recitation in full:

On February 15, 2006, a complaint and warrant was issued charging [the Petitioner] with two counts of interference with interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a). On March 21, 2006, a grand jury in the Eastern District of Pennsylvania returned an indictment of [the Petitioner], charging him with conspiracy to interfere with interstate commerce by robbery, two counts of interference with interstate commerce by robbery, two counts of possession of a firearm in furtherance of a crime of violence, and aiding and abetting, in violation of 18 U.S.C. §§ 1951(a), 924(c), and 2, respectively.

These charges related to the robberies of the Taco Bell restaurant at 4600 City Line Avenue in Philadelphia and the McDonald's restaurant at 101 South 52nd Street in Philadelphia, in January 2006. On October 11, 2006, following a four day trial, the jury found [the Petitioner] guilty of all charges.

The evidence presented at trial was overwhelming and proved the following. On January 3, 2006, at approximately 1:00 a.m., [the Petitioner] drove up and ordered food at the drive-through window of the Taco Bell restaurant at 4600 City Line Avenue in Philadelphia. The cashier gave [the Petitioner] his food, but as she turned back towards him with his change, the car pulled away. A masked gunman, holding the food that the cashier had just handed to [the Petitioner], was standing at the open window, pointing a silver gun at her. The gunman ordered her to open the cash register and give him all the money. After she gave the gunman the cash, he ran away.

About two hours later, the McDonald's restaurant located at 101 S. 52nd Street in Philadelphia, was robbed at gunpoint. Fifteen minutes before the robbery, [the Petitioner] drove through the drive-through lane and placed an order for food. The cashier recognized [the Petitioner] as her fiancé's nephew, and told him the total owed for the food. [The Petitioner] said he did not have enough money for the food, and promised to get the money from an ATM machine and come right back. [The Petitioner] returned to the McDonald's 15 minutes later to pick up his food. When the cashier opened the window to give him his food, a masked gunman ran up to the window and demanded money. [The Petitioner] drove away. The gunman and a second man climbed into the window of the McDonald's and removed the cash register drawer before fleeing.

McDonald's security cameras recorded the robbery, as well as the events leading up to the robbery. The car driven by [the Petitioner] at the window when the gunman approached, a Crown Victoria, was fully visible on the security recording, along with the license plate of the car. Investigation showed that this car was registered to Sunday Adeyemi [the Petitioner's father] in the 800 block of Sanger Street in Philadelphia.

Police detectives also learned that other similar "drive-through window" robberies were committed in Northeast Philadelphia late at night on January 3, 2006, less than 24 hours after the robberies of the Taco Bell and McDonald's. In those cases, early in the morning of January 4, 2006, police stopped Michael Conway, Brian Wynder, and Ryan Hobdy as they were fleeing from these later robberies in a car driven by Conway. Police searched the car and discovered a silver handgun and a black mask. Police arrested Conway, Wynder, and Hobdy.

Wynder and Conway provided biographical information to the police, showing that they lived on the 800 block of Carver Street in Philadelphia. The 800 block of Carver Street and the 800 block of Sanger Street are next to each other, and share a common driveway. This proximity, and the similarity of the "drive-through window" robberies, led detectives to suspect that the car seen driving through the McDonald's was involved in that robbery. On January 6, 2006, police found the Crown Victoria parked on Sanger Street. The car was seized by police and held as part of the investigation.

Detectives suspected that the men arrested in Northeast Philadelphia on January 4, 2006, were involved in the earlier Taco Bell and McDonald's robberies. To pursue this connection, detectives transported Wynder and Hobdy to the detective division on January 9, 2007, for investigation. The detectives, Wynder, and Hobdy arrived at the detective division at about 10:00 p.m. Hobdy declined to make any statement to the detectives. Wynder, however, agreed to make a statement. By 11:30 p.m. on January 9, 2007, Wynder told detectives that [the Petitioner] was involved as the driver in the McDonald's robbery. Wynder also told detectives that [the Petitioner] gave him the gun used at McDonald's, and that Wynder subsequently used that same gun in the robberies he committed with Conway and Hobdy in the Northeast.

While detectives were still speaking to Wynder, at 11:30 p.m. on January 9, 2007, [the Petitioner] arrived at the detective division to speak to detectives about getting his car back. Detectives had not known that [the Petitioner] was coming, but wanted to speak to him, since Wynder had identified him as being involved in the McDonald's robbery. Because the detectives were still speaking to Wynder, and had to transport Wynder and Hobdy back to the prison, they told [the Petitioner] that he had been implicated as a suspect in the robberies of both the Taco Bell and the McDonald's, and placed him in a room to wait. The detectives checked on [the Petitioner] before they left for the prison to return Hobdy and Wynder, and told him they would speak to him as soon as they returned.

The detectives returned to the detective division at approximately 4:00 a.m. on January 10, 2006, and began their interview with [the Petitioner]. The detectives told [the Petitioner] that his car was seen at the McDonald's, and that he had been implicated in the robbery. Before the detectives asked any questions of [the Petitioner], however, they read him his Miranda rights.

[The Petitioner] agreed to speak to the detectives. He initially denied having any part in the Taco Bell and McDonald's robberies. The detectives outlined the evidence

they had compiled, including Wynder's statement, the security video from McDonald's, the similar robberies in Northeast Philadelphia, and the fact that [the Petitioner], Wynder, and Conway all lived near each other. Once confronted with this evidence, [the Petitioner] admitted to the detectives that he was involved in both the Taco Bell and McDonald's robberies. The detectives then committed this admission to writing, but before doing so, again read [the Petitioner] his Miranda rights. [The Petitioner] signed his name on the page containing the warnings, and also initialed and signed a second page containing a series of questions with answers that further confirmed his understanding of his rights. Once that was completed, the detectives took the formal written admission from [the Petitioner].

[The Petitioner] admitted to detectives that he, along with Wynder and Hobdy, robbed both the Taco Bell and McDonald's restaurants on January 3, 2006. He identified himself as the driver during both robberies, and admitted placing the orders at the drive-through windows, and then driving away as Wynder and Hobdy ran up to the windows with a gun. When describing the robberies, [the Petitioner] expressly acknowledged his knowledge that a gun was going to be used.

Question: Tell me in your own words what occurred on the morning of January 3rd in reference to the robberies of the Taco Bell and McDonald's.

Answer: I was at home. I picked Detroit and Brian up from their house on Carver Street. I was driving, it was registered to my dad. It's a 1997 Crown Victoria, black. I drove to City Line Ave. I parked at the girl's house, her name Ashley. It was the street right after the Taco Bell. I didn't [sic] the name of the street. I stay in the car. Brian and Detroit got out and went to the Taco Bell. They told me to drive to the window and get something to eat. I drove up. When I got up to the window, that's when they ran up. I'm not sure who had the gun. There was a wall. They waited behind the wall. They waited till the window was open and ran up. That's when I took off.

Trial testimony, 10/10/06, 119-120. Later in [the Petitioner's] statement, he identified a security photograph of Brian Wynder holding a gun during the robbery. Id. 121. Following the statement, [the Petitioner] was formally arrested and charged with these robberies.

Following the initial arrest warrant and subsequent indictment of [the Petitioner] in connection with the Taco Bell and McDonald's robberies, the government filed a Superseding Information charging Hobdy and Conway with seven robberies of fast-food restaurants in October 2006. Hobdy was charged with the Taco Bell and McDonald's robberies, along with three others. Conway was charged with five other robberies. Later in October 2006, the government filed a Second Superseding Information, adding Wynder, who was charged with seven robberies, including the Taco Bell and McDonald's.

Thereafter, Conway, Wynder, and Hobdy entered into guilty plea agreements with the government, admitting to their numerous Hobbs Act robberies. Each testified as government witnesses at [the Petitioner's] trial. They identified [the Petitioner] as the getaway driver in the Taco Bell and McDonald's robberies in the early morning hours of January 3, 2006. Wynder and Hobdy admitted that they, along with [the Petitioner] and "Basil," participated in the commission of the Taco Bell and McDonald's robberies. Conway testified that [the Petitioner], Wynder, and Hobdy returned to Conway's home after the robberies, and described the robberies to him. Furthermore, Wynder identified the gun used in these robberies as the same gun that police seized from Conway's car on January 4, 2006, when he, Conway, and Hobdy were arrested in Northeast Philadelphia.

On October 5, 2006, immediately prior to trial, [the Eastern District Court] held a hearing on [the Petitioner's] motion to suppress the statement that he had made to Philadelphia police detectives. Finding that [the Petitioner] made the statement after a knowing, voluntary, and intelligent waiver of his Miranda rights, [the Eastern District Court] denied the motion and the case proceeded to trial. On October 11, 2006, a jury found [the Petitioner] guilty of all charges, and he was remanded to prison pending sentencing. On January 8, 2007, this Court sentenced [the Petitioner] to a total of 385 months incarceration, to be followed by five years of supervised release.<sup>1</sup>

<sup>1</sup> Pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), the mandatory minimum sentence for possession of a firearm during and in relation to a crime of violence is not less than seven years (84 months). Pursuant to 18 U.S.C. § 924(c)(1)(C), in the case of a second or subsequent conviction, the mandatory minimum sentence is not less than 25 years (300 months). Here, this Court sentenced [the Petitioner] to one month incarceration on Counts One, Two, and Four; to a consecutive term of 84 months imprisonment on Count Three; and to a consecutive term of 300 months on Count Five, for a total sentence of 385 months incarceration.

(ECF No. 3 at 2-8).

The Petitioner filed a direct appeal in which he raised claims that are not relevant to this proceeding. On May 28, 2008 the United States Court of Appeals for the Third Circuit affirmed his judgment of sentence. United States v. Adeyemi, 279 F.App'x 144 (3d Cir. 2008). In 2009, the Petitioner filed with the Eastern District Court a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. On September 28, 2009, that court denied the § 2255 petition and denied a certificate of appealability.

The 1996 amendments that the Antiterrorism and Effective Death Penalty Act ("AEDPA") made to § 2255 bar the filing of a second or successive § 2255 motion unless the appropriate court of appeals certifies the filing contains a claim based on: (1) "*newly discovered evidence* that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; "or (2) "*a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.*" 28 U.S.C. § 2255(h)(1) and (2) (emphasis added). See also 28 U.S.C. § 2244(a).

On March 5, 2014, the Supreme Court decided Rosemond v. United States, — U.S. — , 134 S.Ct. 1240 (2014). It interpreted 18 U.S.C. § 924(c) and held "that the Government makes its case by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." Rosemond, 134 S.Ct. at 1243. See also id. at 1249-51. "[A]dvanced knowledge," the Supreme Court stated, means "knowledge at a time the accomplice can do something with it—most notably, opt to walk away." Id. at 1249-50.<sup>1</sup> It further held that the jury instructions given in the defendant's case "were erroneous because they failed to require that the defendant knew in advance that one of his cohorts would be armed." Id. at 1243. See also id. at 1251-52.

In the pending petition for a writ of habeas corpus, which he filed pursuant to 28 U.S.C. § 2241,<sup>2</sup> the Petitioner claims that his convictions at Counts 3 and 5 must be vacated in light of the Supreme

<sup>1</sup> Importantly, the Supreme Court further observed: "Of course, if a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge. In any criminal case, after all, the factfinder can draw inferences about a defendant's intent based on all the facts and circumstance of a crime's commission." Rosemond, 134 S.Ct. at 1250 n.9.

<sup>2</sup> The Petitioner originally filed his § 2241 petition in the Eastern District Court. The Respondent contended that that court did not have jurisdiction to consider a § 2241 petition. (ECF No. 3 at 8). For that reason, the Eastern District Court

Court's decision in Rosemond.<sup>3</sup> He quotes the jury instructions given in his case (Mem. of Law at 3, ECF No. 1 at 6), and contends that it does not comply with the dictates of Rosemond because it only required mere knowledge that a cohort used a firearm, not advanced knowledge.

In the answer (ECF No. 3), the Respondent argues that the petition must be denied. The Respondent does not contest the Petitioner's argument that the jury instructions did not comport with what Rosemond now requires. Its argument is that any error was harmless and it asserts:

While it is correct that the jury was not expressly charged that they had to find that [the Petitioner] knew a gun was being used during the two robberies he participated in, as now required by Rosemond, that error was harmless beyond a reasonable doubt. Evidence at trial proved that [the Petitioner] had advance knowledge that guns were going to be used in the two robberies that he aided and abetted. This evidence included the testimony of one of [the Petitioner's] co-defendants, see trial testimony, 10/6/06, 103, 117, as well as [the Petitioner's] own statement made to police, in which [the Petitioner] admitted that when his accomplices jumped out of the car to commit the first robbery, [the Petitioner] was "not sure who had the gun." Id.

(ECF No. 3 at 13-14). The Petitioner did not file a reply to the Respondent's answer.

For the reasons set forth below, the question before this Court is whether the Petitioner has demonstrated that he is actually innocent under Rosemond. Stated another way, to be entitled to habeas relief under § 2241, the Petitioner must demonstrate that he was convicted at Counts 3 and 5 of conduct that is longer criminal in light of Rosemond. Because he has not met that burden, it is recommended that the petition be denied.

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transferred the case to this Court. At the time, the Petitioner was confined at FCI McKean, which is located within the territorial boundaries of this Court.

<sup>3</sup> The Petitioner qualifies his argument by stating that he is entitled to habeas relief because he "was **possibly** convicted for, aiding and abetting a Section 924(c) violation without advance knowledge[.]" (Mem. of Law at 2, ECF No. 1 at 5 (emphasis added)).

## B. Discussion

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute[.]" Cardona v. Bledsoe, 681 F.3d 533, 535 (3d Cir. 2012) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)). "Two federal statutes, 28 U.S.C. §§ 2241 & 2255, confer federal jurisdiction over habeas petitions filed by federal inmates." <sup>4</sup> Id. "The 'core' habeas corpus action is a prisoner challenging the authority of the entity detaining him to do so, usually on the ground that his predicate sentence or conviction is improper or invalid." McGee v. Martinez, 627 F.3d 933, 935 (3d Cir. 2010). That type of habeas action is brought before the district court that sentenced the prisoner by way of a motion filed under 28 U.S.C. § 2255, which permits a federal prisoner to challenge his judgment of sentence "upon the ground that [it] was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]"

In contrast, § 2241 "confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence," McGee, 627 F.3d at 935, such as, for example, the way in which the Bureau of Prisons is computing his sentence. See, e.g., Barden v. Keohane, 921 F.2d 476, 478-79 (3d Cir. 1990); BRIAN R. MEANS, Postconviction Remedies § 5:7, WestlawNext (database updated July 2016). However, "[o]n *rare occasions* it is possible for federal prisoners to attack their convictions and sentence pursuant to § 2241, as opposed to § 2255." Postconviction Remedies § 5:7 (emphasis added) (citing Wright and Miller's Federal Practice and Procedure, Criminal § 591; Federal Procedure, L. Ed. §§ 41:13, 41:501, 114.2 to 114.4, 137 to 139 (2010)). Specifically, § 2255, in what is commonly referred to as its "savings clause" or "safety valve,"

<sup>4</sup> Although a motion under section 2255 is not technically a petition for a writ of habeas corpus, it is habeas corpus' practical substitute for federal prisoners. See, e.g., Davis v. United States, 417 U.S. 333, 343 (1974); Kaufman v. United States, 394 U.S. 217, 221-22 (1969).

provides that a prisoner may challenge his or her federal conviction in a § 2241 habeas petition if "it appears that the remedy by [§ 2255] motion is *inadequate or ineffective* to test the legality of his detention." 28 U.S.C. § 2255(e) (emphasis added).

The Court of Appeals for the Third Circuit has found the remedy under § 2255 to be "inadequate or ineffective" only in extremely limited circumstances, see In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997), and it has repeatedly held that the § 2255 remedy is not "inadequate or ineffective" merely because the petitioner cannot meet the criteria to file a second or successive § 2255 motion. Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002); Cradle v. U.S. ex rel. Miner, 290 F.3d 536, 538-39 (3d Cir. 2002). See also Gardner v. Warden Lewisburg USP, 845 F.3d 99, 103 (3d Cir. 2017) ("there are situations where the remedy under § 2255 is actually 'inadequate or ineffective,' but they are rare.").

In the Third Circuit, the seminal case on the application of § 2255's "savings clause" is In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997). Dorsainvil was convicted of using a gun in connection with a drug crime. He was so convicted notwithstanding that he did not "use" the gun but the gun was merely present in the car from which the drugs were to be bought. After he had exhausted his appeals and litigated a § 2255 motion, the Supreme Court in Bailey v. United States, 516 U.S. 137 (1995) construed the criminal statute under which Dorsainvil was convicted to exclude from the ambit of the statute mere presence of a gun at a drug crime, thus arguably rendering him actually innocent of the crime of using a gun in connection with a drug offense.

After Bailey was decided, Dorsainvil filed an application with the Court of Appeals in which he sought leave to file in the district court a second or successive § 2255 motion. The court denied Dorsainvil's application because he could not satisfy AEDPA's requirements for a second or successive § 2255 motion. That is, although the rule announced in Bailey was substantive and applied retroactively to cases on collateral review, Bousley v. United States, 523 U.S. 614, 620-21 (1998), it was one of

statutory construction and, therefore, did not constitute "a new rule of constitutional law . . . that was previously unavailable[.]" Dorsainvil, 119 F.3d at 247-48 (quoting 28 U.S.C. § 2255 (now at § 2255(h)) (emphasis added)). Nor did it qualify as "newly discovered evidence." Id. But recognizing that the Supreme Court's decision in Bailey meant that Dorsainvil might be "actually innocent," the court held that it would be a "miscarriage of justice" if he could not litigate his Bailey claim. Id. at 250-51. Thus, it concluded the "unusual circumstance" presented by Dorsainvil's situation rendered "the remedy afforded by § 2255 is 'inadequate or ineffective to test the legality of [Dorsainvil's] detention'" and he could, therefore, utilize § 2241 to raise his Bailey claim. Id.

The Supreme Court's decision in Rosemond is one of statutory interpretation. Therefore, similar to the circumstance in Dorsainvil, it appears that the Petitioner cannot utilize § 2255 to litigate his claim that he is being incarcerated for conduct that a new decision by the Supreme Court allegedly rendered non-criminal. His claim is not based on "newly discovered evidence" or "a new rule of *constitutional law*, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(1) and (2) (emphasis added). See also 28 U.S.C. § 2244(a).

Therefore, in accordance with Dorsainvil, it appears that the Petitioner may resort to a § 2241 habeas petition to litigate his Rosemond claim. Importantly, however, he will be entitled to habeas relief only if he demonstrates that he is "actually innocent" of the convictions at issue (Counts 3 and 5). United States v. Tyler, 732 F.3d 241, 246 (3d Cir. 2013) ("We have held that a § 2255 petition is 'inadequate' when a petitioner asserts a claim of 'actual innocence' on the theory that 'he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision' and our own precedent construing the Supreme Court's decision." (quoting Dorsainvil, 119 F.3d at 252)). To meet his burden, he must satisfy the "actual innocence" standard enunciated in Bousley v. United States, 523 U.S. 614 (1998), which requires that he "establish that 'in light of all the evidence, it is more likely

than not that no reasonable juror would have convicted him." Tyler, 732 F.3d at 246 (quoting United States v. Garth, 188 F.3d 99, 107 (3d Cir. 1999), which quoted Bousley, 523 U.S. at 623). See also Postconviction Remedies § 5:7. Because the point of the Court's inquiry is to determine whether Rosemond rendered non-criminal the acts for which he was convicted, the Petitioner must prove that "it is more likely than not that no reasonable juror" would convict him at Counts 3 and 5 if instructed in accordance with Rosemond.

The Petitioner has not met his burden. He does not dispute the Respondent's recitation of the facts or counter the Respondent's argument that the evidence at trial proved that he had advanced knowledge that the guns were going to be used in the two robberies that he aided and abetted. Essentially, the Petitioner's argument is that he is entitled to relief because the instruction given to the jury was violative of the Supreme Court's subsequent decision in Rosemond. But, as explained above, the issue before the Court is not whether an erroneous instruction was given. It is whether the Petitioner has shown that he is "actually innocent" and imprisoned for conduct Rosemond deemed to be non-criminal. Because he has failed to satisfy his burden of demonstrating that he is "actually innocent" under Rosemond, his request for habeas relief should be denied.

### **C. Certificate of Appealability**

28 U.S.C. § 2253 codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. Federal prisoner appeals from the denial of a habeas corpus proceeding are not governed by the certificate of appealability requirement. United States v. Cepero, 224 F.3d 256, 264-65 (3d Cir. 2000); 28 U.S.C. § 2253(c)(1)(B). As such, the Court should make no certificate of appealability determination in this matter.

**III. CONCLUSION**

For the foregoing reasons, it is respectfully recommended that the petition for a writ of habeas corpus be denied. Pursuant to the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Civil Rules, the parties are allowed fourteen (14) days from the date of this Order to file objections to this Report and Recommendation. Failure to do so will waive the right to appeal.

Brightwell v. Lehman, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

/s/ Susan Paradise Baxter  
SUSAN PARADISE BAXTER  
United States Magistrate Judge

Dated: February 22, 2017

cc: The Honorable Barbara Rothstein  
United States District Judge