No.__

IN THE
SUPREME COURT OF THE UNITED STATES

JOE FERNANDEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX OF PETITIONER JOE FERNANDEZ ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RUTH M. LIEBESMAN
Attorney for Petitioner
Joe Fernandez
36 Farview Terrace
Paramus, New Jersey 07652
201-617-7000

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RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th of December, two thousand eighteen.

PRESENT:

DENNIS JACOBS,
ROSEMARY S. POOLER,
RICHARD C. WESLEY,
Circuit Judges.

JOE FERNANDEZ,

Petitioner–Appellant,

-v.- **18-6**

UNITED STATES OF AMERICA,

Respondent-Appellee.

18-6
Fernandez v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PRESENT:

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JOE FERNANDEZ,

Petitioner–Appellant,

-v.- **18-6**

UNITED STATES OF AMERICA,

Respondent-Appellee.

FOR PETITIONER-APPELLANT: Ruth M. Liebesman, Paramus, NJ.

FOR RESPONDENT–APPELLEE: Russell Capone (with Sarah K. Eddy, on the brief), Assistant United States Attorneys, for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Hellerstein, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Joe Fernandez appeals from an order by the United States District Court for the Southern District of New York (Hellerstein, J.) denying his petition for a writ of habeas corpus. Fernandez was convicted after a jury trial of conspiracy to use interstate commerce facilities in the commission of murder-for-hire, in violation of 18 U.S.C. § 1958, and the use of a firearm in furtherance of a crime of violence resulting in the death of two victims, in violation of 18 U.S.C. §§ 924(j)(1) & (2). Fernandez argues that he is entitled to a new trial because the district court gave an incorrect instruction on aiding and abetting liability under § 924(c). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Fernandez argues that the instruction on aiding and abetting liability under § 924 was incorrect in light of the Supreme Court's decision in Rosemond v. United States, 572 U.S. 65 (2014). Rosemond held that a defendant must have had "advance knowledge" that a firearm would be used in the commission of the crime in order to be liable for aiding and abetting under § 924. Id. at 81. The jury charge in this case (given before Rosemond was decided) did not specifically require a finding of such "advance knowledge".

Because Fernandez did not argue that the jury instruction was incorrect on direct appeal (even though Rosemond was decided before his direct appeal was

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Because Fernandez did not argue that the jury instruction was incorrect on direct appeal (even though Rosemond was decided before his direct appeal was

filed), his habeas petition is defaulted unless he can "first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent'". Bousley v. United States, 523 U.S. 614, 622 (1998) (citation omitted).

As to "cause", Fernandez argues that his appellate counsel was ineffective in failing to raise this objection. See McCleskey v. Zant, 499 U.S. 467, 493-94 (1991) ("[C]onstitutionally ineffective assistance of counsel is . . . . cause." (internal quotation marks omitted)). Fernandez has a non-frivolous argument that his counsel's assistance fell "below an objective standard of reasonableness" because his appellate counsel failed to raise an objection to the aiding and abetting instruction based on Rosemond. Strickland v. Washington, 466 U.S. 668, 688 (1984). Rosemond was decided before the direct appeal was filed, and the jury instruction on aiding and abetting under § 924(c) was deficient under Rosemond.

However, Fernandez must demonstrate that he was prejudiced by the improper instruction to obtain collateral relief on his defaulted claim.

To demonstrate that he suffered prejudice from an error in a jury charge, Fernandez must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." United States v. Frady, 456 U.S. 152, 169 (1982) (citation omitted). It is not enough for the petitioner to show that "the instruction is undesirable, erroneous, or even universally condemned." Id. The petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage." Id. at 70. This Fernandez has not done.

The Government's theory at trial was that Fernandez was hired by his cousin, Patrick Darge, to help commit two murders; that Darge told Fernandez to bring a gun to back him up during the murders; and that Fernandez accompanied Darge to the murder site with a gun, and shot one of the two victims when Darge's gun jammed.

There was ample trial evidence to support a finding that Fernandez was aware in advance that a firearm would be used to commit the murders. Darge

testified that: he knew Fernandez owned a gun; Fernandez agreed to help Darge commit the murder-for-hire of two people; he told Fernandez to bring his gun; Fernandez agreed to bring a gun; Fernandez brought a gun and assembled it in front of Darge on the way to the site of the murders; and Fernandez brought the gun into the apartment building strapped to his shoulder and covered with his jacket. And according to testimony by an informant with whom Fernandez briefly shared a cell, Fernandez said that he was in jail because he participated in a crime with Darge and that Darge instructed him "to bring a weapon" when they "g[o]t together". Appellant's Br. 26. A third witness testified that Fernandez told him that he had fired his gun twice at the murder site.

Fernandez points out that regarding sufficiency of the evidence, some of the testimony was contradictory. For example, Darge's brother testified that Fernandez admitted that he fired first, and that Darge finished the job when Fernandez's gun jammed. However, because there was considerable evidence that Fernandez had advance knowledge of the use of a firearm in the commission of the murder-for-hire (and in fact brought a firearm to the murder site himself),[1] we cannot say that Fernandez has shown that the erroneous jury instruction worked to his "actual and substantial disadvantage". Frady, 456 U.S. at 170; see also United States v. Prado, 815 F.3d 93, 104-05 (2d Cir. 2016) (holding [1] that a defendant had not shown prejudice from a jury instruction that failed to comply with Rosemond where "[t]he evidence demonstrate[d] that, after the gun appeared, [the defendant] continued to play an active role in the crime" and [2] that a co-defendant was prejudiced by the erroneous instruction because "there [wa]s very limited evidence of advance knowledge of a gun or of [the co-defendant's] participation in the crime after the gun's appearance"). Considerable evidence supported Fernandez's guilt under the proper jury instruction, and he therefore has not satisfied the standard of prejudice required to overcome procedural default on an erroneous instruction claim.

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[1] The jury need not have found that Fernandez actually committed the murder to find him guilty of aiding and abetting under § 924, even in light of Rosemond. It need only have been found that he had advance knowledge that a firearm would be used in the commission of the murder-for-hire. The evidence amply supported that finding such that the instruction did not infect the entire trial.

Fernandez argues that the jury could have found from the evidence that he was involved in the murder but that he was not carrying a firearm and lacked advance knowledge that Darge would have a firearm. According to Fernandez, the jury could have believed Darge's testimony that Fernandez was involved, but rejected Darge's testimony that Fernandez brought a firearm to the scene or knew that Darge intended to bring a firearm--a finding that would align Darge's testimony with the (otherwise inconsistent) testimony of the other two primary witnesses. Fernandez argues that he was prejudiced because, if the jury made such a finding, they would have found him innocent under the correct instruction.

But while it might have been *possible* for the jury to credit the testimony in such a way and make such a finding, a mere possibility that the jury could have done so is not enough. See Frady, 456 U.S. at 170. Fernandez bears the burden of showing that the erroneous instruction actually disadvantaged him, not that prejudice was possible.

Finally, Fernandez argues in a footnote in his opening brief and in two pages in his reply brief that he is actually innocent, such that his habeas petition is not defaulted. That argument is plainly meritless. His only argument in support of this claim of innocence is that the witnesses who testified against him were not credible, because their testimony was inconsistent and they all stood to benefit from blaming Fernandez for the crime. He does not support this argument with evidence sufficient to demonstrate that "it is more likely than not that no reasonable juror would have convicted him." Bousley, 523 U.S. at 523. The jury was entitled to credit the witnesses who testified that Fernandez committed the crimes with which he was charged.

Accordingly, because Fernandez has not demonstrated cause and prejudice, his petition is procedurally defaulted.

We have considered the petitioner's remaining arguments and find them to be without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: December 04, 2018
Docket #: 18-6pr
Short Title: Fernandez v. United States of America

DC Docket #: 17-cv-4806
DC Court: SDNY (NEW YORK CITY)
DC Judge: Hellerstein

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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VERIFIED ITEMIZED BILL OF COSTS

Counsel for
_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the
_____

and in favor of
_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of March, two thousand nineteen.

Joe Fernandez,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

ORDER

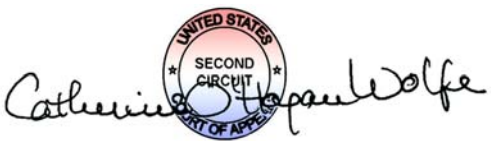
Docket No: 18-6

Appellant, Joe Fernandez, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOE FERNANDEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

17 Civ. 4806 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Joe Fernandez ("Petitioner") filed a timely pro se petition for a writ of habeas corpus on June 28, 2017, *see* 28 U.S.C. § 2255(f), challenging his conviction for conspiracy to commit murder for hire and using a firearm to commit murder. Petitioner alleges that the Court's jury charge was defective and that his counsel was constitutionally deficient for failing to raise these issues on direct appeal. For the reasons stated herein, the petition is denied.

Background

Pursuant to a superseding indictment filed on February 6, 2013, petitioner was charged with conspiracy to commit murder-for-hire, in violation of 18 U.S.C. § 1958, and using a firearm to commit murder in the course of that conspiracy, in violation of 18 U.S.C. § 924(j). Following a trial that concluded on March 7, 2013, the jury found petitioner guilty on both counts. On October 7, 2014, the Court sentenced petitioner to two consecutive life terms of imprisonment, followed by a five-year term of supervised release, and imposed a $200 special assessment. Petitioner's direct appeal was denied on May 2, 2016, *see United States v. Fernandez*, 648 F. App'x 56, 59 (2d Cir. 2016), and the Supreme Court denied the petition for a

writ of certiorari, *see Fernandez v. United States*, No. 17-5760, 2017 WL 4506869 (Oct. 10, 2017).

At trial, the government introduced evidence that Patrick Darge, Fernandez's co-conspirator, contracted with Alberto Reyes, Jose Rodriguez-Mora, and Manuel Suero to murder two agents of Mexican drug suppliers, Cuellar and Flores, for $180,000, thereby enabling Reyes and company to renege on a large drug debt. According to Darge, testifying as a government witness, he agreed to commit the murders and recruited his cousin, petitioner, Joe Fernandez, to act as the backup shooter. Trial Tr. at 255–56. Darge testified that he asked petitioner to participate because he knew him to be trustworthy, and he knew that petitioner had a gun that could be used in the murders. Trial Tr. at 273–74. Darge further testified that he told petitioner that he had been "hired to murder two guys," offered to pay petitioner $40,000 to assist him in the murders, and instructed petitioner to bring his own gun. Trial Tr. at 276–77. Darge testified that petitioner agreed to participate. Trial Tr. at 277.

The plan, according to Darge, was to commit the murders in the lobby of an apartment building in the Bronx on February 22, 2000, the site of an apartment used as a storehouse for drugs and money. Reyes was to bring the two victims to the elevator of the Bronx apartment while Darge and Fernandez lurked in a concealed area nearby. Darge testified that after he shot the first victim in the head, his gun jammed and he fled from the scene, but heard shots fired behind him. Trial Tr. at 328. According to Darge's testimony, petitioner arrived at the getaway car minutes later, parked a block away, stating that he "had to make sure they were both dead." Trial Tr. at 332. Cuellar and Flores, the victims, were later found dead in the apartment lobby, lying in a pool of their blood, the shell casings of the spent bullets lying on the lobby floor. Darge testified that Reyes paid him $180,000 for the murders later that day, and that he gave $40,000 to petitioner. Trial Tr. at 335.

Discussion

Petitioner filed this motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. As relevant here, § 2255 allows federal prisoner to collaterally attack a sentence on "the ground that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). However, it is well settled that "[a] habeas action is not intended to substitute for a direct appeal." *Fountain v. United States*, 357 F.3d 250, 254 (2d Cir. 2004). Therefore, a claim not raised on direct appeal is procedurally barred unless "the defendant establishes (1) cause for the procedural default and ensuing prejudice or (2) actual innocence." *United States v. Thorn*, 659 F.3d 227, 231 (2d Cir. 2011).

Petitioner raises two challenges to the jury instructions in his case: (1) that the Supreme Court's decision in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), decided after the trial in this case, changed the law governing aiding and abetting liability under 18 U.S.C. § 924(c); and (2) that the Court erroneously instructed the jury with respect to the term "use" of a firearm under the § 924(c). Relatedly, petitioner claims that his trial and appellate lawyers were ineffective, thereby excusing petitioner's failure to raise these issues on direct appeal. Because petitioner is appearing pro se, I must construe the petition liberally and interpret it "to raise the strongest arguments that [it] suggest[s]." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks omitted) (quoting *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir.2006)).

A. Petitioner's Challenge to the Aiding and Abetting Jury Instruction Is Procedurally Defaulted

Petitioner first claims that the jury instructions failed to adequately explain aiding and abetting liability under 18 U.S.C. § 924(c), which indirectly formed the basis for Count Two of the Indictment. Petitioner was convicted of violating 18 U.S.C. § 924(j), which criminalizes

causing "the death of a person through the use of a firearm" "in the course of a violation of" § 924(c). § 924(c), in turn, makes it unlawful to use a firearm in connection with "any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c).

Petitioner specifically focuses on *Rosemond v. United States*, 134 S. Ct. 1240 (2014), which held that a defendant can be convicted of aiding and abetting under § 924(c) only upon a showing that the defendant had "advance knowledge of a firearm's presence." *Rosemond*, 134 S. Ct. at 1251. When petitioner was convicted on March 7, 2013, *Rosemond* had not yet been decided. However, even prior to *Rosemond*, the Second Circuit required more than "advanced knowledge" that a firearm would be used under § 924(c) to sustain a conviction. *See United States v. Medina*, 32 F.3d 40, 45–47 (2d Cir. 1994) (holding that "the language of the statute requires proof that [the defendant] performed some act that directly facilitated or encouraged the use or carrying of a firearm," and rejecting the view of other Circuits that required only "knowledge that a firearm will be used").[1]

Petitioner is correct that under *Rosemond* (or the Second Circuit's pre-*Rosemond* rule), my jury instructions did not explain the requirements of the Second Circuit rule. At petitioner's trial, the jury was given a standard charge on aiding and abetting, instructing the jury to consider whether petitioner "participate[d] in the crime charged as something he wished to bring about or associate himself with . . . or [sought] by his actions to make the criminal venture succeed." Trial Tr. at 1017–19. Neither party objected to the charge. Indeed, in their proposed charge submissions, neither party mentioned anything other than the aiding and abetting charge that I gave.

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[1] The parties do not dispute whether *Rosemond* applies retroactively on collateral review. In general, *Teague v Lane*, 489 U.S. 288, 306–10 (1989), and *Bousley v. United States*, 523 U.S. 614, 619–21 (1998), teach that changes in substantive rules generally apply retroactively. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Because *Rosemond* does just that, it applies retroactively to petitioner's case. *See Farmer v. United States*, 867 F.3d 837, 842 (7th Cir. 2017) (holding that "*Rosemond* thus established a new substantive rule that is retroactive to cases on collateral review").

However, this does not entitle petitioner to the relief he seeks. Petitioner did not raise this issue on direct appeal, and therefore his claims are procedurally defaulted unless he can show either: (1) cause for the procedural default and actual prejudice, or (2) that he is actually innocent. *See Thorn*, 659 F.3d at 231. Because petitioner cannot demonstrate either, his claim is procedurally barred.

Under the cause-and-prejudice test, the Supreme Court has instructed courts to construe "cause" narrowly. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (holding "that 'cause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him"). One way to show "cause" under this test is to show that a "claim is so novel that its legal basis [was] not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 16 (1984). But petitioner's challenge is not and was not novel. *Rosemond*, on which petitioner relies, was decided on March 4, 2014, and petitioner's direct appeal was filed on November 3, 2014. Petitioner therefore cannot reasonably suggest that his claim was "novel" under *Reed v. Ross*. And petitioner fails to distinguish himself from other defendants who challenged their convictions under § 924(c) by citing *Rosemond* just after it was decided. *See United States v. Prado*, 815 F.3d 93, 102 (2d Cir. 2016) (holding on a direct appeal that the jury instructions were "erroneous under *Rosemond* because they provide no instruction that the jury must find that the defendants had advance knowledge of the gun at a time that they could have chosen not to participate in the crime"); *see also Smith v. Murray*, 477 U.S. 527, 537 (1986) (finding that a petitioner could not show that his claim was novel because similar claims had been "percolating in the lower courts").

Recognizing this difficulty, petitioner argues that although this issue is not novel and was not raised on direct appeal, he should succeed nonetheless because the failure of his appellate counsel to challenge the jury instructions made his representation constitutionally ineffective. Although "an attorney's errors during an appeal on direct review may provide cause

to excuse a procedural default," *Martinez v. Ryan*, 566 U.S. 1, 11 (2012), a mistake alone is not sufficient. To establish a claim for ineffective assistance of counsel, petitioner must meet the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). First, petitioner must "demonstrate that his counsel's performance 'fell below an objective standard of reasonableness' in light of 'prevailing professional norms.'" *United States v. Cohen*, 427 F.3d 164, 167 (2d Cir. 2005) (quoting *Strickland*, 466 U.S. at 688). Second, petitioner must show actual prejudice—that is, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Thus, both the cause-and-prejudice test and the *Strickland* test require petitioner to show actual prejudice. *See Rajaratnam v. United States*, 2017 WL 887027, at *2 (S.D.N.Y. Mar. 3, 2017).

As to the first prong, petitioner faces a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Petitioner bears the burden of showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. However, I need not reach the issue of whether appellate counsel's performance was objectively reasonable. As the Supreme Court has explained: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697; *see also Rafael Romero v. United States*, 2017 WL 4516819, at *4 (S.D.N.Y. Sept. 21, 2017).

Petitioner has not met his burden of showing actual prejudice under the second prong of *Strickland*. The critical testimony at trial came from Patrick Darge, petitioner's co-conspirator. Darge testified at trial that petitioner not only knew in advance that a gun would be used to commit the crime, but that part of his job was to bring and be prepared to use his own gun. Trial Tr. at 276–81. And the jury reasonably believed that petitioner fired several shots, hitting the victims. Trial Tr. at 308. There was no set of facts that would have allowed the jury

to convict petitioner without believing that he had "advanced knowledge of a firearm's presence." *Rosemond*, 134 S. Ct. at 1251. There can be no reasonable doubt regarding that proposition. *See Strickland*, 466 U.S. at 694 (requiring a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Under *Strickland*, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 693). Petitioner has not shown a reasonable probability that the result at trial would have been different had the jury been instructed according to *Rosemond*.

To the extent that petitioner also suggests that he is actually innocent, this claim is similarly without merit. *Thorn*, 659 F.3d at 231 (providing that a petitioner can overcome procedural default upon a showing of actual innocence). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Petitioner must demonstrate that "in light of all the evidence, it is more likely than not that no juror would have convicted him." *Id.* (internal quotation marks omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995)). As explained above, even had the jury instructions explained the "advanced knowledge" requirement under § 924(c), there would not have been a different result. The evidence introduced at trial established petitioner's guilt beyond a reasonable doubt, even if the "advanced knowledge" had been charged. This is not an "extraordinary case" that warrants application of the actual innocence doctrine. *House v. Bell*, 547 U.S. 518, 536 (2006) (internal quotation marks omitted) (quoting *Schlup*, 513 U.S. at 324).

Because petitioner failed to raise his challenge to the jury instructions on direct appeal, his claim is procedurally defaulted. *See Thorn*, 659 F.3d at 231.

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Fernandez v. United States

UNITED STATES COURT OF APPEALS
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SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th of December, two thousand eighteen.

PRESENT:

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RICHARD C. WESLEY,
Circuit Judges.

JOE FERNANDEZ,

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UNITED STATES OF AMERICA,

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UNITED STATES COURT OF APPEALS
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ROSEMARY S. POOLER,
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Circuit Judges.

JOE FERNANDEZ,

Petitioner–Appellant,

-v.- **18-6**

UNITED STATES OF AMERICA,

Respondent-Appellee.

18-6
Fernandez v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th of December, two thousand eighteen.

PRESENT:

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B. The Court's Jury Instruction Under § 924(c) Was Sufficient

Petitioner separately argues that the Court's jury instruction with respect to the "use" of a firearm under § 924(c) was deficient under *Bailey v. United States*, 516 U.S. 137 (1995). *Bailey* teaches that, in order to sustain a conviction, "§ 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." *Bailey*, 516 U.S. at 143. Petitioner claims that the jury instructions did not capture this requirement.

Not only is this claim procedurally defaulted, it is also without merit. At trial, the jury instructions specified that "[i]n order to prove that the defendant used a firearm, the government must prove beyond a reasonable doubt an *active employment* of a firearm by the defendant during and in relation to the commission of the crime of violence." Trial Tr. at 1013 (emphasis added). The instructions went on to clarify that "use" can include "brandishing, displaying, or referring to a weapon so that other persons know that defendant had a firearm available," Trial Tr. at 1013, as well as actually firing the weapon. The jury instructions were therefore entirely consistent with *Bailey*.

In any event, petitioner's claim is also procedurally defaulted because it was not raised in his direct appeal. As explained above, to overcome procedural default, petitioner would need to show either: (1) cause for the default and actual prejudice, or (2) actual innocence. *See Thorn*, 659 F.3d at 231. As to the cause-and-prejudice test, petitioner cannot show any reason that his trial or appellate counsel should have raised this issue, given that the jury instruction was consistent with applicable law and the fact of use was so clear. Petitioner therefore cannot show that his lawyers "'fell below an objective standard of reasonableness' in light of 'prevailing professional norms.'" *Cohen*, 427 F.3d 164 (2d Cir. 2005) (quoting *Strickland*, 466 U.S. at 688); *see also Abdur-Rahman v. United States*, 2016 WL 1599491, at *2 (S.D.N.Y. Apr. 19, 2016) (noting that "[f]ailure to raise an issue in a brief rarely constitutes ineffective assistance of

counsel"). Moreover, the evidence introduced at trial established that the guns here were certainly "actively employed" during the murders—they were fired numerous times, resulting in the death of two people. Petitioner therefore cannot show any prejudice under *Strickland.*

C. Petitioner's Claim of Ineffective Assistance of Counsel at the Plea State Is Without Merit

Finally, petitioner suggests in his reply brief that his trial counsel failed to properly advise him during the plea bargaining stage. *See Lafler v. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012). Specifically, petitioner claims that "[h]ad counsel explained the *Rosemond* 'advance knowledge' requirement and *Bailey*'s 'active employment' of a firearm meaning . . . Movant would not have proceeded to trial, but would have entered a non-cooperative plea." See Motion in Response to the Government's Memorandum of Law, ECF 4, at 9.

Petitioner has provided no evidence tending to show that his trial counsel's performance was deficient under the test set out in *Strickland.* Petitioner cannot show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

For the reasons discussed herein, the petition is denied. The clerk is instructed to enter judgment, close the file, and tax costs as appropriate. As to appealability, however, petitioner has sufficiently raised a substantial legal question, and I grant a certificate of appealability, *see* 28 U.S.C. § 2253(c)(1), particularly since the sufficiency of my charge is in issue.

SO ORDERED.

Dated: November 13, 2017
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

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