No.

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARD SCAGGS,

Petitioner,

v.

A. CIOLLI,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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I. QUESTION PRESENTED FOR REVIEW

Whether this Court's decision in *United States v. Rosemond* was available to petitioner in a motion filed pursuant to 28 U.S.C. § 2241 under the "savings clause" or "escape hatch" where he demonstrated his "actual innocence" with a jury question that specifically foreshadowed the *Rosemond* advance knowledge requirement?

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II. OPINION BELOW

The Ninth Circuit, in an unpublished opinion, affirmed the district court's dismissal of petitioner's motion pursuant to 28 U.S.C. § 2241. (Appendix A.)

III. JURISDICTION

The Ninth Circuit affirmed the district court on February 10, 2023. (App. A.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL PROVISION AND RULE AT ISSUE

The Fifth Amendment, U.S. Const., states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. § 2241 provides in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2255(e) provides in relevant part:

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, 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.

V. STATEMENT OF THE CASE

In 2008, petitioner was convicted of aiding and abetting murder in violation of 18 U.S.C. §§ 1111 & 2, fifteen years after the shooting death of Fireman Apprentice Mark Anton Smith at the 32nd Street Naval Station in San Diego. He was not the triggerman; his brother David Scaggs was.

The killing occurred during the robbery of Mark Smith after he withdrew money from an ATM machine. Four defendants were charged in the indictment, and the main issue at trial was whether petitioner participated in the robbery with his brother or stayed in the car. Petitioner was the odd man out among the four defendants charged.

Co-defendants Maurice Overton, Jerwayne Balentine, and David Scaggs, along with Askari Morris, had served together in the military in San Diego. They met when they were stationed on the U.S.S. Ranger, and continued to be a tight group. Petitioner, on the other hand, lived in Northern California. He was visiting his brother David when the murder occurred.

On Saturday, January 16, 1993, defendants Overton, Balentine, David Scaggs, and petitioner drove in Overton's car to the 32nd Street Naval Station. They went to the area of the base which housed the Exchange, with a

McDonalds, pay phones, and an ATM. Balentine and David Scaggs were part of Overton's regular crew. Petitioner was not. Overton testified that he had not seen petitioner many times before, "maybe four, six," and that he was not involved with the many robberies of civilians and military personnel Overton committed with the rest of his crew.

The government's theory was that all four codefendants got out of the car and stood at the pay phones near the ATM machine so they could watch people withdraw money. With respect to which of the four co-defendants approached the victim, the government posited that Overton and Balentine returned to the car while petitioner and his brother David Scaggs remained near the ATM machine. This argument relied on the heavily impeached testimony of cooperating co-defendant Overton.

Petitioner gave a statement to investigators that placed him in the car at the Naval Station, but other than Overton's testimony, there was no concrete evidence that petitioner exited the car before or during the robbery. The individuals who observed some of the action did not provide any identification testimony.

Petitioner, when interviewed later by a cold case investigator from San Diego, was adamant that he had stayed in the car while the robbery took place. The government, through cooperating co-defendant Overton, argued that he accompanied his brother David during the robbery and shooting. The

government's theory, which placed petitioner in the thick of things, was not supported by the evidence at trial other than the testimony of the heavily impeached Overton.

VI. PROCEEDINGS BELOW

The trial court instructed the jury that a defendant is guilty of felony murder if he, or another participant whom he aided and abetted, unlawfully killed the victim, and this occurred in the knowing and willful perpetration of the crime of robbery. The court also instructed the jury that a defendant could be found guilty if he knowingly and intentionally aided another person to commit robbery and did so before the robbery was completed. The closing argument of petitioner's counsel focused on the evidence that showed petitioner was not part of the group that had planned and carried out the robbery.

During deliberations, the jury sent a question about the aiding and abetting instruction and the requirement that the defendant act before the crime was completed. The jury asked the court to "define when the crime was completed. Is the escape considered part of the crime?" Petitioner objected to

giving any supplemental instruction. After considering the parties' arguments, the trial court instructed the jury that

> [t]he crime of robbery continues beyond the immediate scene of the robbery and necessarily encompasses the escape. The crime is completed when the robber's concern of being apprehended is no longer imminent or have arrived [sic] at a point of temporary safety. You should consider these responses or definitions along with the entirety of [the aiding and abetting instruction] and all of the other instructions provided to you.

The jury returned a verdict of guilty. Petitioner appealed, and his conviction and sentence were affirmed. *United States v. Scaggs*, 377 Fed. Appx. 653, 655 (9th Cir. April 26, 2010). Petitioner did not file a motion under 28 U.S.C. § 2255 within the one-year statute of limitations. In his 2241 petition, he advised the district court that his attorney did not communicate with him about the timelines for a petition for certiorari or § 2255 motion. He filed a motion to recall the mandate from his direct appeal with the Ninth Circuit, but it was denied. Relying on this Court's decision in *United States v. Rosemond*, 572 U.S. 65 (2014), petitioner argued that he was actually innocent of felony murder because *Rosemond's* statutory interpretation of 18 U.S.C. § 2 effected a material change in the applicable law that was unavailable during trial and direct appeal.

Petitioner's 2241 motion was filed in the Eastern District of California, where he was incarcerated. The district court, without developing the record, dismissed the petition for lack of jurisdiction on the basis that it did not satisfy the escape hatch under 28 U.S.C. § 2255(e). Petitioner filed a timely appeal on June 8, 2020, and the Ninth Circuit granted a certificate of appealability. After submitting the case on the briefs, the court denied relief in an unpublished memorandum disposition. (App. A.)

This Court should grant certiorari to consider this important question.

VII. REASON FOR GRANTING THE WRIT

A. Petitioner made a sufficient showing of "actual innocence" under *Bousely* where the jury de facto questioned whether escape was part of the crime.

In *Bousley v. United States,* 523 U.S. 614 (1998) this Court held that in order to satisfy the "actual innocence" requirement "petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (internal quotation marks omitted).

The Ninth Circuit denied relief on the basis that petitioner had not demonstrated that he was "actually innocent" of murder. (App. A.) The court

said petitioner's argument that the jury's question demonstrated they were persuaded by the defense case that petitioner stayed in the car and was not part of the robbery plan, was mere "speculation." But it was far from that-- the jury's question tracked exactly the concern discussed by this Court in *Rosemond,* and the district court's response was incorrect. That incorrect response allowed petitioner to be convicted even if he did not have the required advance knowledge.

Imposing criminal liability on petitioner when the jury appeared to believe he joined the robbery only after the shooting of the victim, which resulted in a life sentence, is a heavy penalty. The unfairness and disproportionate nature of this penalty was discussed by Judge Rakoff in *United States v. Gyamfi*, 357 F. Supp. 3d 355, 360 (S.D.N.Y. 2019), as part of his analysis on *Rosemond's* imposition of a higher *mens rea* for aiders and abettors in the felony murder context:

> Background principles of criminal liability also weigh against the Government's proposed rule. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Accordingly, the Supreme Court has not hesitated to "read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *United States v. U.S. Gypsum Co*. 438 U.S. 422, 437 (1978). That presumption is at its zenith when the

> offense at issue is murder, carrying a maximum sentence of death. 18 U.S.C. § 924 (j) (1); *see Staples v. United States*, 511 U.S. 600, 616 (1994) ("Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*."). Thus, holding the defendant liable for aiding and abetting the greater offense of murder, even if he intended only to aid and abet the lesser offense of robbery, would be in significant tension not only with the Supreme Court's pronouncements in *Rosemond* but with decades, even centuries, of American criminal jurisprudence.

United States v. Gyamfi, 357 F. Supp. 3d 355, 360 (S.D.N.Y. 2019) (some internal citations omitted).

Here, the combination of the impeachment of Overton, who is the only one who placed petitioner outside of the car, and the jury's question to the judge regarding petitioner could join the robbery and be guilty of felony murder, demonstrate that petition did, indeed, sufficiently prove up his "actual innocence," and he should be able to litigate his 2241 motion and try to set aside his life sentence.

VIII. CONCLUSION

Based on the above, this Court should grant certiorari to consider this important question.

Respectfully submitted,

GAIL IVENS

DATED: April 19, 2023

s/ Gail Ivens
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