No. 16-775

In the Supreme Court of the United States

DARWIN MONTANA, PETITIONER

v.

TOM WERLICH, WARDEN

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
MICHAEL A. ROTKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner is entitled to seek federal habeas corpus relief under 28 U.S.C. 2241 based on his claim that his conviction for aiding and abetting the use of a firearm during and in relation to a bank robbery, in violation of 18 U.S.C. 924(c), is invalid under *Rosemond* v. *United States*, 134 S. Ct. 1240 (2014).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

In the Supreme Court of the United States

No. 16-775

DARWIN MONTANA, PETITIONER

v.

TOM WERLICH, WARDEN

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 829 F.3d 775. The opinion of the district court (Pet. App. 23a-32a) is unreported. A prior opinion of the court of appeals is reported at 199 F.3d 947.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2016. A petition for rehearing was denied on September 27, 2016 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on December 16, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1998, following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of aiding and abetting a bank

robbery, in violation of 18 U.S.C. 2113(a) and 2 (Count 2), and aiding and abetting the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2 (Count 3). Presentence Investigation Report (PSR) ¶¶ 1-3. The district court sentenced petitioner to 322 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2a; Gov't C.A. Br. 4. The court of appeals affirmed. 199 F.3d 947. In 2001, petitioner moved to vacate, set aside, or correct his sentence under 28 U.S.C. 2255(a). Mot. to Vacate 1-13. The district court dismissed the motion. Mem. Op. & Order 1-5; Pet. App. 2a.

In 2014, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 in the United States District Court for the Southern District of Illinois (the district of his confinement), seeking to vacate his conviction and sentence on Count 3 based on *Rosemond* v. *United States*, 134 S. Ct. 1240 (2014). Pet. App. 2a. The district court dismissed the petition, *id.* at 23a-33a, and the court of appeals affirmed, *id.* at 1a-22a.

1. In March 1996, petitioner met James Dodd while the two were incarcerated. Following their release from prison, Dodd would regularly contact petitioner to ask him for rides to the west side of Chicago, often to buy drugs. 6/9/98 Tr. (P.M.) (6/9/98 Tr.) 15-16. During those trips, Dodd was often armed, and he told petitioner that he carried a gun with him for protection because he had been shot five times. *Id.* at 17-19.

In late 1997 or early 1998, Dodd told petitioner that he was "thinking about doing a bank robbery." 6/9/98 Tr. 20. A week or two later, Dodd once again told petitioner that he was thinking about "tak[ing] care of

business," which Dodd later explained meant robbing a bank. *Id.* at 21. On January 22, 1998, Dodd paged petitioner and asked for a ride to the local General Assistance office to pick up his welfare check. *Id.* at 5-6. Petitioner answered the page and drove Dodd to the office, where Dodd picked up an assistance check. Dodd went across the street and cashed the check. *Id.* at 6.

Petitioner and Dodd then drove to the west side of town to buy drugs. 6/9/98 Tr. 6. Later that day, Dodd donned a black skull cap, a black neck scarf, a three-quarter-length black coat, and baggy black pants before instructing petitioner to park the car in the parking lot at a Jewel-Osco supermarket, which was across the street from the Superior Bank. *Id.* at 30-31. Dodd then exited the vehicle and walked into the bank. Once inside, Dodd "flashed" a loaded handgun at a teller and demanded that she give him all of her $50 and $100 bills. *Id.* at 31; 6/8/98 Tr. 21. The teller obliged and handed Dodd approximately $2369. 6/8/98 Tr. 21, 31. Dodd exited the bank, walked across the street, and entered petitioner's car, where he displayed the money he had stolen. 6/9/98 Tr. 32-33. Dodd placed the money and a gun that he was carrying on the arm rest between the seats and told petitioner to drive away. *Id.* at 33.

As petitioner drove away, the police, who had been contacted by the bank teller, pursued the vehicle. Petitioner attempted to elude them by driving through a residential neighborhood at speeds up to 65 miles per hour. After a ten-minute chase, petitioner crashed the car into the porch of a home. Petitioner and Dodd were arrested at the scene. Following their arrest, Dodd and petitioner made statements falsely

asserting that a third person had actually committed the robbery. See Pet. App. 53a-61a; see also PSR ¶¶ 9-10.

2. A federal grand jury in the Northern District of Illinois returned an indictment charging petitioner and Dodd with conspiracy to commit bank robbery, in violation of 18 U.S.C. 371 (Count 1); bank robbery, in violation of 18 U.S.C. 2113(a) and 2 (Count 2); and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2 (Count 3). Pet. App. 4a; PSR ¶¶ 1-2. Dodd pleaded guilty to Counts 2 and 3. Pet. App. 4a. Petitioner pleaded not guilty and elected to stand trial. PSR ¶ 19.

a. Petitioner called Dodd as a defense witness. Dodd testified that he never told petitioner he was planning the robbery. Pet. App. 57a; see *id.* at 61a-62a. Dodd admitted that, on two earlier occasions, he shared a "thought about wanting to rob a bank" with petitioner, but he testified that petitioner said that he "didn't want nothing to do with it." *Id.* at 57a; see *id.* at 58a. Dodd also testified that he did not tell petitioner he had a gun or show a gun to him on the day in question. *Id.* at 59a. On cross-examination, Dodd admitted that he "often" carried a gun with him for protection, and he further admitted that petitioner knew, from earlier conversations with Dodd, that Dodd "carr[ied] a gun." 6/9/98 Tr. 17-19.

Before the close of the evidence, Dodd handed a note to petitioner's lawyer and asked the lawyer to give the note to petitioner's mother. After reading the note, petitioner's mother told the lawyer that it was a demand for money by Dodd in exchange for his testimony. 199 F.3d at 948. The following morning, a deputy marshal overheard a conversation in which

Dodd told petitioner to tell his (petitioner's) father that "it's going to be $10,000" for Dodd's testimony. 6/10/98 Tr. 237. The district court allowed the marshal to testify in rebuttal about what he had overheard, *id.* at 235-238, and also permitted the jury to learn (consistent with the parties' stipulation, *id.* at 238-242), that Dodd had passed a note to petitioner's mother. 199 F.3d at 948.

In its closing argument, the government maintained that petitioner was guilty of conspiring to rob the bank with Dodd based on conversations and numerous phone contacts that preceded the robbery, and that he was guilty of aiding and abetting Dodd's robbery of the bank by serving as the driver of the getaway car. 6/10/98 Tr. 243-246. The government further argued that petitioner was criminally responsible for Dodd's use of a gun in furtherance of the robbery, even though petitioner did not himself use a gun, because petitioner was a co-conspirator of Dodd's and was therefore "responsible for and liable for the acts and consequences done in furtherance of that conspiracy or the natural consequences of the conspiracy." *Id.* at 247; see *Pinkerton* v. *United States*, 328 U.S. 640, 646-647 (1946) (holding that co-conspirators are vicariously liable for substantive crimes committed by their co-conspirators in furtherance of the collective endeavor).

The district court instructed the jury (without objection) that it could convict petitioner of "aid[ing] or abet[ting]" Dodd's robbery of the bank (as charged in Count 2) if it found, beyond a reasonable doubt, that he "knowingly associated with the criminal venture, participate[d] in it, and tr[ied] to make it succeed." 6/10/98 Tr. 283. The court further instructed the jury

that, to convict petitioner on Count 3, the government had to prove, beyond a reasonable doubt, that petitioner "is guilty of the charge of bank robbery in Count 2 * * * [and] that James Dodd knowingly used or carried a handgun during and in relation to the bank robbery." Pet. App. 76a-77a.

The jury convicted petitioner on Counts 2 and 3 and acquitted him on Count 1. PSR ¶ 3. The district court sentenced petitioner to 322 months of imprisonment, consisting of 262 months of imprisonment on Count 2 and a mandatory consecutive sentence of 60 months on Count 3, to be followed by three years of supervised release. Pet. App. 2a; Gov't C.A. Br. 4; see 18 U.S.C. 924(c)(1)(A).

b. The court of appeals affirmed. 199 F.3d 947. The court rejected petitioner's argument that his trial counsel had been ineffective in passing the note from Dodd to petitioner's mother and in permitting the marshal to testify to Dodd's out-of-court statements about the $10,000 payment demand. *Id.* at 948-950.

3. In 2001, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255(a), in which he re-asserted the same ineffective-assistance-of-counsel arguments that he had unsuccessfully raised on direct appeal. Mot. to Vacate 1-13. The district court dismissed the motion. Mem. Op. & Order 1-5; Pet. App. 2a.

4. a. In March 2014, this Court held in *Rosemond* that, to convict a defendant of a Section 924(c) offense on an aiding-and-abetting theory, the government must prove that "the defendant actively participated in the underlying drug trafficking or violent crime" and that he had "advance knowledge that a confeder-

ate would use or carry a gun during the crime's commission." 134 S. Ct. at 1243.

b. In September 2014, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Southern District of Illinois, the district of his confinement. He contended that, under *Rosemond*, his Section 924(c) conviction (Count 3) must be vacated because the jury was not instructed that, to convict petitioner of aiding and abetting Dodd's use of a gun in relation to the robbery, the jury had to find that petitioner had advance knowledge that Dodd would use a gun. See Pet. C.A. Br. 7-8.

Without requesting a response from the government, the district court dismissed the petition. Pet. App. 23a-32a. The court recognized that under Section 2255(e), referred to as the habeas corpus savings clause, a federal prisoner who is authorized to apply for relief under Section 2255 may not file a habeas corpus petition under Section 2241 unless the remedy provided by Section 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e); see Pet. App. 27a-28a. The court explained that, under governing circuit precedent, see, *e.g.*, *In re Davenport*, 147 F.3d 605, 609-610 (7th Cir. 1998), Section 2255 is "inadequate or ineffective" when three conditions are met: (1) the defendant's claim is based on a new rule of statutory interpretation; (2) the rule applies retroactively and the defendant "could not have invoked" the rule in his first Section 2255 motion; and (3) the error of which the defendant complains is a "fundamental defect." Pet. App. 28a (citation omitted). The court concluded that those conditions were not satisfied here because this Court's decision in

Rosemond "has not been applied retroactively to a collateral challenge." *Id.* at 30a.

c. The court of appeals affirmed. Pet. App. 1a-22a. The court agreed with petitioner that the jury was not adequately instructed on aiding-and-abetting liability for a Section 924(c) offense in light of *Rosemond*, *id.* at 13a, and it analyzed petitioner's claim under the three-part *Davenport* test, *id.* at 18a-22a. The court agreed with the parties that *Rosemond* was a decision of statutory interpretation that could, in theory, support recourse to Section 2241. *Id.* at 18a. The government conceded that the district court had erred in concluding that *Rosemond* did not apply retroactively, and the court of appeals agreed. *Id.* at 18a-19a.[1] The court concluded, however, that petitioner could not

---

[1] A decision that "narrow[s] the scope of a criminal statute by interpreting its terms" to require the government to prove facts not previously required by Supreme Court precedent is substantive and therefore retroactive. *Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016) (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004)). *Rosemond* substantively changed the mens rea requirement for aiding-and-abetting liability under Section 924(c). The Court noted that, under general principles of aider-and-abettor liability, a defendant must "actively participate[] in a criminal scheme knowing its extent and character." *Rosemond*, 134 S. Ct. at 1249. In the context of a Section 924(c) offense, the Court held that the "defendant's knowledge of a firearm must be *advance* knowledge," meaning "knowledge that enables him to make the relevant legal (and indeed, moral) choice" when deciding whether to participate in the underlying crime of violence, as opposed to knowledge gained during the commission of the crime. *Ibid.* (emphasis added). That holding narrowed the scope of Section 924(c)'s scienter requirement and thus applies retroactively. See *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) (holding that *Bailey* v. *United States*, 516 U.S. 137 (1995), which narrowed the scope of another element of Section 924(c), applied retroactively).

invoke the savings clause because nothing prevented petitioner from raising this claim in his initial Section 2255 motion. *Id.* at 19a-21a.

The court of appeals explained that, insofar as petitioner asserted that accessory liability could not be predicated on proof of *constructive* knowledge that a co-defendant would use a gun, the court's decision in *United States* v. *Woods*, 148 F.3d 843 (7th Cir. 1998), involved a showing of actual knowledge and pointedly declined to address whether actual knowledge was required. *Id.* at 846. Thus, "[i]t was * * * open to [petitioner] to argue, at the time of his appeal and at the time of his initial collateral attack under [Section] 2255, that the statutory offense of aiding and abetting the carrying of a firearm during a crime of violence required that he have actual knowledge that his confederate was carrying a firearm." Pet. App. 21a. Petitioner thus failed to demonstrate that Section 2255 was inadequate or ineffective, the court concluded, and for that reason it affirmed the dismissal of his petition. *Id.* at 22a.

ARGUMENT

Petitioner contends (Pet. 17-19) that the court of appeals erred in concluding that he could have raised his current argument based on *Rosemond* v. *United States*, 134 S. Ct. 1240 (2014), in earlier proceedings. The judgment of the court of appeals is correct, and any disagreement in the courts of appeals on the standard for determining whether a Section 2255 motion is "inadequate or ineffective" to test the legality of a prisoner's detention, 28 U.S.C. 2255(e), does not warrant this Court's review because petitioner's claim would fail in any circuit. The petition for a writ of certiorari should be denied.

1. a. Section 2255 of Title 28 of the United States Code generally prevents a federal prisoner from raising challenges to his conviction or sentence by filing a petition for a writ of habeas corpus under 28 U.S.C. 2241. According to the habeas corpus savings clause, federal district courts "shall not * * * entertain[]" a federal prisoner's application for a writ of habeas corpus unless "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. 2255(e). In 1996, Congress restricted the grounds on which federal prisoners may file second or successive Section 2255 motions by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220. AEDPA limited the availability of successive Section 2255 relief to cases involving either (1) persuasive new evidence that the prisoner was not guilty of the offense, or (2) a new rule of constitutional law made retroactive by this Court to cases on collateral review. See 28 U.S.C. 2255(h); cf. *Tyler* v. *Cain*, 533 U.S. 656, 661-662 (2001) (interpreting the state-prisoner analogue to Section 2255(h)). AEDPA did not, however, provide for successive Section 2255 motions based on intervening statutory decisions.

This Court has not addressed the circumstances under which a Section 2255 motion is "inadequate or ineffective to test the legality of [a prisoner's] detention." 28 U.S.C. 2255(e). The courts of appeals, however, including those that permit Section 2241 petitions under the savings clause based on intervening statutory interpretations, have generally agreed on several governing principles. They recognize that Section 2255 is not inadequate or ineffective simply

because relief has been denied under that provision, see *Pack* v. *Yusuff*, 218 F.3d 448, 452 (5th Cir. 2000); or because a prisoner has been denied authorization to file a second or successive Section 2255 motion, see, *e.g.*, *United States* v. *Barrett*, 178 F.3d 34, 50 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); or because a prisoner is barred from pursuing Section 2255 relief once the statute of limitations has expired, see, *e.g.*, *Hill* v. *Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003). See generally *Charles* v. *Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam) (collecting circuit cases supporting the above-stated principles). A contrary rule, as the courts have explained, would nullify the limitations that Congress has placed on federal collateral review. See *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000); *Barrett*, 178 F.3d at 50; *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998); *Triestman* v. *United States*, 124 F.3d 361, 376 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997).

Two courts of appeals have found that Section 2255(e) never permits resort to habeas corpus based on intervening statutory interpretation decisions. *McCarthan* v. *Director of Goodwill Indus.-Suncoast, Inc.*, No. 12-14989, 2017 WL 977029, at *1 (11th Cir. Mar. 14, 2017) (en banc) (overruling prior circuit precedent and holding that an intervening decision "does not make a motion to vacate a prisoner's sentence 'inadequate or ineffective to test the legality of his detention.'"); *Prost* v. *Anderson*, 636 F.3d 578, 590 (10th Cir. 2011) (denying Section 2241 relief on the ground that an initial motion under Section 2255 would not have been inadequate or ineffective even though circuit precedent would likely have foreclosed the prisoner's claim), cert. denied, 565 U.S. 1111

(2012). Some courts of appeals, however, have found Section 2255 to be "inadequate or ineffective" when (1) an intervening decision of this Court establishes that the prisoner is in custody for an act that the law does not make criminal; (2) the prisoner's claim was foreclosed by (erroneous) circuit law at the time of sentencing, direct appeal, and a first motion under Section 2255; and (3) the prisoner cannot satisfy the requirements for bringing a second or successive motion under Section 2255. See *Reyes-Requena* v. *United States*, 243 F.3d 893, 903-904 (5th Cir. 2001); *Jones*, 226 F.3d at 333-334; *Davenport*, 147 F.3d at 609-612; *Triestman*, 124 F.3d at 378-380; *Dorsainvil*, 119 F.3d at 251-252.[2]

b. Petitioner contends that the court of appeals erred in holding that, even though an intervening decision may sometimes allow a prisoner to seek federal habeas corpus relief, he could not do so here because he failed to show that his *Rosemond* claim was foreclosed by circuit precedent at the time of his trial, direct appeal, and initial Section 2255 motion. Pet. App. 21a ("When we examine the state of the law of this circuit at the time of his trial, direct appeal, and, indeed, at the time of the initial [Section] 2255 proceeding, we must conclude that there was an opening for the argument [petitioner] now raises."). That claim does not warrant further review. The court reviewed its precedent, including *United States* v.

---

[2] This case does not present any issue concerning whether the savings clause is available to remedy sentencing errors. Compare, *e.g.*, *Hill* v. *Masters*, 836 F.3d 591, 599-600 (6th Cir. 2016) (remedy available for mandatory Sentencing Guidelines career-offender errors), with *In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011) (remedy not available for that class).

Taylor, 226 F.3d 593, 596 (7th Cir. 2000)), on which petitioner now principally relies (Pet. 18), and held that a *Rosemond*-based argument was not foreclosed. Although petitioner disputes that *Taylor* left room for that argument, a disagreement over the contours of pre-*Rosemond* law in the Seventh Circuit, which that court resolved through review of its own cases, does not merit this Court's attention. There is therefore no warrant for revisiting the court of appeals' conclusion that petitioner had an opportunity, unobstructed by any since-abrogated decisional law, to argue at the time of trial, direct appeal, and first Section 2255 motion that his conviction for aiding and abetting Dodd's use of a firearm during the robbery was predicated on an erroneous theory of after-acquired knowledge.

Even assuming that *Rosemond* altered the principle announced in *Taylor* (and that petitioner could not have challenged that principle), he still had an unobstructed procedural shot to make his alternative *Rosemond*-based argument that he could not be guilty of aiding and abetting a Section 924(c) violation unless he shared Dodd's intent to use a firearm during or in relation to the bank robbery. Petitioner contends that *Rosemond* overturned a separate strand of Seventh Circuit case law holding that the government need not prove that an accomplice shared the principal's intent to use a gun in the commission of a robbery. See Pet. 17 (citing *United States* v. *Torres*, 809 F.2d 429, 433 (7th Cir. 1987) (holding the defendant was "in error when he contend[ed] that the government must establish that he and [the principal] shared a criminal intent to use a firearm in the commission of the robbery")). Petitioner contends (Pet. 17) that *Torres*

"remained the law of the circuit" through the completion of his initial Section 2255 motion and was later abrogated by *Rosemond*. Petitioner's portrayal of the state of the law on that point is incomplete.

In decisions issued after *Torres*, the court of appeals explained that, to prove accessory liability under Section 2, "it is necessary [for the government] to demonstrate that [the would-be accessory] 'shared the criminal intent of [the principal].'" *United States* v. *Moore*, 936 F.2d 1508, 1527-1528 (7th Cir.) (quoting *United States* v. *Moya-Gomez*, 860 F.2d 706, 756 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989)) (holding that defendant shared criminal intent (knowledge) for a Section 922(g) conviction because he "was clearly aware of [co-defendant's] use of a gun in" the robberies), cert. denied, 502 U.S. 991 (1991). Those decisions suffice to show that the intent-based argument petitioner presses was not foreclosed earlier and that it would not have been futile for petitioner to advance this argument. Cf. *Davenport*, 147 F.3d at 610 (argument is foreclosed if "[t]he law of the circuit [i]s * * * firmly against [the defendant]" and there is no basis for "challeng[ing] * * * settled law").

2. Petitioner contends (Pet. 9-16) that this Court's intervention is warranted to resolve a circuit split on the reach of the habeas corpus savings clause. But the circuit conflict on that issue is not implicated here. As explained above (p. 12, *supra*), even in those courts of appeals that have concluded that habeas relief is warranted in circumstances where a prisoner is in custody for an act the law does not make criminal under an intervening statutory interpretation decision of this Court narrowing the scope of the statute, the prisoner must still show that he was foreclosed from making

his argument at earlier stages by since-abrogated circuit precedent. And in two other courts of appeals, his claim would fail under an even more restrictive approach. *Id.* at 11-12.

Petitioner does not dispute that, to prove that Section 2255 was inadequate, he bears the burden of showing, *inter alia*, that he could not have meaningfully pressed his claim at trial, on appeal, or in his first Section 2255 motion. Rather, petitioner's claim is that the courts of appeals describe this requirement in different ways. As petitioner notes (Pet. 11-14), decisions addressing this requirement refer to the prisoner's burden to show that he "had an unobstructed procedural opportunity to raise the claim," Pet. 11 (citation and internal quotation marks omitted); that the claim was "open" to the prisoner to raise earlier, Pet. 14 (citation omitted); or that it would have been "futile" to have pressed the claim earlier because it was "squarely foreclosed" by then-extant circuit precedent, Pet. 13-14 (citation omitted). Although the courts describe the standard using different words, those semantic variations make no difference to the outcome in this case. According to the Seventh Circuit's view of its own cases, petitioner had an unobstructed procedural shot to raise the claim; the claim was "open" to him; the argument was not foreclosed by circuit precedent; and it would not have been futile to press the point. See pp. 12-14, *supra*.

Petitioner asserts (Pet. 9) that "[t]he law of some circuits would have permitted [petitioner] to pursue Section 2241 relief," see Pet. 15-16, but he does not explain which circuits would have permitted his habeas petition or why. He has made no showing that a different phrase describing the concept of foreclosure

would have produced a different result in his case. Petitioner describes (Pet. 10) *Triestman* as a case holding that "a petitioner who is detained for conduct that is no longer criminal, but who cannot access habeas review of that detention" would likely be permitted to invoke the savings clause based on due process concerns. But the Second Circuit in *Triestman* stated that those due process concerns would arise in a case where Congress had cut off all avenues for an innocent person to obtain relief, and the prisoner "could not have raised his claim of innocence * * * in an effective fashion at an earlier time." 124 F.3d at 379. The Second Circuit thus follows the same basic approach as the Seventh, and it would not assist petitioner here.

3. In any event, petitioner's case is an unsuitable vehicle in which to address any variation in the standard for evaluating whether a claim could have been raised earlier because petitioner has not shown that he stands convicted of an act the law does not make criminal. A rational jury, properly instructed after *Rosemond*, could have found beyond a reasonable doubt that petitioner had advance knowledge that Dodd intended to use a gun to rob the bank. Although no direct evidence established that petitioner knew in advance that Dodd intended to use a gun, the strong circumstantial evidence of his knowledge would readily permit a rational jury to infer that petitioner had the requisite knowledge. The record establishes that petitioner knew Dodd often carried a gun with him for protection and that petitioner had seen Dodd carrying a gun before. See p. 4, *supra*. The record also reflects that petitioner and Dodd had discussed the possibility of robbing banks on at least two occasions before the

robbery in question. *Ibid.* Petitioner's argument that he lacked advance knowledge is based entirely on Dodd's trial testimony that petitioner did not know Dodd had a gun on the day in question, but a jury is not required to accept exculpatory testimony, even if unrebutted. See, *e.g.*, *United States* v. *Howard*, 413 F.3d 861, 864 (8th Cir. 2005); cf. *United States* v. *Navarro*, 737 F.2d 625, 636 (7th Cir. 1984) ("Nor was the jury required to believe defendants' testimony, arguably exculpatory, to the extent not contradicted by the government's witnesses * * * In sum, giving due respect to the jury's exclusive authority to make factual and credibility determinations, there was sufficient evidence upon which it could find, beyond a reasonable doubt, defendants' predisposition to commit the offenses for which they were convicted."). Here, of course, Dodd's testimony was rebutted by circumstantial evidence that he and petitioner had had numerous discussions about robbing banks and by petitioner's knowledge that Dodd regularly carried a gun. And the government also introduced evidence that Dodd's favorable and implausible trial testimony had been purchased. See pp. 4-5, *supra*. Under those circumstances, petitioner has failed to demonstrate that he stands convicted of engaging in an act that the law does not make criminal.

Furthermore, to prove that he has been convicted of a non-existent crime, petitioner should also have to negate the possibility that he was guilty of Dodd's use of the gun under Section 924(c) based on the *Pinkerton* theory of vicarious co-conspirator liability advanced by the government in closing argument, even though the jury was not instructed on that theory. Cf. *Bousley* v. *United States*, 523 U.S. 614, 619-620 (1998)

(describing defendant's burden to overcome procedural default on an actual-innocence theory). *Pinkerton* liability, where it applies because of defendant's joinder of a conspiracy, establishes a defendant's liability as a principal for the foreseeable acts committed within the scope and in furtherance of the agreement. *United States* v. *Adams*, 789 F.3d 713, 714 (7th Cir. 2015). The Court's decision in *Rosemond*, which concerns accessory liability under 18 U.S.C. 2, does not disturb that separate basis for liability. See, *e.g.*, *United States* v. *Edmond*, 815 F.3d 1032, 1047 (6th Cir. 2016) ("*Rosemond* dealt with the aiding and abetting theory of liability for Section 924(c), not with the *Pinkerton* co-conspirator theory of liability. The two theories are distinct, and we allow the use of either theory to reach a [Section] 924(c) conviction."), petitions for cert. pending, Nos. 16-5441 and 16-5461 (filed Aug. 1, 2016), and cert. denied, 137 S. Ct. 619 (2017) (No. 16-160); accord *United States* v. *Hare*, 820 F.3d 93, 105 (9th Cir.), cert. denied, 137 S. Ct. 224 (2016); *Adams*, 789 F.3d at 714-715. *Pinkerton* liability does not require that the defendant be charged with conspiracy. See *United States* v. *Zackery*, 494 F.3d 644, 648-650 (8th Cir. 2007) (agreeing with the Third and Seventh Circuits), cert. denied, 552 U.S. 1261 (2008); but see *United States* v. *Nakai*, 413 F.3d 1019, 1023 (9th Cir.) (holding conspiracy must be charged), cert. denied, 546 U.S. 995 (2005). Petitioner was charged with conspiracy and acquitted, but that acquittal does not preclude a finding of *Pinkerton* liability. See *United States* v. *Pisman*, 443 F.3d 912, 914-915 (7th Cir.) (acquittal on conspiracy charge did not preclude *Pinkerton* liability on the substantive crime), cert. denied, 549 U.S. 955 (2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
MICHAEL A. ROTKER
Attorney

MARCH 2017