No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FRANKIE BEQIRAJ, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant has a constitutional right to be present during a conference at which the parties exercise their peremptory challenges to strike prospective jurors.

2. Whether a waiver of a defendant's right to be present during the exercise of peremptory challenges can be found merely from his failure to protest, when it was not clear he knew the purpose of the in-chamber's conference and the record does not reflect any opportunity to consult with counsel about which jurors to strike.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

PETITION FOR WRIT OF CERTIORARI

Petitioner Frankie Beqiraj respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming his federal conviction.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-4a) is reported at United States v. Beqiraj, __ Fed. Appx. __, 2019 U.S. App. Lexis 37648 (2d Cir. 2019).

JURISDICTIONAL STATEMENT

The Court of Appeals issued its opinion and entered judgment on December 19, 2019. Pet. App. 1a.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This case involves the following constitutional provision and federal rule:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of liberty . . . without due process of law.

Federal Rule of Criminal Procedure 43 provides, in relevant part:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

STATEMENT OF THE CASE

A. Proceedings Below

In a one-count indictment, petitioner was charged with conspiring to sell four drugs (over one kilogram of heroin, and unspecified amounts of cocaine, oxycodone, and alprazolam) between July 2016 and January 2017. The indictment further charged that heroin use caused the deaths of two individuals.

The main witness against petitioner was a cooperator, who admitted he delivered the heroin that killed one of the individuals. He testified he did this for petitioner, who ran the operation. Petitioner did not dispute that he was involved with the cooperator in distributing controlled substances. However, the defense maintained that the heroin that killed both victims was sold to them by the cooperator, as part of his independent drug business with his own supplier.

Petitioner was convicted of narcotics conspiracy, as to all four drugs alleged. With respect to heroin, however, the jury found his involvement in a

lesser amount than charged – more than 100 grams but less than one kilogram – despite the cooperator's contrary testimony. The jury also found that petitioner was not responsible for one death, but convicted him of causing the other man's death. This resulted in an increase in the mandatory minimum sentence from 5 to 20 years, 21 U.S.C. § 841(b)(1)(B)(i), as well as a substantial increase in petitioner's offense level under the sentencing guidelines.

During jury selection, the court and counsel agreed on who would sit on petitioner's jury in his absence, in the robing room. On appeal, petitioner argued that there was no record evidence that he was given an opportunity to confer with counsel beforehand, and that the record did not show he waived his right to be present when peremptory challenges were exercised. He also challenged the sufficiency of the evidence supporting his conviction.

A panel of the Second Circuit affirmed petitioner's conviction on December 19, 2019. The decision is included in the appendix hereto.

B. Statement of Relevant Facts Concerning Voir Dire Challenges

At the beginning of jury selection, in the midst of its opening remarks to the panel, the court announced that some jurors may be excused "peremptorily," meaning that "one of the attorneys will request . . . to have you excused without

giving any reason" (5-6 [emphasis added]).[1] Some prospective jurors were questioned before a luncheon recess. There is no record evidence that petitioner spoke with his attorney during the recess. On the contrary, when counsel asked to raise a trial issue before leaving the courtroom himself, petitioner had already gone (73-74).

After lunch, more panel members were questioned. Immediately before retiring to the robing room with counsel, the court announced that it was sometimes necessary "to talk to the lawyers outside the hearing of the jurors" (121). "So right now I am going to be going with the parties and counsel to the robing room, which is an office I have right outside that door, and we are going to discuss the peremptory challenges that counsel may have. When that is finished – it shouldn't take too long – we will come back out and I think we will be able to select our jury. So if you would just remain in place and counsel would join me in the robing room" (121-22 [emphasis added]). "Peremptory challenge" was not explained, and no opportunity was provided for counsel to confer with petitioner.

The next record entry, after the statement quoted above, was "(In the robing room)" (122). The court asked defense counsel, "So [defense counsel], just so the

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[1] Numbers without prefix refer to a separately paginated volume of minutes of jury selection, held on June 5, 2018.

record is clear, we don't have Mr. Beqiraj for the challenges. Is that okay with you?" (id. [emphasis added]). He replied simply, "Yes, your Honor, it is" (id.). The parties then proceeded to use their allotted peremptory challenges to strike jurors (122-26). Back in open court, the court announced, "we have selected 14 jurors," whose names the deputy clerk would call. She did, and the panel filled the jury box as directed (127-28). The record next states that "(Jury of 12 and two alternates impaneled and sworn)," after which the court proceeded with preliminary instructions to the jury.

C. The Direct Appeal to the Court of Appeals

On appeal to the Second Circuit, petitioner challenged the sufficiency of the evidence that he caused the death of an individual through distribution of drugs. He also argued that he was deprived of his right to be present when, in the court's robing room, prospective jurors were struck and the jurors who would sit in judgment at his trial were chosen. He asked that his case be remanded to the District Court for further fact-finding. The Court of Appeals rejected both claims and affirmed petitioner's conviction. See decision.

As to the right to be present claim, the Court of Appeals held that "[d]efendant's assertion that he neither knew he had a right to be present nor was instructed that he had a right to be present is not dispositive on the question of

whether he waived the right. . . . The trial court's actions in open court gave Defendant 'sufficient minimal knowledge' of the nature and purpose of the peremptory challenge procedure," and his failure to object constituted a waiver. Decision, App. 4a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to consider (a) whether a defendant has the right to be present when, after potential jurors are questioned, the parties exercise their peremptory challenges, and (b) if so, important questions about conditions precedent, if any, for establishing defendant's waiver of the right.

A criminal defendant has a due process right to be present at all stages of the proceedings, "to the extent that a fair and just hearing would be thwarted by his absence." Snyder v. Massachusetts, 291 U.S. 97, 108 (1934). Jury selection is one such stage. See Gomez v. United States, 490 U.S. 858, 873 (1989); see also Rule 43 of the Federal Rules of Criminal Procedure (codifying this right and specifically referencing the impaneling of the jury).

The Supreme Court has never squarely addressed whether a defendant may be excluded from a conference at which the parties exercise their peremptory challenges. There is a difference of opinion among the Circuits. For example, the Second Circuit has held that the defendant's constitutional right to be present

attaches, acknowledging that his presence "serve[s] the purpose of preserving [his] 'perogative to challenge a juror simply on the basis of the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another'.'" Cohen v. Senkowski, 290 F.3d 485, 490 (2d Cir. 2002), quoting United States v. Crutcher, 405 F.2d 239, 244 (2d Cir. 1968), which quotes Lewis v. United States, 146 U.S. 370, 376 (1892). The Ninth Circuit, in contrast, has opined that the exercise of peremptories concerns only questions of law: it "involves only the application of legal rules, such as whether the parties have used no more than the allotted number of peremptory challenges." United States v. Reyes, 764 F.3d 1184, 1190-91 (9th Cir. 2014). Thus, the defendant "may be excluded [from such a conference] at the district court's discretion." Id., at 1191. This case presents an opportunity for the Court to resolve the issue.

Assuming the defendant has the right to be present, granting the petition would enable the Supreme Court to formulate rules or guidelines as to how the right could be implicitly waived. The Second Circuit found an implicit waiver in this case, based on a three-part test it has fashioned: "[the defendant's] presence during the questioning of jurors, his opportunities to confer with counsel, and the formal announcement of the stricken and seated jurors in open court." Cohen v. Senowski, supra, 290 F.3d at 490. If all three criteria were met, the defendant will

be deemed "sufficiently present to satisfy the Constitution." Id. It noted that many "sister circuits" had similarly found the constitutional right to be satisfied "if a defendant is given an opportunity to register his opinions with counsel after juror questioning and is present when the exercise of strikes is given formal effect." Id.

Here, the record does not reflect any chance for petitioner to talk with his lawyer about who should be struck before the challenges were made. There is nothing in the record to suggest the two were together for any part of the luncheon recess. In fact, the record reflects that petitioner left the courtroom immediately, and that his lawyer stayed behind to discuss a trial issue with the prosecutor and court. More important, prospective jurors were questioned both before and after lunch, and a determination as to who should be excused – using the finite number of peremptory challenges allowed to the defense – could not be made until the entire panel had been vetted. Petitioner was never given the opportunity to express his views to counsel, for immediately after all the questioning ended, the judge announced he would retire to the robing room and invited counsel to join him. Counsel did not ask if he could confer with his client, and no consultation is indicated.

Nor does the record reflect petitioner's waiver of his right to be present, either express or implied. He was not advised of his right on the record, and

counsel did not claim that he had done so privately. Counsel had that opportunity, when the court asked him, in the robing room, if petitioner's absence "was okay with you" (emphasis added). It would have been natural for counsel to note that it was also "okay" with his client, if that was the case, but he did not.

The record also fails to show an implied waiver by petitioner. Although the court stated in petitioner's presence it was going to discuss "the peremptory challenges that counsel may have," it did not explain what this legalese meant. Moreover, petitioner had no experience that could have informed him. Although he had numerous prior convictions, they were all based on guilty pleas (see PSR ¶¶ 34-61) – this was his first trial. Adding to the opacity, the court strongly intimated that the strikes were wholly dependant on the lawyers' views, with no input from the defendant himself.

The Supreme Court held long ago that a waiver is "an intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Further, "'[c]ourts should indulge every reasonable presumption against waiver' of fundamental constitutional rights." Id. (citation omitted). Accordingly, an implied waiver should be found only if the nature of the proceeding from which the defendant is excluded is made clear to him. If the

petition is granted in this case, the Court will be able to resolve this important issue as well.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Beverly Van Ness

BEVERLY VAN NESS
Attorney-at-Law
Counsel for Petitioner Frankie Beqiraj

Dated: January 23, 2020

APPENDIX

Court of Appeals' Opinion, United States v. Beqiraj, No. 19-133-cr (2d Cir. December 19, 2019), 2019 U.S. App. Lexis 37648

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 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 19th day of December, two thousand nineteen.

PRESENT: JOSÉ A. CABRANES,
RAYMOND J. LOHIER JR.,
Circuit Judges,
CHRISTINA REISS
District Judge.[*]

UNITED STATES OF AMERICA,

Appellee,

v.

FRANKIE BEQIRAJ,

Defendant-Appellant,

FABRICE DIAZ,

Defendant.

19-133-cr

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[*] Judge Christina Reiss, of the United States District Court for the District of Vermont, sitting by designation.

FOR APPELLEE: David Denton, Elizabeth Hanft, Anna M. Skotko, *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

FOR DEFENDANT-APPELLANT: Beverly Van Ness, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **AFFIRMED.**

Defendant-Appellant, Frankie Beqiraj ("Defendant"), appeals from a December 28, 2018 judgment of conviction following a trial before Judge Berman and a jury. Superseding Indictment S1 17 Cr. 315 (RMB) charged Defendant, in one count, with participating in a narcotics conspiracy to distribute heroin and other narcotics, in violation of 21 U.S.C. § 846. The indictment also alleged that heroin distributed by the conspiracy caused the deaths of Robert Vivolo ("Vivolo") and Leonides Madrid ("Madrid"). Defendant was convicted by the jury. The jury found in a special interrogatory that Defendant was guilty of conspiring to distribute and possess with intent to distribute at least 100 grams of heroin but less than one kilogram of heroin, and that such conspiracy resulted in Vivolo's death. The jury did not hold Defendant liable for Madrid's death. Judge Berman sentenced Defendant to 300 months' imprisonment, a sentence he is currently serving. On appeal, Defendant challenges the sufficiency of the evidence of his conviction. He also argues that his constitutional right to be present was violated when the parties exercised their peremptory juror challenges in Judge Berman's robing room, without Defendant present. We otherwise assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal. We find all of Defendant's arguments without merit and affirm the judgment of the District Court.

I.

Defendant argues there was insufficient evidence to support his conviction. Specifically, he challenges the sufficiency of the evidence supporting the conclusion that the conspiracy caused the death of Vivolo. We find no merit in this argument.

"We review sufficiency of evidence challenges *de novo*, but defendants face a heavy burden, as the standard of review is exceedingly deferential." *United States v. Baker*, 899 F.3d 123, 129 (2d Cir. 2018) (internal quotation marks omitted). "We must view the evidence in the light most favorable to the [G]overnment, crediting every inference that could have been drawn in the [G]overnment's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight

of the evidence." *Id.* (internal quotation marks and brackets omitted). "[W]e will sustain the jury's verdict if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks omitted) (emphasis in original).

The Government offered substantial evidence at trial that Defendant's conspiracy caused Vivolo's death. This included testimony from a cooperating co-conspirator, Fabrice Diaz ("Diaz"). Diaz testified that on the morning after Vivolo's death, Defendant told Diaz during an in-person conversation between them that Defendant "had seen [Vivolo] the night before and he had given [Vivolo] two bags of heroin." Trial Transcript ("Tr.") at 231. Diaz further testified that Defendant repeated that admission on multiple separate occasions. *Id.* at 232. The Government also offered text messages from Vivolo's phone that corroborated Diaz's testimony. Government Exhibit 100A; Tr. at 414-426. These text messages indicated that Defendant had a drug-dealing relationship with Vivolo dating back to February 2016. Text messages from Vivolo's phone also show that on the night before Vivolo died—the night Defendant is alleged to have sold Vivolo two bags of heroin at Vivolo's home—Vivolo texted Defendant asking for drugs and indicating that he was on his porch and would see Defendant pull up to make the sale.

Defendant argues that Diaz's testimony could not be trusted and that the jury had found Diaz not credible with regard to other aspects of his testimony. Defense counsel at trial subjected Diaz to rigorous cross-examination. Defense counsel also attacked Diaz's credibility and alleged inconsistencies in summation. We must defer to the jury's credibility determinations of witnesses. *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011). The jury was also permitted to believe some parts of Diaz's testimony and disregard others. *United States v. Norman*, 776 F.3d 67, 78 (2d Cir. 2015). Additionally, our deference to the jury's determination of witness credibility does not change simply because a witness testified pursuant to a government cooperation agreement. *United States v. Glenn*, 312 F.3d 58, 64 (2d Cir. 2002). Because we are required to "defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses," *United States v. Payne*, 591 F.3d 46, 60 (2d Cir. 2010), and to view the evidence both in totality and in the light most favorable to the Government, we conclude that there was sufficient evidence to sustain the conviction under Count One.

II.

Defendant also argues that he was deprived of his constitutional right to be present during an *in camera* session where the parties exercised their peremptory juror challenges, without Defendant present. The factual circumstances presented here are similar to those in *Cohen v. Senkowski*, 290 F.3d 485 (2d Cir. 2002). There we held that Cohen did not have a right to be present during the in-chambers exercise of juror challenges, where Cohen was "represented by counsel at these sessions, [ ] given an opportunity to consult with counsel before the sessions began, and [where] the challenges were later effectuated in open court." *Id.* at 490. Assuming *arguendo* that the

factual circumstances presented here are distinguishable and that Defendant did have a right to be present, we conclude that Defendant impliedly waived that right through his conduct.

"Although trial courts must vigorously safeguard a criminal defendant's right to be present, a defendant may expressly or effectively waive the right." *United States v. Fontanez*, 878 F.2d 33, 36 (2d Cir. 1989). Defendant's assertion that he neither knew he had a right to be present nor was instructed that he had a right to be present is not dispositive on the question of whether he waived the right. *Cohen*, 290 F.3d at 491-492. The trial court's actions in open court gave Defendant "sufficient minimal knowledge" of the nature and purpose of the peremptory challenge procedure. *Id.* at 491 (internal quotations omitted); *see* Tr. at 5-6, 121-122. Defendant was represented by counsel throughout the entire *voir dire* process. He was present for all other parts of the *voir dire*, including the impaneling of the final jury. At no point, however, did he raise the objection he makes now. Accordingly, we conclude that, under the circumstances presented here, Defendant waived his right to be present during the *in camera* juror challenges.

CONCLUSION

We have reviewed all of the arguments raised by Defendant on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the December 28, 2018 judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk