
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DONNELL MURRAY

Petitioner,

against

UNITED STATES OF AMERICA

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT**

/s/ Bruce R. Bryan

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ISSUES PRESENTED FOR REVIEW

1. Whether Murray's conviction on Count One should be reversed because there is insufficient evidence after *Davis* that the jury found two or more predicate acts of racketeering?
2. Whether there is insufficient evidence to support the conviction under Count Two that Murray specifically intended to aid and abet Johnson in the assault and attempted murder of rival gang members at the chicken restaurant?
3. Whether the district court erred in its supplemental instruction to the jury that it could find that Murray acted as a principal in the chicken restaurant shooting alleged in Count Two, when the Indictment and the government said that Murray was liable under an aiding and abetting theory?
4. Whether the district court erred when it advised Murray about the plea offers, and in particular when it did not advise Murray of the pending decision in *Davis*?
5. Whether the district court erred when it did not suppress items seized during the execution of an arrest warrant at Murray's apartment when, among other things, police did not have specific and articulable facts that Murray might be present?
6. Whether the district court erred when it did not adjourn the trial date to substitute new counsel after it became apparent Murray and his assigned counsel were in conflict?

7. Whether the district court's 235-month sentence was substantively unreasonable?

PARTIES TO PROCEEDINGS

The Petitioner in this Court is Donnell Murray. The Respondent is the United States of America.

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**PETITION FOR WRIT OF CERTIORARI
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Petitioner, Donnell Murray, respectfully prays that a writ of certiorari issue to review the judgment and Summary Order of the United States Court of Appeals for the Second Circuit, wherein the Second Circuit held: (1) there was sufficient evidence to support Murray's conviction under Count One; (2) there was sufficient evidence to support the conviction under Count Two that Murray specifically intended to aid and abet Johnson in the assault and attempted murder of rival gang members at the chicken restaurant; (3) the district court did not err in its

supplemental instruction to the jury that it could find that Murray acted as a principal in the chicken restaurant shooting alleged in Count Two, despite that the Indictment and the government said that Murray was liable under an aiding and abetting theory; (4) the district court did not err when it advised Murray about the plea offers, and in particular when it did not advise Murray of the pending decision in *Davis*; (5) the district court did not err when it did not suppress items seized during the execution of an arrest warrant at Murray's apartment; (6) the district court did not err when it did not adjourn the trial date to substitute new counsel after it became apparent Murray and his assigned counsel were in conflict; and (7) the district court's 235-month sentence was not substantively unreasonable.

OPINION BELOW

A copy of the Summary Order of the United States Court of Appeals for the Second Circuit, dated June 22, 2021, has not yet been published. The citation is *United States v. Murray*, 861 Fed. App'x 483 (2d Cir. 2021). The Summary Order is reproduced in Appendix A, *infra*. A copy of the order denying Murray's Petition for rehearing and/or rehearing *en banc*, dated October 21, 2021 is reproduced in Appendix B.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit as set forth in the Summary Order in *United States v. Murray*, 861 Fed. App'x 483 (2d Cir. 2021) is dated and was entered on June 22, 2021. The Order denying petition for rehearing and/or rehearing *en banc* is dated and was entered on October 21, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court for the Southern District of New York had jurisdiction of this case pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves, in part, the construction of the Fourth, Fifth and Sixth Amendments of the United States Constitution, 18 U.S.C. § § 2; 1962 (c) & (d);

3553(a), and FRCP 11. The pertinent texts of the Constitution and statutes are set forth in Appendix C, *infra*.

STATEMENT OF THE CASE

Murray appealed from a judgment of conviction and sentence entered in the Southern District of New York (Gardephe, J.) after a jury trial for conspiracy to violate the racketeering laws of the United States through a pattern of racketeering activity (RICO) in violation of 18 U.S.C. §1962(d) (Count One); assault and attempted murder in-aid-of racketeering in violation of 18 U.S.C. §1959(a) (Count Two); conspiring to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. §§846 and 841(b)(1)(A) (Count Four); and using, possessing, carrying, brandishing, and discharging a firearm in connection with the charged racketeering and narcotics conspiracy in violation of 18 U.S.C. §924(c) (Count Five).

The jury trial commenced on February 19, 2019. Murray was found guilty on the foregoing charges on March 27, 2019. On September 19, 2019, the court dismissed the conviction under Count Five for violation of 18 U.S.C. §924(c) in light of this Court's decision in *United States v. Davis*, ___ U.S. ___, 139 S.Ct. 2319 (2019). On November 4, 2019, the district court sentenced Murray to 235 months incarceration. On November 15, 2019, the Judgment the Conviction was filed. On November 25, 2019, Murray filed a notice of appeal.

On appeal to the United States Court of Appeals for the Second Circuit, Murray contended, among other things, that (1) his conviction on Count One should be reversed because there was insufficient evidence after *Davis* that the jury found two or more predicate acts of racketeering; (2) there was insufficient evidence to support the conviction under Count Two that Murray specifically intended to aid and abet Johnson in the assault and attempted murder of rival gang members at the chicken restaurant; (3) the district court erred in its supplemental instruction to the jury that it could find that Murray acted as a principal in the chicken restaurant shooting alleged in Count Two, when the Indictment and the government said that Murray was liable under an aiding and abetting theory; (4) Murray was rendered ineffective assistance of counsel on the plea offers, and the district court erred when it advised Murray about the offers, because Murray was not advised of the pending decision in *Davis*; (5) the district court erred when it did not suppress items seized during the execution of an arrest warrant at Murray's apartment when, among other things, police did not have specific and articulable facts that Murray might be present; (6) Murray's counsel was ineffective on multiple other grounds; (7) the district court erred when it did not adjourn the trial date to substitute new counsel after it became apparent Murray and his assigned counsel were in conflict; and (8) the district court's 235-month sentence was substantively unreasonable.

The Second Circuit held as to the claim there was insufficient evidence to support Count One and Count Two, “[t]here was ample evidence to support the jury’s finding that Murray participated in a pattern of racketeering based on the narcotics trafficking crimes alone.” As to Murray’s claims regarding the verdict form, the court held that it had “rejected a requirement that juries answer ‘special interrogatories as to which specific predicate acts each defendant agreed would be committed.’” Furthermore, the court said “the form specific[d] that a ‘pattern’ of narcotics activity was required..., and the [district] court instructed the jury that a pattern consists of ‘[t]wo or more acts and offenses’ within a “category” of crime.” Also as to Count Two, the Second Circuit held that “[e]nough circumstantial evidence existed for a rational trier of fact to conclude that Murray knowingly drove Johnson to the restaurant to aid and abet an assault.”

The Second Circuit held that “the district court did not constructively amend the crime charged in Count Two by instructing the jury that the named defendants could be found guilty whether they committed the act or aided and abetted its commission” because “[t]he federal aiding and abetting statute, 18 U.S.C. § 2, does not penalize conduct apart from the substantive crime with which it is coupled.” The court held that “[t]he district court also did not err in denying Murray’s motion to suppress evidence obtained during a search of his apartment pursuant to an arrest warrant [] [b]ecause Murray’s driver’s license and statements during a previous arrest indicated that the apartment at issue was his residence.”

As to the claim that the court improperly interfered with plea discussions, the Second Circuit held that “[t]he record indicates that the district court simply confirmed that Murray had rejected two prior plea offers” and that “[t]he conversation contained no persuasive or coercive language at all.” Therefore, the court found no violation of Rule 11(c)(1).

Moreover, the court said “the district court did not exceed its discretion in denying Murray’s request for new counsel months before trial,” because, among other things, “Murray initially acquiesced to proceeding with trial counsel and requested new counsel only when the court explained that finding new counsel would become more difficult closer to the trial date.” Finally, the court held “Murray’s sentence was not substantively unreasonable” because, among other things, “[t]he court properly analyzed the Section 3553(a) factors and sentenced Murray to a term of imprisonment within the applicable Guidelines range.” The court “decline[d] to reach the merits of Murray’s arguments regarding purportedly ineffective assistance of counsel.”

REASONS FOR GRANTING THE PETITION

As discussed below, certiorari should be granted because, among other things, the Summary Order of the Second Circuit conflicts with decisions of this Court, decisions of other circuits, and several of its own decisions. This case also involves important questions of first impression and public importance.

As to Count One, the verdict form contained special interrogatories asking the jury whether the government had proven certain categories of predicate acts necessary to sustain a conviction. The jury found that the government had “not proven” all categories with the exception of one. Specifically, Question “D” of the verdict sheet asked:

D. If you have found the defendant guilty of Count One, then please indicate whether the pattern of racketeering activity that the defendant agreed would be committed involved the distribution of controlled substances, possession of controlled substances with the intent to distribute them, or conspiracy to distribute or possess with intent to distribute controlled substances:

DONNELL MURRAY

PROVEN X NOT PROVEN

Question “E” of the verdict form pertained to *Apprendi*. As to Murray, the jury left the answers blank:

E. If you checked “Proven” for Question D **and** you concluded that the defendant you are considering committed conspiracy to distribute controlled substances, or conspiracy to possess controlled substances with the intent to distribute then, did the defendant either have personal involvement with, or was it reasonably foreseeable to him that the narcotics conspiracy involved: 5 kilograms or more of cocaine, 280 grams or more of cocaine base, in a form commonly known as “crack,” and/or one kilogram or more of heroin, over the course of the conspiracy?

Check all that apply:

DONNELL MURRAY

5 KILOGRAMS COCAINE 280 GRAMS CRACK 1 KILOGRAM HEROIN

On appeal, Murray contended that, at most, the jury's findings on the verdict form only established that Murray committed one predicate act of a single drug crime because Question "D" was in the disjunctive. It listed types of controlled substance offenses separated by the word "or." Murray contended that without a further interrogatory asking whether Murray committed more than one drug offense, the jury failed to find two or more predicate acts to support the RICO conspiracy conviction.

In rejecting Murray's argument, the Summary Order states there is no "requirement that juries answer 'special interrogatories as to which specific predicate acts each defendant agreed would be committed.'" The Summary Order further states that "[i]n any event, the [verdict] form specifies that a 'pattern' of narcotics activity is required...and the court instructed the jury that a pattern consists of '[t]wo or more acts and offenses' within a category of a crime."

The district court's instruction that finding of a single drug offense would in essence satisfy the "pattern" element of RICO is inconsistent with this Court's decision in *Yates v. United States*, 354 U.S. 298 (1957). This Court said that when "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise save them from that error." *Griffin v. United States*, 502 U.S. 46, 59 (1991). This Court also said that when a conviction may have rested on a ground that is statutorily defective, and "it is impossible to tell which ground the jury selected," the conviction must be

reversed. *Yates*, 354 U.S. at 298.

The jury herein also failed to find the critical elements of type and threshold quantities of drugs as charged in the Superseding Indictment in Count One. As to the predicate acts supporting the allegation that the conspirators had engaged in a “pattern of racketeering activity,” Count One charged murder, robbery under New York and federal law, and drug-related crimes. As to drug-related crimes, Count One specified the types and threshold quantities of drugs as follows:

d. Multiple offenses involving the distribution of controlled substances, including 280 grams and more of cocaine base in a form commonly known as “crack,” one kilogram and more of heroin, five kilograms and more of cocaine, and less than 50 kilograms of marijuana, in violation of the laws of the United States, specifically Title 21, United States Code, Sections 812, 841(a) (1), 841(b) (1) (A), 841(B) (1) (D), and 846, and Title 18, United States Code, Section 2.

As established by this Court in *Apprendi*, the type(s) and threshold quantities of drugs are elements of the crime(s). *Apprendi v. United States*, 530 U.S. 466 (2000); See *United States v. Pauling*, 924 F.3d 649, 655 (2d Cir. 2019). The jury herein failed to find these critical elements. It left the verdict form blank.

The Second Circuit’s Summary Order is inconsistent not only with its prior decision in *United States v. Pierce*, 940 F. 3d 817 (2d Cir. 2019) but also the decisions of the Sixth Circuit in *United States v. Randolph*, 794 F.3d 602, 612 (6th Cir. 2015) and the Tenth Circuit in *United States v. Shippley*, 690 F.3d 1192 (10th Cir. 2012). As stated in *Pierce*, it is “metaphysically impossible” to reconcile the jury’s lack of findings on drug types and threshold quantities with the guilty verdict

on Count One. Therefore, the conviction must be set aside. As also stated in *Randolph*, “because the jury found that none of the charged drugs were ‘involved in’ the conspiracy, it follows that [the defendant] cannot be guilty of the charged conspiracy.” 794 F.3d at 612.

This appeal also involves the novel question of the appropriate standard to apply when a jury makes a deficient finding on an element of an offense and the appellant then argues there is insufficient evidence to otherwise support the conviction. When the jury has made an adequate finding on an element, the standard for sufficiency of the evidence is well settled. As established by this Court, trial evidence is sufficient to support a conviction if, viewed in the light most favorable to the government, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). And evidence is insufficient when the jury may not reasonably infer that each essential element of the crime charged has been proven beyond a reasonable doubt. *Id.* at 316.

But when a jury has not made an adequate finding on an element, Murray contends that the foregoing standard of review does not apply. The foregoing standard assumes that the jury made all credibility determinations necessary to a verdict of guilt. Where a jury has made inadequate findings, there remain unresolved credibility issues. Murray contends an appellate court may not simply accept as true the testimony of witnesses making allegations relating to the

inadequate finding.

In the case at bar, the jury made an inadequate finding that Murray was involved in two or more drug offenses. From other findings, it is clear the jury did not believe everything that witnesses said against Murray. For example, the jury rejected and marked as “not proven” the allegations that Murray was involved in robberies or an attempted murder. The jury also did not find that Murray was accountable for substantial quantities of drugs. To try to salvage the conviction, the government relied on the testimony of cooperating witnesses without regard to whether the jury believed, or would have believed, their testimony was true.

The Summary Order accepts as true the testimony of certain witnesses that “Murray purchased 10 grams of heroin to resell, that Murray had stated he was selling crack [at an intersection], and that Murray had encouraged BHB members to ‘come to the hounds’ if they needed drug or firearm supplies.” The court necessarily did so without regard to whether the jury believed, or would have believe, their testimony. As such, the panel made credibility determinations of the witnesses for the first time on appeal. Murray contends a federal appellate cannot and should not do so.

A court must defer to a jury assessment of witness credibility and the weight of the evidence. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The task of choosing among competing, permissible inferences is for the jury, not the court. See *Id.* In *Pierce*, the Second Circuit relied on the jury’s answers to special

interrogatories to reverse a conviction because there was a conflict between the jury's finding of guilt and the jury's answers to the special interrogatories. *United States v. Pierce*, 940 F.3d 817 (2d Cir. 2019). The defendant in *Pierce* was charged with conspiracy to possess with intent to distribute, and to distribute, cocaine, cocaine base, heroin, and marijuana. *Id.* at 818. On the verdict form, the jury was first asked whether the defendant was guilty of the drug conspiracy. The jury answered affirmatively. The jury was then asked in special interrogatories whether the government had proven specific "types" and "quantities" of drugs. The jury answered that the "types" of drugs had not been proven and left blank whether the quantities had been proven. This Court in *Pierce* held that the guilty verdict was inconsistent with the jury's answers to the special interrogatories and therefore reversed the conviction, reasoning that the jury's answers were "metaphysically impossible" to reconcile with the guilty verdict.

As in *Pierce*, the jury's answers to the special interrogatories herein support reversal of Murray's convictions on Count One and Count Four (also pertaining to narcotics conspiracy). While a district court may not be required to ask the jury special interrogatories on whether there are two or more predicate acts, once the court does ask, the jury's answers determine whether the "pattern" element of RICO was met. The jury's answers to the special interrogatories were inconsistent with the finding of guilt.

The Summary Order relies on the district court's instruction to the jury that a

“pattern” consists of “[t]wo or more acts and offenses.” But the Summary Order overlooks that the district court also told the jury that if it found that a defendant committed a single drug offense, it should mark the special interrogatory on drugs as proven. Specifically, the court instructed the jury:

If you find that one of the predicate crimes that was part of the defendant’s agreement was *a controlled substance offense*, you will be asked to indicate on the verdict form whether the government has proven beyond a reasonable doubt that the pattern of racketeering acts included *a controlled substance offense*....

(Murray App’x, at 830) (emphasis added)

In other words, the jury was instructed that it only needed to find that Murray committed a single controlled substance offense to mark the special interrogatory on drugs as “proven.” As such, it is impossible from the jury’s answer to conclude the jury unanimously found that Murray committed two or more predicate acts. The jury having marked as “not proven” every other category of offense (robberies and attempted murder), it is not possible to conclude beyond a reasonable doubt that the jury unanimously found that Murray agreed to a “pattern of racketeering activity.” The conviction must reverse.

Murray further contends the Summary Order conflicts with decisions of the Second Circuit on the threshold of proof necessary to find sufficient evidence on the *mens rea* element of a specific intent crime. Here, there must have been sufficient evidence that Murray specifically intended to aid and abet Johnson in assaulting rival gang members as alleged in Count Two. The Summary Order

correctly states that “most evidence of intent is circumstantial.” But even the Second Circuit acknowledged that with a specific intent crime, the government must do more than introduce circumstantial evidence that Murray knew that Johnson brought the gun to the restaurant for some nefarious purpose. *See United States v. Frampton*, 382 F.3d 213, 223 (2d Cir. 2004); *United States v. Pipola*, 83 F.3d 556, 562 (2d Cir. 1996) (suspicion is not enough); *See Anderson v. United States*, 417 U.S. 211 (1974); *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589 (1967).

Murray contends the circumstantial evidence in this case did not meet the necessary threshold of proof. Murray knew Johnson obtained a gun and instructed Murray to drive to the restaurant. While such fact was circumstantial evidence that Murray knew Johnson had some nefarious purpose in bringing the gun, Murray contends it was insufficient to prove he knew Johnson intended to use the gun to assault rival gang members. Murray could have thought that Johnson brought the gun for self-protection. The rival gang members were armed. Murray could have also thought that Johnson brought the firearm to intimidate or threaten the rival gang members to leave the intersection so the BHB gang could “take back over” the drug territory.

Murray contends the Summary Order conflicts with factually analogous cases in which the Second Circuit found there was insufficient evidence of specific intent. *See United States v. Samaria*, 239 F.3d 228 (2d Cir. 2009); *United States v.*

Ogando, 547 F.3d 102, 107-08 (2d Cir. 2008); *United States v. Rodriguez*, 392 F.3d 539 (2d Cir. 2004); *United States v. Friedman*, 300 F.3d 111 (2d Cir. 2002); *United States v. Lorenzo*, 534 F.3d 153 (2d Cir. 2008); *United States v. Torres*, 604 F.3d 58 (2d Cir. 2010).

CONCLUSION

Murray respectfully requests that this petition for a writ of certiorari be granted.

DATED: November 24, 2021

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