No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

LATIQUE JOHNSON,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Whether testimony by ballistics toolmark experts that a particular firearm fired recovered bullets or casings is presently so flawed as to be inadmissible under Fed. R. Evid. 702 in any circumstances.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Petitioner is unaware of any related cases pending in this Court.

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OPINION BELOW

The summary order and judgment of the United States Court of Appeals for the Second Circuit, entered October 28, 2021, is not reported and is found at Appendix A.

JURISDICTION

The court of appeals issued its judgment on October 28, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Rule of Evidence 702 provides:

> **Rule 702. Testimony by Expert Witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

STATEMENT

On April 20, 2016, a grand jury sitting in the Southern District of New York returned a sealed indictment charging appellant Latique Johnson with one count of brandishing a firearm in connection with his participation in the Blood Hound Brims, a gang and alleged racketeering organization engaged in, *inter alia*, drug distribution and acts of violence. C.A. App. A47-A49. He was eventually charged along with others in a superseding indictment with participating in a racketeering conspiracy between 2005 and December 2016 (Count One); with conspiring

between 2006 and December 2016 to distribute and possess with intent to distribute at least 280 grams of crack cocaine ("crack"); one kilogram of heroin; five kilograms of cocaine; and marijuana (Count Four); and with using, possessing, carrying, brandishing, and discharging a firearm in connection with the charged racketeering and narcotics conspiracies (Count Five). C.A. App. A50-A67

Johnson and two co-defendants proceeded to trial on February 19, 2019. Following a five-week jury trial in United States District Court (Gardephe, J., presiding), Johnson was convicted on all counts. C.A. Spec. App. SPA112-SPA119. The jury made findings (1) as to Count One, that the racketeering activity he agreed would be committed as part of the racketeering conspiracy involved (a) attempted murder or conspiracy to commit murder; (b) at least two predicate crimes constituting "crimes of violence"; and (c) distribution, possession with intent to distribute, or conspiracy to distribute or possess with intent to distribute five kilograms of cocaine, 280 grams of crack cocaine, and one kilogram of heroin; (2) as to Count Two, Johnson was guilty of assault in aid of racketeering, but not attempted murder; (3) as to Count Three, Johnson was guilty of attempted murder in aid of racketeering, but not assault; (4) as to Count Four, Johnson agreed to distribute or possess with intent to distribute five kilograms of cocaine, 280 grams of crack cocaine, one kilogram of heroin, and a quantity of marijuana; and (5) as to Count Five, Johnson possessed or used a firearm in relation to both the racketeering and narcotics conspiracies, and brandished and discharged a firearm in connection with the racketeering conspiracy. C.A. Spec. App. SPA49 n.2; Tr. 3710-21. Johnson was sentenced to a total of 30 years' imprisonment. C.A. Spec. App. SPA112-SPA119.

The court of appeals affirmed. The court of appeals rejected Johnson's claim that the district court erred in admitting expert ballistics testimony through government witness Detective

Jonathan Fox of the New York City Police Department. Detective Fox, an expert in toolmark identification, testified that bullets and casings recovered from the scene of a shooting in the Bronx were fired from a rifle later recovered from an alleged confederate of Johnson's. Johnson argued that toolmark identification, a methodology used to determine whether pieces of ballistics evidence, such as bullets and casings, were discharged from a given firearm, is insufficiently reliable because there is little or no scientific evidence establishing that toolmarks are unique to each firearm.

The court of appeals noted that "Federal Rule of Evidence 702 and the *Daubert* factors do not create "a definitive checklist or test" and allow for the admission of "specialized knowledge" outside of purely scientific or technical fields." App. A14 citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (internal quotation marks omitted). The court of appeals observed that the district court "conducted an extensive *Daubert* hearing, carefully considered Johnson's contentions as well as Detective Fox's testimony, and rendered a thorough, reasoned opinion that took full account of Johnson's contentions." *Id*.

Reviewing for abuse of discretion, the court of appeals held that:

> In the circumstances, we doubt that admission of Fox's testimony was an abuse of discretion. In any case, however, any error certainly was harmless. Counsel explored the alleged flaws in Fox's opinion in a substantial cross-examination, and the jury was able to draw its own conclusions. *See Amorgianos v. Nat'l R.R. Passenger Corp*., 303 F.3d 256, 267 (2d Cir. 2002) ("[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). At least equally important, multiple witnesses testified that Johnson mimicked shooting the victims, obtained an assault rifle shortly before the shooting, placed Johnson at the shooting and identified him as the shooter, and provided evidence of the motive, i.e., an ongoing rivalry between BHB and another gang.

App. A14.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision is not yet in conflict with the decision of any other federal court of appeals or state supreme court. However, it raises an important issue regarding the reliability of firearm toolmark evidence and the ability of experts to reliably opine that particular bullets or shell casings were fired from a particular firearm.

1. Firearm toolmark analysis has been scrutinized by at least two scientific reports published in recent years. In 2009 the National Research Council published a report on Strengthening Forensic Science in the United States: A Path Forward (2009) ("NRC Report") (available at https://www.ojp.gov/ncjrs/virtual-library/abstracts/strengthening-forensic-science-united-states-path-forward) (last viewed 1/20/2022) It considered several branches of forensic science, including firearms toolmark analysis. *See, e.g., id*. at 3-4. After reviewing the theory underlying toolmark analysis, *id*. at 150-51, the NRC Report noted several weaknesses in the field: "Knowing the extent of agreement in marks made by different tools, and the extent of variation in marks made by the same tool, is a challenging task." *Id*. at 153. The report noted the potential for new technology or techniques to improve accuracy but emphasized that "the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for the estimation of error rates." *Id*. at 153-54. The report concluded that "[i]ndividual patterns from manufacture or wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable." *Id*. at 154.

These concerns were echoed in the Report of the President's Council of Advisors on Science and Technology, Ensuring Scientific Validity of Feature-Comparison Methods (2016) ("PCAST report") (available at

https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf) (last visited 1/20/2022). The PCAST Report analyzed the scientific research on seven branches of forensic sciences, including firearms analysis. *Id.* at 7-14. The Report sought to establish whether each branch of forensic science had achieved (1) "foundational validity," which the report defined as "the scientific standard corresponding to the legal standard of evidence being based on 'reliable principles and methods'" and (2) "validity as applied," which the report defined as "the scientific standard corresponding to the legal standard of an expert having 'reliably applied the principles and methods.'" *Id*. at 43 (quoting Fed. R. Evid. 702) (emphasis omitted). The report identified "two key elements" of foundational validity. *Id*. at 48. First, a method must have "a reproducible and consistent procedure for (a) identifying features within evidence samples; (b) comparing the features in two samples; and (c) determining ... whether the samples should be declared to be a [match]." *Id*. Second, there must be "empirical measurements, from multiple independent studies, of (a) the method's false positive rate ... [and] (b) the method's sensitivity," which is the "probability that it declares a [match] between samples that actually come from the same source." Id. (emphasis omitted).

Finally, the report noted a difference between "objective" and "subjective" forensic science methods: objective methods "consist[ ] of procedures that are each defined with enough standardized and quantifiable detail that they can be performed by either an automated system or human examiners exercising little or no judgment," and subjective methods "includ[e] key procedures that involve significant human judgment." *Id*. at 47. For subjective methods like firearms toolmark analysis, *see id*. at 104, "the foundational validity . . . can be established only through empirical studies of examiner's performance to determine whether they can provide

accurate answers" because "the black box in the examiner's head cannot be examined directly for its foundational basis in science." *Id*. at 49 (emphasis in original).

The report found that "firearms analysis currently falls short of the criteria for foundational validity." *Id*. at 112. The report asserted that the "sufficient agreement" standard falls short of the necessary "reproducible and consistent procedure" to reliably compare forensics evidence; the report characterized the AFTE Theory of Identification ("AFTE Theory")— used by members of the Association of Firearm and Toolmark Experts—as "clearly not a scientific theory" and "circular." Id. at 60. The report also found that the toolmark analysis failed to meet the second key element of foundational validity. It analyzed several studies with different study designs, *id*. at 106-10, and concluded that there was "only a single study that was appropriately designed to test foundational validity and estimate reliability," *id*. at 111. It concluded by observing the "need for additional, appropriately designed . . . studies to provide estimates of reliability." *Id*.

2. The trial court performs a gatekeeping role by assessing the reliability of any expert testimony proffered under Fed. R. Evid. 702. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 593-94 (1993). *Daubert* lays out the test for whether scientific testimony is reliable. To qualify as science, a proposition "must be derived by the scientific method." *Id*. at 593-94. The expert's assertion need not be verified as an objective certainty, but it must have been derived by a verified scientific process to meet the necessary standard of evidentiary reliability. *Id*. When assessing the reliability of scientific expert testimony, federal courts apply a five-part balancing test. The five factors are: (1) whether a scientific theory has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and

maintenance of standards controlling the technique's operation; and (5) general acceptance within the relevant scientific community. *Id*.

Under this analysis, the district court should instead have precluded the ballistics testimony of Detective Fox or, in the alternative, restricted his testimony to his observations of similarities and differences he found between sets of ballistics. Recent cases have followed this approach and prevented toolmark experts from testifying "that the recovered firearm is, in fact, the source of the recovered fragment and shell casing." *See United States v. Shipp*, 422 F. Supp 3d 762, 765-66 (E.D.N.Y. 2020) ("because the PCAST Report's findings cast considerable doubt on the reliability of the theory behind matching pieces of ballistics evidence," the detective was limited to testifying that "the toolmarks on the recovered bullet fragment and shell casing are consistent with having been fired from the recovered firearm. In other words, [the detective] may testify that the recovered firearm cannot be excluded as the source of the recovered bullet fragment and shell casing, but not that the recovered firearm is, in fact, the source of the recovered fragment and shell casing.") *See also United States v. Adams,* 444 F. Supp. 3d 1248, 1259-1263 (D. Or. 2020) (AFTE "sufficient agreement" standard "is a tautology that doesn't mean anything" because there is no evidence "that the AFTE relies on any scientific standard that would explain to an examiner . . . how to interpret the data he sees in any kind of objective way."); *United States v. Tibbs*, No. 2016-CF1-19431, 2019 WL 4359486 at *8-*10 (D.C. Super. Sep. 5, 2019) ("[o]ther courts considering challenges to this discipline under Daubert have concluded that publication in the AFTE Journal satisfies [the peer review] prong of the admissibility analysis," but "these courts devote little attention to the sufficiency of this journal's peer review process or to the issues stemming from a review process dominated by financially

and professionally interested practitioners, and instead, mostly accept at face value the assertions regarding the adequacy of the journal's peer review process.")

The inability of AFTE toolmark analysts to establish the error rate of their analysis is of particular concern. For example, *Tibbs* held that "reliable principles and methods do not adequately support the theory that a firearms examiner can identify a particular firearm as having fired a particular bullet or cartridge casing," "particularly in light of the inability of the published studies to establish an error rate, the absence of an objective standard for identification, and the lack of general acceptance of the foundational validity of the field outside of the community of practitioners within the field . . . ." 2019 WL 4359486 at *22. *See also United States v. Green*, 405 F. Supp. 2d 104, 109, 114, 116 (D. Mass. 2005) (finding that firearms examiner's standards were "either tautological or wholly subjective"; noting the absence of (1) data concerning error rates, and (2) "national standards to be applied to evaluate how many marks must match"; examiner not allowed to testify that "the match he found by dint of the specific methodology he used permits 'the exclusion of all other guns' as the source of the shell casings.")

In *Adams*, 444 F. Supp. 3d at 1264, the court noted that "[a] .9 percent error rate would lead to about 1 in 111 wrongful convictions. A 1.5 percent error rate would mean that 1 in 67 convictions were wrong. And 2.2 percent would mean that 1 in 46 convictions were wrong. These are dramatically different rates of error when put into context." The court continued:

> What's more, the higher error rates tend to arise from the studies that most closely resemble the real-world conditions of toolmark testing. The lowest rates arise from the "closed-set" tests, which require the examinee to perform a matching exercise between two sets of bullets or shell casings. *Shipp*, 422 F. Supp. 3d at 777-78 (citing PCAST Report, 106-11 (2016)). An examinee can "perform perfectly" if he simply matches each bullet to the standard that is closest. *Id*. Further, each match narrows the field for further matches. *Id*.

> The next highest error rates—about 2.1 percent—arise from partly closed sets. Id. (citing PCAST Report at 109). These tests also give the examinee a closed set of matches, but it also includes two bullets or shells that do not have a match in the set. *Id.* The error rate from these tests is "nearly 100-fold higher" than from the closed-set tests. *Id.*
>
> Finally, the "black box" studies yield the highest error rates, about 2.2. percent. *Id*. (citing PCAST Report at 110-11). These tests presented each examinee with an unknown shell casing or bullet and three test fires from the same known firearm, which may or may not have been the source of the unknown casing or bullet. *Id*.

Id. In sum, the rate of error—to the extent one can be quantified—was far too high for the admission of Detective Fox's testimony.

Unscientific and flawed toolmark identification testimony—testimony that asserts with certainty that a particular firearm fired certain bullets or shell casings—is admitted in numerous federal and state criminal trials across the United States every year. There is a significant possibility that the convictions of innocent defendants will result. This Court should therefore grant the petition even though this case does not meet the normal criteria for this Court's review,

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for a new trial.

Dated: January 20, 2022

Respectfully submitted,

_____

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APPENDIX A

United States v. Latique Johnson, **Page**

United States Court of Appeals for the Second Circuit, No. 19-4357

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 21st day of October, two thousand twenty-one.

United States of America,

Appellee,

v.

Latique Johnson, Donnell Murray, AKA Don P.,

Defendants - Appellants.

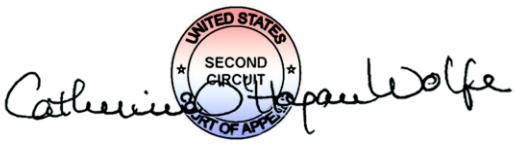
ORDER

Docket Nos: 19-3952 (Lead)
19-4357 (Con)

Appellant, Latique Johnson, 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



19-3952 (L)
United States of America v. Latique Johnson

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 22nd day of June, two thousand twenty one.

Present: ROSEMARY S. POOLER,
WILLIAM J. NARDINI,
Circuit Judges,
LEWIS A. KAPLAN,
District Judge.[1]

UNITED STATES OF AMERICA,

Appellee,

v. 19-3952-cr
19-4357-cr

LATIQUE JOHNSON, DONNELL MURRAY, AKA DON P.,

Defendants-Appellants.[2]

Appearing for Appellants: Andrew Levchuk, Amherst, MA, *for Defendant-Appellant Latique Johnson*.

Bruce R. Bryan, Manlius, N.Y., *for Defendant-Appellant Donnell Murray*.

[1] Judge Lewis A. Kaplan, District Judge, United States District Court for the Southern District of New York, sitting by designation.
[2] The Clerk of Court is directed to amend the caption as above.

Appearing for Appellee: Allison Nichols, Assistant United States Attorney (Andrew K. Chan, Jessica Feinstein, Karl Metzner, Assistant United States Attorneys, *on the brief*), *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Gardephe, *J.*).

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

Latique Johnson and Donnell Murray (collectively, "Appellants") appeal from judgments of conviction entered on December 23, 2019 and November 15, 2019, respectively, in the United States District Court for the Southern District of New York (Gardephe, *J.*), following a jury trial. Together, they were convicted of racketeering conspiracy; assault and attempted murder or aiding and abetting the same in aid of racketeering; conspiracy to distribute cocaine, crack cocaine, and heroin; and use and possession of a firearm in connection with a drug trafficking crime. The district court principally sentenced Johnson to 30 years' imprisonment, and Murray to 235 months' imprisonment. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Johnson and Murray's convictions stem from their association with a subset of the nationwide gang commonly known as the Bloods. While incarcerated, Johnson founded the unit of the Bloods at issue here, the Blood Hound Brims ("BHB"), in which Murray held various positions. Appellants each present multiple arguments on appeal. For the reasons below, we affirm both judgments.

A. Johnson

Johnson first argues that the evidence supporting his conviction under Count Three, attempted murder in aid of racketeering, was insufficient. Johnson highlights the purportedly contradictory testimony of two cooperating witnesses who were present at the drive-by shooting underlying the charge. This argument fails. The discrepancies Johnson points to are minor and do not undermine the critical facts established at trial—that Johnson commanded another member of BHB to shoot at two nearby members of a rival gang with which BHB was feuding. To the extent Johnson questions the witnesses' credibility, "[i]t is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory, and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony." *United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011) (internal quotation marks omitted). "[A]ny rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *United States v. Chow*, 993 F.3d 125, 135-36 (2d Cir. 2021) (italics and internal quotation marks omitted), so we must uphold the conviction.

Next, Johnson argues that the district court erred in admitting expert ballistics testimony through government witness Detective Jonathan Fox of the New York Police Department. He

contends in particular that toolmark identification, a methodology used to determine whether pieces of ballistics evidence, such as bullets and casings, were discharged from a given firearm, is insufficiently reliable because there is little or no scientific evidence establishing that toolmarks are unique to each firearm. Federal Rule of Evidence 702 and the *Daubert* factors do not create "a definitive checklist or test" and allow for the admission of "specialized knowledge" outside of purely scientific or technical fields. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (internal quotation marks omitted). Here, the district court conducted an extensive *Daubert* hearing, carefully considered Johnson's contentions as well as Detective Fox's testimony, and rendered a thorough, reasoned opinion that took full account of Johnson's contentions.

We review the admission of expert testimony for abuse of discretion. *United States v. Romano*, 794 F.3d 317, 330 (2d Cir. 2015). We previously have affirmed the admission of toolmark identification expert testimony even where the trial court did not conduct an extensive *Daubert* hearing, as the court did here. *See United States v. Williams*, 506 F.3d 151, 160-61 (2d Cir. 2007). In the circumstances, we doubt that admission of Fox's testimony was an abuse of discretion. In any case, however, any error certainly was harmless. Counsel explored the alleged flaws in Fox's opinion in a substantial cross-examination, and the jury was able to draw its own conclusions. *See Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) ("[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). At least equally important, multiple witnesses testified that Johnson mimicked shooting the victims, obtained an assault rifle shortly before the shooting, placed Johnson at the shooting and identified him as the shooter, and provided evidence of the motive, i.e., an ongoing rivalry between BHB and another gang.

The district court also did not err in denying Johnson's motion for a new trial. As discussed, Fox's testimony was properly admitted. As for Johnson's conviction on Count Four, conspiracy to distribute controlled substances, "[i]t is well settled that individual defendants are responsible for all reasonably foreseeable quantities of drugs distributed by a conspiracy of which they were members." *United States v. Johnson*, 633 F.3d 116, 118 (2d Cir. 2011). Ample evidence supported the finding that Johnson, the leader and founder of BHB, was responsible for 5 kilograms or more of cocaine, 280 grams or more of cocaine base, 1 kilogram or more of heroin, and any quantity of marijuana. Indeed, the Elmira portion of BHB's drug operation alone accounted for one kilogram of cocaine every two to three days, half of which was converted to crack cocaine, and 80 grams of heroin on each restock trip to New York City. To the extent Johnson again raises witness credibility issues regarding his Count Four conviction, the jury has already resolved this question, and we may not disturb its judgment.

Johnson also argues that his sentence was unreasonable. "We review a sentence on appeal for procedural and substantive reasonableness." *United States v. Seabrook*, 968 F.3d 224, 232 (2d Cir. 2020). "A district court commits procedural error when it fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [18 U.S.C.] § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." *United States v. Alcius*, 952 F.3d 83, 87 (2d Cir. 2020) (internal quotation marks omitted). "Our review of a sentence for

substantive reasonableness is particularly deferential, and we will set aside only those sentences that are so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice." *United States v. Muzio*, 966 F.3d 61, 64 (2d Cir. 2020) (citation, alteration, and internal quotation marks omitted).

Johnson concedes that he received a below-Guidelines sentence and does not present grounds for finding procedural error. Instead, Johnson argues that his difficult childhood, along with exemplary behavior during incarceration, merited a shorter term of imprisonment. However, the district court took all of this, along with the other Section 3553(a) factors, into consideration at sentencing. Weighing against Johnson were several other factors, including the violent nature of his crimes, his founding and leadership role within BHB, and the high risk of recidivism, given that Johnson founded BHB while he was incarcerated for other crimes. Accordingly, we cannot say the court's 30-year sentence is shockingly high.

B. Murray

Murray argues that the evidence at trial was insufficient to support his convictions for racketeering conspiracy (Count One) and assault and attempted murder in aid of racketeering (Count Two). There was ample evidence to support the jury's finding that Murray participated in a pattern of racketeering based on the narcotics trafficking crimes alone. *See United States v. Zemlyanksy*, 908 F.3d 1, 11 (2d Cir. 2018) (explaining that racketeering conspiracy requires proof of, inter alia, "two or more predicate acts of racketeering"). For example, witnesses testified that Murray purchased 10 grams of heroin to resell, that Murray had stated he was selling crack near 241st Street and White Plains Road, an area BHB members frequented, and that Murray encouraged BHB members to "come to the hounds" if they needed drug or firearm supplies. Murray App'x at 675-76.

Murray also argues that the verdict form was deficient because it did not specify that the jury must find at least two predicate acts of narcotics trafficking to consider him guilty of racketeering conspiracy. But we have rejected a requirement that juries answer "special interrogatories as to which specific predicate acts each defendant agreed would be committed." *United States v. Applins*, 637 F.3d 59, 82-83 (2d Cir. 2011). In any event, the form specifies that that a "pattern" of narcotics activity was required, Murray App'x at 866, and the court instructed the jury that a pattern consists of "[t]wo or more acts and offenses" within a "category" of crime, Murray App'x at 818. Because "we presume that a jury follows the instructions of the court," *United States v. Batista*, 684 F.3d 333, 342 (2d Cir. 2012), and Murray does not present more than speculation on what the jury might have considered sufficient, we affirm this conviction.

Sufficient evidence also supports Murray's conviction under Count Two. At trial, the government presented evidence suggesting Murray aided and abetted the shooting underlying Count Two of the indictment. "To prove that the defendant acted with . . . specific intent [to aid and abet a crime], the government must show that he knew of the crime; but it need not show that he knew all the details of the crime, so long as the evidence shows that he joined the venture, that he shared in it, and that his efforts contributed towards its success." *United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006) (citations, brackets, and internal quotation marks omitted). It is axiomatic that "most evidence of intent is circumstantial." *United States v. Salameh*, 152 F.3d

88, 143 (2d Cir. 1998). Enough 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.

Furthermore, 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. "The federal aiding and abetting statute, 18 U.S.C. § 2, does not penalize conduct apart from the substantive crime with which it is coupled." *United States v. Mucciante*, 21 F.3d 1228, 1234 (2d Cir. 1994). Therefore, we affirm the conviction on Count Two.

The 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. Because Murray's driver's license and statements during a previous arrest indicated that the apartment at issue was his residence, the officers had "reason to believe" Murray lived there, and, accordingly, authority to enter. *United States v. Bohannon*, 824 F.3d 242, 249 (2d Cir. 2016). A small scale, typically used to weigh drugs, and small amounts of drugs were in plain view. *See United States v. Babilonia*, 854 F.3d 163, 179-80 (2d Cir. 2017) (explaining the "plain view" exception to the Fourth Amendment's protections). These items supported a search warrant for the apartment, which the officers subsequently obtained, thereby triggering the inevitable discovery doctrine. *See United States v. Vilar*, 729 F.3d 62, 84 (2d Cir. 2013) ("[E]vidence obtained during the course of an unreasonable search and seizure should not be excluded if the government can prove that the evidence would have been obtained inevitably without the constitutional violation." (internal quotation marks omitted)). We affirm the district court's denial of Murray's motion to suppress.

Nor did the district court improperly interfere in Murray's plea discussions. "[T]he court must not participate in [any plea] discussions . . . because such discussion inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty." *United States v. Paul*, 634 F.3d 668, 671 (2d Cir. 2011) (brackets and internal quotation marks omitted) (citing Fed. R. Crim. P. 11(c)(1)). The record indicates that the district court simply confirmed that Murray had rejected two prior plea offers. The conversation contained no persuasive or coercive language at all. Therefore, we find no violation of Rule 11(c)(1).

Additionally, the district court did not exceed its discretion in denying Murray's request for new counsel months before trial. We consider "(1) whether defendant made a timely motion requesting new counsel; (2) whether the trial court adequately inquired into the matter; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense." *United States v. John Doe No. 1*, 272 F.3d 116, 122 (2d Cir. 2001) (internal quotation marks omitted). The record does not suggest that counsel's relationship with Murray had devolved into a "total lack of communication." *John Doe No. 1*, 272 F.3d at 122 (internal quotation marks omitted). Indeed, 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. Due to circumstances outside of the district court's control, the trial date was postponed, but finding alternate counsel was still not feasible. The court's decision to proceed with Murray's counsel in February 2019

did not exceed the bounds of its "great deal of latitude in scheduling trials," as a court "need not grant a continuance so that a defendant may be represented by counsel of his choosing, where such a continuance would cause significant delay." *United States v. Griffiths*, 750 F.3d 237, 241-42 (2d Cir. 2014) (internal quotation marks omitted).

Finally, Murray's sentence was not substantively unreasonable. The court properly analyzed the Section 3553(a) factors and sentenced Murray to a term of imprisonment within the applicable Guidelines range. Given Murray's participation and leadership role in BHB and its violent crimes, including being a getaway driver for a shooting at a restaurant, a 235-month imprisonment was not "shockingly high." *Muzio*, 966 F.3d at 64. Accordingly, we affirm Murray's sentence.

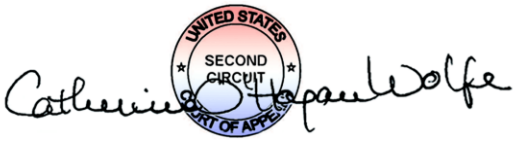
We decline to reach the merits of Murray's arguments regarding purportedly ineffective assistance of counsel. "[I]n most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective[]assistance." *United States v. Khedr*, 343 F.3d 96, 100 (internal quotation marks omitted). We have declined to hear ineffective assistance claims on direct appeal where, as here, the district court has not had an opportunity to "develop the facts necessary to determining the adequacy of representation during an entire trial." *Id.* (internal quotation marks omitted); *see generally United States v. Johnson*, 452 F. Supp. 3d 36 (S.D.N.Y. 2019) (no mention of an ineffective assistance claim).

C. Conclusion

Appellants also rely on *United States v. Davis* as grounds for vacatur. 139 S. Ct. 2319 (2019). To the extent *Davis* invalidated portions of the verdict, the district court already granted the necessary relief during post-trial motion practice. *See Johnson*, 452 F. Supp. 3d at 73, 77-78. Therefore, no unresolved *Davis*-related issues remain on appeal.

We have considered the remainder of Appellants' arguments and find them to be without merit. Accordingly, the judgments of the district court hereby are AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit