No. 22 –

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY RAMOS,

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 A WRIT OF CERTIORARI

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Gregory Ramos

QUESTION PRESENTED

Whether the Second Circuit's determination that Petitioner was not denied his right to the effective assistance of counsel consistent with the Sixth Amendment to the United States Constitution was correct.

PARTIES TO THE PROCEEDING

Petitioner is Gregory Ramos, defendant and appellant below.

Respondent is the United States of America, Appellee below.

RELATED PROCEEDINGS

None.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gregory Ramos respectfully petitions for writ of certiorari to the review of the United States Court of Appeals for the Second Circuit in this case

OPINIONS BELOW

The Second Circuit's opinion is not reported. The unofficial cite is 2022 WL 1553040.

JURISDICTION

The Court of Appeals entered its judgment on June 7, 2022 denying Appellant's Appeal. On August 17, 2022 this Court extended the time to file a Petition for Writ of Certiorari until October 14, 2022. The jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that all parties are entitled to the effective assistance of counsel.

INTRODUCTION

This Court in the past has granted review to determine whether and under what circumstances an appellant has been denied the effective assistance of counsel during the trial of their indictment.

STATEMENT OF THE CASE

This case presents one question which we ask the United States Supreme Court to determine. The issue is whether Petitioner was deprived of his right to effective assistance of counsel based upon the numerous errors of Mr. Ramos' then assigned trial counsel who passed away shortly after a jury returned a verdict of guilty. As newly assigned

counsel for Mr. Ramos determined, trial counsel's performance was, to say the least, less than satisfactory. Among the numerous issues which were put forth before the United States Court of Appeals for the Second Circuit, Mr. Ramos, as set forth in his affidavit to the court on his motion to vacate his conviction, claimed that he had advised his counsel that he wished to testify at the trial. However, counsel did not allow him to testify and he was subsequently convicted. Mr. Ramos' affidavit set forth the nature of his testimony and his motion to vacate the conviction.

On May 23, 2016 the Niagara Falls, New York, Police Department obtained information relative to a person "of interest" whose name was Gregory Ramos. The information apparently was initiated by the Buffalo, New York Police Department. The vehicle was located and a chase ensued from Niagara Falls, New York to Grand Island, New York. It was alleged that one officer claimed that an object was thrown from a window the contents of which later tested negative for any controlled substance. At a later time the vehicle was found abandoned in Grand Island, New York.

At a later time a police officer found a black handbag in the middle of the road which contained a handgun. He also indicated that he observed a bag which he believed contained a white powdery substance fly from the driver's side window striking the hood of the police car.

Petitioner was apprehended in Grand Island, New York. The vehicle which was found on the side of a road abandoned, was later searched and specs of white powder were found inside the vehicle. Additionally, some empty vials were found in the trunk of the car which an officer testified could have been utilized to package a controlled substance or marijuana.

Mr. Ramos was convicted following a jury trial of

Possession with the Intent to Distribute Cocaine in violation of Title 21 USC §841(a)(1) and 841(b)(1)(C), Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of Title 18 USC §924(c)(1)(A)(i) and Possession of a Firearm by a Person Subject to a Domestic Violence Order of Protection in violation of Title 18 USC §922(c) and 18 USC §924(a)(2).

In support of his motion to vacate his conviction, Petitioner filed a 10 page affidavit outlining the circumstances of his relationship with his trial counsel, conversations he had with his counsel and other errors which took place during the trial. As it relates to petitioner's petition for a Writ of Certiorari to this Court, Petitioner advised that during his trial he spoke with his then trial counsel with respect to his request to testify in his own behalf. He indicated that counsel met with him on a number of occasions both prior to and during the trial. He swore to the fact that "at each meeting I had with him I advised him that I wanted to testify on my own behalf. I was aware that I did have the right to testify and communicated that to him."

Mr. Ramos further indicated:

> I wanted to testify about numerous areas which I thought were important. For example, my testimony would have been that items found in the vehicle which had been seized and later searched were legitimate and were not related, in any way, to any drug trafficking crime. For example, I would have testified the reason for why I possessed the scale, which was found, the legitimate source of the money which I possessed, the legitimate source of the vials found in the car, the fact that I had been a drug user and that a small amount of drugs found in the vehicle were not related,

> in any way, to any drug distribution on my part. Simply put, I was not selling drugs nor did I have any intention to do so. (Ramos Affidavit paragraph 4)

Petitioner further advised in his affidavit that he would have testified that the weapon which was earlier thrown from the vehicle was not related in any way to any drug distribution activity and the weapon was "not possessed in connection with or to facilitate any drug distribution activity on my part." (Ramos Affidavit paragraph 5). Mr. Ramos further averred that he had previously suffered from drug abuse and wanted to testify about that fact as it related to the Government's position that the weapon had been possessed in relation to a drug distribution crime. In sum, he indicated that he wanted to testify relative to the legitimacy of the money that was seized as well as his own drug abuse issues. In the end, Mr. Ramos stated:

> 10) In short, there were many reasons why I wanted to testify on my own behalf. For the most part, my attorney did not put on an active defense. I had given him the names of other individuals who would have been able to testify on my behalf. He did not call those witnesses and it was more important that I be allowed to testify to be able to provide an active defense and explanations for much of what the government witnesses were testifying to.

Interestingly, at the close of the government's case, the district court did not inquire of Mr. Ramos' desire to testify. As Mr. Ramos stated, "11) Because I had no right to complain or speak with the judge, the only person I was able to communicate with relative to my desire to testify was my previous counsel who did not call me to testify."

In the end, Petitioner set out numerous reasons why he felt that it was necessary for him to testify as he realized that his attorney's ability to represent him was deficient.

THE DECISION AND ORDER OF THE DISTRICT COURT

Recognizing that Petitioner claimed that his right to testify was violated as it related to the Sixth Amendment to the United States Constitution by his counsel not allowing him to testify, the District Court noted that "if Ramos' attorney actually refused to let Ramos testify, that well may be a Sixth Amendment violation. See Brown v. Artuz, 124 F3d 73, 78 (2d Cir., 1997) "[T]he decision whether to testify belongs to the defendant and may not made for him by defense counsel."). The court concluded, however, that:

> An uncorroborated affidavit, however, is not sufficient to substantiate such a claim. See United States v. Castillo, 14 F3d 802, 805 (2d Cir., 1994) ("[I]n a subsequent collateral attack on the conviction the defendant must produce something more than a bare, unsubstantiated, thoroughly, self-serving, and none too plausible statement that his lawyer (in violation of professional standards) forbade him to take the stand." (quoting Underwood v. Clark, 939 F2d 473, 475 (7th Cir., 1991)); *cf.* United States v. Mejia, 18 F. App'x 20, 23 (2d Cir., 2001) (holding that "unsworn, self-serving assertion [in appellate brief] is insufficient, on its own, to establish ineffective assistance of counsel"). After all, "[i]t is extremely common for criminal defendants not to testify, and there are good reasons for this, as we

> have seen. Yet is it simply enough after being convicted for the defendant to say, "my lawyer wouldn't let me testify. Therefore I'm entitled to a new trial." Underwood, 939 F2d at 475. And that is especially so after the lawyer – in this case, an experienced, dedicated, and well-respected attorney – is no longer available to refute the defendant's allegation of unprofessional conduct."

The Court went on to chide Mr. Ramos' assertions, claiming that if he had testified, his testimony would not have provided a complete and full defense to all of the charges against him. The court concluded:

> There is no reason to believe that Ramos's explanation for his purportedly legitimate reasons for having the vials, scale, and thousands of dollars in cash might have persuaded the jury to acquit him. (D&O, p. 8).[1]

In other words, the court did not take into account that the only source of corroboration of his statement would have been his then trial attorney. Neither did the court consider that the only corroboration that would have been available to Petitioner, his trial attorney's own testimony, was not available because his assigned counsel had passed away shortly after Petitioner's conviction at trial.

THE SECOND CIRCUIT PROCEEDINGS

The Court of Appeals for the Second Circuit affirmed Petitioner's conviction. In a Summary

[1] Interestingly in later proceedings the Court found that the government had not shown that the money came from an illegal source.

Order filed on May 17, 2022, as it related to Petitioner's argument of denial of the effective assistance of counsel, and particularly as to his right to testify, the court did not specifically address that issue. Rather, the court stated that "in light of the strong evidence against Ramos presented at trial, we conclude that Ramos did not show that "there is a reasonable probability that, but for counsel's [alleged] professional errors, the result of the proceeding would have been different." United States v. DiTomasso, 932 F3d 58, 69 (2d Cir., 2019) (citation omitted).

REASON FOR GRANTING THE PETITION

This case has many of the hallmarks for the grant of certioraris. To Petitioner's knowledge, this Court has never had the opportunity to determine what claims are necessary when a defendant states that he had been denied the opportunity to testify in his own behalf in violation of the Sixth Amendment to the United States Constitution. In most cases where the issue has arisen, the courts have merely stated that a defendant's uncorroborated allegation that he wished to testify was insufficient to grant him a new trial. But that is not the only issue in this case. As counsel has noted, shortly after trial, Mr. Ramos' assigned counsel passed away. At that moment, Mr. Ramos lost the opportunity to have his attorney testify to what he had claimed. Simply put, Mr. Ramos was deprived the right to argue and prove that he wanted to testify, asserted his right to testify to his counsel but was never called to testify at the trial. That, coupled with the fact that the court did not inquire at the trial of Mr. Ramos' right to testify nor did the Court conduct an evidentiary hearing to hear what Mr. Ramos had to say under oath deprived him of all of his rights. Surprisingly, the Court merely concluded that Mr. Ramos, like many other defendants, claimed that he wanted to testify but was not placed on the stand. However, in virtually all of those cases, the defendants' trial counsel were available to testify as

to what actually took place. But in this case, due to no fault of Petitioner, his trial counsel was no longer available to testify. Therefore, this case has an appropriate hallmark for the grant of certiorari. Because this case raises the timely issue of what proof is necessary when a defendant claims that he was denied the right to testify, certiorari is warranted.

I. THE SECOND CIRCUIT'S DETERMINATION AS TO WHAT PROOF IS NECESSARY TO VACATE A CONVICTION BASED UPON A DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL *VIS-À-VIS* HIS RIGHT TO TESTIFY IS WRONG

As indicated above, the Second Circuit Court of Appeals did not directly deal with Mr. Ramos' specific claims of ineffective assistance of counsel. Rather, the court generally held that Mr. Ramos did not fully explain "how he was prejudiced by these alleged shortcomings...." The court did not respond directly to Mr. Ramos' claim that he was denied the effective assistance of counsel when he told his trial counsel that he wanted to testify. In support of his claims, Mr. Ramos' affidavit specifically dealt with the specific reasons why he wished to testify and what he would have said. (See Ramos affidavit in support of motion to vacate 28 USC §2255). This Petition for Certiorari singularly requests vacature of the judgment of conviction on the basis that Mr. Ramos had a fundamental right to testify in his own behalf and was denied that right by his trial counsel. Seemingly, neither the Government nor the court would find fault with that issue. Rather, the only reference in the record is the trial court's Decision and Order which referenced:

> If Ramos' attorney actually refused to let Ramos testify, that well may be a Sixth Amendment violation. See Brown v. Artuz, 124 F3d 73, 78 (2d

> Cir., 1997) ("[T]he Decision whether to testify belongs to the defendant and may not be made for him by defense counsel."

However, the court refused to vacate Mr. Ramos' conviction because his affidavit was "uncorroborated." This court, to counsel's knowledge, has never determined what type of corroboration is necessary, if at all, to substantiate a claim for ineffective assistance of counsel. As well, the error in this case is even more egregious because Mr. Ramos' trial counsel passed away shortly after the jury returned its verdict. Put another way, Mr. Ramos did not have the ability to have his trial counsel testify as to the reasons why he failed to allow Mr. Ramos to testify. To make matters worse, the trial court did not conduct a hearing as to Mr. Ramos's claims which were sworn to in his affidavit.

In Rock v Arkansas, 483 US 44 (1987) this court held that the right to testify at an individual's criminal trial, while not found in the text of the Constitution, "has sources in several provisions of the Constitution including the Due Process Clause of the Fifth and Fourteenth Amendments and the Compulsory Process Clause of the Sixth Amendment."

Further, as the court in Brown v. Artuz, supra, found:

> However, every circuit that has considered this question has placed the defendant's right to testify in the "personal rights" category – i.e. waivable only by the defendant himself regardless of tactical considerations. See *eg.*, United States v. Pennycooke, 65 F3d 9, 10-11 (3d Cir., 1995); United States v. McMeans, 927 F2d 162, 163 (4th Cir., 1991);

> Jordan v. Hargett, 34 F3d 310, 312 (5th Cir., 1994), vacated without consideration of this point, 53 F3d 94 (5th Cir., 1995) (in banc); Rogers-Bey v. Lane, 896 F2d 279, 283 (7th Cir., 1990); United States v. Bernloehr, 833 F2d 749, 751 (8th Cir., 1987); United States v. Joelson, 7 F3d 174, 177 (9th Cir., 1993); United States v. Teague, 953 F2d at 1532 (11th Cir., 1992); United States v. Ortiz, 82 F3d 1066, 1070 (D.C. Cir., 1996); see also Lema v. United States, 987 F2d 48, 52 (1st Cir., 1993) (assuming without deciding that right to testify may not be waived by counsel). Indeed, in Rock v. Arkansas, 483 US 44, (1987) the court described a defendant's right to testify as "[e]ven more fundamental to a personal defense and the right of self-representation." Rock, at 52.

In the end, in Brown v. Artuz, supra, the court concluded that "...counsel must inform the defendant that the ultimate decision whether to take the stand belongs to the defendant, and counsel must abide by the defendant's decision on this matter."

The circumstance in this case are even more egregious than most because Mr. Ramos was not represented by retained counsel. Rather, his trial counsel was assigned to represent him. The question raised, therefore, is not so much whether Mr. Ramos was denied effective assistance of counsel based upon his attorney's refusal to call him as a witness, but what proof is necessary to conclude that a defendant has met his burden in proving that counsel's performance was deficient for failing to call him in the first instance.

Unfortunately, the district court's misperceived Mr. Ramos' argument about the nature of his proposed

testimony. Mr. Ramos did not claim in his affidavit that he was innocent of the possession of the weapon. His claim was, rather, that he did not possess the weapon in relation to a drug distribution crime in violation of 18 USC §924(c). His testimony would have been aimed at refuting the government's argument that he possessed a controlled substance and/or the possession of the controlled substance was possessed with the intent to distribute. The record makes clear that a conviction for the crime of possession of a weapon in relation to a drug distribution crime (18 USC § 924(c)) if accepted by the jury would have eliminated a 5 year mandatory consecutive sentence. That is all Mr. Ramos intended to show.

In fact, Mr. Ramos outlined in his affidavit the numerous reasons why he wished to testify. Virtually all of his testimony would have refuted the Government's argument that he possessed the weapon in relation to a drug distribution crime. Without his testimony, he stood virtually no chance of success at trial.

The trial court's reliance on United States v. Castillo and Underwood v. Clark, 939 F2d 473, 476 (7th Cir., 1991) stood for the proposition that Mr. Ramos's own sworn statement was not sufficient. In fact, a reading of the trial court's Decision and Order confirms that the court virtually held it against Mr. Ramos that his trial counsel had passed away.

II. THE QUESTION PRESENTED IN THIS CASE IS CRITICALLY IMPORTANT AND IS THE APPROPRIATE VEHICLE TO RESOLVE THE ISSUE AS TO WHAT PROOF IS NECESSARY IN A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Resolving this issue is important to all parties. This court has not previously determined what proof is

necessary for a defendant to show that he was denied the effective assistance of counsel by the failure of his attorney to call him to the stand. Resolution of this issue is important for the courts, prosecutors and all litigants. Given the especially heightened importance of a defendant's right to testify on his own behalf, this court should resolve the issue, once and for all, as to what proof is necessary for a defendant to show that his Sixth Amendment right to the effective assistance of counsel was violated when his attorney refused to allow him to testify.

This case is also important to determine if the trial court should inquire of a defendant's position whether he/she wishes to testify.

This case, in contrast to others, clearly allows this court to determine what evidence is necessary for a defendant to show that he was denied the effective assistance of counsel. Given the facts set forth herein, this appears to be an ideal case to resolve the issue once and for all.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

By: 

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DATED: October 12, 2022
Buffalo, New York

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. The foregoing Petition contains 3,679 words including headings, foot notes and quotations and is in accordance with the length restrictions in S. Ct. R. 33. This Petition complies with the typeface requirements and the typestyle requirements of S. Ct. R. 33 because it is prepared and proportionately spaced type faced using **Microsoft Word** 2010 ad 12-point Century Schoolbook font.

Dated: October 13, 2022
Buffalo, New York

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MANDATE A-1

20-4275, Cir
United States v. Ramos

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 TO 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 17th day of May, two thousand twenty-two.

PRESENT:

BARRINGTON D. PARKER,
MICHAEL H. PARK,
EUNICE C. LEE,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. **20-4275**

GREGORY RAMOS, a/k/a PROSPECT,

Defendant-Appellant.

FOR DEFENDANT-APPELLANT: HERBERT L. GREENMAN, Lipsitz Green Scime Cambria LLP, Buffalo, NY.

FOR APPELLEE: MONICA J. RICHARDS, *for* Trini E. Ross, United States Attorney for the Western District of New York, Buffalo, NY.

A-2

Appeal from a judgment of the United States District Court for the Western District of New York (Vilardo, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

On August 23, 2016, the grand jury returned an indictment charging Defendant Gregory Ramos with four counts: (1) possession with intent to distribute cocaine base, 21 U.S.C. § 841(b)(1)(C); (2) possession with intent to distribute cocaine, 21 U.S.C. § 841(b)(1)(C); (3) unlawful possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A)(i); and (4) unlawful possession of a firearm by a person subject to a domestic violence order of protection, 18 U.S.C. § 922(g)(8).

For count 1, the government's theory at trial was that on August 14, 2015, Ramos led police on a high-speed chase in Buffalo, New York, during which he threw baggies containing cocaine base, heroin, and butyryl fentanyl from his vehicle.[1] As to counts 2–4, the government proffered evidence showing that on May 23, 2016, Ramos led police officers on another high-speed chase through the City of Niagara Falls. During the chase, Ramos threw a bag with ammunition and a loaded gun out of the car, which law enforcement later recovered. He also threw a second bag out of the car containing an unknown quantity of white powder, which dissipated after hitting a pursuing police vehicle. Ramos was eventually arrested with two cell phones and $3,640 in cash on his person. Police also searched Ramos's vehicle and recovered a small amount of cocaine coating the interior of the vehicle as well as a digital scale with white residue, 200 plastic vials, an additional $804 in cash, and two tablet computers and a phone containing messages related to drug trafficking.

[1] Ramos was not charged with the heroin and butyryl fentanyl conduct.

A jury found Ramos not guilty of count 1 and guilty on counts 2–4. Ramos filed two sets of post-trial Rule 29 and Rule 33 motions, which the district court denied. Ramos timely appealed and now raises the same arguments he made in his post-trial motions. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Ramos raises five arguments on appeal, all of which are meritless. *First*, Ramos argues that there was insufficient evidence to convict him of possession of cocaine with intent to distribute or possession of a firearm in furtherance of a drug trafficking crime. As to count 2, Ramos argues that the small amount of cocaine recovered (0.56 grams) raises "no inference of an intent to distribute." Appellant's Br. at 30. But, "view[ing] the evidence in the light most favorable to the government, [and] drawing all inferences in the government's favor," *United States v. Alston*, 899 F.3d 135, 143 (2d Cir. 2018) (citation omitted), the circumstantial evidence was sufficient for a rational jury to have found that (1) the reason a small amount of cocaine was recovered was because Ramos discarded the cocaine during the police pursuit, and (2) he intended to distribute the discarded cocaine. Ramos was found with multiple cell phones and over $3,000 in cash on his person, and his car contained a scale with white residue, plastic vials consistent with those used to distribute drugs, and multiple electronic devices with messages related to drug trafficking. Moreover, the fact that Ramos discarded the bag with white powder while being chased by the police shows consciousness of guilt.

As to count 3, Ramos argues that there was no nexus between the firearm and the drug trafficking crime. But there was sufficient evidence for the jury to convict Ramos on the firearm count. "[A] drug dealer may be punished under [18 U.S.C.] § 924(c)(1)(A) where the charged weapon is readily accessible to protect drugs, drug proceeds, or the drug dealer himself." *United States v. Snow*, 462 F.3d 55, 62–63 (2d Cir. 2006). Determining whether a firearm was used as

protection for drug-dealing activity is a fact-intensive question. *Id.* at 63. Here, before Ramos discarded the firearm, it was loaded and located in his vehicle, which contained drugs, drug proceeds, and drug paraphernalia. There was thus sufficient evidence that Ramos's possession of the firearm "facilitated or advanced the instant drug trafficking offense by protecting himself, his drugs, and his business." *Id.* (cleaned up); *see also id.* (concluding there was sufficient evidence for a conviction under 18 U.S.C. § 924(c)(1)(A) where loaded handguns were found in the bedroom where drugs were packaged and stored for sale and in close proximity to drug paraphernalia, trace amounts of illegal narcotics, and drug proceeds).

Second, Ramos raises 19 instances of defense counsel allegedly providing him with ineffective assistance of counsel. We affirm the district court's finding that Ramos failed to show that he was prejudiced by these various errors. In his brief, Ramos states only that "all of the examples listed above were injurious to the defense" and does not explain how any specific example prejudiced him. Appellant's Br. at 38. For instance, Ramos argues that defense counsel was deficient for opening the door to testimony about drug-related messages on his Facebook account and for failing to investigate whether his Facebook account actually contained those messages. But Ramos fails to explain how he was prejudiced by these alleged shortcomings when the same witness that testified about the Facebook messages also testified about drug-related text messages—unrelated to his Facebook account—that were on Ramos's phone. In light of the strong evidence against Ramos presented at trial, we conclude that Ramos did not show that "there is a reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *United States v. DiTomasso*, 932 F.3d 58, 69 (2d Cir. 2019) (citation omitted).

Third, Ramos argues that the district court abused its discretion by admitting the testimony of two government witnesses, Officer Cory Higgins and Agent James McHugh, because their expert testimony was not beyond the ken of the jury. We disagree. This Court has previously affirmed the admission of Agent McHugh's expert testimony regarding "the kinds of paraphernalia or tools that are typically found in the possession of people who are distributing narcotics."[2] *United States v. Willis*, 14 F.4th 170, 185–86 (2d Cir. 2021); *see also United States v. Tutino*, 883 F.2d 1125, 1134 (2d Cir. 1989) ("This Court has repeatedly held that the operation of narcotics dealers are a proper subject for expert testimony under Fed. R. Evid. 702." (cleaned up)). As for Officer Higgins—who testified as a lay witness—Ramos argues that he improperly veered into expert testimony and that this expert testimony was not beyond the ken of the jury. Although this Court has expressed concern when law enforcement officials testify as both fact and expert witnesses, *see United States v. Dukagjini*, 326 F.3d 45, 53–54 (2d Cir. 2003), even assuming portions of Officer Higgins's testimony were improper, "[t]he inadmissible aspects of [Higgins's] testimony, viewed in relation to the prosecution's formidable array of admissible evidence, was merely corroborative and cumulative," *id.* at 62.

Fourth, Ramos contends that the government committed prosecutorial misconduct in its summation by shifting the burden of proof, vouching for witnesses' credibility, putting at issue the prosecutor's own credibility, and suggesting that defense counsel did not believe its own case.

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[2] Ramos also argues in passing that Agent McHugh did not provide information about the experience that provided the basis for his testimony and that McHugh's testimony was designed to improperly bolster the testimony of Officer Higgins. Contrary to Ramos's argument, Agent McHugh testified to the experience and expertise that provided the basis for his expert opinion about drug trafficking. Further, this testimony was also properly used to rehabilitate Officer Higgins's testimony after it was attacked by defense counsel on cross-examination. *See United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992) ("[T]he credibility of a fact-witness may not be bolstered by arguing that the witness's version of events is consistent with an expert's description of patterns of criminal conduct, *at least where the witness's version is not attacked as improbable or ambiguous evidence of such conduct.*" (emphasis added)).

Even if we were to assume that some of the prosecutor's comments during summation were improper, Ramos does not demonstrate that they caused "substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Aquart*, 912 F.3d 1, 27 (2d Cir. 2018) (citation omitted). Ramos fails to address prejudice in his brief except in conclusory fashion. There was strong evidence against Ramos, making it likely that he would have been convicted even without the prosecutor's allegedly improper comments. And the trial court instructed the jury that the attorneys' closing statements were not evidence and that the government had the burden of proof. This is not the "rare case" where the prosecutor's summation comments were so prejudicial that relief from conviction is warranted.[3] *Aquart*, 912 F.3d at 27.

Fifth, Ramos argues that the district court erred because it did not sever count 1, which addressed the August 2015 incident and contained "inflammatory" evidence about butyryl fentanyl from counts 2–4, which addressed the May 2016 incident.[4] Appellant's Br. 53. Federal Rule of Criminal Procedure 14(a) states that "[i]f the joinder of offenses . . . appears to prejudice a defendant . . . the court may order separate trials of counts." "[T]he denial of a severance motion should be reversed only when a defendant can show prejudice so severe as to amount to a denial of a constitutionally fair trial or so severe that his conviction constituted a miscarriage of justice." *United States v. Blount*, 291 F.3d 201, 209 (2d Cir. 2002) (cleaned up). We conclude that the

[3] Ramos also argues the prosecutor committed misconduct by using evidence about butyryl fentanyl and McHugh's expert testimony in his summation. As explained above, McHugh's expert testimony was properly admitted. And Ramos cannot show prejudice from the evidence about butyryl fentanyl where Ramos was acquitted on count 1, the only count related to the butyryl fentanyl.

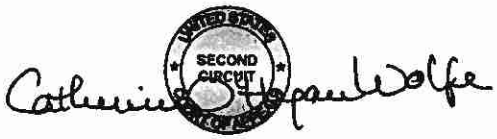
[4] Ramos characterizes his argument as a Rule 8 challenge, but it is more accurately characterized as a Rule 14 challenge. Rule 8 allows joinder of counts where "the offenses charged . . . are of the same or similar character." Fed. R. Crim. P. 8(a). Ramos does not argue on appeal that the offenses charged for count 1 and counts 2–4 were not of similar character. Instead, Ramos argues that the court should have severed the counts because joinder was prejudicial.

evidence about butyryl fentanyl was not so prejudicial as to constitute a denial of a constitutionally fair trial or a miscarriage of justice, especially in light of the strong evidence presented at trial on counts 2–4.

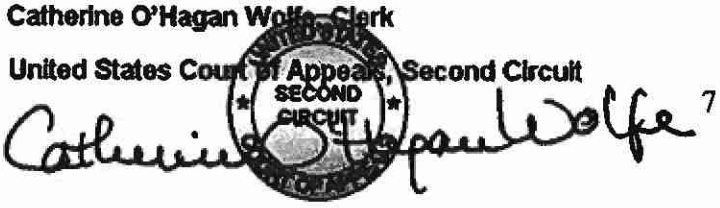
Ramos also argues that there was a retroactive misjoinder in light of his acquittal on count 1. "The term retroactive misjoinder refers to circumstances in which the joinder of multiple counts was proper initially, but later developments . . . render the initial joinder improper." *United States v. Hamilton*, 334 F.3d 170, 181 (2d Cir. 2003) (cleaned up). A defendant may be entitled to a new trial if he can show "compelling prejudice" in the form of "prejudicial spillover," which "requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant." *Id.* at 182 (citation omitted). Here, Ramos fails to demonstrate prejudicial spillover where the jury acquitted him on count 1, the only count related to the butyryl fentanyl. *See id.* at 183 ("The absence of [prejudicial] spillover is most readily inferable where the jury has convicted a defendant on some counts but not on others." (listing cases)).

We have considered the remainder of Ramos's arguments and find them to be without merit. Accordingly, we affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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



Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

A-8

Scott S. Harris
Clerk of the Court
(202) 479-3011

August 17, 2022

Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Gregory Ramos
v. United States
Application No. 22A140
(Your No. 20-4275)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on August 17, 2022, extended the time to and including October 14, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Emily Walker
Case Analyst

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Gregory Ramos
Prisoner ID #17B1422
P.O. Box 2001
Dannemora, NY 12929

Mrs. Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007