21-1896-cr(L), 21-1923-cr(CON)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

LATIQUE JOHNSON, INES SANCHEZ, AKA Meth, DONNELL MURRAY, AKA Don P, THOMAS MORTON, AKA 10 Stacks, SAEED KAID, AKA O-Dog, ERIC GRAYSON, AKA Gistol, MARQUES CANNON, AKA Paper Boy, MANUEL ROSARIO, AKA Top Dolla, MICHAEL EVANS, AKA Puff, TERRELL PINKNEY, PATRICK DALY, DAVID CHERRY, AKA Showtime,

Defendants,

BRANDON GREEN, AKA Light, AKA Moneywell,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

The Government wants this Court to affirm Green's §924(c) conviction based on Adams's testimony about Green/Light possessing/providing guns for the BHB. However, the verdict form establishes that Green's §924(c) conviction was not based on Adams's testimony; the Government never argued to the jury that that testimony supported Green's guilt on the §924(c) Count; and that testimony did not establish the §924(c) Count's drug-quantity or gun-drug-nexus elements. Besides, relief under the Grand Jury Clause is warranted because it is at least "uncertain" whether the §924(c) conviction was based on uncharged conduct (namely, the May 2017 guns).

Because Green's RICO/§846 convictions necessarily rested on the inflammatory May 2017 gun evidence and because there is no reliable evidence establishing his guilt on the RICO/§846 Counts, a new trial on the RICO/§846 Counts is warranted based on "spillover prejudice."

Even if an acquittal on the §924(c) Count is not warranted, the cumulative effect of the countless violations of Green's constitutional rights (including Trial Counsel's ineffective assistance) deprived him of a fundamentally fair trial. The Government does not seriously argue otherwise, and relies on speculation upon speculation and ignores all the significant unreliable aspects of the trial evidence.

For these and other reasons discussed below, Green's three convictions should be reversed.

I. Green's §924(c) Conviction Was Based Solely on the Guns Found in Connecticut in May 2017

In arguing that Green's § 924(c) conviction was based on sufficient evidence and was not violative of the Grand Jury Clause, the Government relies on (1) Adams's testimony that in September 2011, he was given a handgun and "[a]bout 60 grams" of "cocaine" by Green; (2) Adams's testimony that in around December 2012, he heard that "B-Zo ran off with Light's drugs and his guns while they was in Syracuse"; and (3) other evidence "provid[ing] both context and corroboration for Adams's testimony." (*See* G.Br.28-34, 39, 66). For numerous reasons, the record establishes that Green's §924(c) conviction was based solely on the guns found in his Connecticut apartment on May 16, 2017.

First, and contrary to the arguments at G.Br.31-32, the jury's verdict does show that Green's §924(c) conviction was based on the May 2017 guns. The verdict form directed the jury to "indicate whether [it] found [Green] possessed or used a firearm in relation to Count One (racketeering conspiracy), Count Four (conspiracy to distribute controlled substances), or both." (A1081). The jury put a check next to "Count Four," but not next to "Count One" or "Both." (*Id.*).[1] Thus, the jury convicted Green of possessing/using a gun in connection to the §846 Count, but acquitted him

[1] By contrast, the jury found that (1) both the RICO and §846 Counts served as predicates for Johnson's §924(c) conviction, and (2) only the RICO Count served as the predicate for Murray's §924(c) conviction. (A1081).

of possessing/using a gun in connection to the RICO Count (which included as a predicate act the same drug conspiracy charged in the §846 Count).

The only alleged drug-related evidence against Green that was unconnected to the RICO conspiracy are the lite-Rube text messages that were exchanged in April 2017 and the alleged drug paraphernalia that was found in Connecticut in May 2017. Adams testified that in around May 2016, he heard from Johnson that (1) Johnson "wasn't dealing with Light because Light didn't bail [Johnson] out when [Light] was supposed to," and (2) "Light … didn't have no position [in the BHB] no more." (A208-09, 213-14). "Light" violated the BHB's rules (including the requirement that "we loyal to the death") by not bailing out Johnson, who "literally wrote" the rules and whose "word was the law." (A137; Tr.3349-50). Moreover, there is no evidence that (1) Light/Green had any association with the BHB since mid-2016, or (2) Rube ever had any association with the BHB. This Court "knows only what the jury's verdicts were" (G.Br.31), and the verdict here shows that the jury determined that Green had violated §924(c) via possession of the May 2017 guns (which constituted the only gun evidence arguably connected to the April-May 2017 alleged drug-related evidence).

The Government's discussions at G.Br.31-33 concern "inconsistent verdicts," which show that the jury did not "act[] rationally." *See United States v. Powell*, 469

U.S. 57, 68 (1984). Here, by contrast, the jury's special interrogatory answers can "rationally be reconciled." *See id.* at 69.

Because Green was charged with violating §924(c) based on both the RICO and §846 Counts, and because the verdict form "specifically required the jury to indicate the precise theory upon which its [§924(c)] conviction … rested," the general rule requiring consideration of "whether the Government's evidence was sufficient to support the jury's verdict on either theory … is inapplicable." *See United States v. Frampton*, 382 F.3d 213, 224 (2d Cir. 2004). Therefore, there is no reason to "endeavor to determine whether [Green's §924(c)] conviction could be supported" by any guns other than the May 2017 ones. *See id.*; *see also United States v. Gonzales*, 841 F.3d 339, 345-51 (5th Cir. 2016) (holding that the Sixth Amendment requires "the sufficiency review [to] be conducted in light of the special answers the jury provided").

Second, the Government never argued to the jury that Adams's gun-drug testimony supported the §924(c) Count, and so that theory "cannot support an affirmance." *United States v. Ness*, 565 F.3d 73, 79 (2d Cir. 2009); *see also McCormick v. United States*, 500 U.S. 257, 269 & 270 n.8 (1991) ("[W]e are quite sure that the Court of Appeals affirmed the conviction on legal and factual grounds that were never submitted to the jury.… [F]or that reason alone, … the judgment must be reversed.… Appellate courts are not permitted to affirm convictions on any

theory they please simply because the facts necessary to support the theory were presented to the jury."); *United States v. Rigas*, 490 F.3d 208, 231 n.29 (2d Cir. 2007) ("[W]e will not consider in the first instance arguments regarding materiality that were not presented to the jury."). In its jury arguments, the Government cited the following evidence only as support of Green's guilt on the §924(c) Count: (1) the May 2017 guns; (2) the alleged plot to murder Cherry (which had nothing to do with drugs); and (3) an unspecified "mountain of evidence" that Green was a BHB leader and so must have known that a coconspirator would violate §924(c). (Tr.3345-49).

Contrary to the Government's assertions at G.Br.33, trial transcript pages cited by Green do show that the Government did not reference "the gun allegedly given to Adams" as support for the §924(c) Count. When the Government told the jury that Adams had testified "that Light gave him 60 grams of cocaine and a gun when he came out of jail," the Government was discussing the RICO Count and alleging that that testimony showed that "Green held guns for other [Hounds]." (Tr.3288, 3305, 3321). The Government later referenced that testimony as support for Johnson's (not Green's) guilt on the §924(c) Count. (A901-03).

Third, Adams's testimony is insufficient to establish the §924(c) Count's drug-quantity element. Adams testified that he was given "[a]bout 60 grams" of "cocaine," which is less than the 280 grams of crack and the 5 kilograms of powder alleged in the §846 Count. (A72-74, 1079-81). Regarding Adams's testimony about

B-Zo stealing "all of Light's drugs," there is no evidence regarding the drug type(s) or quantity/ies.

Fourth, Adams's testimony is insufficient regarding the §924(c) Count's gun-drug nexus element. Adams testified that he was given the handgun and cocaine "[b]ecause [he] just came home [from prison], and [Johnson] told [Light that Adams] was messed up." (A121). It would be speculative to find that the alleged gun furnishing was "to protect that cocaine, drug proceeds, and [Adams] while selling the cocaine" (*see* G.Br.28-29, 33), as opposed to a transaction coincidentally occurring at the same time as the alleged cocaine furnishing. *See United States v. Pauling*, 924 F.3d 649, 656-57 (2d Cir. 2019) ("[T]he government must do more than introduce evidence at least as consistent with innocence as with guilt.… [W]e may not credit inferences within the realm of possibility when those inferences are unreasonable."); *Smith v. United States*, 508 U.S. 223, 232, 238 (1993) (holding that under §924(c)'s "during-and-in-relation-to" element, a gun's "presence or involvement cannot be the result of … coincidence"); *United States v. Snow*, 462 F.3d 55, 62 (2d Cir. 2006) (holding that §924(c)'s "in-furtherance" element is not satisfied by "the mere presence of a weapon at the scene of a drug crime"); *United States v. Wilson*, 115 F.3d 1185, 1192 (4th Cir. 1997) ("[W]e are hardpressed to conclude that the sale of the rifle facilitated Wilson's drug trafficking business. It was a completely independent, yet contemporaneous action."). Indeed, the evidence

shows that Hounds had guns for many purposes unrelated to drug trafficking. For example, Adams himself testified that Hounds had to "bust" their guns for "life or death," that he had guns for "[p]rotection … against … rival gangs," and that Hounds had guns for security at powwows. (Tr.189, 198, 380-81, 398). And the Government (1) said in summation that that the BHB "kept guns at their drug spots, *at their homes, at the places that they frequently spent time in order to protect their territory and to retaliate against anyone who disrespected or threatened them*"; and (2) concedes on appeal that Hounds "had guns to protect drugs and drug proceeds, *among other reasons*." (Tr.3346-49; G.Br.30 (emphasis added)). For similar reasons, there is no evidence regarding a nexus between the unspecified "drugs and guns" that "Light" allegedly had in Syracuse.

The Government presents other speculation regarding Adams's testimony:

- Adams testified that when he was incarcerated between 2005 and August 3, 2011, he saw the name "Light … on paperwork[,] [i]t's like the four-star." (A106-07, 120, 148, 210, 253, 285). The Government cites that testimony as "indicating that Green had then held [a BHB] leadership role" (G.Br.28), but ignores the evidence about "Light Skin" and several other Hounds having the name "Light/Lite" (*See* Op.Br.59). If anything, the "Light … on paperwork" was not Green. Morton testified that Green had no BHB status when they first met "between sometime in 2010 and 2011," and Adams testified that Green "was the acting GF" in "[a]round 2011" (even though Morton testified that he became "an acting GF" in "early 2011" and Rosario testified that Adams "was the godfather for Greyhound right before [Rosario] came home in [December] 2011"). (Tr.174, 819, 840, 844, 1033-34, 2969). Except for Adams's testimony about Light having "no position [in the BHB] no more" as of mid-2016, there is no evidence about Light/Green being demoted from a BHB position.

- It is speculative to infer from Adams's testimony that Green violated §924(c) while he was allegedly in Syracuse. (*See* G.Br.21-22, 29-30). Adams "kn[e]w that Hounds were selling drugs in Syracuse" because "[t]hat's where Light was," and Adams knew that "Light was in Syracuse" based on hearing that "B-Zo ran off with Light's drugs and guns while they was in Syracuse." (A186-88). There is no other evidence about a "Light's" presence in Syracuse, and the "Light in Syracuse" could have been any of the numerous Lights/Lites identified a trial.

Fifth, Adams's testimony was "patently incredible" such that it could not have been credited by a rational jury. *See United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). Adams was a CW who was incredible in countless significant respects (*see* Op.Br.13-16, 23-27, 60-63, 65), and had told the Government during a proffer "that Light gave Adams a little handgun to give to [Johnson]" (A881). The Government contends that Adams "denied that the [proffer] notes accurately captured what he said." (G.Br.33). But Adams's denial came only after he had *thrice* testified that the notes refreshed his "recollection that [he had] told the government Light gave [him] a little handgun to give to [Johnson]." (A284).

For the same five reasons just discussed, Adams's testimony was insufficient to convict Green as an aider/abettor of "Adams's possession of [a] gun in furtherance of the [charged drug] conspiracy." (*See* G.Br.29-30, 39). Moreover, there is no evidence that Adams possessed/used that gun to facilitate the charged §846 conspiracy; even if there is such evidence, there is no proof that Green had prior knowledge that Adams was going to possess/use the gun for that purpose. *See Rosemond v. United States*, 572 U.S. 65, 70-81 (2014) ("[A]n aiding and abetting

conviction requires … a state of mind extending to the [specific and] entire crime.").[2]

The Government faults Green for relegating to a footnote Green's alleged furnishing of the cocaine/gun. (G.Br.32). But as discussed, it is obvious that Adams's testimony played no role in Green's 924(c) conviction. Moreover, the May 2017 guns were the basis for the District Court's finding of a sufficient gun-drug nexus (the District Court merely cited Adams's gun-drug testimony as "additional evidence … linking Green's possession of firearms to his drug trafficking"). (SPA57-61). Green sufficiently raised his sufficiency-of-the-evidence claim. *See* Fed. R. App. P. 28(a)(5)-(9).

In sum, Green's §924(c) conviction cannot be affirmed based on Adams's testimony.

II. Green's §924(c) Conviction Was Based on Uncharged Conduct

Because the April-May 2017 evidence formed the basis of Green's §924(c) conviction, it must be reversed under the Grand Jury Clause for three reasons. The §924(c) Count did not contemplate possession/use of a gun in Connecticut, in mid-May 2017, or in connection with a single alleged drug deal having no connection to

[2] Because Adams's patently incredible testimony did not suggest that Green had violated §924(c) and was not presented to the jury as support of Green's guilt on the §924(c) Count, it makes perfect sense why the jury acquitted him of possessing/using a gun in connection to the RICO Count.

the BHB. *Cf. United States v. Knuckles*, 581 F.2d 305, 309-12 (2d Cir. 1978) (finding no fatal variance because "the time, place, people, and object proved at trial [we]re in all respects those alleged in … the indictment").

Frist, a grand jury indicted Green under §924(c) for possessing/using a gun "in the S[DNY]" (A73-74), but there is no evidence that any of the May 2017 evidence was possessed/used in that district or that any lite-Rube conduct occurred there. (*See* Op.Br.51-53). The Government does not even attempt to counter Green's argument that the discrepancy between the location specified in the Indictment (SDNY) and the trial evidence (Connecticut) violated the Grand Jury Clause. (*See* G.Br.63-69). Thus, Green's § 924(c) conviction must be reversed on this basis alone.

Second, regarding the single-multiple conspiracy discrepancy, the Government asserts that (1) marijuana trafficking was charged in the RICO and §846 Counts; (2) the jury "could properly infer that Green … agreed to the sale of marijuana by [Hounds]"; and (3) cellphones and the alleged drug paraphernalia seized in May 2017 revealed his "continued participation in the charged narcotics conspiracy." (G.Br.63-64). But the predicate crime underlying Green's §924(c) conviction was the conspiracy charged in the §846 Count, which charged him with conspiring with Johnson, Murray, Cherry, "and other known and unknown" to traffic drugs. (A72-74). Because (as discussed) the only reasonable inference from the evidence is that Green/Light had no association with the BHB since mid-2016, there

is insufficient evidence that the lite-Rube conduct was related to the charged predicate BHB drug-conspiracy. Therefore, it is obvious that the jury's §924(c) conviction was based on an uncharged non-BHB drug conspiracy. *See United States v. Bradley*, 381 F.3d 641, 646 (7th Cir. 2004) (holding that because a predicate crime charged in a §924(c) Count is "an essential element of the § 924(c) offense charged," the Government "must connect that predicate offense with the firearm possession"); *United States v. Randall*, 171 F.3d 195, 198, 203-10 (4th Cir. 1999) (finding that a §924(c) count was constructively amended via "proof of an alternative § 924(c) predicate offense not charged in the indictment"); *United States v. Willoughby*, 27 F.3d 263, 265-67 (7th Cir. 1994) (finding "constructive amendment" in similar situation).

Third, regarding the date-discrepancy between the Indictment ("in or about December 2016") and the evidence (May 16, 2017), the Government ignores this Court's caselaw that date-differences are allowed "*provided* that the proof fell within the period charged." *See United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) (emphasis added). Regardless, and even if mid-May 2017 is not "reasonably near" December 2016, the "reasonable near" principle "contemplates a single act the exact date of which is not precisely known by the grand jury and, therefore, does not need to be proved with exactitude." *See United States v. Ford*, 872 F.2d 1231, 1236 (6th Cir. 1989). Given the Indictment's end date of "in or about December 2016," it is

obvious that Green was not indicted for possessing guns on a particular date in May 2017.

Whether or not the May 2017 guns were admissible "even if the charged conspiracies had ended" (*see* G.Br.68-69) is irrelevant to the Grand Jury Clause issues. The caselaw cited by the Government concern whether post-conspiracy conduct is "relevant," not whether a verdict can be based on such conduct. *See United States v. Nathan*, 476 F.2d 456, 457-60 & n.10 (2d Cir. 1973) (explicitly noting that the jury was "carefully instructed" that certain post-conspiracy activity was to be used only regarding "the existence of a conspiracy or the participation of the alleged conspirator"); *United States v. Robinson*, 560 F.2d 507, 510-513 & n.4 (2d Cir. 1977) (finding that testimony that the defendant possessed a .38 caliber gun in July 1975 tended to identify him as the individual who had committed a robbery with a ".38 caliber or [a] gun that 'looked like' a .38 caliber" in May 1975, and upholding the testimony's admission because (inter alia) the jury was not shown the gun and was "carefully instruct[ed]" that the testimony was admitted for identity purposes only). Besides, for reasons discussed at Op.Br.55-56 and *infra* at 20-22, the May 2017 gun evidence was/is inadmissible.

Green's filing of a pretrial motion to suppress the May 2017 guns does not show that he had "adequate" notice of the Government's intention to introduce the guns at trial. (*See* G.Br.69). Instead, all the filing shows is that Green sought to

suppress evidence that had the potential to be introduced. The Government cites nothing to suggest that it had informed Green of the intention to introduce the guns. Trial Counsel's failure to pursue meritorious dispositive arguments regarding the April-May 2017 evidence shows that the introduction of the guns at trial truly came as a surprise. (*See* Op.Br.52-53, 72).

The Government does not address the fact that because the §924(c) Count specified SDNY and "in or about December 2016" as the crime's location and end date, Green is at risk of a second prosecution for possessing guns in Connecticut in May 2017.

Even if there is a basis to affirm Green's §924(c) conviction based on Adams's gun-drug testimony, the Government's presentation of the April-May 2017 evidence still violated the Grand Jury Clause because it is "uncertain" whether Green's §924(c) conviction was based on "conduct that was the subject of the grand jury's indictment." *See United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005); *see also United States v. Thomas*, 274 F.3d 655, 671 (2d Cir. 2001) (providing that a constructive amendment occurs if there is "substantial likelihood" that the defendant "may have" been convicted of an uncharged offense); *United States v. Hassan*, 578 F.3d 108, 133-34 (2d Cir. 2008) (providing that a constructive amendment occurs when there is a "real possibility" that the defendant was convicted of an uncharged offense); *United States v. Miller*, 891 F.3d 1220, 1231 (10th Cir. 2018) ("Even under

plain error review, we will find that a constructive amendment occurred when the evidence presented at trial, together with the jury instructions, *raises the possibility* that the defendant was convicted of an offense other than that charged in the indictment.").

In sum, each of the three differences between the Indictment's allegations and the trial evidence show that Green's §924(c) conviction was based on uncharged conduct.

III. There is No Nexus Between the May 2017 Guns and Charged Drug Conspiracy

In claiming that the evidence seized from Green's apartment is sufficient to sustain his §924(c) conviction, the Government alleges that the May 2017 guns were found "loaded" in "an open handbag in his bedroom closet, closely accessible to where Green presumably slept and where he was first seen when the officers entered the apartment … [and] in close proximity … to approximately $2,000 in cash, which a rational jury could infer was drug proceeds." (G.Br.34-40). But because the only reasonable inference from the evidence is that Green/Light had no association with the BHB since mid-2016, there is no evidence linking the May 2017 guns to the charged predicate BHB drug-conspiracy. *See Bradley*, 381 F.3d at 646; *Randall*, 171 F.3d at 198.

The Government presents other specious inferences and also mischaracterizes the record:

- Marshals did not "first see[]" Green "in" (or even near) a bedroom closet. (A303, 327-28 (Kushi: "As soon as we made entry into the apartment, we heard there was noise upstairs of an occupant that we didn't know who was upstairs, but eventually Brandon Green did come down to the first floor …. [A]t the time when we made entry into the residence … we assumed there was an individual on the second floor which we could audibly hear, and it ended up being Mr. Green who came down the stairwell to the first floor.")).

- Because nowadays ordinary citizens keep a couple of thousands of dollars in cash at home, the "very existence" of $2,000 in a home is not "seen to warrant a gun for protection." (*See* G.Br.37). Indeed, in *United States v. Lasanta*, this Court found an insufficient gun-drug nexus even though a defendant—in April 1990, during "his involvement in [drug] conspiracies," and "immediately after a narcotics-related meeting"—had in his car a loaded gun right near $2,376 in cash (which, in 2017, amounted to almost double when accounting for inflation). 978 F.2d 1300, 1303, 1308-10 (2d Cir. 1992).

- The Government cites A972 as evidence "that the guns were loaded or otherwise operable." (G.Br.37-38). A972 is a photograph of a gun and three loaded magazines, and the magazines were not attached to the gun. Besides, the photograph was taken after the guns were seized. Accepting the Government's proposition would require this Court to also find that a photograph of bullets outside one of the guns (A977) sufficiently shows that the gun was unloaded when found. Indeed, the photographs depicting guns in the handbag reveal unloaded guns. (A968-70). If any of the guns were loaded when found, the Government should (and would have) elicited such testimony from Kushi.

- Similarly, there is no evidence that (1) the handbag was open when found, or (2) the cash was found in the same closet where the photograph of the money was taken. (*See* G.Br.37).

- There is no evidence that Cellphone-1's "I got four bands" text to an unidentified person was a "drug trafficking-related communication." (*See* G.Br.35).

- Nor is there evidence that the texts show that "Rube" owed "lite" "a debt for marijuana that [lite] had provided him on consignment." (*See* G.Br.35, 65-66). The lite-Rube texts do not indicate why "lite" owed Rube money, and the texts about "loud" concerned what Rube "said [he] was gonna send [to lite]." (A1041-48).

- There is no evidence that the "Gotti" written in a BHB address book is the same "Gotti" who exchanged texts with Cellphone-1. (*See* G.Br.35, 64-65). Indeed, "[l]ots of [Hounds] had nicknames," "[s]ometimes different [Hounds] had the same nickname," and the phone number for the Gotti in the address book is different from the number for the Gotti involved in the texts. (A658, 958, 1031-40). Even if the Gotti involved in the texts was a present/former Hound, that mere communication does not suggest that "lite" was associated with the BHB since mid-2016.

- By the Government's logic (*see* G.Br.35, 64-65), the lack of evidence that Green/Light was in the BHB address book (*see* A338) proves that Green was never a Hound.

Even crediting *all* of the Government's specious inferences (including the speculation that the May 2017 guns somehow had a nexus to Green's alleged role in the Elmira Drug Operation that ended in early 2013), there is still an insufficient gun-drug nexus. Most significantly, there were no drugs on Green or in his apartment; the guns were in a handbag that was behind clothes in a closet (as opposed to being strategically located for quick use, like near Green's bed); and the guns and alleged drug paraphernalia were not in the same room (let alone same floor).

In attempting to distinguish the on-point precedential *Lasanta* opinion, the Government claims that the jury may have convicted Green under §924(c)'s "use"

prong and cites evidence regarding the BHB's drug operations. (G.Br.38-40; *see also* G.Br.29-31). But as discussed, the §924(c) conviction was based on the May 2017 guns (which had no link to BHB drug-trafficking), and there is no evidence of Green "using" those guns. *See Bailey v. United States*, 516 U.S. 137, 143-50 (1995) (holding that §924(c)'s "use" element requires "active employment" of a gun).

Moreover, the Government omits the crucial fact that the *Lasanta* defendant possessed a loaded gun and $2,376 "immediately after a narcotics-related meeting." 978 F.2d at 1308-09. Despite that fact, and the fact that the defendant possessed the gun and cash in close proximity during "his involvement in heroin and cocaine conspiracies," this Court found an insufficient gun-drug nexus under §924(c)'s use/carry prong. *Id.* at 1308-09. Here, even assuming that the evidence sufficiently shows that the guns were near the $2,000, there is no evidence that the guns were found "immediately after" drug-related activity. It would thus "surely [be] speculation" to find a sufficient gun-drug nexus, especially under §924(c)'s in-furtherance prong (which imposes "a higher standard of participation" than the "during-and-in-relation-to" prong). *See Lasanta*, 978 F.2d at 1309; *United States v. Combs*, 369 F.3d 925, 932-33 (6th Cir. 2004).

Notably, the Government does not even attempt to distinguish other cases wherein appellate courts found an insufficient gun-drug nexus that was stronger than any nexus in Green's case. *See United States v. Ray*, 803 F.3d 244 (6th Cir. 2015);

United States v. Rios, 449 F.3d 1009 (9th Cir. 2006); *United States v. Iiland*, 254 F.3d 1264 (10th Cir. 2001).

The cases relied upon by the Government concerned much stronger gun-drug nexuses than any nexus presented in Green's case. *See Snow*, 462 F.3d at 63 ("[L]oaded handguns, illegally possessed, were found in the bedroom of an apartment where drugs were packaged and stored for sale. The guns were in close physical proximity to the paraphernalia used in the packaging and sale of crack cocaine and the trace amounts of illegal narcotics found in the kitchen. Moreover, the guns were found in the same dresser as $6,000 in cash[.]"); *United States v. Medina*, 944 F.2d 60, 62-63, 66-67 (2d Cir. 1991) (concerning a "pistol and a spare loaded magazine in a partially opened gun case lying on a table next to [Defendant's] bed," which was "in the same room where large amounts of buy money (almost $47,000) were stored"); *United States v. Clark*, 319 F. App'x 46, 48 (2d Cir. 2009) ("Among the most significant testimony was that of Torrence Dyck, who testified that he had bought drugs from [Defendant James] Clark three to four hundred times over several years and that Clark 'always' answered the door to his house, from which he trafficked drugs, holding a gun."); *United States v. Maya*, 966 F.3d 493, 496-98, 502-04 (6th Cir. 2020) (there was evidence that Defendant "drug-trafficking conspiracy was ongoing" and that he "bought increasingly larger quantities of marijuana from [a coconspirator]," "always purchased that marijuana with cash,"

"sometimes had to go home to get the cash for the drugs," "owned a 9-millimeter handgun the entire time he sold drugs," "usually kept [the handgun] … underneath his pillow," "would 'sometimes' have the gun with him while selling drugs," and "considered it useful to have a firearm at drug deals"; moreover, police found a "loaded 9-millimeter handgun" in "an easily accessible gap between the mattresses of his bed," "extra ammunition on his dresser," "$8,545 in cash in a jacket in his closet, $6,340 in cash underneath a television stand, and $5,900 in money orders on his dresser").

The Government cites law on "termination" of a conspiracy. (G.Br.40-41). If Green's alleged "membership [in the BHB was] presumed" in May 2017 (G.Br.40), then that simply means that he remained liable for "acts of his co-conspirators." *See Smith v. United States*, 568 U.S. 106, 111 (2013). The Government still had to establish a specific nexus between the May 2017 guns and the charged BHB drug-conspiracy.

IV. Green's RICO/§846 Convictions Resulted from Prejudicial Spillover

There was spillover prejudice from the evidence regarding the §924(c) Count because the §924(c) Count charged Green with possessing/using a gun in connection with the RICO/§846 Counts; the highly-inflammatory May 2017 gun evidence was essential to the Government's case and irrelevant to the charged conspiracies; and the evidence on the RICO/§846 Counts was beyond weak.

The May 2017 Guns Were The Most Inflammatory Evidence

Contrary to the Government's blanket assertion (G.Br.71-73), the May 2017 guns were the most sensational pieces of evidence against Green. The gravamen of the remaining evidence was CW testimony and the cocaine allegedly seized from him in August 2010.

The May 2017 Guns Would Be Inadmissible

At a new trial, the May 2017 guns would be inadmissible. The Government's claim to the contrary (G.Br. 72-72) ignores the evidence that "Light" played no role in the BHB since mid-2016. Because the RICO/§846 Counts charged BHB conspiracies, the May 2017 guns were not relevant (let alone "highly probative") of Green's alleged "role … [or] ongoing participation in those conspiracies." (*See* G.Br.73). Indeed, because the May 2017 guns are severely prejudicial and were possessed after the "indictment period," admission of that evidence would constitute an abuse of discretion. *See United States v. Zhong*, 26 F.4th 536, 551-54 (2d Cir. 2022).

In *United States v. Diaz* (cited at G.Br.72), this Court found no abuse of discretion in the district court's admission of a defendant's "stockpiling of weapons to protect [his] gang's drug trade," reasoning that the stockpiling (1) was "admissible as direct evidence of the conspiracy itself"; and (2) "had significant probative value" regarding several disputed issues ("including the existence, nature and operations of

the RICO enterprise, and the related racketeering and drug conspiracies") that was not substantially outweighed by undue prejudice. 176 F.3d 52, 73, 80 (2d Cir. 1999). Here, by contrast, the May 2017 guns had no connection to any BHB activity, the BHB's "existence, nature and operations" was beyond dispute, and the abuse-of-discretion standard is inapplicable to a prejudicial spillover claim.

Although this Court has "innumerable precedents … approving the admission of guns in narcotics cases as tools of the trade" (G.Br.72-73), those precedents involved guns that were relevant to the charged drug conduct. *See, e.g.*, *United States v. Muniz*, 60 F.3d 65, 67-68, 71 (2d Cir. 1995) ("The defendant's possession of the gun [in Apartment 6C on March 4, 1993] … showed that at the time he was charged with possession of the heroin, [which police found in Apartment 6C's mailbox on February 24, 1993,] he had equipped himself with a tool of the narcotics trade. The gun … logically supported the proposition that it was the defendant, rather than … some other person, who placed the heroin in the mailbox."); *United States v. Roldan-Zapata*, 916 F.2d 795, 804-05 (2d Cir. 1990) ("[T]he jury could infer by the[] presence [of a revolver and other items] that they were *tools of the trade in current use*. Evidence of their possession at a *closely related time* is relevant to the charged conspiracy and not a mere showing of bad character, even if it relates to transactions outside the scope of the indictment. The evidence is also probative of Osario-Serna's

intent and state of mind to engage in the *narcotics trafficking that was charged*." (emphasis added)).

The Government has not identified any permissible non-propensity purpose for the May 2017 guns. *See* Fed. R. Evid. 404(b).

The May 2017 Guns Were Used by the Jury in Reaching Its RICO/§846 Verdicts

In arguing that the jury did not use the May 2017 guns to convict Green on the RICO/§846 Counts, the Government repeats the claim that "only the jury's verdicts … can be known" and cite the District Court's jury instruction about deciding "each count … separately." (G.Br.73). The Government's contentions are contrary to the record (*see supra* at 2-9), as well as to the spillover prejudice factor of whether there is an "indicat[ion]" that the jury "probably" used the May 2017 gun evidence in reaching its RICO/§846 verdicts (*see* Op.Br.53-54, 57). Indeed, the Government's claim that "[t]here is no reason to think that the jury" used the May 2017 gun evidence to convict Green on the RICO/§846 Counts (G.Br.73) contradicts the Government's prior claim that those guns were a/the basis for the jury's §924(c) verdict (G.Br.34-38).

The Evidence Regarding the RICO/§846 Counts Was Fatally Weak

In claiming that the evidence of Green's guilt on the RICO/§846 Counts was "strong," the Government asserts that the CWs' testimony "strongly inculpated Green" and "was corroborated by records, recordings, and physical evidence."

(G.Br.20-27, 73). But the Government does not address any of the countless significant unreliable aspects of the evidence set forth at Op.Br.57-65. Contrary to the Government's blanket assertion at G.Br.27, 74-76, the inconsistencies in the testimony went to significant material matters. The points presented at Op.Br.58-65 establish Green's actual innocence.

Turning to the physical evidence against Light/Green, it is far from "entirely logical" to infer that "Brandon Green's" Western Union transfers were part of the Elmira Operation. (*See* G.Br.74). Green allegedly was a "primary drug supplier[]" for the Elmira Operation, which "transferred drug sale proceeds back to the Bronx via Western Union." (G.Br.23, 74). Yet, the Western Union records merely show that for transactions from/to Elmira/Horseheads, "Brandon Green" was involved in four transactions, totaling $510. (A1018-20). Moreover, the Western Union records do not suggest that any of "Brandon Green's" transactions were related to drugs or were made with Daly or a Hound. And although "all of Light's drugs" were stolen in around late 2012 and there is no evidence that the Elmira Operation existed after January 2013, only 1 (a mere $200 one) of the 18 Western Union transactions involving "Brandon Green" occurred before June 2013. (A1018-20).

The Government's contention that "Johnson's reference to [Light's] 'stash'" must have referred to drugs "ignores" Jones's testimony that Light "provide[d]

guns" for the BHB. (*See* G.Br.21, 74). Indeed, the Government itself said in opening that "Light kept a stash of loaded guns for the [BHB]." (A103).

V. The District Court's Rule 33 Denial Constituted an Abuse of Discretion

The Government notes that Green "points to nothing" in the District Court's Rule 33 decision "that he claims is … a clearly erroneous assessment of facts." (G.Br.76). That is precisely Green's point—if the significant weaknesses in the case were considered, then the District Court could not have been "satisfied that competent, satisfactory and sufficient evidence" supported his convictions. *See United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001).

VI. The Government's Improprieties Warrant Reversal of Green's Convictions

The Government *was* "required to refer to Sisco's testimony as perjury rather than a mistake." (*See* G.Br.78). Despite knowing that the August 2010 traffic stop occurred at Monterey Avenue and 180th Street, the Government led Sisco to testify that the stop occurred just "[o]ne city block … away from the Honeywell housing projects" (A755)—in an apparent attempt to link the stop to where Green allegedly supplied drugs from in around 2012. A prosecutor's knowing elicitation of perjury or failure to correct it will lead to "virtually automatic" reversal, *Shih Wei Su v. Filion*, 335 F.3d 119, 126-27 (2d Cir. 2003), because such "prosecutorial misconduct … involves a corruption of the truth-seeking function of the trial process," *United States v. Bagley*, 473 U.S. 667, 680 (1985). Because Sisco's testimony went to the

heart of Green's convictions and the evidence against him was not "overwhelming," there is a "reasonable likelihood" that Sisco's perjury "could have" influenced the jury's judgment. *See Shih Wei Su*, 335 F.3d at 126-30.

Given Sisco's refusal to acknowledge the correct location of the stop even after reading it in his own paperwork, his testimony could not have been a mere "mistake." It is mystifying how Sisco's paperwork refreshed his memory regarding Green's birthday but not the stop's location. Although the District Court found that Sisco was generally "credible" (G.Br.78), this Court is reviewing the District Court's findings, not deferring to them.

The Government claims that CWs other than Morton, Adams, and Rosario "suggested that Green was one of the Gang's top [drug] suppliers," but does not name any of those other supposed CWs (because there were none). (G.Br.78). Indeed, in summation, the Government named "Adam[s], Morton, [and] Rosario" only as the CWs who testified "that Light was a drug supplier to the gang." (A890-91).

Contrary to the Government's assertion (G.Br.78), "cooperator after cooperator" connotes much more than three CWs.

The Government concedes that three of the challenged summation remarks were misstatements, but characterizes them as "minor." (A78-79). But because Morton's testimony does not suggest that "Light" ever had "status" in the BHB, it

was a significant misstatement for the Government to represent that Morton's testimony was that "Light was the GF" "between sometime in 2010 and 2011." The fact that Rosario testified that "[Light] supplied heroin to Elmira" does not explain the Government's misstatement that "Rosario had testified that Evans ('Puff') sold heroin for Green." (*See* Gov.Br.78-79). And the Government does not address the fact that Adams never testified that Evans "sold heroin for Light." (*See id.*). Nor does the Government deny that it had misstated Rosario's testimony as saying that he had heard from "people" other than Kaid that "Light" was the Elmira Operation's heroin supplier. (*See id.*).

Although the jury was told that attorney arguments are not evidence (G.Br.79), the misstatements were not stricken from the record and the jury was not even informed about the misstatements. *See Floyd v. Meachum*, 907 F.2d 347, 355 (2d Cir. 1990) ("[T]he only arguably curative measure adopted by the trial judge—the normal instruction in the course of his charge that argument of counsel is not evidence—was inadequate."); *United States v. Friedman*, 909 F.2d 705, 710 (2d Cir. 1990) ("In those cases where a prosecutor's improper remarks have not been deemed prejudicial, the record has disclosed emphatic curative instructions by the trial judge.").

Because the trial lasted five weeks and took up over 3,500 transcript pages, and because Trial Counsel failed to object to the challenged summation remarks,

there is no reason to believe that the jury realized the Government's misstatements upon "review[ing] the record." (*See* G.Br.79). Indeed, although the jury requested certain portions of the trial transcript, the jury did not request all of Rosario's testimony (Tr.3680-81, 3686-87) or any of Morton's testimony.

In sum, the Government's misstatements (about Green/Light being "the GF" and a drug supplier of the BHB) went to the heart of Green's convictions; no specific curative measures were taken; and the case against him was weak. *See Friedman*, 909 F.2d at 710 (reversing conviction based on improper prosecutorial summation where "the gravity of the misconduct was substantial, the District Court's response was insufficient to preclude a significant risk of prejudice, and [it could not be] confidently sa[id] that a conviction would surely have been obtained in the absence of the misconduct"); *Berger v. United States*, 295 U.S. 78, 88 (1935) (providing that a prosecutor's "improper suggestions" and "insinuations" are "apt to carry much weight against the accused when they should properly carry none"); *United States v. Burse*, 531 F.2d 1151, 1155 (2d Cir. 1976) ("[I]n an admittedly close case such as this, prosecutorial misstatements take on greater importance, whether those statements are intentional or not."); *United States v. Grunberger*, 431 F.2d 1062, 1067 (2d Cir. 1970) ("Error which may be deemed relatively minor in other circumstances may reach prejudicial proportions in a close factual case such as

this."). The improper summation was aggravated by the Government's prejudicial leading questions. (*See* Op.Br.11, 13, 28).

VII. Trial Counsel's Deficient Representation Prejudiced Green

The Government does not dispute that at the time of August 2010 stop-and-frisk, the NYPD persistently and pervasively made unconstitutional stops and frisks of blacks. Nor does the Government address the fact that (1) Sisco's deposition testimony establishes that the NYPD lacked reasonable suspicion to conduct the stop, or (2) the state case was dismissed before presentment to a grand jury. For these reasons alone, it is clear that Trial Counsel was ineffective for failing to move to suppress the August 2010 cocaine.

The Government also fails to dispute Green's claims that Sisco lacked reasonable suspicion that Green was "armed and dangerous" and that Sisco's frisk of Green did not make it "immediately apparent" there was contraband in his waistband. Instead, the Government contends that these claims are based "on the absence of evidence in a record that has not been developed." (G.Br.83). But the record includes the transcript of the deposition testimony of Sisco, who had every incentive at the deposition to counter Green's civil rights claims.

Regarding the prejudice resulting from Trial Counsel's failure to file a suppression motion, it is reiterated that the alleged August 2010 cocaine was the only tangible evidence of drug possession by Green.

The fact that Trial Counsel (and Johnson's/Murray's attorneys) presented to the jury "certain purported inconsistencies and impeachment matters" did not excuse Trial Counsel from presenting the major incredible aspects of the evidence that are specified at Op.Br.58-65. *Cf. United States v. Eisen*, 974 F.2d 246, 265 (2d Cir. 1992) (cited at G.Br.87) ("Napoli culls *five* instances of alleged deficiencies in Shargel's performance.… We are convinced that *Shargel's overall performance was vigorous, sustained, and effective*. Furthermore, we find that *none of the five instances complained of falls outside the wide range of professionally competent assistance*.'… *Shargel could have reasonably concluded that further cross-examination on relatively unimportant matters would have confused or fatigued the jury*." (emphasis added)); *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987) (cited at G.Br.87-88) ("Counsel might very well have felt that there was little need for additional probing by the time it was his turn to cross-examine, or even that cross-examination at that point might have been counterproductive.").

Green's IAC claims regarding a sufficient gun-drug nexus are meritorious. The fact that the *pretrial evidence* may have shown certain things (e.g., that the May 2017 guns were found "in an open handbag," G.Br.88-89) did not excuse Trial Counsel from arguing that the *trial evidence* was insufficient to convict Green on the §924(c) Count. Because the Government's sufficiency-of-the-evidence argument rests on a "close proximity" between the May 2017 guns and $2,000 cash,

it would not have been "pointless" for Trial Counsel to show that the guns and drugs were in different closets. (*See* G.Br.89). A person does not have six guns (operable or otherwise) to "protect" a mere $2,000. (*See* G.Br.38, 91).

It is self-explanatory how the verdict form suggested that Green "could be guilty of [the §924(c) Count] even if he possessed a gun 'in relation to' the narcotics distribution conspiracy charge. (*See* G.Br.90). Although §924(c)'s "in-furtherance" element is a higher standard than the "during-and-in-relation-to" element, the verdict form here summarized the §924(c) Count (in relevant part) as follows: "Possession or Use of Firearms, or Aiding and Abetting the Possession or Use of a Firearm, During and in Relation to, or in Furtherance of, … [the §846 Count]," (A1081). Thus, the jury may have returned its §924(c) verdict based on finding that Green committed a non-federal offense, namely "Possession … of Firearms, or Aiding and Abetting the [Same], During and in Relation to … the §846 Count." *See Combs*, 369 F.3d at 934-36 (finding an "impermissible amendment" where the indictment charged a violation of §924(c)'s "possession" prong and the jury instructions "cross-matched the conduct from the 'possession' offense with the standard of participation from the wholly distinct 'use' offense"). The principle that "juries are presumed to follow their instructions" (G.Br.91) applies with particular force to a verdict form, which the jury has during deliberations.

Trial Counsel could have questioned Jones about "not know[ing] Green well enough to know his real name" without revealing that name. (*See* G.Br.91).

The cumulative effect of Trial Counsel's numerous prejudicial errors deprived Green of his right to effective assistance of counsel.

VIII. Jones's Unconstitutional In-court Identification Contributed to a Fundamentally Unfair Trial

In contending that the District Court did not clearly err in allowing Jones's in-court identification of Green (despite Jones's previous inability to identify Green in the courtroom), the Government relies heavily on *United States v. Gershman*, 31 F.4th 80, 93-94 (2d Cir. 2022). (G.Br.96-97). In *Gershman*, there was no indication that the identification witness had any difficulty in making an in-court identification of the defendant. *See* 31 F.4th at 91-94. Indeed, the witness's in-court identification was made "with '100 percent' certainty." *Id.* at 94. Here, the issue is not whether Jones's in-court identification of Green was "improperly tainted by … previous identification events," *see id.* at 92, but rather whether that identification "had an origin independent of [his] viewing [Green] in the courtroom," *see United States v. Matthews*, 20 F.3d 538, 548 (2d Cir. 1994).

Insofar as a pretrial *Wade* hearing should have been requested (*see* G.Br.96-97), Trial Counsel's failure to do so contributed to the deficient representation that Green had received.

The Government speculates about two "possible explanations for Jones' later identification other than that he was seated at counsel's table"—he "may have recognized Green after having had a fuller opportunity to observe him, or after his memory was refreshed by viewing video and a photograph of Green." (G.Br.97-98). But the record does not reflect that Jones had a "fuller" opportunity to view Green after taking the stand. And the "video and a photograph" depicted Green with some facial hair and glasses (A502-18, 524, 1012-16, 1064), which is how he appeared at trial (A448).

In sum, the combination of the numerous indicators of Jones's inability to make an in-court identification of Green and the "corrupting effect" of the suggestive in-court show-up identification rendered the identification constitutionally unreliable. *See Manson v. Brathwaite*, 432 U.S. 98, 114-16 (1977); *see also Kennaugh v. Miller*, 289 F.3d 36, 46 (2d Cir. 2002) ("Mrs. Terzi's in-court identification was given under undeniably suggestive conditions, in a context of failed earlier confrontations, that must raise serious doubts about the reliability of her proffered testimony. The fact that [the eyewitness] had participated in a lineup as well as several photo arrays and was unable to identify the petitioner during any of these repeated pretrial confrontations, inevitably heightens the risk that her in-court identification was induced by the suggestiveness of the setting in which it occurred."); *United States v. Emanuele*, 51 F.3d 1123, 1127, 1131 (3d Cir. 1995)

(finding abuse of discretion in district court's admission of witness's in-court identification, because there was no "reliable" evidence that she would have testified that the defendant was "the robber" if she had not seem him being "led from the courtroom in manacles by U.S. Marshals").

Finally, it is noted that the Government does not address Green's cumulative error claim that is raised in his counseled principal brief.

CONCLUSION

This Court should enter a judgment of acquittal on the §924(c) Count, and reverse the RICO/§846 convictions and remand for a new trial based on spillover prejudice. Alternatively, this Court should reverse and grant a new trial on all counts.

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CERTIFICATE OF COMPLIANCE

This reply brief does not comply with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(ii) or the word limit of Local Rule 32.1(a)(4)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 7,939 words. Counsel has filed a motion with this Court for permission to file an oversized reply brief.

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