

09-3556-cr

To Be Argued By:
S. DAVE VATTI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3556-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

GWAYNE FISHER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Kravitz, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. On May 16, 2008, a jury found the defendant-appellant, Gwayne Fisher, guilty of one count of conspiracy to possess with the intent to distribute 500 grams or more of cocaine, one count of possession with the intent to distribute 500 grams or more of cocaine, and one count of use of a telephone to facilitate the commission of a narcotics trafficking felony. Government's Appendix ("GA") 736-739. On August 4, 2009, the district court (Mark R. Kravitz, J.) sentenced the defendant to a total effective term of 120 months' incarceration and eight years' supervised release. Joint Appendix ("JA") 16, 282, 287. Judgment entered on August 4, 2009, and was amended on August 7, 2009 to correct the spelling of defendant's name. JA 16-17, 282, 287. On August 5, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291. JA 16, 285.

Statement of the Issues Presented for Review

- I. Whether the defendant's claim of ineffective assistance of trial counsel, the only claim on direct appeal, is better addressed by the district court in a habeas proceeding, which, at a minimum, would give the district court the opportunity to consider trial counsel's reasons for making the decisions that are now challenged?

- II. Whether defendant's trial counsel rendered constitutionally ineffective assistance of counsel in the way in which he handled his objections to several different forms of evidence identifying the defendant as one of the participants in the intercepted wiretap calls offered against him at trial?

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Preliminary Statement

Between October 2005 and September 2006, Luis A. Colon, a.k.a. “Anthony Colon,” (hereinafter “Colon”) headed a narcotics trafficking organization that distributed substantial quantities of cocaine and cocaine base (“crack cocaine”) in and around Waterbury, Connecticut. Colon obtained kilogram quantities of cocaine from co-defendant Arnulfo Andrade, a.k.a. “The Mexican,” and would often convert the cocaine into crack cocaine. With the aid of other co-defendants, Colon would distribute the crack

cocaine and powder cocaine to a group of street level dealers in the greater Waterbury area. The evidence at trial, particularly the testimony of Colon, who cooperated with the Government following his indictment and arrest, established that this defendant and Colon had a stand-alone drug trafficking relationship that spanned approximately one year. During that time, they consummated three cocaine deals, one for 250 grams and two for 500 grams each. After a three day trial, a jury convicted the defendant of one count of conspiracy to possess with the intent to distribute 500 grams or more of cocaine, one count of possession with intent to distribute 500 grams or more of cocaine and one count of use of a telephone to facilitate the commission of a drug trafficking felony.

The defendant's sole claim on appeal is that his trial counsel provided ineffective assistance in several respects. First, he faults his trial counsel for failing to prevent the Government's case agent from offering lay opinion as to the identification of the defendant's voice on intercepted wiretap recordings. Second, he argues that his trial counsel should have objected to testimony by this same case agent regarding his identification of the defendant from a photograph on file with the Waterbury police department. Third, he claims that his trial counsel should have objected to the admission of transcripts of the intercepted calls because the transcripts identified the defendant as a speaker without the proper foundation for such identification. Finally, he maintains that trial counsel should have objected to testimony by a police officer indicating that, from "prior interactions" with the

defendant, he knew him by a nickname which was the same nickname the defendant had during the intercepted wiretap calls.

These claims have no merit. In the first instance, this appeal should be dismissed because the defendant's ineffective assistance claims require a factual record which would include, at a minimum, trial counsel's explanation for his evidentiary decisions. The claims, therefore, are more properly addressed in the first instance by the district court as part of a petition pursuant to 28 U.S.C. § 2255.

Second, based on the current factual record, the claims have no merit. Trial counsel did not render constitutionally ineffective assistance. To the contrary, his strategic decisions regarding the use of objections were reasonable in light of the Government's anticipated evidence and the defense theory of the case. Moreover, the defendant has failed to demonstrate how any alleged ineffectiveness prejudiced him, as there was ample evidence at trial of the defendant's guilt beyond a reasonable doubt which was independent of the evidence that the defendant now claims should have been excluded.

Statement of the Case

On April 29, 2008, a federal grand jury returned a three-count superseding indictment against the defendant which charged him in Count One with conspiring with Colon and others to possess with intent to distribute, and to distribute, 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, in Count

Two with possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and in Count Three with use of a telephone to facilitate the commission of a drug trafficking felony, in violation of 21 U.S.C. § 843(b). JA 26-28.

Trial commenced on May 12, 2008. JA 8 (docket entry). The defendant was tried together with Nicholas Rojas, who had been charged in a separate indictment with one count of conspiring with Colon and others to possess with the intent to distribute, and to distribute, 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, and four counts of use of a telephone to facilitate a drug trafficking felony, in violation of 21 U.S.C. § 843(b). JA 8 (docket entry). On May 16, 2008, the jury convicted the defendant of all three counts of the superseding indictment. GA 736-739.¹

¹ The jury also found Rojas guilty of the conspiracy count and two of the telephone counts. On July 8, 2009, the district court sentenced Rojas to a total effective term of 80 months' imprisonment and four years' supervised release. On July 13, 2009, Rojas file a notice of appeal. On appeal, Rojas claimed that he had sold drugs that he had acquired from Colon to finance his own drug habit, so that the evidence was insufficient to establish that he had joined the conspiracy with the purpose of furthering its objectives. Rojas also claimed that the district court erred in recalling a still-assembled jury that had been pronounced "discharged" to correct a clerk's misreading of the verdict form. On August 12, 2010, this Court rejected Rojas's claims and affirmed his conviction. *See United States v. Rojas*, 617 F.3d 669 (2d Cir. 2010).

On May 21, 2008, the defendant filed a motion for judgment of acquittal, or alternatively, for a new trial. JA 9 (docket entry). On December 19, 2008, the district court issued a written ruling denying this motion. GA 740-757.

On August 4, 2009, the district court sentenced the defendant to a total effective term of 120 months' imprisonment and eight years' supervised release. JA 16, 282, 287. Judgment entered on August 4, 2009. JA 282. On August 5, 2009, the defendant filed a timely notice of appeal. JA 285. An amended judgment was entered August 7, 2009.² JA 287. The defendant is currently serving his sentence.

² The amendment was for the purpose of correctly spelling the defendant's name.

Statement of Facts

A. Pre-trial proceedings regarding the defendant's identification

At a pre-trial conference held on May 9, 2008, the Government informed the district court, *inter alia*, that it had hoped to reach a stipulation with the defendant regarding the allegation that he used the nickname "Fruit," but the parties could not reach an agreement. JA 41. The Government said that, in the absence of a stipulation, it would call Waterbury Police Officer Stephen Binette to testify about the defendant's use of that nickname. JA 41. Defense counsel confirmed that a stipulation had not been reached, but indicated that he and the defendant would continue to discuss the issue. JA 41. He also articulated a concern that Officer Binette's testimony would lead to the admission of prejudicial evidence of the defendant's prior bad acts. JA 42.

The Government noted that Officer Binette had been a patrol officer in Waterbury for approximately twenty years, had prior interaction with the defendant, knew his nickname to be "Fruit," had arrested the defendant on a prior drug charge, and would testify only that, based on prior interactions, he knew the defendant's nickname to be "Fruit." JA 42. Officer Binette would also testify that the Waterbury Police Department maintained a database of known nicknames and that, according to the database, the defendant was known by the nickname "Fruit." JA 42-43. Defense counsel indicated that these parameters for

Officer Binette's testimony would be acceptable if a stipulation could not be reached. JA 43-44.

On May 11, 2008, the day before the start of evidence, defense counsel filed a motion *in limine* seeking to preclude Officer Binette from testifying regarding the existence of the nickname database at the Waterbury Police Department and the defendant's inclusion in that database. JA 46. On May 13, 2008, during trial, this motion was resolved by an agreement between the parties that Officer Binette would not provide any testimony regarding the nickname database and would testify only that, based on his prior interactions with the defendant and discussions with others at the police department, he knew the defendant's nickname to be "Fruit." JA 148-149. The parties confirmed this agreement again on May 14, 2008, shortly before Officer Binette testified. JA 167.

B. The evidence at trial

Based on the evidence presented at trial, the jury could have reasonably found the following facts: in October 2005, the FBI began an investigation into a Drug Trafficking Organization ("DTO") operating in Meriden, Connecticut. GA 41-42. Utilizing a cooperating witness, the FBI engaged in several controlled purchases of multi-ounce quantities of cocaine base from a variety of different sources and, based on these purchases, commenced a wiretap investigation. GA 43-44, 53. Through the wiretap, the FBI identified Colon as a source of supply for the distribution chain of cocaine flowing into Meriden. GA 69.

Subsequently, the district court authorized a wiretap as to cellular phones used by Colon. GA 74-75. This wiretap investigation lasted for approximately ninety days. GA 101. The investigation revealed that Colon was the head of a drug trafficking ring that operated out of a building located at 262 Walnut Street in Waterbury. GA 102, 277. Colon primarily distributed kilogram quantities of cocaine and approximately one kilogram of cocaine base per week. GA 73, 267-268. He was assisted in his trafficking activities by his brother and co-defendant Luis E. Colon, a.k.a. "Emanuel," and co-defendant Jose Garcia, a.k.a. "Pelichi." GA 74, 76, 80-82. On those occasions during the wiretap investigation when Colon went to Puerto Rico, he left supplies of narcotics for Emanuel Colon to distribute to his customers. GA 80-81. Colon also supplied Garcia with crack cocaine on credit with the understanding that Garcia would then distribute the crack cocaine to Colon's customers in the area of 262 Walnut Street in Waterbury, which Colon considered to be his block. GA 81, 278-79.

Following his arrest on September 29, 2006, Colon cooperated with the Government and testified against the defendant.³ GA 273, 287-288, 292-332. The defendant and Colon had their own direct relationship separate and apart from Colon's 262 Walnut Street neighborhood

³ Colon pled guilty to conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). GA 270. He stipulated to an attributable drug quantity of 35 kilograms of cocaine and one kilogram of cocaine base. GA 271-272.

associates. GA 153-154. Colon met the defendant in the late fall of 2005. GA 316-317. At that time, Colon lived in the Elmwood Avenue neighborhood in Waterbury and was acquainted with Kevin Robinson, the defendant's brother-in-law. GA 316-317. Robinson introduced the defendant to Colon. GA 316-317.

Colon explained that the defendant was already involved in drug trafficking, but was looking to establish a new cocaine supplier. GA 317-318. For his part, Colon was seeking additional individuals to whom he could sell cocaine. GA 416, 425, 427-428. Following this introduction, the defendant and Colon spoke on a number of occasions in an effort to set up cocaine deals. GA 300-301, 316. These discussions culminated in February 2006 with their first transaction for 250 grams of cocaine which took place at the Enterprise apartment complex in Waterbury. GA 300-301, 303.

The defendant and Colon continued to communicate throughout the summer and fall of 2006 in an effort to build their drug trafficking relationship. GA 301, 316. On June 22, 2006, the defendant and Colon had a telephone conversation in which the defendant asked "[W]hat's good though, it's going to be popping or what?" Colon responded "I can hook you up tomorrow. You know I got, I got somebody working over there." Gov't. Ex. 58 (GA 687-688). The defendant was looking to acquire cocaine, but Colon was not in a position to provide any because he was in Puerto Rico; Colon intended to have his brother, whom he left in charge, tend to the defendant. GA 296-297.

On June 29, 2006, after Colon returned from Puerto Rico, the defendant ordered 500 grams of cocaine from Colon which Colon delivered to him at an apartment located on the third floor of a building on Bishop Street in Waterbury. GA 303. The chain of events that culminated in this transaction began with a telephone conversation in which the defendant asked Colon “what the business is?” When Colon responded that the defendant should tell him, the defendant said, “You already know.” Colon then inquired, “Half?” The defendant replied, “You all ready . . . yeah.” Gov’t. Ex. 59 (GA 689-690). Colon testified that the defendant was asking for cocaine and that Colon’s reference to “half” confirmed that the defendant was seeking a half-kilogram or 500 grams of cocaine. GA 298.

In a series of phone calls between 4:01 p.m. and 4:24 p.m. that same day, Colon and the defendant made arrangements to meet in a unit of an apartment building located on Bishop Street in Waterbury. GA 303-304; Gov’t. Exs. 60, 61, 62 and 63 (GA 691-698). Colon explained that, when he arrived at the Bishop Street apartment, he had a kilogram of cocaine. GA 305-306. He broke off half of the kilogram and weighed out 500 grams for the defendant. GA 306-307. After receiving a call, the defendant immediately weighed out 50 grams of his portion of the cocaine and left the building for approximately 20-25 minutes. GA 306-307.

Colon and the defendant spoke on the phone after the defendant left the building, and Colon told defendant “Yo, get some zip-locks too.” The defendant told Colon to “look under the cabinet.” Colon responded that there were

“no bags here.” Gov’t. Ex. 64 (GA 699-700).⁴ Colon explained that he needed zip-lock bags to pack up the remaining half kilogram of cocaine. GA 308. When the defendant returned to the building, he brought zip-lock bags with him. GA 308. The defendant weighed his remaining portion of the cocaine and bagged it into 50 and 100 gram increments. GA 309. Colon testified that the defendant weighed the cocaine himself to make sure he had received all 500 grams of cocaine. GA 311. The defendant then left the apartment for approximately 25 minutes and returned with the money to pay Colon for the cocaine. GA 309.

At approximately 5:03p.m., it was clear from a phone call involving Colon, his wife Ivelisse and another associate, Luis Vazquez a.k.a. “Kike,” that Colon was still in the Bishop Apartment building with the defendant. Colon confirmed to Vazquez in the call that “I’m busy right now with this man” and said “you know. . . and he takes so damn long.”⁵ Gov’t. Ex. 65 (GA 701-705).

⁴ FBI Special Agent William Aldenberg (hereafter “SA Aldenberg”), the Government’s case agent, testified that zip-lock bags are a tool of the drug trafficking trade. GA 130.

⁵ In discussing a deal with the defendant on September 7, 2006, Colon indicated he would set aside a “couple of hours” for the defendant because “I know you take your time.” Gov’t. Ex. 79 (GA 728-730). This conversation corroborated Colon’s testimony that he and the defendant were engaged in a cocaine transaction on June 29, 2006 and that, when Colon said, “he takes so damn long,” he was referring to the defendant. Colon
(continued...)

During these calls, a male voice can be heard in the background on Colon's side of the conversation. Colon identified this individual as the defendant. GA 310-311.

SA Aldenberg also opined that, based on a comparison of the voice in the background of this call to the other calls between the defendant and Colon on June 29, 2006, he believed the voice in the background to be the defendant. GA 132-133. Following this testimony, the district court cautioned the jury that, while SA Aldenberg was offering his opinion, it was ultimately up to each member of the jury to determine whose voice it was. GA 133.

Following the June 29 transaction, Colon and the defendant continued their efforts to cement their narcotics relationship. On July 6, 2006, the defendant indicated to Colon that "I might want to get me some today" and Colon told him to "just get ready and give me a call." Gov't. Ex. 66 (GA 706-707). On July 8, 2006, the defendant called Colon and told him that another individual was "coming up with a different number" and that it had been offered to him for a "solid two." The defendant explained that he

⁵ (...continued)

also testified that the cocaine he provided to the defendant on June 29 was the color of butter. GA 311. In subsequent discussions of another deal on July 20 (Gov't. Ex. 68, GA 758-760), the defendant indicated that he "wanted that yellow," which was a reference to the cocaine that Colon supplied to the defendant on June 29 and further corroborated Colon's testimony that the cocaine he supplied to the defendant on June 29 was "butter" in color. GA 315.

wanted to make sure that Colon “was there” for him. Colon assured the defendant, “You know my work is official papi.” Gov’t. Ex.67 (GA 708-710). Colon testified that the defendant was trying to bargain down the price for cocaine by telling Colon that he had a third party that was willing to sell him cocaine for \$20,000 per kilogram. Colon was reminding the defendant that his cocaine was good quality. GA 313-314.

On July 27, 2006, the relationship between the defendant and Colon had progressed to the point where Colon offered to provide 500 grams of cocaine to the defendant on credit, an offer that the defendant accepted. GA 318-319. In a telephone conversation on that date, Colon told the defendant that he still had “half a brick” (half a kilogram of cocaine) and that he would give it to the defendant for “20 and a half.” GA 318. When the defendant offered to give Colon, who was in Puerto Rico, “half now” and “your other half when you get here,” Colon responded that he would tell his brother to give the entire half kilogram to the defendant. GA 319. The defendant responded, “Hey yo, hey if you do that for me I swear to God, I’m have your . . . your money good! Give me my motherfucking half right now, today. . . and as soon as you get back you call me and you got your money in your hand.” Gov’t. Ex. 69 (GA 711-713). A little over an hour later, Colon confirmed that his brother had 400 grams of cocaine available and would deliver it to the defendant after his brother got out of work later that night. Gov’t. Ex. 70 (GA 714-715); GA 319.

On August 8, 2006, Colon learned that an associate nicknamed “O” had shot at a car in which the defendant was a passenger. GA 320-324. Colon was concerned that this had occurred on his “block” and that, as a result, the defendant might conclude that Colon had something to do with the shooting. GA 320-324. Colon then called the defendant to assure him that he did not have any involvement in the shooting. Colon explained that he felt it necessary to call the defendant so they would not develop any problems in the drug business. Gov’t. Ex. 71 (GA 716-717); GA 320-324. During this call, Colon referred to the defendant as “Fruit.” In describing the shooting to his wife in a subsequent phone conversation, Colon again referred to the individual who was the target of the shooting as “Fruit.” Gov’t. Ex. 72 (GA 718-721).

SA Aldenberg had listened to the recorded telephone calls pertaining to the shooting incident and testified that, in his opinion, the person referred to as Fruit in Gov’t. Ex. 71 was the same person to whom Colon spoke on June 29, 2006 in Gov’t. Exs. 59-64. GA 136-137. SA Aldenberg also conducted research at the Waterbury Police Department and, as a result, believed that the defendant used the nickname Fruit.⁶ GA 138-139, 157, 168. SA Aldenberg obtained a picture of the defendant and used it to identify him during the investigation. GA 157. In

⁶ The Government did not elicit any specific details of the research conducted by SA Aldenberg as instructed by the district court. GA 137-139. Indeed, the fact that SA Aldenberg’s research occurred at the Waterbury Police Department was elicited on cross-examination.

addition, Waterbury Police Officer Steven Binette testified that, based on prior interactions with the defendant, he knew him by the nickname “Fruit.”⁷ GA 512-515. Finally, on multiple occasions, Colon identified the speaker in the intercepted telephone calls involving him and the defendant as “Fruit” and identified the defendant in court as the individual whom he knew as “Fruit.” GA 287, 292, 296, 310-312, 315, 320-328, 329-332.

Throughout August and September 2006, Colon and the defendant continued their narcotics relationship and their efforts to consummate cocaine deals. GA 301, 332. In a series of calls on August 15 and August 16, they attempted to conduct a deal for 500 grams of cocaine. On August 16, the defendant informed Colon, “I need um um 500 man,” which Colon explained was a reference to 500 grams of cocaine. Gov’t. Ex. 75 (GA 722-723); GA 325-326. On August 16, the defendant again reminded Colon, “I need that five cent, that five hundred,” another reference to 500 grams of cocaine. Colon replied, “[L]et me go grab it and I’ll call you.” Gov’t. Ex. 76 (GA 724-725); GA 326. Due to Colon’s concern over police activity on the evening of August 16, he and the defendant agreed to

⁷ Although the Government sought to limit Officer Binette’s testimony and not to elicit any information regarding any prior arrests involving the defendant, in response to a question regarding when he first met the defendant, Officer Binette stated that he had arrested him in 2004. GA 512. The district court immediately instructed the jury to disregard the comment and told the jurors that this information should not factor into their deliberations at all. GA 512-513.

conduct the deal early in the morning of August 17, when the police shift change reduced any chance of detection. Gov't. Ex. 78 (GA 726-727); GA 327-328. The deal never actually took place. GA 328.

On September 7, 2006, Colon was intercepted asking the defendant, "What do you need like 500?", and the defendant replied, "Hell ya. . . ." Colon said that he could do "20 for you man," a reference to a price of \$20 per gram. GA 293. During the call, the defendant also stated, "That shit's gone like hot cakes, I sold mother fucking 500 like ring." Gov't. Ex. 79 (GA 728-730). Colon testified that, during this call, he and the defendant extensively discussed cocaine trafficking, and the defendant acknowledged that he had recently sold 500 grams of high quality cocaine very quickly. GA 292-294. The defendant emphasized his desire to obtain high quality cocaine from Colon and attempted to argue for a lower price. GA 292-294. At the conclusion of the call, Colon indicated he would attempt to obtain the cocaine for the defendant. GA 295.

Colon reached out the same day to Andrade, his primary cocaine source of supply, and informed him, "[T]hey called me for five hundred bucks," a reference to 500 grams of cocaine. GA 295. When Andrade replied, "[I]t's the one the one from my friend there, what I had there," Colon said, "I am not going to take that to him either because he is a black friend of mine and it would be trouble later on." Gov't. Ex. 25 (GA 685-686). Colon explained that, according to Andrade, there was some cocaine left over from a prior shipment that had been of

poor quality. GA 295-296. Colon told Andrade that he would wait for a better shipment and that he did not want to give this cocaine to the defendant because it would cause problems in their relationship. GA 295-296.⁸

By this time, it was not only evident that Colon saw the defendant as an important business partner, but it was also apparent that, after nearly a year, the defendant also viewed himself as a key associate of Colon's. On September 4, the defendant told Colon, "[W]e got to do some business" and insisted, "[P]lug me in man, on the team" Gov't. Ex. 144 (GA 731-733).

On September 25, 2006, the defendant spoke to Colon and asked, "You ready?" When Colon said, "Yeah," the defendant told him to "come to the building" and added, "419." Gov't. Ex. 145 (GA 734-735). On this occasion, Colon testified that he provided the defendant with 500 grams of cocaine in apartment 419 of the Enterprise Building in Waterbury. GA 330. Officer Binette confirmed that there is an apartment 419 located in the Enterprise Building. GA 515.

C. The ruling and order denying the motion for judgment of acquittal

On December 19, 2008, the district court issued a written ruling denying the defendant's motion for a judgment of acquittal, or alternatively, for a new trial. GA

⁸ When asked who he was referring to as "a black friend of mine," Colon answered, "Fruit." GA 296.

740-757. In doing so, the district court recognized that the defendant's main defense to the conspiracy charge at trial was that he was merely a buyer of drugs from Colon and not a member of the Colon drug trafficking organization. GA 743. Accordingly, the district court acknowledged that the principal issue was whether there was sufficient evidence to support an inference that the defendant agreed to participate in a conspiracy beyond simply buying drugs from Colon. GA 742, 744.

As a preliminary matter, the district court noted that the defendant had always disputed that he was the one who was intercepted on the recorded calls that were played to the jury. GA 749. But, the court concluded that the jury had a proper basis for concluding that the defendant was, in fact, that individual because Colon testified that the defendant was involved in those calls, and Officer Binette identified the defendant as someone whose street name was "Fruit," a name by which the individual in the wiretap calls was frequently referred. GA 749.

Although the court noted that there was evidence that supported the defendant's theory that he and Colon were two independent contractors who occasionally did business together, it found that the jury had ample evidence to conclude beyond a reasonable doubt that the defendant and Colon conspired to distribute drugs. GA 750. In making this finding, the court relied upon evidence that (1) the relationship between the defendant and Colon was over a year in the making; (2) the defendant wanted to be part of Colon's "team"; (3) their deals involved significant re-distribution quantities of

cocaine; (4) there was sufficient mutual trust such that they spoke to each other about their customers and Colon was willing to meet at the defendant's stash locations; (5) they communicated with each other frequently to discuss prices, meeting places, and travel plans; (6) the defendant expressed a preference for the quality of Colon's drugs; (7) the quantities they discussed had an element of standardization; (8) Colon was willing to extend the defendant credit for a 500 gram cocaine transaction; and (9) each enjoyed a mutual benefit from the relationship. GA 750-753.

The court also denied the defendant's claim that the evidence was insufficient to support a conviction for possession with the intent to distribute 500 grams or more of cocaine. GA 753-754. In rejecting the defendant's argument that the evidence in support of that charge was wholly dependent on the uncorroborated testimony of Colon, the district court held that the content of the recorded calls corroborated much of Colon's testimony and that his identification of the defendant was corroborated by the testimony of Officer Binette. GA 754.

Finally, having concluded that the evidence was sufficient to support the convictions on the conspiracy and possession with intent counts and that the jury was justified in concluding that the defendant was the individual ordering drugs over the phone from Colon, the district court also upheld the defendant's conviction for use of a telephone to facilitate a drug trafficking felony. GA 754.

Summary of Argument

As a preliminary matter, this appeal should be dismissed because the defendant's claims of ineffective assistance of counsel are more properly raised in a habeas petition filed with the district court, which can then develop a factual record as to the specific attacks on trial counsel's performance. By raising these claims on direct appeal, the defendant has deprived his former counsel of the ability to explain his actions through an affidavit or testimony before the district court. At a minimum, even if this Court decides to permit the defendant to raise his ineffective assistance claims through a direct appeal, it should remand this matter to the district court, which presided over the trial, to allow it to make necessary factual findings as to trial counsel's performance.

If the Court considers the merits of the defendant's claims, however, it should affirm the judgment of conviction because there is no basis in the record to conclude that his trial counsel rendered constitutionally ineffective assistance. First, with respect to the defendant's claim that trial counsel was ineffective for failing to preclude SA Aldenberg from opining that it was defendant's voice in certain audio recordings, permitting SA Aldenberg to testify that he had obtained a photograph of defendant from the police, and allowing the use of wiretap transcripts containing the defendant's name, trial counsel's decision not to press an objection on these issues was a reasonable trial strategy. His main defense was that the defendant was not involved with Colon in a conspiracy to distribute drugs for profit, but was merely acquiring

cocaine from Colon as a buyer with no conspiratorial relationship. To preserve the credibility of this defense, trial counsel made the good decision not to emphasize a challenge to the identification evidence. This approach was particularly reasonable where trial counsel knew that Colon would identify the defendant as the other person involved in the intercepted calls and where there was ample other evidence to corroborate Colon's identification.

Second, in the absence of a stipulation by the defendant that he was the individual referred to as "Fruit" in the intercepted calls, the Government was entitled to offer any evidence necessary to establish the defendant's identity. Trial counsel engaged in effective performance by objecting to Officer Binette's testimony and thereby extracting an agreement from the Government to limit testimony about the basis of Officer Binette's knowledge of the defendant's nickname to "prior interactions." His conduct in this regard was well within the bounds of sound trial strategy and objective standards of reasonableness.

Finally, even assuming *arguendo* the performance deficiencies enumerated by the defendant, he cannot demonstrate prejudice in light of the ample evidence of his guilt. The heart of the Government's proof of the defendant's conspiracy with Colon were the numerous wiretap phone calls during which the defendant and Colon plainly discuss their acquisition and distribution of large amounts of cocaine. Colon testified that the defendant was the individual involved in the wiretap calls that were introduced at trial and further testified at length regarding

the substance of the discussions between himself and the defendant. Their relationship involved the planning of several large quantity cocaine deals and resulted in the consummation of three transactions, one for a quarter kilogram of cocaine in February 2006, one for a half kilogram of cocaine on June 29, 2006, and one for a half of kilogram of cocaine on September 25, 2006. Colon's testimony, which was corroborated by the intercepted calls, demonstrated that the relationship between them was built over a period of time to the point where the defendant viewed himself as deserving, in his own words, to be included on Colon's "team." Given their mutual intent to distribute cocaine for profit, their prolonged period of dealings, and the sizeable quantities of their dealings, the defendant's guilt was established by ample evidence, and any alleged ineffectiveness of his trial counsel did not affect the outcome of the case.

ARGUMENT

I. The defendant's claims of ineffective assistance of counsel should not be addressed on direct appeal

A. Relevant facts

The relevant facts are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."⁹

B. Standard of review and governing law

"This Court is generally disinclined to resolve ineffective assistance claims on direct review." *United States v. Gaskin*, 364 F.3d 438, 467 (2d Cir. 2004) (citation omitted); *see also United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003) ("this Court has expressed a baseline aversion to resolving ineffectiveness claims on direct review") (citation omitted). "Among the reasons for this preference is that the allegedly ineffective attorney should generally be given the opportunity to explain the

⁹ On March 16, 2011, the Government moved to dismiss this appeal on the grounds that the appeal raised only ineffective assistance claims which were more appropriately addressed in a petition filed under 28 U.S.C. § 2255. This Court denied that motion on August 2, 2011. The Government respectfully raises this issue again for the Court to consider in light of the full merits briefing of the parties and the complete trial record that has been submitted.

conduct at issue.” *Khedr*, 343 F.3d at 100 (citing *Sparman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998)).

The Supreme Court has held that “in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance” because the district court is “best suited to developing the facts necessary to determining the adequacy of representation during an entire trial.” *Massaro v. United States*, 538 U.S. 500, 504, 505 (2003). “When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.” *Id.* at 504-505. “The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. . . . inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (citations omitted). Accordingly, the Supreme Court explained that few ineffectiveness claims “will be capable of resolution on direct appeal.” *Massaro*, 538 U.S. at 508.

Nevertheless, direct appellate review is not foreclosed. This Court has held that “[w]hen faced with a claim for ineffective assistance of counsel on direct appeal, we may: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand

the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us.” *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003). “The last option is appropriate when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is ‘beyond any doubt’ or ‘in the interest of justice.’” *Gaskin*, 364 F.3d at 468 (quoting *Khedr*, 343 F.3d at 100).

C. Discussion

Here, the defendant raises only claims of ineffective assistance of counsel for which there is an inadequate factual record, and accordingly, this appeal should be dismissed so that such claims may be presented and addressed in a petition made pursuant to 28 U.S.C. § 2255. Alternatively, the Government requests that the matter be remanded to the district court to allow it to make factual findings as to the defendant's claims.

In a variety of circumstances not unlike those presented here, this Court has opted to dismiss claims of ineffective assistance of counsel in favor of their presentation in subsequent § 2255 motions. In *United States v. Venturella*, 391 F.3d 120 (2d Cir. 2004), the defendant asserted, for the first time on appeal, an ineffective assistance of counsel claim based upon her counsel's performance at trial. She alleged that her counsel had made unprofessional comments to the jury, failed to call numerous unbiased witnesses in her behalf, failed to utilize readily available exculpatory evidence, failed to introduce two letters, and stipulated to an element of the offense. *Id.* at 134-135. Noting that the "[direct] review of ineffective assistance of counsel claims is discretionary and should not be invoked lightly," the Court declined to entertain defendant's ineffective assistance claim, leaving the defendant free to raise her claim in a subsequent § 2255 motion. *Id.* at 135 (citations and internal quotation marks omitted). *See also United States v. Oladimeji*, 463 F.3d 152, 154 (2d Cir. 2006) (declining to review the defendant's ineffective-assistance claims on direct appeal,

noting that “[w]here the record on appeal does not include the facts necessary to adjudicate a claim of ineffective assistance of counsel, our usual practice is not to consider the claim on the direct appeal, but to leave it to the defendant to raise the claims on a petition for habeas corpus under 28 U.S.C. § 2255”).

In *United States v. Morris*, 350 F.3d 32 (2d Cir. 2003), the defendant claimed that she had received ineffective assistance of counsel at sentencing. Like the defendant, Morris raised her ineffective assistance of counsel claims for the first time on direct appeal. This Court determined that, in light of its “baseline aversion to resolving ineffectiveness claims on direct review, and the Supreme Court’s recent[ly]” stated preference for resolving such claims in the context of § 2255 motions, it would not consider the defendant’s claim. *Id.* at 39 (internal quotations and citations omitted).

Similarly, in *United States v. Morgan*, 386 F.3d 376 (2d Cir. 2004), the defendant alleged, for the first time on appeal, that he received ineffective assistance of counsel “because his attorney failed to secure a cooperation agreement requiring the government to file a § 5K1.1 motion in exchange for his purported cooperation.” *Id.* at 383. Acknowledging the options of a remand or dismissal in favor of a § 2255 motion, the Court dismissed the defendant’s claim, noting that he was free to pursue a subsequent § 2255 motion. *Id.*

This Court has also dismissed direct appeals where the factual record did not include trial counsel’s explanation

of the strategic decision-making process. As this Court has repeatedly instructed, “except in highly unusual circumstances,” the attorney whose performance is challenged should be afforded an “opportunity to be heard and to present evidence, in the form of live testimony, affidavits or briefs” to explain the decision-making process. *See Sparman*, 154 F.3d at 52; *see Khedr*, 343 F.3d at 99-100.¹⁰

For example, in *United States v. Williams*, 205 F.3d 23 (2d Cir. 2000), the defendant, who was convicted following a jury trial of conspiracy to import cocaine and importation of cocaine, raised on direct appeal a claim that his trial counsel had been ineffective in failing to introduce documents at trial that allegedly would have corroborated the testimony of a witness presented by the defendant to refute key evidence offered by the Government. This Court declined to hear the ineffective assistance claim on the ground that the record in the district court had not been fully developed as to any such claim and specifically noted the lack of any statement in the record from trial counsel as to why such documents were not offered at trial. *Id.* at 35-36.

Here, too, the bases for the defendant’s claims of ineffective assistance of counsel were not raised in the district court, and these claims require additional fact-finding beyond what has occurred in the district court,

¹⁰ The defendant also appears to recognize that trial counsel must be given the opportunity to explain his decisions during the course of trial. *See* Def.’s Brief at 34.

primarily to give trial counsel the opportunity to explain the rationale for decisions made prior to, and during, the course of trial so that the district court (and ultimately, this Court) can determine whether those decisions fell within the realm of reasonable legal and trial strategy. For example, the defendant claims that trial counsel failed to prevent the Government's case agent from offering a lay opinion that it was the defendant's voice on certain audio recordings. *See* Def.'s Br. at 48-50. To evaluate this claim, it is necessary to hear from trial counsel as to the nature of his trial strategy, the reasons why he chose not to further challenge such lay testimony from the case agent within the context of that trial strategy, and the reasoning behind the scope and manner of the cross-examination that he conducted of the case agent. Without awareness of trial counsel's state of mind – specifically with respect to his strategy and assessments of the case – the reasonableness of his approach in dealing with the case agent's testimony in this regard cannot be fairly evaluated.

Similarly, trial counsel's state of mind is critical to evaluating the defendant's claim that trial counsel failed to prevent prejudicial testimony which implied that the defendant had "prior interaction" with law enforcement. *See* Def.'s Brief at 51-55. Here, there is no dispute that the Government and the defendant entered into an agreement that Officer Binette would refer only to "prior interaction" with the defendant without further detail and, that based on that interaction, he knew the defendant's nickname to be "Fruit." To decide whether this agreement constituted ineffective assistance of counsel, as the defendant claims, this Court needs more information as to

trial counsel's rationale in agreeing to such parameters and in rejecting any stipulation that the defendant was in fact the individual referred to as "Fruit" in the intercepted calls. In other words, it is necessary to know what counsel knew about the further details of those prior interactions that prompted counsel to believe that the defined parameters of Officer Binette's testimony were in the defendant's best interest. Moreover, to the extent that identity of the defendant was in dispute, it is also imperative for this Court to know trial counsel's analysis of any Rule 404(b) evidence that the Government might have offered to identify the defendant and the potential prejudice of such evidence that was avoided through a stipulation limiting Officer Binette's testimony.

Finally, a defendant cannot succeed on an ineffective assistance claim unless he can also show there is a reasonable probability that, but for counsel's deficient performance, the results of his proceeding would have been different. *See Strickland*, 466 U.S. at 694. Where, as here, "the defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. The district court is in the best position to render factual findings in the first instance as to whether any alleged deficiencies were prejudicial to the outcome of the defendant's trial. The district court was familiar with the evidentiary issues presented by the defendant's trial and the parties' efforts to address those issues prior to the commencement of trial. The district court also observed the testimony of all the witnesses and

was intimately familiar with the facts of the case.¹¹ The district court is likewise familiar with the nature of the testimony that forms the crux of the defendant's ineffective assistance claims, the manner in which that testimony was received at trial and the effectiveness of any cautionary instructions that accompanied the introduction of such testimony at the trial. Indeed, the district's court's first-hand knowledge of the totality of the trial record places it in the best position to assess any prejudice to the defendant by the introduction of such evidence within the larger picture of the Government's entire body of evidence presented against the defendant.

In short, trial counsel's state of mind in making certain strategic decisions during the course of trial cannot be gleaned without affording him the opportunity to be heard. Fact-finding in the district court is necessary to determine both whether counsel's performance was deficient and, if so, whether the defendant suffered prejudice as a result. Because these are necessarily fact-intensive questions, and the facts are not established on the current record, they should be presented to the district court in the first instance.

¹¹ The district court's knowledge of the trial record is amply demonstrated by its comprehensive ruling denying the defendant's post-trial motion for judgment of acquittal or alternatively for a new trial. GA 740-757.

II. The defendant's trial counsel rendered effective performance and any claimed deficiencies caused him no prejudice

A. Relevant facts

The relevant facts are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."

B. Standard of review and governing law

A defendant seeking to overturn a conviction on the ground of ineffective assistance of counsel bears "a heavy burden." *Gaskin*, 364 F.3d at 468. He is required to demonstrate both: (1) that counsel's performance was so unreasonable under prevailing professional norms that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that counsel's ineffectiveness prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 at 687, 694); accord *United States v. Campbell*, 300 F.3d 202, 214 (2d Cir. 2002); *United States v. Trzaska*, 111 F.3d 1019, 1029 (2d Cir. 1997).

A defendant must meet both requirements of the *Strickland* test to demonstrate ineffective assistance of counsel. If defendant fails to satisfy one prong, the Court need not consider the other. See *Strickland*, 466 U.S. at 697. "The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally

ineffective counsel founder on that standard.” *Linstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001). “The court’s central concern is not with ‘grad[ing] counsel’s performance,’ but with discerning ‘whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.’” *United States v. Aguirre*, 912 F.2d 555, 560 (2d Cir. 1990) (quoting *Strickland*, 466 U.S. at 696-97 (internal citations omitted)).

“Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland*, 466 U.S. at 467. “[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690. Moreover, the Supreme Court stressed that judicial scrutiny of an attorney’s performance must be highly deferential and must avoid “the distorting effects of hindsight.” *Id.* at 689.

A defendant’s *post hoc* accusations alone are not sufficient to overcome this strong presumption because a contrary holding would lead to constant litigation by dissatisfied criminal defendants and harm the effectiveness, and potentially even the availability, of defense counsel. *See id.* In light of the presumption in favor of counsel, the threshold for an ineffectiveness claim is extremely high, and courts have “declined to deem counsel ineffective notwithstanding a course of action (or

inaction) that seems risky, unorthodox, or downright ill-advised.” *Tippens v. Walker*, 77 F.3d 682, 686 (2d Cir. 1996). The ultimate goal of the inquiry is not to second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections. *See Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (citing *United States v. Cronin*, 466 U.S. 648, 658 (1984)).

As to the first prong of the *Strickland* inquiry—whether counsel’s performance was unreasonable – this Court has held that the defendant has the burden of showing that “his trial counsel’s performance ‘fell below an objective standard of reasonableness.’” *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (quoting *Strickland*, 466 U.S. at 687-88 (1984)). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690-91.

The Supreme Court recently reiterated that “[a] court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*). “The challenger’s burden is to show ‘that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the

defendant by the Sixth Amendment.”” *Id.* (quoting *Strickland*).

The Supreme Court recently cautioned courts about the application of the *Strickland* test:

An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. . . . Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel’s assistance after conviction or adverse sentence The question is whether an attorney’s representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Richter, 131 S. Ct. at 788 (internal citations and quotation marks omitted).

The Court again reaffirmed its view that *Strickland* was meant to be very narrowly applied in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), wherein it held that the

lower court had “misapplied” *Strickland*, failed to apply the “strong presumption of competence that *Strickland* mandates,” and “overlooked the constitutionally protected independence of counsel and the wide latitude counsel must have in making tactical decisions.” *Id.* at 1406-1407 (internal quotation marks and ellipse omitted). The Court cautioned that, “[b]eyond the general requirement of reasonableness, specific guidelines are not appropriate.” *Id.* (internal quotation marks omitted). The Court explained, “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions.” *Id.* (internal quotation marks omitted).

As to the second prong of *Strickland*—whether the defendant can establish prejudice—, the Supreme Court has held that “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 690-691. “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cullen*, 131 S. Ct. at 1403 (internal quotation marks omitted). “That requires a substantial, not just conceivable, likelihood of a different result.” *Id.* (internal quotation marks omitted). “In making this determination, a court hearing an ineffectiveness claim must consider the totality of the

evidence before the judge or jury.” *Strickland*, 466 U.S. at 694.

C. Discussion

The defendant appears to make four separate, but somewhat related, claims of ineffective assistance. First, he argues that defense counsel was ineffective for failing to object to opinion testimony from SA Aldenberg that the defendant’s voice was on certain audio recordings played for the jury. Second, he claims that defense counsel should not have stipulated to the use of transcripts for the wiretap calls which repeatedly referenced the defendant as a participant in the calls. Third, he maintains that trial counsel should have sought to preclude SA Aldenberg from testifying that he had obtained a picture of the defendant from the Waterbury Police Department. Fourth, he takes issue with trial counsel’s stipulation that Officer Binette could testify that he knew the defendant as “Fruit” from “prior interaction.” Even assuming that an adequate factual record exists to resolve these claims, none of them has any merit.

1. The performance prong

The decision whether to stipulate to certain items of evidence and whether to object to proffered evidence are matters of trial tactics that are fundamentally the province of trial counsel and enjoy a strong presumption that any decision by counsel in that regard is sound legal strategy. As this Court noted in *Brown v. Artuz*, 124 F.3d 73, 77 (2d Cir. 1997), criminal defendants at trial “possess essentially

two categories of constitutional rights: those which are waivable by defense counsel on the defendant's behalf, and those which are considered 'fundamental' and personal to the defendant, waivable only by the defendant." *Id.*, 124 F.3d at 77 (quoting *United States v. League*, 953 F.2d 1525, 1531 (11th Cir. 1992)). "Included in the former category are matters that primarily involve trial strategy and tactics such as what evidence should be introduced, what stipulations should be made, what objections should be raised and what pre-trial motions should be filed." *Id.* (internal quotations omitted); *see also United States v. Cohen*, 427 F.3d 164, 168-171 (2d Cir. 2005) (holding that trial counsel's failure to object to portion of Government's summation was not ineffective where decision was a matter of trial tactics and objection was likely to be futile); *Gaskin*, 364 F.3d at 467-469 (holding that trial counsel's stipulation to defendant's signature on four trial exhibits was a strategic choice that was not objectively unreasonable because experienced defense attorneys routinely stipulate to undisputed facts in order to maintain credibility with the jury when challenging other aspects of the prosecution); *United States v. Campbell*, 300 F.3d 202, 214 (2d Cir. 2002) (holding that defense counsel's decision to forego objection to a reference by a witness to defendant's escape from jail rather than have a parade of government witnesses testify about the escape did not constitute ineffective assistance).

Here, all of defense counsel's challenged decisions were well within the bounds of sound trial tactics. As to his failure to challenge SA Aldenberg's proffered lay

opinion regarding the defendant's voice on certain audio recordings, this decision, like many others, allowed trial counsel to maintain credibility in front of the jury for his principal defense that the defendant was not involved in any conspiracy. As a preliminary matter, "where evidence includes a voice identification, authentication may be satisfied by opinion testimony based on hearing the voice at any time under circumstances connecting it with the alleged speaker." *United States v. Rommy*, 506 F.3d 108, 138 (2d Cir. 2007); *see also* Fed. R. Evid. 701 and 901(b)(5)(same). SA Aldenberg was the case agent who had listened to many phone calls during the wiretap investigation, had done a voice comparison, and would offer lay testimony pursuant to Fed. R. Evid. 701. GA 132-133 and 137-138. Trial counsel appropriately had to weigh the credibility of his primary trial strategy against the possible futility of any objection to SA Aldenberg's opinion testimony.

Indeed, defense counsel knew at the time of SA Aldenberg's testimony that Colon would also testify that the individual talking with Colon in the intercepted telephone calls was the defendant and that the defendant's nickname was "Fruit." GA 25. Defense counsel also knew that Officer Binette would corroborate Colon in this respect, bolstering the credibility of Colon's identification. JA 42. In light of the imminent identification testimony by Colon and Officer Binette, it would have made little sense for trial counsel to base his defense on the identity element of the charged offenses.

Rather than posit an identity defense that appeared to have virtually no chance of success in light of the government's anticipated evidence, it was clear that defense counsel intended to argue that the defendant was not involved in any conspiracy to distribute drugs for profit with Colon, but was, at best, an independent buyer of narcotics. GA 30, 518-520, 628-629, 632-634. As the district court noted, trial counsel elicited evidence that supported this defense, including testimony that Colon did not consider the defendant to be his partner, that the defendant was not a member of Colon's organization, that Colon did not know the defendant's customers, that their completed transactions were all for cash and, that after their transactions, Colon and the defendant went their separate ways. GA 749-750.

As to the substantive charge of possession with intent to distribute 500 grams or more of cocaine, defense counsel pursued an argument that, absent evidence of any cocaine seized from the defendant and absent any surveillance of the alleged transaction between the defendant and Colon on June 29, 2006—points which he elicited on cross-examination of government witnesses—reliance upon Colon's word that the transaction took place was insufficient to sustain the government's burden of proof beyond a reasonable doubt. GA 152-157, 520-521, 632-633. Since the telephone count was premised upon the June 29 transaction, the same arguments applied to that count. GA 635-636. Thus, in the context of defense counsel's strategy, it mattered not that the defendant was intercepted speaking to Colon or that the defendant may have been involved in acquiring drugs from Colon.

In the context of this theory of defense, identity evidence offered by the government simply was not material. In light of the anticipated testimony of Colon and Officer Binette as to the defendant's identity as "Fruit" and his own theory of the case, defense counsel's strategy not to object to the voice authentication testimony offered by SA Aldenberg, but rather to discredit him by eliciting some brief testimony on cross-examination that his opinion was based solely upon Colon's voice identification was understandable and undoubtedly sound. Extensively contesting SA Aldenberg's testimony regarding the defendant's voice on the recordings and drawing the proverbial line in the sand as to identity would only have undermined the credibility of defense counsel in the eyes of the jury with respect to the principal defense he wished to assert.

The defendant's claim that defense counsel was deficient for failing to object to the admission of transcripts of the intercepted calls was not objectively unreasonable for much the same reasons. Not only was the admission of transcripts within the discretion of the trial court, but the testimony of Colon and Officer Binette would have constituted ample foundation to support the form and admission of the transcripts. In light of the defenses he intended to advance, defense counsel had little to gain by objecting to the form of the transcripts. Moreover, the defendant was not prejudiced by the introduction of the transcripts because the district court reminded the jury that it was ultimately their decision whether defendant was the individual speaking to Colon in the recordings, GA 133, and further charged the jury

that the recordings were the controlling evidence, not the transcripts themselves, which were merely offered as a guide. GA 547-550.

Similarly, in light of the anticipated testimony of Officer Binette, there was little point in defense counsel seeking to prevent SA Aldenberg from testifying that he had conducted research at Waterbury Police Department and, in doing so, had obtained a photograph of the defendant which helped him conclude that the defendant was “Fruit.” If the prejudice claimed by the defendant is that he would be associated with prior police involvement in the jury’s eyes, this information would be offered in any event through the testimony of Officer Binette.¹²

The manner in which defense counsel dealt with the testimony of Officer Binette likewise cannot be faulted as objectively unreasonable. It is well established that evidence as to a defendant’s nickname is appropriate where that evidence is necessary to identify the defendant and connect him to the crime charged. *See United States v. Farmer*, 583 F.3d 131, 146 (2d Cir. 2009). In the absence of a stipulation that defendant was the individual

¹² In its direct examination, the Government did not elicit any information regarding SA Aldenberg’s possession of a photograph or where he had done his research. GA 137-139. Indeed, the Government elicited only the fact that SA Aldenberg had done some “research” in determining that the defendant’s nickname was “Fruit.” GA 138. The challenged information was elicited first on cross-examination and then only confirmed during re-direct examination. GA 157, 168.

referred to as “Fruit,” the government was entitled, and in fact required, to offer evidence establishing that it was the defendant talking with Colon over the intercepted calls. The government offered evidence from Colon that the defendant was “Fruit” with whom he was speaking in intercepted calls and also gave advance notice to the district court and defense counsel that it would offer Officer Binette’s testimony that he knew the defendant’s nickname to be “Fruit.” JA 41-42. The government also advised both the district court and defense counsel that the basis of Binette’s knowledge was prior police interactions, which included a prior drug arrest. JA 42.

By the time Officer Binette testified, defense counsel had obtained important concessions from the government regarding his testimony. Officer Binette would only testify that the basis of his knowledge of the defendant’s nickname was his “prior interactions” with him and would make no reference to any specific details of those interactions, nor mention the existence of the nickname database at Waterbury Police Department. JA 148-149, 167. In essence, defense counsel crafted an agreement that sanitized the admission of Officer Binette’s testimony in the least prejudicial manner possible. GA 213-214, 362-363. Accordingly, the manner in which defense counsel handled this issue was sound and within the scope of reasonable trial tactics.¹³

¹³ While Officer Binette mentioned that the defendant had been arrested, this testimony was inadvertent and could not have been anticipated by defense counsel from the question that
(continued...)

The defendant appears to argue that trial counsel should have stipulated to the defendant's identity. In light of defense counsel's statement at the May 9 pre-trial conference that there would be no stipulation that the defendant was the person referred to as "Fruit" in the wiretap calls, his promise to continue to discuss the issue with the defendant, JA 41, and the scant mention of the identity defense in his Rule 29 argument at the close of the government's case-in-chief and in his closing argument, GA 518-520 and 626-639, it might be inferred that defendant was the driving force behind the refusal to stipulate to identity. Indeed, defense counsel's Rule 29 argument and his summation only underscore that his strategy was premised on the notion that Colon and the defendant were not co-conspirators in a drug distribution scheme as alleged by the government. This fact highlights the very reason that this Court has always cautioned against considering ineffective assistance claims without affording counsel an "opportunity to be heard and present evidence" to explain the decision-making process. *See Sparman*, 154 F.3d at 52. If the defendant himself declined to permit an identity stipulation, this decision would undermine any claim that trial counsel was ineffective for failing to stipulate.

¹³ (...continued)

had been asked. The district court concluded that the testimony had not been intentional and that any prejudice to the defendant was cured by the court's cautionary instruction that the jury disregard the information. GA 756; *see also United States v. Mussaleen*, 35 F.3d 692, 694-695 (2d Cir. 1994); *United States v. Castano*, 999 F.2d 615, 618 (2d Cir. 1993).

In any event, even if the Court were to proceed on the current record, it was certainly objectively reasonable for defense counsel to believe that a tactic of battling identity-related evidence proffered by SA Aldenberg and Officer Binette would have caused the jury, once they heard the subsequent testimony of Colon, to view with skepticism any further contentions made by him as to other aspects of the Government's case. *See United States v. Jones*, 482 F.3d 60, 76-77 (2d Cir. 2006) (finding that defense counsel strategy not to contest defendant's involvement in a shooting, but to challenge whether shooting had enterprise-related motivation and to concede the defendant's involvement in drug sales, but not as part of the alleged conspiracy, was sound). Thus, the defendant cannot satisfy the first prong of *Strickland* .

2. The prejudice prong

Even if this Court were to find that trial counsel's performance in the respects identified by defendant were deficient, he cannot establish any prejudice flowing from those deficiencies, much less that the outcome of the trial would have been different, but for those deficiencies. As the district court recognized and even the defendant appears to concede, Def.'s Brief at 55, there was an abundance of evidence, even without SA Aldenberg's voice authentication and irrespective of any reference to the defendant in the call transcripts or to his prior interactions with police, that the defendant was the individual speaking with Colon in the intercepted calls

offered by the government. GA 749.¹⁴ Colon repeatedly identified the “Fruit” with whom he was speaking in the calls as the defendant. On this evidence alone, a reasonable jury could have concluded beyond a reasonable doubt that the identity element of the charged offenses had been established, independent of any of the evidence that defendant claims his counsel should have precluded.

In criticizing the manner in which defense counsel addressed the identity evidence, the defendant suggests that the proper solution was for defense counsel to stipulate to his identity as “Fruit.” It is difficult to fathom, in light of the evidence offered by the government of the stand-alone conspiracy between Colon and the defendant, particularly the content of the intercepted calls, how such a stipulation would have altered the outcome of the trial, even if it meant that the jury would not have associated the defendant with any prior police contact. Indeed, the content of the wiretaps, many of which appear plain and unambiguous in their references to cocaine trafficking, coupled with Colon’s testimony, established beyond a reasonable doubt that Colon and the defendant were involved in a mutually beneficial and dependent relationship to distribute cocaine for profit.

¹⁴ The defendant’s insistence that there was so much evidence as to identity such that a stipulation was warranted, *see* Def.’s Brief at 54-55, seems to contradict his assertion that trial counsel’s failure to object to SA Aldenberg’s voice authentication was both objectively unreasonable and prejudicial.

The government presented substantial evidence of a conspiratorial relationship between the defendant and Colon. The government's evidence revealed that the defendant and Colon built a relationship of trust over nearly a one year period that had as its common goal the resale of cocaine for profit. GA 317-318, 416, 425, 427-428. The relationship provided a mutual benefit to both parties in the conspiracy. In the defendant, Colon found a steady partner through whom he could move wholesale quantities of cocaine. In Colon, the defendant found a reliable supplier for high quality cocaine. This relationship was a long-standing one. Not only did Colon testify that they had been dealing with each other for nearly one year, but this testimony was borne out by the series of intercepted calls which involved negotiations for multiple deals, three consummated transactions and spanned from June 2006 to September 2006. GA 292-332.

The defendant and Colon had also developed a significant degree of mutual trust. The three deals that took place all occurred at stash locations used by the defendant. GA 329-330. The jury could have inferred that a drug dealer such as the defendant would not have had Colon come to his stash locations absent a significant degree of trust. Colon also identified one of his suppliers to the defendant. GA 314; Govt. Ex. 68 (GA 758-760). Again, this suggests a level of trust between them. When the defendant was shot at by one of Colon's associates, Colon made sure to reach out to the defendant and assure him that he had nothing to do with the shooting. GA 320-324. On September 7, when his supplier, Andrade, indicated he had some poor quality cocaine that could be

provided to the defendant, Colon declined because he did not want to create any problems with the defendant. GA 295-296. Colon's handling of the shooting incident and his conversation with Andrade undercut any suggestion by defense counsel that Colon's care for the relationship did not extend beyond the particular transaction at hand.

In addition, nearly one year into their relationship, the quantities involved had reached some level of standardization. The Bishop Street deal, which was their second transaction, involved 500 grams. GA 305-307. In the phone call preceding this deal, when Colon asked how much the defendant wanted, he simply said, "You know." Colon then responded, "Half," a reference to a half-kilogram, suggesting a familiarity with their course of dealing. All of the negotiations during July, August and September 2006 focused on the 500 gram quantity, GA 305-332, underscoring the fact that this was the typical quantity that they negotiated, bought and sold.

Finally, the fact that the relationship between the defendant and Colon had progressed to a point in the summer of 2006 wherein Colon was willing to provide a sizeable quantity of cocaine to the defendant on credit also weighs in favor of a finding that the defendant and Colon were co-conspirators. On July 27, after having completed two cash deals with the defendant, Colon offered 500 grams of cocaine on credit. GA 318-319. Not only did the defendant accept the offer, but he indicated that he would be able to pay Colon for the cocaine in a matter of days, giving Colon a stake in the defendant's re-distribution efforts. GA 318-319; Gov't. Ex. 69 (GA 711-713).

In short, when the facts developed at trial are considered in their totality, there was ample evidence from which the jury could reasonably have concluded beyond a reasonable doubt that Colon and the defendant had, over time, established a relationship of trust and coordination as a result of which they had become co-conspirators. Thus, even in the absence of evidence introduced as a result of alleged deficiencies of defendant's trial counsel, such as references to the defendant in call transcripts, testimony by SA Aldenberg that the defendant's voice was on certain audio recordings and suggestions that defendant had some prior involvement with police, there was ample evidence of the defendant's guilt such that any claimed deficiencies did not create the prejudice necessary to support a claim of ineffective assistance of counsel.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 23, 2011

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,107 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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