SUPREME COURT OF THE UNITED STATES
1 First Street, N.E
Washington, D.C. 20543

UNITED STATES OF AMERICA
v.
RALPH BERRY

APPEAL No. 22-3207

October 2, 2024

RE: (Seeking Permission, for Extension to file Writ of Certiorari.)

Dear Clerk,

This application requesting an extension to file a writ of certiorari, stems from Appellate Counsel, Steven Y. Yurowitz's failure to inform petitioner of the Second Circuit Court of Appeals adverse ruling on May 17, 2024, on petitioner's direct appeal.

Petitioner has made the Court of Appeals, for the Second Circuit, aware of Counsel's failures from the outset of Counsel's misrepresentation under CJA 3006(A). Petitioner through Certified Mail on July 1, 2024, addressed the Court of Appeals with the issue, and informed the Court, that petitioner was not made aware of the Court's May 17, 2024 decision, but through

his own diligence on June 27, 2024 (approximately 40 days), while searching through the prisons law library computer where he is being housed and discovered that his direct appeal had been denied.

This letter was forwarded to Counsel by the Court, for him to take appropriate action. In which Counsel on July 1, 2024, filed for rehearing enbanc, which was denied July 31, 2024, which he again failed to inform petitioner. Petitioner once again was made aware of the denial of re-hearing enbanc, by his own diligence, and calling the Clerk of Court in the Second Circuit Court of Appeals, who informed Petitioner that she "could not tell petitioner when his time for writ of cert. expired" But gave petitioner the phone # to the Supreme Court.

Copies of the certified letters to the Court before mandate issued on petitioner's appeal, are in his possesion, and available as exhibits if necessary.

Petitioner humbly asks because of Counsel's failure under CJA 3006(A) as addressed above, seeks an extension on the Court's behalf to file a pro-se writ of certiorari.

Petitioner - based on the facts stated above -

asks this Court, at the very least, to inform him of the deadline on his writ of certiorari at this present time, so he may at least with diligence attempt to file a timely pro-se writ of Cert.

Sincerely,

Ralph Berry

Ralph Berry
#60431-054
U.S.P. Hazelton
P.O. Box 2000
Bruceton Mills W.V. 26525

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

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: July 03, 2024
Docket #: 22-3207cr
Short Title: United States of America v. Berry

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:20-cr-84-1
DC Court: SDNY (NEW YORK CITY)
DC Judge: Nathan

NOTICE OF CLIENT SUBMISSION

Court records in the above-referenced case list you as counsel to Ralph Berry. The Clerk's office received the enclosed papers from your client in the above referenced appeal. Because you represent the sender as counsel the papers are forwarded to you for appropriate action.

By copy of this notice your client is advised of this action.

Inquiries regarding this case may be directed to 212-857-8513.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SOUTHEN DISTRICT SECOND CIRCUIT

APPEAL NO. 22-3207

RALPH BERRY

V.

UNITED STATES OF AMERICA

ON MOTION FOR EXTENSION OF TIME
TO FILE PETITION FOR REHEARING
AND REHEARING EN BANC

Ralph Berry, the Appellant, in pro se, in necessity, hereby files his motion requesting an extension of time to file a Petition for Rehearing and Rehearing en banc. Mr. Ralph Berry relies on Rules 26(b) and 27 as basis for his request. This Court should issue an order for Extension of time based on the following:

Mr. Ralph Berry did not receive and as of today's date June 25th 2024, has yet to receive a formal copy of the Courts order and opinion made on May 17, 2024, pertaining to his direct appeal (# 22-3207 U.S. v. Berry.)

Mr Ralph Berry's sole inquiry on June 25, 2024, while browsing the Lexis Nexis Law Library Computer at U.S.P. Hazelton acknowleged that his judgement was

affirmed and the Court's order had been made, nearly 6 weeks earlier, making it impossible for a timely request for rehearing on his appeal, within the 14 days required by the Court.

Mr Ralph Berry asserts that review of the record at U.S.P. Hazelton will prove that as of May 17, 2024 the date of the decision handed down and filed by the Court he has yet to receive any legal mail from the Court or Counsel on his behalf.

Mr. Ralph Berry is an inmate confided in a federal U.S.P. and has only limited access and legal resources.

U.S.P. Hazelton has been acknowledged by the B.O.P. that it has the greatest staff shortage, resulting in excessive lockdowns.

I Ralph Berry am now Pro-Se with no legal training, and assert that this motion is made in the interest of justice and not meant to delay the proceedings.

Wherefore, based on the above, Mr. Ralph Berry moves this Court to grant his motion and asks the Court to issue an order granting a 30-day extension of time.

Respectfully submitted on the 27 day of June, 2024

Certificate of Service

This is to certify that a true and correct copy of the foregoing document: Re: [ON MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING and REHEARING EN Banc] has been sent using First Class Mail with adequate pre-paid postage, and properly addressed. Under the pains and laws of the United States of America and pursuant to the laws of Perjury, 28 U.S.C. Section 1746 Executed this 27 day of June 2024, Addressed to:

UNITED STATES COURTS OF APPEALS
SOUTHERN DISTRICT OF NEW YORK
for the SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY Sq.
New York, N.Y. 10007

22-3207-cr
United States v. Berry

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of May, two thousand twenty-four.

PRESENT: PIERRE N. LEVAL,
SARAH A. L. MERRIAM,
MARIA ARAÚJO KAHN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 22-3207-cr

RALPH BERRY, a/k/a Sealed Defendant 1,

Defendant-Appellant,

FRANK LOPEZ, a/k/a Sealed Defendant 2,

Defendant.

FOR APPELLEE:	JACOB R. FIDDELMAN (Dominic A. Gentile, James Ligtenberg, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.
FOR DEFENDANT-APPELLANT:	STEVEN Y. YUROWITZ, Newman & Greenberg, LLP, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Nathan, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the December 21, 2022, judgment is **AFFIRMED**.

Defendant-appellant Ralph Berry appeals from a judgment of conviction after a jury trial. Berry was found guilty of one count of murder through the use of a firearm, in violation of 18 U.S.C. §924(j)(1) ("Count One"); one count of murder while engaged in a narcotics offense, in violation of 21 U.S.C. §848(e)(1)(A) ("Count Two"); and one count of murder in aid of racketeering ("VICAR murder"), in violation of 18 U.S.C. §1959(a)(1) ("Count Three").[1] Berry was accused of ordering Frank Lopez to shoot the leader of a rival drug crew in the Bronx in June 2000. Lopez instead shot an innocent bystander, Caprice Jones, who died in 2010 of complications from his injuries.

Before the case was submitted to the jury, Berry moved for a judgment of acquittal, arguing that the evidence was insufficient to support a conviction on Counts

[1] Berry was also charged with aiding and abetting each of these offenses pursuant to 18 U.S.C. §2.

One and Two because Jones died more than a year and a day after the shooting. See Rogers v. Tennessee, 532 U.S. 451, 453 (2001) ("At common law, the year and a day rule provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act."). Berry's trial counsel did not make the same argument with respect to Count Three; indeed, counsel expressly conceded that the VICAR murder statute, 18 U.S.C. §1959(a), does not incorporate the year-and-a-day rule. The District Court reserved judgment, and Berry renewed his motion after the jury's verdict. The District Court agreed with Berry that §924(j)(1) incorporates the common-law year-and-a-day rule and therefore entered a judgment of acquittal with respect to Count One, but it denied Berry's motion with respect to Count Two. The District Court subsequently sentenced Berry principally to twenty years of imprisonment on Count Two, to run concurrently with the mandatory term of life imprisonment on Count Three.

Berry, now represented by new counsel, argues that his trial counsel provided ineffective assistance of counsel by failing to argue to the District Court that the VICAR murder statute incorporates the year-and-a-day rule. Berry also argues that his conviction on Count Two violates the Double Jeopardy Clause, because he was previously convicted of a drug conspiracy covering the same time frame as the drug conspiracy underlying this charge.

We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, and recite them only as necessary to explain our decision to affirm.

I. VICAR Murder and the Year-and-a-Day Rule

Berry contends that he received ineffective assistance of counsel because his trial attorney failed to move for a judgment of acquittal on Count Three on the basis that the VICAR murder statute, 18 U.S.C. §1959(a), incorporates the year-and-a-day rule, and Jones died ten years after the shooting. To show ineffective assistance of counsel, an appellant must satisfy two criteria. "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). We do not ordinarily hear claims of ineffective assistance of counsel that are raised for the first time on direct appeal because in such cases, no factual record has been developed in the district court. But where, as here, the issue "is both straightforward and susceptible to resolution as a matter of law," there is no reason to defer consideration of the ineffective assistance claim. United States v. De La Pava, 268 F.3d 157, 163 (2d Cir. 2001) (citation and quotation marks omitted).

Berry's ineffective assistance claim fails because he has not shown that "counsel's performance was deficient," as required by Strickland, 466 U.S. at 687. Indeed, our precedent forecloses the argument Berry contends his trial counsel should have raised. Section 1959(a) penalizes, among other things, the commission of murder "in violation of the laws of any State or the United States," in aid of a racketeering enterprise. 18 U.S.C. §1959(a). The Superseding Indictment alleges that Berry violated §1959(a) by committing second-degree murder under New York Penal Law §125.25 and §20.00, specifically, by ordering Lopez "to carry out a shooting which caused Jones's death."

App'x at 27. Berry contends that the conduct supporting a VICAR murder charge must violate both New York's murder statute, which he acknowledges does not incorporate the year-and-a-day rule, and the federal offense of murder, which he argues does incorporate the rule – even though the only predicate offense charged is a violation of New York state law.

We have previously rejected a similar argument where a defendant-appellant was charged with VICAR murder based on his commission of felony murder under New York state law. See United States v. Mapp, 170 F.3d 328, 335 (2d Cir. 1999). In Mapp, the defendant argued that "section 1959 should be interpreted as punishing only intentional murders," and the evidence at his trial "at most proved that he killed [the victim] accidentally." Id. But "New York's felony murder law mandates that an individual is guilty of second-degree murder if he participates in a robbery that results in the death of a non-participant." Id. We concluded that "section 1959, without qualification, leaves to state law the definition of the predicate acts of murder." Id. at 336.[2]

[2] Berry contends that Mapp has been called into question, citing a Fourth Circuit decision concluding "that Congress intended for individuals to be convicted of VICAR assault with a dangerous weapon by engaging in conduct that violated both that enumerated federal offense as well as a state law offense." United States v. Keene, 955 F.3d 391, 398-99 (4th Cir. 2020). Whatever the merits of the Keene decision, "prior opinions of a panel of this court are binding upon us in the absence of a change in the law." United States v. Moore, 949 F.2d 68, 71 (2d Cir. 1991). Mapp remains good law. See United States v. Delgado, 972 F.3d 63, 73, 73 n.8 (2d Cir. 2020) (considering accomplice liability under both New York and federal law because VICAR murder charge expressly referred to both); see also United States v. Perez, 138 F. App'x 379, 381 (2d Cir. 2005) (summary order) (considering VICAR murder conviction with a Connecticut-law predicate).

It is undisputed that New York abandoned the year-and-a-day rule long ago. See People v. Brengard, 265 N.Y. 100, 106 (N.Y. 1934). Second-degree murder under New York law therefore does not incorporate the year-and-a-day rule. Berry was charged and convicted under VICAR based on the New York predicate offense. Therefore, his charge and conviction likewise are not subject to the rule.

In sum: Section 1959(a), as charged in this matter based solely on a violation of New York law, does not incorporate the year-and-a-day rule. We therefore find that Berry's counsel was not ineffective for failing to raise this argument at trial, because no amount of argument would have changed the outcome.[3]

II. Double Jeopardy

Berry argues that his prosecution on Count Two, murder while engaged in a narcotics conspiracy, violates the Double Jeopardy Clause because he was convicted in 2008 of the predicate narcotics conspiracy. Berry attempted to raise this argument in a motion to dismiss that he submitted himself – not through his counsel – to the District Court. See App'x at 29-30. The District Court declined to consider the motion because Berry was represented by counsel. See id.; see also United States v. Rivernider, 828 F.3d

[3] Berry's counsel asserted at oral argument before this Court that he had adequately raised a substantive direct appeal challenge to the conviction on Count Three, in addition to the ineffective assistance of counsel claim. Berry's briefing identifies the issue presented as: "Was Berry deprived of his constitutional right to the effective assistance of counsel, where defense counsel failed to challenge his conviction under Count Three charging a VICAR murder charge based on the year and a day rule?" Appellant's Br. at 2. Furthermore, the brief only discusses the § 1959(a) year-and-a-day issue in the context of the ineffective assistance of counsel claim. It is not at all clear that Berry has adequately preserved this issue on appeal. However, we need not determine whether Berry adequately made a substantive challenge to his conviction on Count Three, because, as set forth above, any such claim would lack merit.

91, 108 (2d Cir. 2016) ("A defendant has a right either to counsel or to proceed pro se, but has no right to 'hybrid' representation . . . ." (citation omitted)). The District Court noted that even if it reached the merits of the motion, the motion would be denied as "frivolous." App'x at 30.[4]

This Court has recently addressed the interplay of 21 U.S.C. §846 and 21 U.S.C. §848(e)(1)(A) and has resolved this very question against Berry's position. In United States v. Aquart, the appellant was convicted at the same trial under both §846 and §848(e)(1)(A). See 92 F.4th 77, 101-02 (2d Cir. 2024). He argued "that because the charged crack conspiracy was . . . the specified predicate crime for the charged drug-related murders, that conspiracy must be considered a lesser included offense to the §848(e)(1)(A) murders, for which he cannot stand convicted or be punished without violating double jeopardy." Id. at 102. This Court disagreed:

> In Garrett[v. United States, 471 U.S. 773 (1985)], the Supreme Court concluded, based on "common sense" and the "language, structure, and legislative history" of §848, that Congress intended for the CCE provisions of §848 to state separate offenses from any substantive drug crimes under other statutory sections that might be used to prove the enterprise. 471 U.S. at 785, 779, 781 (holding that double jeopardy did not preclude §848 prosecution based in part on proof of §952 drug importation for which defendant had earlier been indicted). . . . While Garrett's focus was on the CCE provisions of §848, its reasoning applies with equal force to the statute's drug-related murder provision here at issue.

---

[4] The government argues that Berry's double-jeopardy challenge was not raised before the District Court, and we therefore must review it for plain error. See United States v. Polouizzi, 564 F.3d 142, 153-54 (2d Cir. 2009). Berry contends that we should review the issue de novo, because he raised the issue in his pro se submission. See United States v. Olmeda, 461 F.3d 271, 278 (2d Cir. 2006). We need not determine which standard of review applies, because even on de novo review, Berry's argument fails.

Id. at 104.

Like the defendant in Aquart, Berry "was convicted of engaging in distinct crimes, one substantive and one conspiratorial, with different objectives: murder in the case of §848(e)(1)(A); a scheme to traffic drugs in the case of §846." Id. at 102. Congress intended to provide for separate offenses and commensurate punishments for those offenses. Berry was charged with conduct in this case that was not a part of his prior drug conviction; the earlier drug offense simply did not encompass all of "the multilayered conduct, both as to time and to place, involved in this case." Garrett, 471 U.S. at 789.[5] We therefore conclude that Berry's successive prosecutions under 21 U.S.C. §846 and 21 U.S.C. §848(e)(1)(A) did not violate the Double Jeopardy Clause.

We have considered all of Berry's remaining arguments and find them to be without merit. The judgment of the District Court is **AFFIRMED**.

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

[5] Of course, Berry could not have been prosecuted for the murder at the time of his prosecution for the drug conspiracy because the victim of the shooting had not yet died.

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

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: May 17, 2024
Docket #: 22-3207cr
Short Title: United States of America v. Berry

DC Docket #: 1:20-cr-84-1
DC Court: SDNY (NEW YORK CITY)
DC Judge: Nathan

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

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

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: May 17, 2024
Docket #: 22-3207cr
Short Title: United States of America v. Berry

DC Docket #: 1:20-cr-84-1
DC Court: SDNY (NEW YORK CITY)
DC Judge: Nathan

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of July, two thousand twenty-four.

United States of America,

Appellee,

v.

Frank Lopez, AKA Sealed Defendant 2,

Defendant,

Ralph Berry, AKA Sealed Defendant 1,

Defendant - Appellant.

ORDER

Docket No: 22-3207

Appellant Ralph Berry has filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk