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S.D.N.Y. – N.Y.C.
16-cv-3468
Nathan, J.
Fox, M.J.

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 27th day of June, two thousand eighteen.

Present:

Dennis Jacobs,
Reena Raggi,
Peter W. Hall,
Circuit Judges.

John Thompson,

Petitioner-Appellant,

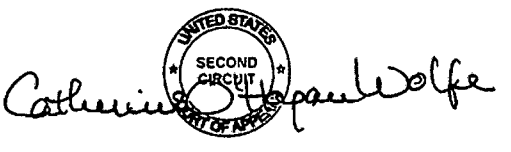
v. 18-212

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for "Reinstatement of Appeal," a certificate of appealability, and for leave to proceed in forma pauperis. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" denying leave to amend the Appellant's 28 U.S.C. § 2255 motion. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

John Thompson,

Petitioner,

-v-

United States of America,

Respondent.

----------X

16 CIVIL 3468 (AJN)

JUDGMENT

Whereas on April 18, 2017, the Honorable Kevin Nathaniel Fox, United States Magistrate Judge, to whom this matter was referred, having issued a Report and Recommendation recommending that Thompson's motion pursuant to §2255, Docket entry No. 1, be denied, and the matter having come before the Honorable Alison J. Nathan, United States District Judge, and the Court, on January 3, 2018, having rendered its Memorandum Opinion and Order and the Order dated January 5, 2018, adopting the Report and Recommendation in its entirety, and denies Thompson's petition for a writ of habeas corpus. No evidentiary hearing is necessary because the files and records of the case conclusively show that he is not entitled to relief. 28 U.S.C. § 2255(b). The Court also denies Thompson's second and third motions for leave to amend, and his motion for the appointment of pro bono counsel. In addition, the Court declines to issue a certificate of appealability. Petitioner has not made a substantial showing of a denial of a federal right, and appellate review is therefore not warranted. See Love v. McCray, 413 F.3d 192, 195 (2d Cir. 2005). The Court also finds pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from the order would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438, 445 (1962); and directing the Clerk of Court to close this case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the

Court's Memorandum Opinion and Order dated January 3, 2018, and the Order dated January 5, 2018, the Report and Recommendation is adopted in its entirety, and Thompson's petition for a writ of habeas corpus is denied. No evidentiary hearing is necessary because the files and records of the case conclusively show that he is not entitled to relief. 28 U.S.C. § 2255(b). The Court has also denied Thompson's second and third motions for leave to amend, and his motion for the appointment of pro bono counsel. In addition, the Court has declined to issue a certificate of appealability. Petitioner has not made a substantial showing of a denial of a federal right, and appellate review is therefore not warranted. See Love v. McCray, 413 F.3d 192, 195 (2d Cir. 2005). The Court also finds pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from the order would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438, 445 (1962); accordingly, the case is closed.

Dated: New York, New York
January 8, 2018

RUBY J. KRAJICK

Clerk of Court

BY: _____

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

John Thompson,

Petitioner,

–v–

United States of America,

Respondent.

16-CV-3468 (AJN)

MEMORANDUM
OPINION & ORDER

ALISON J. NATHAN, District Judge:

Before the Court are *pro se* Petitioner John Thompson's ("Petitioner" or "Thompson") objections to a report and recommendation (the "Report" OR "R&R") issued by the Honorable Kevin Nathaniel Fox, United States Magistrate Judge, recommending that Thompson's motion to vacate his conviction and sentence under 28 U.S.C. § 2255 be denied, *see* Dkt. No. 23[1], as well as two outstanding motions for leave to amend, *see* Dkt. Nos. 19 & 28, and one motion for the appointment of pro bono counsel, *see* Dkt. No. 24. For the following reasons, the Court adopts the Report in its entirety and denies Thompson's petition. The Court also denies Thompson's motions for leave to amend and for the appointment of counsel.

I. Background

A. Procedural History

In 2013, Petitioner was arrested and charged with three total counts: 1) one count of conspiracy to distribute and possess with intent to distribute five kilograms and more of cocaine and one kilogram and more of heroin, in violation of 21 U.S.C. §§ 846 and 841(a) and (b)(1)(A), and 2) one count of conspiracy to commit a Hobbs Act robbery in violation of 18 U.S.C. §§ 1951 and 2; and 3) one count of using and carrying a firearm during and in relation to a crime of

[1] Unless otherwise specified, all references to the docket refer to the docket in the above-captioned case.

violence, namely the Hobbs Act conspiracy, and possessing a firearm in furtherance of that crime, in violation of 18 U.S.C. §§ 924(c) and 2. No. 13-CR-378, Dkt. No. 13. On January 21, 2014, pursuant to a plea agreement with the respondent, Petitioner pleaded guilty before this Court to a lesser-included offense of Count One, that is, a violation of §§ 846 and 841(b)(1)(B), and to Count Two. No. 13-CR-378, Dkt. No. 80. On May 28, 2014, Petitioner was sentenced to 188 months imprisonment. *Id.* Thompson appealed his sentence, but the Second Circuit Court of Appeals affirmed the judgment of this Court. No. 13-CR-378, Dkt. No. 121.

On May 9, 2016, Petitioner, now proceeding *pro se*, filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. Dkt. No. 1; No. 13-CR-378, Dkt. No. 126. By Order dated June 7, 2016, the Court referred this matter to the Magistrate Judge for supervision of *habeas corpus* proceedings. Dkt. No. 5. After the Government (or "Respondent") filed its answer, *see* Dkt. No. 6, Petitioner moved for leave to amend his motion for habeas relief. Dkt. No. 13. On March 20, 2017, Magistrate Judge Kevin Fox issued a memorandum and order denying Petitioner leave to amend as futile. Dkt. No. 17. Petitioner then filed objections to the Magistrate's order, arguing that the Magistrate erred in construing his motion under Federal Rule of Civil Procedure 15(a) instead of 15(c), and erred in his evaluation of the Petitioner's proposed amendments. Dkt. No. 18. On June 19, 2017, this Court reviewed Judge Fox's March 20 Order and denied Petitioner's objections. Dkt. No. 26. Petitioner has moved for leave to amend or supplement his habeas petition two more times, *see* Dkt. Nos. 19 & 28, which remain pending. Petitioner also appealed the Court's June 19 Order denying him leave to amend to the Second Circuit, which remains pending as well. *See Thompson v. United States*, No. 17-2386 (2d Cir. Aug. 3, 2017).

Separately, on April 18, 2017, Magistrate Judge Fox issued a Report and Recommendation ("R&R") on Petitioner's original motion to vacate his sentence under 28 U.S.C. § 2255. Dkt. No. 21. Judge Fox recommended that Petitioner's motion be denied. *Id.* at 11. Petitioner filed objections to Judge Fox's R&R, Dkt. No. 23, and Judge Fox's R&R and Thompson's objections are now before the Court.

B. Summary of Judge Fox's Report and Recommendation

The Court assumes familiarity with the facts as stated in the R&R. Briefly, in March 2013, a cooperating witness, Jose Rodriguez, identified Thompson to law enforcement as an individual who robbed drug dealers. At the direction of law enforcement, Rodriguez called Thompson claiming to have information about a drug trafficking organization that could be robbed. At a meeting in New York City with Rodriguez and an additional confidential informant ("CI") working with law enforcement, Thompson expressed interest in helping the CI with the robbery of a shipment of drugs coming up from Florida. At a meeting on or about March 29, 2013, Thompson told Rodriguez and the CI that he had assembled a robbery crew.

At a meeting held on or about April 19, 2013, Thompson was informed that the shipment would arrive on April 22nd. In recorded telephone conversations on April 22, 2013, Thompson indicated the he and his crew were ready to carry out the robbery and were on their way to New York City to meet Rodriguez and the CI. When Thompson and his accomplices reached the designated meeting location, they were arrested, and evidence and firearms were seized incident to the arrest.

As recounted above, Thompson was charged with three counts, and ultimately pleaded guilty to a drug conspiracy in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B) and to a Hobbs Act conspiracy in violation of 18 U.S.C. §§ 1951 and 2.

In his present habeas petition, Thompson principally asserts: (1) that he is actually innocent of conspiracy to commit a Hobbs Act robbery, because law enforcement "concocted" a fictitious robbery, and, as a result, interstate commerce was not affected; (2) that his guilty plea was not knowing and voluntary because defense counsel "forced" him to enter it, and (3) that the Government "[m]anufactured jurisdiction" by having a CI contact him to travel to New York to "rob a fictitious drug dealer," inducing and entrapping him to commit a crime that did not affect interstate commerce. *See generally* Dkt. No. 1.

Judge Fox concluded that all three arguments were without merit. First, Judge Fox found that "factual impossibility" is no defense to Hobbs Act conspiracy. Dkt. No. 21 at 6-7 (quoting

United States v. Clemente, 22 F.3d 477, 480-81 (2d Cir. 1994)). The fact that no robbery took place or could have taken place is immaterial given that the Government's evidentiary proffer included that Thompson conspired to conduct a robbery using firearms that traveled in interstate commerce to steal narcotics which were in and affecting interstate commerce. *Id.* at 7. Second, applying the test set out by the Supreme Court in *Strickland v. Washington*, Judge Fox determined that Thompson had not shown how his attorney's representation fell below "an objective standard of reasonableness," how counsel had "coerced him," nor how he was "prejudiced" by counsel's errors, concluding that "no grounds exist for vacating the movant's sentence on the basis of ineffective assistance of counsel." *Id.* at 8-9 (quoting 104 S. Ct. 2052 (1984)). As a result, Judge Fox also found Thompson's motion was procedurally barred by the waiver provision of his plea agreement. *Id.* at 10-11. Third, Judge Fox, noting that a valid entrapment defense includes an element of "a lack of predisposition on the part of the defendant to engage in criminal conduct," concluded that Thompson repeatedly expressed "his willingness to participate in the robbery scheme," leaving his entrapment claims "unfounded." *Id.* at 9-10 (citing *United States v. Cromitie*, 727 F.3d 194, 204 (2d Cir. 2013) and *United States v. Salerno*, 66 F.3d 544, 547 (2d Cir. 1995)).

The Court will address the R&R and Petitioner's objections first, followed by Petitioner's two motions for leave to amend, and his motion for the appointment of pro bono counsel.

II. Discussion

A. Review of the Report and Recommendation on Thompson's Habeas Petition

1. Legal Standard

When reviewing a report and recommendation on a dispositive motion, a district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). If a party files objections to the Report, the district court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* For those portions of the Report

that face no objections, however, the district court reviews for clear error. *Watson v. Geithner*, No. 11-CV-9527(AJN), 2013 WL 5441748, at *2 (S.D.N.Y. Sept. 27, 2013). Similarly, "when a party makes conclusory or general objections, or simply reiterates the original arguments, the Court will review the report only for clear error." *Chebere v. Phillips*, No. 04-CV-296(LAP), 2013 WL 5273796, at *3 (S.D.N.Y. Sept. 18, 2013). "A decision is 'clearly erroneous' when the reviewing Court is left with the definite and firm conviction that a mistake has been committed." *Courtney v. Colvin*, No. 13-CV-2884(AJN), 2014 WL 129051, at *1 (S.D.N.Y. Jan. 14, 2014) (internal quotation marks and citation omitted).

A district court considering a Section 2255 motion must hold a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). A hearing is warranted if the motion sets forth "specific facts supported by competent evidence, raising detailed and controverted issues of fact that, if proved at a hearing, would entitle [the defendant] to relief." *Gonzales v. United States*, 722 F.3d 118, 131 (2d Cir. 2013). By contrast, a hearing is not necessary "where the allegations are vague, conclusory, or palpably incredible." *Id.* at 130-31 (internal quotation marks and citation omitted).

Because Thompson is proceeding *pro se*, his submissions "must be construed liberally and interpreted to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks and emphasis omitted).

2. Thompson's Objections

Thompson's objections to the R&R may be found in three places. First, on May 1, 2017, he filed a direct response that lodges procedural objections only. *See* Dkt. No. 23. In that document, Thompson claims that Judge Fox did not have the authority to issue the March 20, 2017 Memorandum and Order denying his motion for leave to amend, and that it should have been issued as a Report and Recommendation. *Id.* at 2. He goes on to claim that Judge Fox only issued the Report at issue here to correct his mistake in issuing the first Memorandum and Order,

and so is "tainted." *Id.* Thompson moves this Court to "enter default judgment against MJ Fox's R and R, and strike same as moot." *Id.*

Petitioner's objections about the procedure followed by the magistrate judge are unavailing. "Motions...to amend are generally considered nondispositive motions," and so Judge Fox's styling of his opinion as a "Memorandum and Order" is procedurally appropriate. *See McNeil v. Capra*, No. 13-CV-3048(RA), 2015 WL 4719697, at *2 (S.D.N.Y. Aug. 7, 2015); *Kilcullen v. New York State Dep't of Transp.*, 55 F. App'x 583, 584-85 (2d Cir. 2003) (summary order) (characterizing plaintiff's motion to amend as "nondispositive"); *see also Sokol Holdings, Inc. v. BMB Munai, Inc.*, No. 05-CV-3749(KMW)(DCF), 2009 WL 3467756 (S.D.N.Y. Oct. 28, 2009) (affirming Magistrate Judge Freeman's "Memorandum and Opinion" granting in part and denying in part plaintiffs' motion for leave to amend); *Tardif v. City of New York*, No. 13-CV-4056(KMW)(FM), 2016 WL 2343861 (S.D.N.Y. May 3, 2016) (same). Moreover, whether styled as a "Report and Recommendation" or "Memorandum and Order," this Court, following Petitioner's filing of objections, did undertake a careful review of Judge Fox's opinion. *See* Dkt. No. 26. Thompson provides no basis in the law for his argument, nor offers any explanation of how Judge Fox's March 20 Order "taints" the subsequently submitted and presently considered R&R. These objections are denied.

Second, in Thompson's objections to the R&R, he "incorporates by reference" the objections he filed in response to Judge Fox's March 20 Memorandum and Order. Dkt. No. 23 at 1. Those objections were subsequently addressed in the Court's June 19 Order, *see* Dkt. No. 26, and do not merit reconsideration within the context of evaluating this R&R.

Third, as Thompson claims to have not received the Government's original submission in opposition to his habeas petition until it was definitively served in June 2017, *see* Dkt. Nos. 10, 27, he first filed his reply on July 28, 2017. Dkt. No. 29. Out of an abundance of caution, as it is possible that Petitioner had not received the Government's submission until after he submitted his objections to the R&R, the Court will deem the reply as part of his objections since it was submitted after Judge Fox had already issued his R&R.

Petitioner makes two main arguments in his reply, one of which is new and not reflected in his initial petition, and one of which reiterates an argument previously made and considered.

First, he argues that the waiver provisions in his plea agreement should not be enforced because "the process by which the guilty plea was procured were [sic] statutorily and constitutionally invalid," and because he "received ineffective assistance of counsel in the process." Dkt. No. 29 at 4. Specifically, Thompson claims he was "either misinformed of the offense charged, or informed of the offenses charged in which he was not charged, when the court misinformed him of the lesser-included offense of 21 U.S.C. 846 and 841(b)(1)(A) to be that of 841(b)(1)(B), rather than 841-simply possession." *Id.* at 5. He further claims that the court misinformed him "that the indictment charged him under subsection (b)(1)'(B)' of § 841, when in fact he was only charged under subsection (b)(1)'(A)' of § 841." *Id.*

This is factually incorrect. The plea agreement Thompson signed makes it clear that while Mr. Thompson was charged with a violation of 21 U.S.C. § 841(b)(1)(A), the Government would accept a guilty plea to the lesser included offense of a violation of 21 U.S.C. § 841(b)(1)(B). *See* Plea Agreement dated January 13, 2014 at 1. The plea colloquy accurately reflected the Plea Agreement and accurately stated the offense both charged and to which he pleaded.

> THE COURT: So turning to the charges, do you understand that you are charged in count one with participating in a conspiracy to distribute or possess with intent to distribute give -- I'm going to state what you're charged with and then we'll discuss the lesser included offense which I understand is what the government has agreed to. But you are charged in count one with participating in a conspiracy to distribute or possess with intent to distribute 5 kilograms or more of mixtures or substances containing a detectable amount of cocaine, and 1 kilogram or more of mixtures or substances containing a detectable amount of heroin; do you understand that is what you are charged with in count one?
> THE DEFENDANT: Yes.
> THE COURT: And I understand that under the terms of the plea agreement, the government will accept a guilty plea to the lesser-included offense of participating in a conspiracy to distribute or possess with intent to distribute 500 grams or more of mixtures and substances containing a detectable amount of cocaine, and 100 grams or more of mixtures or substances containing a detectable amount of heroin; is that correct?
> MR. IMPERATORE: That's correct, your Honor.

Tr. 8:20-9:15

The Court's description of each offense was accurate. Additionally, the Court had the Government state the elements of the offense to which Mr. Thompson pleaded guilty.

> THE COURT: All right. I'll ask counsel for the government if you would please, with respect to each count, describe, state the elements of the offenses in question.
> MR. IMPERATORE: Yes, your Honor. Count one charges the defendant with entering into a conspiracy to violate the narcotics laws of the United States in violation of Title 21 United States Code Section 846. There are two elements to this offense. First, the existence of an agreement to violent those provisions of the law that make it illegal to distribute a controlled substance or to possess a controlled substance with the intent to distribute it; second, that the defendant knowingly became a member of the conspiracy. Count one also charges 21 USC Section 841(b)(1)(B). This is a penalty provision that applies when the object of the conspiracy was to distribute more than 100 grams of heroin or more than 500 grams of cocaine.
> Tr. 9:20-22; 10:3-15.

The Government's description of these provisions was accurate. It was clear from the Agreement and colloquy that Thompson was pleading guilty to a violation of 21 U.S.C. § 841(b)(1)(B).[2] There is no basis in Petitioner's objection.

Second, Thompson argues in his reply that, contrary to the Government's contention, his motion is not procedurally barred "because he is actually innocent of the underlying facts leading to [the] offense of conviction in this case." Dkt. No. 29 at 5. Thompson argues that he is innocent because "he has not affected interstate commerce and the factual basis adduced at or during the plea colloquy failed to support these facts." *Id.* at 6. Petitioner made a similar argument in his initial submission, Dkt. No. 1 at 20-23, and Judge Fox considered and rejected these claims in his R&R. *See* Dkt. No. 21 at 6-7. Accordingly, the Court reviews this portion of the R&R only for clear error. *Chebere*, 2013 WL 5273796, at *3 ("[W]hen a party...simply

[2] The Court is not sure what Petitioner means when he suggests that he should have been informed about "841-simply possession," but to the extent that his argument is that there should have been no specified quantity of drugs attached to the charge, as in a violation of § 841(b)(1)(C), this is plainly contradicted by the language of the Agreement and by his understanding as stated during the colloquy.

reiterates the original arguments, the Court will review the report only for clear error."). The Court finds no clear error; as Thompson has failed to demonstrate his actual innocence, he cannot show cause for his procedural default.

Finally, Thompson includes a brief statement in his reply stating that the Court had failed "to assure that a factual basis was legally sufficient before accepting the guilty plea." Dkt. No. 29 at 4. This statement is far too general and conclusory to constitute a valid objection, and so the Court reviews this aspect of Judge Fox's R&R – which focused on the interstate commerce element of Hobbs Act robbery – for clear error only. The Court finds no clear error in this section of Judge Fox's R&R. *See* Dkt. No. 21 at 6-7.

The Court's *de novo* review of the objected-to portions of Judge Fox's R&R reveals no basis for rejecting or modifying it, nor does the Court perceive any clear error in the remainder of the R&R. Accordingly, the Court adopts the Report and Recommendation in its entirety.

B. Petitioner's Second and Third Motions to Amend

"A motion to amend a *habeas* petition is analyzed under the standards set forth in Federal Rule of Civil Procedure 15(a)." *Feliciano v. United States*, 01-CV-9398(PKL), 2009 WL 928140, at *2 (S.D.N.Y. Mar. 30, 2009) (citing *Ching v. United States*, 298 F.3d 174, 180 (2d Cir. 2002)). Under Rule 15(a), leave to amend is to "be freely given when justice so requires." *Jones v. New York State Div. of Military & Naval Affairs*, 166 F.3d 45, 50 (2d Cir. 1999) (internal quotation marks omitted). However, "motions to amend should generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party." *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

In his second motion to amend, Petitioner points to the recent Supreme Court decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and argues that under *Mathis*, his prior

convictions under New Jersey controlled substances laws do not count as predicate offenses for the purposes of the career offender provision in the United States Sentencing Guidelines. Dkt. No. 19 at 7-11. Relying on *Mathis*, Petitioner argues that his motion is timely under 28 U.S.C. § 2255(f)(3), which allows a motion to be filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]" *Id.* at 9.

Petitioner's reading of *Mathis* is unduly broad, and *Mathis* creates no new right applicable to his arguments here. Thompson argues that his 2001 and 2011 drug trafficking convictions under N.J.S. 2C:35, "should no longer qualify as predicates for 'career offender' enhancement purposes under U.S.S.G. § 4B1.1, because the § 2C:35 statute is broader than the generic drug statute for enumerated crime clauses." *Id.* at 7. His claim goes simply to whether the Court misapplied the "modified categorical approach" in deciding whether his prior state drug crime rendered him a career offender under the Guidelines. *Mathis* dealt with the narrow question of laws that enumerate "various factual means of committing a single element," and not multiple elements listed disjunctively. *See Mathis*, 136 S. Ct. at 2249. That is not an issue present with respect to this particular statute. *See, e.g.*, *Gonzalez v. United States*, No. 16-CV-9412(KSH), 2017 WL 4119585, at *2-3 (D.N.J. Sept. 15, 2017) (rejecting the applicability of *Mathis* to 2C:35); *Arrington v. United States*, No. 17-CV-2638(PGS), 2017 WL 3202826, at *2 (D.N.J. July 26, 2017) (same). *Mathis* did not announce any new law relevant to Petitioner's claim, and so his motion is time-barred, 28 U.S.C. § 2255(f), and amendment would be futile.

In his third motion to amend, Petitioner points to *Lee v. United States*, 137 S. Ct. 1958 (2017), in another attempt to prolong his *habeas* case. Dkt. No. 28. As with Petitioner's second motion to amend, however, *Lee* presents no new law affecting his petition. In *Lee*, the Supreme Court held that the defendant showed "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," when his attorney failed to inform him that his plea would lead to mandatory deportation. 137 S. Ct. at 1964-68 (quoting *Strickland*, 466 U.S. at 694). Petitioner's motion to amend simply relitigates his

arguments under *Strickland*, namely Thompson's claim that his attorney provided poor advice when analyzing Thompson's defenses to the Hobbs Act charge. Dkt. No. 28 at 2. *Lee* relies on *Strickland* and does not change the relevant standard in any way applicable here. *Lee*, 137 S. Ct. at 1964. Petitioner's proposed amendment would be futile, and therefore leave to amend is denied.

C. Petitioner's Motion to Appoint Pro Bono Counsel

For the reasons stated above, the Court finds that Petitioner's *habeas* claim lacks merit. Accordingly, the Court denies Thompson's motion for appointment of pro bono counsel. *See Cooper v. A. Sargenti Co., Inc.*, 877 F.2d 170, 174 (2d Cir. 1989) (holding that without a threshold showing of likelihood of merit, courts should not appoint counsel).

III. Conclusion

For the foregoing reasons, the Court adopts the Report and Recommendation in its entirety, and DENIES Thompson's petition for a writ of habeas corpus. No evidentiary hearing is necessary because the files and records of the case conclusively show that he is not entitled to relief. 28 U.S.C. § 2255(b).

The Court also denies Thompson's second and third motions for leave to amend, and his motion for the appointment of pro bono counsel.

In addition, the Court declines to issue a certificate of appealability. Petitioner has not made a substantial showing of a denial of a federal right, and appellate review is therefore not warranted. *See Love v. McCray*, 413 F.3d 192, 195 (2d Cir. 2005). The Court also finds pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962).

This Order resolves Dkt. Nos. 19, 24, & 28 in Case No. 16-CV-3468, and Dkt. Nos. 126 & 148, in Case No. 13-CR-378. The Clerk of Court shall close this case.

This Order will be mailed to Petitioner, who appears *pro se*.

SO ORDERED.

Dated: January 3, 2018
New York, New York

ALISON J. NATHAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

John Thompson,

Petitioner,

–v–

United States of America,

Respondent.

16-CV-3468 (AJN)

ORDER

ALISON J. NATHAN, District Judge:

For the reasons set forth in the Court's January 5, 2018 Memorandum Opinion & Order, the Court adopts Magistrate Judge Fox's Report & Recommendation, Dkt. No. 21, in its entirety.

SO ORDERED.

Dated: January 5, 2018
New York, New York

ALISON J. NATHAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN THOMPSON,

Movant,

-against-

UNITED STATES OF AMERICA,

Respondent.

REPORT and RECOMMENDATION

16-CV-3468 (AJN)(KNF)

13-CR-378 (AJN)

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE ALISON J. NATHAN, UNITED STATES DISTRICT JUDGE

John Thompson ("Thompson"), proceeding pro se, made a motion, pursuant to 28 U.S.C. § 2255, seeking to vacate, set aside, or correct his sentence. The respondent opposes the motion.

BACKGROUND

In March 2013, Thompson was identified to law enforcement officials by a cooperating witness as an individual who robbed drug dealers and who had connections to crews that conducted such robberies. At the direction of law enforcement officials, the cooperating witness, who was identified by Thompson as Jose Rodriguez ("Rodriguez"), a former prison acquaintance of his, called Thompson and claimed to have information from a "tipster" about a drug trafficking organization that could be robbed. The telephone call was recorded. Thompson showed interest and he and Rodriguez agreed to meet to discuss the robbery.

On or about March 16, 2013, they met at a restaurant in New York City. The person posing as the "tipster," who was a law enforcement agency's confidential informant ("CI"), was also at the meeting. According to Thompson, Rodriguez told him that the CI was his uncle. The

CI wore a recording device and law enforcement officials conducted surveillance of the meeting. Thompson asserts that the CI "asked [him] about doing a robbery for him by intercepting a shipment of drugs coming from Miami, Florida for him." The CI also told Thompson that the CI's girlfriend would be traveling with a member of the drug trafficking organization who would be carrying a large sum of money and that she would provide further updates to the CI. Among other things, Thompson told Rodriguez that he was interested in robbing the shipment and had access to guns, and that his crew consisted of members of his family. On or about March 29, 2013, Rodriguez and the CI met with Thompson and Thompson's accomplice. Law enforcement officials conducted surveillance of the meeting by means of a recording device worn by Rodriguez. At the meeting, Thompson told Rodriguez and the CI that he had assembled a robbery crew.

At a meeting held on or about April 19, 2013, Thompson was informed that a shipment of drugs would arrive in New York from Miami on April 22, 2013. On that date, in two recorded telephone conversations, Thompson indicated that he and his crew were ready to carry out the robbery, and were on their way to New York, New York, from Atlantic City, New Jersey, and would meet Rodriguez and the CI in a designated location. When they arrived at the designated location, Thompson and his accomplices were arrested. Following a search by law enforcement officials, incident to the arrest, items of evidence were seized, including loaded semi-automatic handguns and an extended firearm magazine.

Thompson was charged in this court with one count of conspiracy to distribute and possess with intent to distribute five kilograms and more of cocaine and one kilogram and more of heroin, in violation of 21 U.S.C. §§ 846 and 841(a) and (b) (Count One); one count of conspiracy to commit a Hobbs Act robbery in violation of 18 U.S.C. §§ 1951 and 2 (Count

Two); and one count of using and carrying a firearm during and in relation to a crime of violence, namely, the Hobbs Act conspiracy charged in Count Two, and possessing a firearm in furtherance of that crime, in violation of 18 U.S.C. § 924(c) (Count Three). On January 21, 2014, Thompson pleaded guilty before your Honor to Counts One and Two of the indictment, pursuant to a plea agreement with the respondent. As part of the plea agreement, Thompson was permitted to plead guilty to a lesser-included offense of Count One (that is, conspiracy to distribute and possess with intent to distribute 100 grams and more of heroin and one kilogram and more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)), which carried a five-year mandatory minimum sentence. In addition, the respondent agreed to dismiss the firearms offense charged in Count Three, which carried a five-year mandatory minimum sentence, which would have to run consecutively to any other sentence imposed on Thompson in connection with his guilty plea. In addition, the plea agreement constricted Thompson's ability to appeal from or collaterally attack the sentence imposed.

During the plea proceeding, your Honor, among other things, determined that Thompson understood the nature and scope of the appellate waiver contained in the plea agreement:

> THE COURT: Now, in your plea agreement you waived your right to appeal or otherwise challenge any sentence that is 235 months or below. In other words, if I sentence you to 235 months, or anything less than 235 months, you would have no right to appeal or otherwise try to challenge that sentence. Do you understand that?
>
> THE DEFENDANT: Yes.

On May 28, 2014, Thompson was sentenced to 188 months imprisonment, to be followed by a four-year term of supervised release; in addition, a mandatory special assessment of $200 was imposed on him. The judgment of conviction was filed on May 30, 2014. On June 11, 2014, Thompson appealed his conviction and sentence to the United States Court of Appeals for the Second Circuit. In a summary order dated July 2, 2015, the Second Circuit Court of Appeals, inter alia, granted: (1) the respondent's motion to dismiss with respect to Thompson's appeal of

his terms of imprisonment and supervised release; and (2) the respondent's motion for summary affirmance with respect to Thompson's appeal of his conviction and the special assessment component of his sentence. See United States v. John Thompson, 14-2136 (2d Cir. July 2, 2015).

On May 9, 2016, Thompson filed the instant motion, pursuant to 28 U.S.C. § 2255, seeking to vacate, set aside or otherwise correct his sentence on the grounds that: (1) he is actually innocent of conspiracy to commit a Hobbs Act robbery in violation of 18 U.S.C. §§ 1951 and 2, because law enforcement officials "concocted" a fictitious robbery and, as a result, interstate commerce was not affected; (2) he was forced to enter a plea of guilty because his defense counsel did not want to proceed to trial and, as a result, his guilty plea was "not knowingly, intelligently or wilfully voluntarily entered [into]"; and (3) jurisdiction in this case was "manufactured" by law enforcement officials in New York who had a CI contact him, allegedly to have him travel to New York and "rob a fictitious drug dealer," resulting in inducement and entrapment to commit a crime that did not "affect interstate commerce."

As noted above, the respondent opposes the motion. According to the respondent, Thompson's motion is procedurally barred because: (a) he gave up his right to appeal or collaterally attack his sentence when he agreed to the waiver provision of his plea agreement; and (b) his challenge to his conviction is subject to the procedural default rule, which prevents claims that could have been brought on direct appeal from being raised on collateral review, absent cause and prejudice. Furthermore, the respondent contends, even if Thompson's motion were not procedurally barred, it would fail on the merits.

DISCUSSION

Legal Standard

28 U.S.C. § 2255 provides that:

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed

> in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> 28 U.S.C. § 2255(a).

Section 2255 provides further that a court shall hold an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).

As a form of collateral review, a § 2255 motion may not be used as a substitute for a direct appeal. See United States v. Frady, 456 U.S. 152, 165, 102 S. Ct. 1584, 1593 (1982). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice' or that he is 'actually innocent.'" Bousley v. United States, 523 U.S. 614, 622, 118 S. Ct. 1604, 1611 (1998) (citations omitted).

"Waivers of the right to appeal a sentence are presumptively enforceable." United States v. Arevalo, 628 F.3d 93, 98 (2d Cir. 2010) (citing United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000)). "'Knowing and voluntary appellate waivers included in plea agreements must be enforced because, if they are not, the covenant not to appeal becomes meaningless and would cease to have value as a bargaining chip in the hands of defendants." Id. (quoting United States v. Granik, 386 F.3d 404, 412 (2d Cir. 2004)). In like manner, "[a] defendant's knowing and voluntary waiver of the right to . . . collaterally attack his conviction and/or sentence is enforceable." Sanford v. United States, 841 F.3d 578, 580 (2d Cir. 2016).

Application of Legal Standard

1) Interstate Commerce Element of Hobbs Act

Thompson contends that he is actually innocent of conspiracy to commit a Hobbs Act

robbery in violation of 18 U.S.C. §§ 1951 and 2, because law enforcement officials "concocted" a fictitious robbery and, as a result, interstate commerce was not affected. According to Thompson, "(d)ue to the fact that there was no person to rob, and no one was robbed, [p]etitioner did not affect interstate commerce. . . . Petitioner is actually and factually innocent."

Thompson's claim is without merit. During the plea proceeding, the respondent, at your Honor's request, stated what the government's evidence would be if the defendant were to go to trial:

> THE COURT: Mr. Imperatore, would you please summarize what the government's evidence would be if the defendant were to go to trial?
>
> MR. IMPERATORE: Yes, your Honor. The government would prove, through the testimony of law enforcement and other witnesses, through physical evidence seized, that in approximately 2013 the defendant agreed with others to conduct an armed robbery of people carrying a shipment of cocaine and heroin; that the defendant and others drove to New York with loaded guns and other weapons; and that they planned to rob cocaine and heroin and then sell those drugs.
>
> The government's evidence would also include records of meetings between this defendant and a confidential source and a cooperating witness, in which the defendant made statements about his intent and the nature of the robbery and the drug distribution conspiracy.

As outlined by the respondent, the evidence would have been sufficient to support a finding of a conspiracy to commit robbery and such a conspiracy would have satisfied the interstate commerce element of a Hobbs Act charge, even though "no one was robbed." This is so because "[i]n order to establish a Hobbs Act conspiracy, the government does not have to prove any overt act." United States v. Clemente, 22 F.3d 477, 480 (2d Cir. 1994). Moreover, "'[f]actual impossibility' is no defense to the inchoate offense of conspiracy under the Hobbs Act. The government needs to prove only that an agreement to commit extortion existed, not that extortion was actually committed." Id. at 480-481 (citing United States v. Skowronski, 968 F.2d 242, 250 (2d Cir. 1992) ("it is as much a violation of § 1951 to conspire to commit a

robbery affecting interstate commerce as it is to commit such a robbery")).[1] Moreover, the respondent's proffer, during the plea proceeding, with respect to the interstate commerce element of the Hobbs Act charge in this case further undermines Thompson's assertion that his conduct "did not affect interstate commerce."

> MR. IMPERATORE: Yes, your Honor. The government would proffer: First, that the robbery involved the use of firearms which traveled in . . . interstate commerce; and secondly, that the object of the robbery was to steal narcotics which were in and affecting interstate commerce.

For these reasons, Thompson cannot establish that he is actually innocent of conspiracy to commit a Hobbs Act robbery because interstate commerce was not affected by the scheme in which he participated.

2) Ineffective Assistance of Counsel

Thompson contends that he was "forced to enter a plea of guilty" because his defense counsel did not want to proceed to trial. In addition, he asserts that his plea was "unintelligent, and thus void, due to my misunderstanding, and the district court's misunderstanding of the reach" of the Hobb's Act interstate commerce element.

In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), the Supreme Court established a two-part test to determine whether defense counsel's assistance was ineffective.

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[1]During the plea proceeding, Thompson acknowledged that he "conspired with others to commit a robbery of a drug dealer for drugs and money."

THE COURT: And you said that you conspired. A conspiracy means that you knowingly entered into an agreement with others. Did you knowingly enter an agreement with others?

THE DEFENDANT: Yes.

THE COURT: To commit the robbery?

THE DEFENDANT: Yes.

THE COURT: And did you knowingly enter into an agreement with others to distribute or possess with the intent to distribute the narcotics that you indicated?

THE DEFENDANT: Yes.

THE COURT: And do you know what the drug types were?

THE DEFENDANT: Heroin and cocaine.

First, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness" according to "prevailing norms." Id. at 688-89, 104 S. Ct. 2064-65. Second, the petitioner must "affirmatively prove prejudice" by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 693-94, 104 S. Ct. at 2067-68. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. When a claim is made that counsel has rendered ineffective assistance, a strong presumption exists that counsel's performance falls within the "wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065.

Thompson has not provided any evidence of how his counsel coerced him into entering into the plea agreement. Indeed, Thompson's claim is contradicted by the record. During the plea proceeding, Thompson, speaking under oath, confirmed that he was pleading guilty voluntarily and of his own free will, he was satisfied with his attorney's representation of him, he had discussed the charges against him with his attorney, he had read and reviewed with his attorney the plea agreement and he understood the rights he would give up, including his right to a trial.[2]

Under the circumstances, Thompson is unable to show that "counsel's representation fell below an objective standard of reasonableness" as provided in Strickland, or that he suffered prejudice as a result of counsel's errors. As noted above, a waiver of the right to collaterally attack a sentence is enforceable. See Sanford, 841 F.3d at 580. Thompson was aware that he

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[2]Thompson predicates his ineffective assistance of counsel claim in part on his assertion that his plea was unintelligent because he and the "district court" misunderstood or were unaware of the "reach" of the Hobbs Act interstate commerce element. As discussed above, however, the evidence would have been sufficient to support a finding of a conspiracy to commit robbery and such a conspiracy would have satisfied the interstate commerce element of a Hobbs Act charge.

would have to agree to the waiver of an appeal or collateral attack of his sentence before the plea agreement could be accepted. His counsel informed him of the consequences of accepting the plea agreement; hence, he cannot show that his counsel acted in an unreasonable manner. Further, Thompson cannot show that he was prejudiced by counsel's errors. On the contrary, Thompson was permitted to plead guilty to a lesser included offense of Count One and the respondent agreed to dismiss the firearms offense charged in Count Three, which carried a five-year mandatory minimum sentence which would have run consecutively to any other sentence imposed on Thompson in connection with his guilty plea. For the reasons set forth above, no grounds exist for vacating the movant's sentence on the basis of ineffective assistance of counsel.

3) Jurisdiction and Entrapment

Thompson claims that jurisdiction in this case was "manufactured" by law enforcement officials in New York who had a confidential informant contact him, allegedly to have him travel to New York and "rob a fictitious drug dealer," resulting in inducement and entrapment to commit a crime.

The concept of manufactured jurisdiction has been explained as, "a subset of three possible defense theories," including the theory that "the defendant was entrapped into committing a federal crime, since he was not predisposed to commit the crime in the way necessary for the crime to qualify as a federal offense." United States v. Wallace, 85 F.3d 1063, 1065 (2d Cir. 1996). "A valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in criminal conduct." United States v. Cromitie, 727 F.3d 194, 204 (2d Cir. 2013) (citation and internal quotation marks omitted). "A defendant is predisposed to commit a crime if he is ready and willing without persuasion to commit the crime charged and awaiting any propitious

opportunity to do so." United States v. Salerno, 66 F.3d 544, 547 (2d Cir. 1995) (citation and internal quotation marks omitted).

In his motion papers, Thompson claims that "he has demonstrated that he was not predisposed to come to New York or commit a robbery until the government's C.I. contacted him." However, the record in this case demonstrates that Thompson was known by a former prison acquaintance, Rodriguez, who was acting as a cooperating witness, as a person who robbed drug dealers and who had connections to crews that conducted such robberies, and that he was willing, on this occasion, to serve as the organizer of a crew to commit a robbery by intercepting a shipment of drugs.

Thompson expressed repeatedly, both through words and actions, his willingness to participate in the robbery scheme in the period leading up to his arrest. Thompson traveled willingly to New York City from New Jersey to meet with Rodriguez and an individual who was a CI, and informed them that he had access to guns and that he was prepared to assemble a robbery crew. During a subsequent meeting, Thompson advised Rodriguez and the CI that a robbery crew had been assembled. Under the circumstances, Thompson showed "a willingness to commit the crime for which he [was] charged as evidenced by [his] ready response to inducement." Salerno, 66 F.3d at 547 (citation omitted). Therefore, Thompson's claims that the government manufactured jurisdiction over this case, and that he was a victim of entrapment, are unfounded.

4) Procedural Default

The respondent argues that Thompson's motion is procedurally barred because he gave up his right to appeal or collaterally attack his sentence when he agreed to the waiver provision of his plea agreement and his challenge to his conviction is subject to the procedural default rule, which prevents claims that could have been brought on direct appeal from being raised on

collateral review, absent cause and prejudice. Cause can be shown by demonstrating ineffective assistance of counsel. However, as discussed earlier, the movant here cannot show that his counsel was ineffective under the Strickland standard. Hence, because Thompson waived his right to appeal or collaterally attack his sentence in his plea agreement, and informed your Honor, while under oath during his plea allocution, that he understood the impact of that waiver, he cannot show cause for his procedural default. Moreover, since any appeal would be denied, he cannot show prejudice.

As noted earlier, § 2255 does not require a hearing where, as here, "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Therefore, under the circumstances, Thompson's motion pursuant to § 2255 may be resolved without a hearing.

RECOMMENDATION

For the reasons set forth above, I recommend that Thompson's motion pursuant to § 2255, Docket Entry No. 1, be denied.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Alison J. Nathan, 40 Centre Street, Room 2102, New York, New York, 10007, and to the chambers of the undersigned, 40 Centre Street, Room 425, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Nathan. ***Failure to file objections within fourteen (14) days will result in a waiver of objections and will***

preclude appellate review. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003).

Dated: New York, New York
April 18, 2017

Respectfully submitted,

Kevin Nathaniel Fox

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

Copy mailed to:

John Thompson

Additional material from this filing is available in the Clerk's Office.