NO.

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY MAYES JUNIOR, Petitioner,

v

UNITED STATES OF AMERICA, Respondent.

APPENDIX FOR WRIT OF CERTIORARI

ANTHONY MAYES, JUNIOR
PRO SE
P.O. BOX 33
USP-TERRE HAUTE
Terre Haute, In. 47808

INDEX TO APPENDIX

UNITED STATES OF AMERICA, Appellee, v. ANTHONY MAYES, JR., ANTOINE MAYES, Defendants-Appellants.*
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
650 Fed. Appx. 787; 2016 U.S. App. LEXIS 10079
No. 13-2331 (L)
May 31, 2016, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Mayes v. United States, 2016 U.S. LEXIS 7007 (U.S., Nov. 28, 2016)US Supreme Court certiorari denied by Mayes v. United States, 2016 U.S. LEXIS 7516 (U.S., Dec. 12, 2016)

Editorial Information: Prior History

Appeal from judgments of the United States District Court for the Eastern District of New York (Ross, Judge).United States v. Mayes, 2014 U.S. Dist. LEXIS 96338 (E.D.N.Y., July 10, 2014)

Counsel FOR APPELLEE: ALICYN L. COOLEY (Susan Corkery, Berit W. Berger, Richard M. Tucker, on the brief), Assistant United States Attorneys, for Robert L. Capers, United States Attorney for the Eastern District of New York, Brooklyn, NY.

FOR ANTOINE MAYES, DEFENDANT-APPELLANT: LAWRENCE D. GERZOG (Jeremy Gutman, on the brief), New York, NY.

ANTHONY MAYES, JR, DEFENDANT-APPELLANT, Pro se, Jonesville, VA.

Judges: PRESENT: JOSÉ A. CABRANES, CHESTER J. STRAUB, RAYMOND J. LOHIER, JR., Circuit Judges.

Opinion

{650 Fed. Appx. 788} SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the District Court are AFFIRMED.

Defendants Antoine Mayes and **Anthony Mayes**, Jr. each appeal two judgments of conviction.1 Antoine Mayes appeals (1) a May 31, 2013 judgment of the District Court (Ross, J.) convicting him, after a guilty plea, of seven counts of distributing and possessing with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1), and (2) a January 14, 2015 judgment convicting him, after a jury trial, of several racketeering and drug charges in violation of, inter alia, 18 U.S.C. § 1962(c). **Anthony Mayes**, Jr. appeals (1) a December 24, 2014 judgment convicting him, after a jury trial, of possessing a firearm after a prior felony conviction, in violation of 18 U.S.C. § 922(g)(1), and (2) another December 24, 2014 judgment convicting him, after a subsequent jury trial, of several

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racketeering and drug charges. We assume the parties' familiarity with the facts and record of the prior proceedings, to which we refer only as necessary to explain our decision to affirm.

1. Antoine Mayes

We briefly address only two of Antoine Mayes's several arguments in support of reversing his convictions. First, he argues that the Government failed to prove that **{650 Fed. Appx. 789}** the racketeering enterprise existed for the length of time charged in the indictment. Based on the trial testimony, a reasonable jury could find that the enterprise existed "in an essentially unchanged form during substantially the entire period charged in the indictment." 5.13.14 Trial Tr. 33; see generally United States v. Eppolito, 543 F.3d 25, 49 (2d Cir. 2008). Second, he asserts that the evidence was insufficient to convict him of possessing a machinegun in furtherance of a racketeering enterprise. Again, our review of the trial record confirms that a reasonable jury could find that Antoine Mayes possessed a machinegun in furtherance of the racketeering enterprise, in violation of 18 U.S.C. § 924(c)(1)(B)(ii). **[GA17]**

2. **Anthony Mayes**, Jr.

Anthony Mayes, Jr. argues that the District Court should have suppressed wiretap evidence used against him in both trials, because (1) inconsistencies between the trial testimony of the FBI Special Agent who prepared the affidavit supporting the wiretap application and a later stipulation by the Government suggested that the agent must have lied in the affidavit; and (2) the affidavit did not establish the necessity of the wiretap. We reject the arguments because (1) a confidential informant testified in a way that supported the agent's affidavit, and (2) the affidavit adequately detailed the Government's prior traditional investigative efforts, why they fell short, and why a wiretap was necessary.

We have considered of the defendants' remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgments of the District Court are AFFIRMED.

Footnotes

* The Clerk of Court is directed to amend the case caption as set forth above.

1 On May 9, 2016, **Anthony Mayes** moved to withdraw certain appeals. We denied his motion on May 13, 2016. See United States v. Mayes, No. 13-2331-cr (2d Cir.), ECF Docket No. 243.

IN RE APPLICATION OF KATE O'KEEFFE TO I

Exhibit A-2

65259053

 P/F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANTHONY MAYES,

Petitioner,

-against-

UNITED STATES,

Respondent.

10-CR-473 (ARR)
12-CR-385 (ARR)
17-CV-2198 (ARR)
17-CV-2200 (ARR)

17-2357
17-2362

NOT FOR ELECTRONIC
OR PRINT PUBLICATION

OPINION & ORDER

ROSS, United States District Judge:

By pro se petition dated April 7, 2017, Anthony Mayes seeks, pursuant to 28 U.S.C. § 2255, to vacate his conviction by jury of several crimes, including racketeering, unlawful use and possession of firearms in connection with the racketeering offense, and violent crimes in aid of racketeering. Judgment, Dkt. No. 12-cr-385, ECF No. 250, at 2. On May 31, 2016, the Second Circuit Court of Appeals affirmed the conviction, United States v. Mayes, 650 F. App'x 787 (2d Cir. 2016), and the Supreme Court denied Mayes's petition for certiorari on February 21, 2017, Mayes v. United States, 137 S.Ct. 1140 (2017).

The relevant procedural history and facts of the case – including the evidence adduced at trial and the issues raised and resolved on appeal – have been fairly and accurately summarized in the government's submission in opposition to this petition, see Letter of Assistant United States Attorneys Richard M. Tucker and Alicyn Cooley (April 28, 2017) ("Opp'n") at 1-4, 13, Dkt. No. 10-cr-473, ECF No. 91. I therefore incorporate the government's recitation of these matters and need not repeat them here.

Read liberally, Mayes's habeas petition contains four claims. First, he claims ineffective

Exhibit B

assistance of counsel by his trial counsel. Mem. Law Supp. Pet.'s Mot. Seeking Remand & Vacate, Set Aside or Correct Sent. Pursuant to 28 U.S.C. § 2255 ("Pet.") at 11-19, 29-36, 40-44, 49, Dkt. No. 10-cr-473, ECF No. 411-1. Second, Mayes argues that the trial court improperly admitted wiretap evidence against him at trial. Id. at 2-3, 19-27, 51-75. Third, he alleges prosecutorial misconduct, namely that the United States intentionally elicited perjurious testimony from a witness in the first trial and then moved to suppress evidence of the inconsistency in the second trial. Id. at 27-28, 76-81. Finally, Mayes requests the disclosure of the grand jury minutes from June 7, 2012, to support a claim of malicious prosecution. Id. at 82-87. As set forth below, petitioner's ineffective assistance of counsel claim is patently meritless and his remaining claims are not properly before the court on collateral review.

DISCUSSION

A. Procedural Default and the Mandate Rule

Generally, issues that were or could have been raised on direct appeal may not be pursued collaterally. "First, the so-called mandate rule bars re-litigation of issues already decided on direct appeal." Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010) (citing Burrell v. United States, 467 F.3d 160, 165 (2d Cir. 2006); United States v. Minicone, 994 F.2d 86, 89 (2d Cir. 1993)); see also United States v. Pitcher, 559 F.3d 120, 123 (2d Cir. 2009) ("It is well established that a § 2255 petition cannot be used to 'relitigate questions which were raised and considered on direct appeal.'" (quoting United States v. Sanin, 252 F.3d 79, 83 (2d Cir. 2001))). Second, the procedural default rule "prevents claims that could have been brought on direct appeal from being raised on collateral review absent cause and prejudice." Mui, 614 F.3d at 54 (citing Marone v. United States, 10 F.3d 65, 67 (2d Cir. 1993); Campino v. United States, 968 F.2d 187, 190 (2d Cir. 1992)); see also United States v. Thorn, 659 F.3d 227, 231 (2d Cir. 2011) ("[A]

Exhibit B2

defendant is barred from collaterally challenging a conviction under § 2255 on a ground that he failed to raise on direct appeal.").[1]

With the exception of petitioner's ineffective assistance of counsel claim, all of Mayes's grounds for relief were or could have been raised on direct appeal. First, the Second Circuit directly addressed – and rejected – his arguments that the wiretap evidence should not have been admitted. Mayes, 650 F. App'x at 789. The mandate rule therefore precludes me from revisiting this issue on collateral review.[2]

Second, Mayes's claims of prosecutorial misconduct and his request for the grand jury minutes, were not raised on direct appeal. See generally Brief, 2d Cir. Dkt. No. 14-2766, ECF No. 217. This court is therefore procedurally barred from considering this issue on collateral review.[3]

B. Ineffective Assistance of Counsel

Petitioner also challenges his conviction on the ground that he received constitutionally ineffective assistance from his trial counsel. To establish a violation of the Sixth Amendment right to counsel, petitioner must meet the two-prong test established by Strickland v. Washington, 466 U.S. 668 (1984). First, petitioner must demonstrate that counsel's performance

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[1] An exception applies for issues that were not raised on direct appeal "if the defendant establishes (1) cause for the procedural default and ensuing prejudice or (2) actual innocence." Thorn, 659 F.3d at 231. Mayes has not attempted to make either showing.

[2] Even if additional review were proper, I would reject these arguments for the same reasons the Second Circuit stated. See id.

[3] Even if these arguments were not procedurally barred, I would reject them for substantially the reasons explained in the government's opposition, see Opp'n at 9-10, and my prior rulings on these issues, see Tr. Status Conf. (Oct. 30, 2013) at 18:22-24:14, Dkt. No. 12-cr-385, ECF No. 126; Tr. Status Conf. (Jan. 6, 2014) at 6:5-20, Dkt. No. 12-cr-385, ECF No. 162.

Exhibit B3

fell below "an objective standard of reasonableness" under "prevailing professional norms." Id. at 688. The court must apply a "strong presumption of competence" and "affirmatively entertain the range of possible 'reasons [petitioner's] counsel may have had for proceeding as they did.'" Cullen v. Pinholster, 563 U.S. 170, 176 (2011) (citation omitted). Second, petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; see also United States v. Jones, 482 F.3d 60, 76 (2d Cir. 2006). "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011). Where multiple errors are alleged, the court must "consider [them] in the aggregate," Lindstadt v. Keane, 239 F.3d 191, 199 (2d Cir. 2001), and evaluate the "cumulative effect of all of [trial] counsel's actions," Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991). Finally, the court need not address both prongs of the Strickland test if the petitioner makes an insufficient showing on one. See Strickland, 466 U.S. at 697.

Petitioner argues that trial counsel's representation was constitutionally deficient because he failed to (1) move to dismiss the initial indictment in Case No. 12-cr-385; (2) persuade the court to suppress the wiretap evidence; (3) argue that the second trial violated double jeopardy; and (4) object to the use in the second trial of certain evidence admitted in the first trial. Pet. at 11-19, 29-36, 40-44, 49.

With respect to each of these complaints, and all of them in the aggregate, petitioner has failed to satisfy the Strickland test. First, Mayes's argument that his counsel failed to advance an essential argument in seeking to dismiss the indictment in Case No. 12-cr-385 is based on a misstatement of testimony from the first trial. Mayes alleges that FBI Special Agent Ryeshia Holley testified that "there was no distribution or sales [of narcotics by] Anthony Mayes." Pet.

Exhibit B4

at 13; see also id. at 39. Agent Holley's testimony was that a confidential informant working with the FBI made no purchases from Mayes. Tr. Trial (May 30, 2012) at 10-11, Dkt. No. 10-cr-473, ECF No. 308-1. This testimony would not have supported a successful motion to dismiss the indictment. Therefore, counsel's failure to raise this meritless argument could not have been unprofessional, nor could it have changed the outcome of the case.

Second, trial counsel did, in fact, contest the admissibility of the wiretap evidence and raise the double jeopardy issue. See Def. Anthony Mayes Jr.'s Mem. Law at 3-21, Dkt. 12-cr-385, ECF No. 45.

Third, that Mayes's attorney failed to object to the government's use in the second trial of certain evidence admitted in the first trial was nether unprofessional nor could it have changed the outcome of the trial. Mayes raised this precise complaint in a pro se submission to the court on the eve of his second trial. See Letter from Anthony Mayes (Apr. 17, 2014), Dkt. No. 12-cr-385, ECF No. 176. I addressed his concern on the record, concluding that "Mayes's counsel had no duty to file a motion opposing the admission of this evidence since the law clearly allows its admission." Tr. Jury Selection (Apr. 28, 2014) at 271:5-7, Dkt. No. 12-cr-385, ECF No. 220; see also Tr. Status Conf. (Jan. 6, 2014), at 7:1-23, Dkt. No. 12-cr-385, ECF No. 162 (explaining why this evidence was admissible). The same reasoning compels me to dismiss Mayes's ineffective assistance claim at this stage.

CONCLUSION

For the foregoing reasons, the petition is denied in its entirety. Because petitioner has failed to make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(C)(2), no certificate of appealability will be granted. The Clerk of Court is directed to enter judgment accordingly.

Exhibit B5

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17-cv-2198
17-cv-2200
10-cr-473
12-cr-385
Ross, 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 14th day of December, two thousand seventeen.

Present:

Guido Calabresi,
Raymond J. Lohier, Jr.,
Circuit Judges,
Edward Korman,*
District Judge.

Anthony Mayes, Jr.,

Petitioner-Appellant,

v. 17-2357

United States of America,

Respondent-Appellee.

Anthony Mayes, Jr.,

Petitioner-Appellant,

v. 17-2362

United States of America,

Respondent-Appellee.

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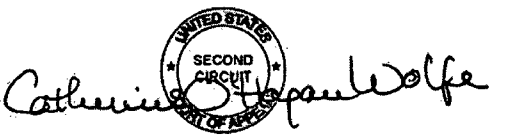
* Judge Edward Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

Appellant, pro se, moves for a certificate of appealability, vacatur of his convictions, a limited remand so the district court can rule on arguments not addressed in its order, an evidentiary hearing, free transcripts, a "statement of reasons" for this Court's decision, and in forma pauperis status, in appeals from denials of two 28 U.S.C. § 2255 motions. It is hereby ORDERED that the appeals are consolidated for purposes of this order. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeals are DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

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



CERTIFICATE OF SERVICE

I, Anthony Mayes Jr, Hereby Certify and Declare that I have
Anthony Mayes Jr.
served a true and correct copy of the foregoing:
APPENDIX TO WRIT OF CERTIORARI

Which is deemed filed at the time it was hand delivered to the Prison authorities for forwarding to the Court, in accordance with the provisions of Houston v Lack, 487 US 266 (1988), for the distribution to the Court and parties to litigation and/or his/her attorney(s) of record, by placing same in sealed, postage prepaid envelope addressed to:

OFFICE OF THE CLERK
SECOND CIRCUIT COURT OF APPEALS
40 Foley Square
New York, New York 10007

Copy enclosed for distribution:
OFFICE OF THE U.S. ATTORNEY
271 Cadman Plaza
East Brooklyn, New York 11201

and deposited same in the United States Postal Mails at the United States Penitentiary. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to the penalty for perjury under [28 U.S.C. § 1746].

Signed on this 7th day of March 2018

Respectfully submitted
Anthony Mayes Jr.
Anthony Mayes Jr.