APPENDIX A

Memorandum Decision, Filed April 24, 2019

NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARQUIS TRAVELL EDWARDS, AKA Baby Uzi, AKA Marquis Edwards, AKA JJ, AKA Oozie, AKA Seal A, AKA Uzi, Defendant-Appellant.	No. 16-55537 D.C. No. 2:15-cv-07683-SJO 2:10-cr-00923-SJO-42 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Submitted April 10, 2019**
Pasadena, California

Before: RAWLINSON and MURGUIA, Circuit Judges, and RAKOFF,*** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

Marquis Edwards appeals the denial of his motion for relief from his conviction under 28 U.S.C. § 2255. We granted a certificate of appealability (COA) as to one issue: whether Edwards' counsel was ineffective for failing to file a motion to dismiss the indictment due to pre-indictment delay. However, in his opening brief, Edwards makes two additional arguments: (1) that his counsel was ineffective for not moving to dismiss the indictment because it charged only acts committed when he was a juvenile, and (2) that the district court abused its discretion in failing to order discovery as to Edwards' claim of pre-indictment delay. While Edwards failed to properly designate these issues as uncertified, we will treat Edwards' inclusion of these issues as a motion to expand the COA. *See Schardt v. Payne*, 414 F.3d 1025, 1032 (9th Cir. 2005).

We review *de novo* the district court's denial of a section 2255 motion and review its denial of an evidentiary hearing for abuse of discretion. *United States v. Olsen*, 704 F.3d 1172, 1178 (9th Cir. 2013). We review motions to expand a COA by the same standard as initial motions to obtain a COA: the habeas petitioner's assertion of the claim must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). For the reasons below, we affirm the district court in full and deny the motion to expand the COA.

I. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is a strong presumption that an attorney's conduct falls within "the wide range of reasonable professional assistance." *Id.* at 689-90.

Edwards pled guilty to one count of engaging in a racketeering conspiracy related to his role in the Pueblo Bishops Bloods, a Los Angeles street gang, which included as overt acts Edwards' participation in two murders committed while he was a minor. Edwards argues that his counsel was ineffective for failing to move to dismiss the indictment on the ground of pre-indictment delay, which would have required making a showing that: (1) he suffered "actual, non-speculative prejudice from the delay" and (2) "the length of the delay, when balanced against the reason for the delay,…offend[s]… fundamental conceptions of justice[.]" *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992) (internal quotation marks omitted). "[E]stablishing prejudice is a heavy burden that is rarely met." *United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007) (internal quotation marks omitted).

Edwards argues that he was prejudiced by the delay because, had he been indicted before he turned 21 years old, the Juvenile Delinquency Act (JDA), 18 U.S.C. § 5031 *et. seq.*, would have applied and the Government would not have

proceeded against him as an adult. However, the JDA permits the Government to seek certification from the Attorney General to proceed against juveniles who are 15 years old or older as adults when "the offense charged is a crime of violence that is a felony" and the district court determines that it would be "in the interest of justice" to do so, a determination made based on an assessment of six factors including the age of the individual and the nature of the alleged offense. 18 U.S.C. § 5032; *United States v. Juvenile Male*, 492 F.3d 1046, 1048 (9th Cir. 2007). Edwards was charged with crimes of violence – murder and attempted murder – committed when he was 16 and 17 years old, close to majority, factors weighing heavily against denying certification. While it would have been the Government's burden to establish that transfer to adult status was warranted under the JDA, it would have been Edwards' burden to show that he was actually prejudiced by the delay and, given the likelihood of certification, Edwards appears unable to make this showing. Moreover, beyond summary statements that the Government delayed indictment to gain a tactical advantage, Edwards has offered nothing to suggest that the delay in his indictment is attributable to anything beyond the time required to investigate and establish a large-scale, wide-ranging racketeering case. Given that Edwards does not appear to have been able to make the required showing for a motion to dismiss due to pre-indictment delay – a motion that is very rarely

granted – Edwards' counsel was not deficient in failing to file such a motion, and this failure did not prejudice Edwards.

II. Motion to Expand the COA

Edwards fails to make a substantial showing of the denial of a constitutional right as to either of the additional claims that he proposes for consideration in this appeal. Edwards' argument that his counsel was ineffective in failing to move to dismiss the indictment on the ground that it failed to state an offense because it charged him only with acts committed as a juvenile rests entirely on case law interpreting the JDA. As this Court has previously held, the JDA did not apply to Edwards as he was indicted after he turned 21, and, accordingly, there was no applicable requirement for a post-majority ratifying act. As this argument is meritless, counsel was not ineffective for failing to raise it.

A habeas petitioner "is not entitled to discovery as a matter of ordinary course[,]" but only "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief[.]" *Bracy v. Gramley*, 520 U.S. 899, 904, 908-09 (1997). The district court properly denied Edwards' request for discovery as to the cause of the Government's pre-indictment delay as moot because it found that Edwards could not make the requisite showing that he suffered actual prejudice due to the delay.

Accordingly, the motion to expand the COA is denied.

AFFIRMED.

APPENDIX B

Order Granting COA, Filed February 13, 2017

FILED

FEB 13 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARQUIS TRAVELL EDWARDS, AKA Baby Uzi, AKA Marquis Edwards, AKA JJ, AKA Oozie, AKA Seal A, AKA Uzi, Defendant-Appellant.	No. 16-55537 D.C. Nos. 2:15-cv-07683-SJO 2:10-cr-00923-SJO-42 Central District of California, Los Angeles ORDER

Before: W. FLETCHER and CLIFTON, Circuit Judges.

Appellant's motion for leave to file supplemental memorandum in support of his request for a certificate of appealability (Docket Entry No. 4) is granted.

The request for a certificate of appealability (Docket Entry Nos. 2, 3 & 4) is granted with respect to the following issue: whether trial counsel was ineffective for failing to file a motion to dismiss the indictment due to pre-indictment delay. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

A review of this court's docket reflects that the filing and docketing fees for this appeal are due. Within 21 days of the filing date of this order, appellant shall either (1) pay to the district court the $505.00 filing and docketing fees for this appeal and file in this court proof of such payment, or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed Form CJA 23. Failure

to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

If appellant moves to proceed in forma pauperis, appellant may simultaneously file a motion for appointment of counsel.

The Clerk shall serve a copy of Form CJA 23 on appellant.

If appellant pays the fees, the following briefing schedule shall apply: the opening brief is due May 16, 2017; the answering brief is due June 15, 2017; the optional reply brief is due within 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

The Clerk shall serve on appellant a copy of the "After Opening a Case – Pro Se Appellants" document.

APPENDIX C

Order Denying COA, Filed April 9, 2016

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Marquis Edwards PETITIONER v. USA RESPONDENT.	CASE NUMBER 2:10-cr-00923-SJO-42/ 2:15-cv-07683-SJO **ORDER RE: CERTIFICATE OF APPEALABILITY**

On 4/1/16, Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

☐ The Certificate of Appealability is **GRANTED**. The specific issue(s) satisfy §2253(c)(2) as follows:

☐ The Certificate of Appealability is **DENIED** for the following reason(s):
- ☑ There has been no substantial showing of the denial of a constitutional right.
- ☐ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.
- ☐ The appeal seeks to test the validity of the detention pending removal proceedings.

4/9/16
Date

United States District Judge

APPENDIX D

Order Denying 2255 Motion, Filed February 29, 2016

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES- GENERAL

Priority ___
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CASE NO.: **CV 15-07683 SJO**
CR 10-00923 SJO

DATE: **February 29, 2016**

TITLE: **United States of America v. Marquis Edwards**

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz	Not Present
Courtroom Clerk	Court Reporter
COUNSEL PRESENT FOR PETITIONER:	**COUNSEL PRESENT FOR RESPONDENT:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE [Docket No. 1]**; GRANTING IN PART AND DENYING IN PART PETITIONER'S RULE 15(c) MOTION TO AMEND/SUPPLEMENT** [Docket No. 10]**;DENYING AS MOOT PETITIONER'S MOTION FOR LEAVE TO PURSUE DISCOVERY, MOTION FOR APPOINTMENT OF COUNSEL, AND MOTIONS FOR EXTENSION OF TIME** [Docket Nos. 15, 16, 17, 18]

These matters are before the Court on Petitioner Marquis Edwards' ("Petitioner") (1) Motion to Vacate, Set Aside, or Correct Sentence ("Underlying Motion"), filed September 30, 2015; (2) Motion to Amend/Supplement ("Supplement"), filed January 5, 2015; (3) Motion for Leave to Pursue Discovery ("Discovery Motion"), filed January 29, 2016; (4) Motion for Appointment of Counsel ("Counsel Motion"), filed January 29, 2016; (5) Motion for Extension of Time to Amend ("First Extension Motion"), filed January 29, 2016; and (6) Motion for Extension of Time to Reply ("Second Extension Motion"), filed February 10, 2016. Respondent the United States of America (the "Government" or "Respondent") opposed the Underlying Motion ("Opposition") on January 5, 2015, and has not opposed any other motion. The Court finds these matters appropriate for disposition without oral argument. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **DENIES** Petitioner's Underlying Motion, **GRANTS IN PART** and **DENIES IN PART** Petitioner's Motion to Amend, and **DENIES AS MOOT** Petitioner's Discovery, Appointment of Counsel, and Extension of Time Motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 2010, the Government secured an indictment ("Initial Indictment") against several members of the Pueblo Bishop Bloods gang other than Petitioner. *See* Indictment, *United States v. White et al.*, No. 10-CR-00923 SJO (C.D. Cal. Aug. 18, 2010), ECF No. 4.[1] Thirty days later,

[1] References to a particular docket entry in *United States v. White*, No. 10-CR-00923 SJO (C.D. Cal.) are hereinafter cited as ("CR [X]"), where [X] represents the cited docket entry.

on September 17, 2010, Petitioner turned twenty-one years old. (*See* Suppl., ECF No. 10.) On May 25, 2011, 250 days after Petitioner's twenty-first birthday, the Government obtained a Superseding Indictment ("Superseding Indictment") that included additional Pueblo Bishop Bloods gang members, including Petitioner. (*See* First Superseding Indictment, CR 610.)

On April 17, 2012, Petitioner entered into a Plea Agreement ("Plea") with the United States Attorney's Office. (*See* Plea, CR 1141.) Two days later, Petitioner plead guilty to participating in a criminal conspiracy in aid of racketeering in violation of violation of 18 U.S.C. section 1962(d). (*See* Minutes of Change of Plea Hr'g, CR 1157.) Consequently, on November 21, 2012, this Court entered judgment against Petitioner and sentenced him to forty years in prison. (*See* Minutes of Sentencing Hr'g, CR 1893; Judgment and Probation/Commitment Order, CR 1894.)

Petitioner appealed the November 21, 2012 judgment to the Ninth Circuit Court of Appeals, which summarily affirmed the judgment on April 11, 2014. (Notice of Appeal, CR 2017; Order Summarily Affirming Judgment, CR 2526.) On April 24, 2014, Petitioner filed motions for reconsideration, which the Ninth Circuit denied in an order dated October 8, 2014. (*See* Order Den. Mots. for Reh'g en Banc, CR 2561.) Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, which was denied on February 23, 2015. *See Edwards v. United States*, 135 S. Ct. 1461 (2015).

On September 30, 2015, Petitioner, proceeding *pro se*, filed his underlying Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. section 2255 ("Section 2255"). (*See* Underlying Mot., ECF No. 1.) In the Underlying Motion, Petitioner asserts a single claim: that his trial counsel, Robert Little ("Mr. Little"), rendered ineffective assistance by failing to raise a lack of jurisdiction defense. (Underlying Mot. 3.) More particularly, Petitioner alleges that Mr. Little failed to argue that this Court lacked jurisdiction to prosecute Petitioner because he committed no post-majority act ratifying his involvement in the alleged conspiracy. (Underlying Mot. 5-6.) Petitioner further argues that absent post-majority ratification, his offenses "should have been covered" under the Juvenile Delinquency Act, 18 U.S.C. sections 5031-5042 ("JDA"), which in turn would have divested this Court of jurisdiction. (Underlying Mot. 3, 5-6.)

On November 2, 2015, the Government filed an Application for Extension of Time to File an Opposition. (*See* Ex Parte Appl., ECF No. 5.) The Court granted the requested extension, allowing the Government until January 4, 2016 to oppose the Underlying Motion. (*See* Order on Ex Parte Appl., ECF No. 6.) A day after the expiration of this deadline, on January 5, 2016, the Government filed its opposition to the Underlying Motion ("Opposition"). (*See* Opp'n, ECF No. 9.) In its Opposition, the Government contends the jurisdictional argument at the heart of Petitioner's ineffective assistance of counsel claim is identical to the argument the Ninth Circuit rejected on direct appeal, and therefore cannot be re-litigated via a Section 2255 motion. (*See* Opp'n 2-4.) Additionally, the Government asserts that Petitioner cannot demonstrate Mr. Little provided ineffective assistance because Petitioner has failed to show that Mr. Little committed **any** error, much less gross incompetence. (*See* Opp'n 4-10.)

The same day the Government filed its Opposition, Petitioner filed an Amended/Supplemental Section 2255 Motion ("Supplement") in which he asks the Court to consider additional bases for relief not specified in the Underlying Motion. (*See* Suppl., ECF No.10.) In the Supplement, Petitioner asserts that Mr. Little also provided ineffective assistance by: (1) failing to file for dismissal of the Petitioner's indictment due to unjust pre-indictment delay, (Suppl., 5-7); (2) failing to investigate or prepare a defense, (Suppl., 8-12); (3) failing to challenge the Court's jurisdiction, (Suppl., 12-17); and (4) misinforming Petitioner concerning the length of the sentence Petitioner would receive if he accepted the Government's proposed plea offer, (Suppl. 16-18).

On January 29, 2016 Petitioner filed three additional motions. First, he filed a Motion for Leave to Pursue Discovery ("Discovery Motion") in which he requests (1) "copies of all pre-trial interviews conducted by his attorney while he was in federal custody;" (2) "copies of the reports, written by any defense investigators, in relation to any investigation that was done on behalf of [Petitioner];" (3) the identity and criminal record of the confidential informant who implicated Petitioner in the March 17, 2007 murder; (4) all Los Angeles Police Department reports and videos that relate to the crack cocaine charges listed in Petitioner's indictment; (5) all other "documents, reports, and any other data" related to the Government's investigation into Petitioner and his RICO conspiracy participation;" and (6) Mr. Little's notes. (Disc. Mot. 3-5, ECF No. 16.) Second, Petitioner filed a Motion for Appointment of Counsel ("Counsel Motion"), requesting counsel to assist in obtaining the requested discovery materials. (Counsel Mot., ECF. No. 17.) Finally, Petitioner filed a Motion for Extension of Time to Amend his section 2255 Motion ("First Extension Motion") in which he requests additional time to (1) "add to his complaint and allegation that Mr. Little . . . allowed Mr. Edwards to plead guilty to the sales of crack cocaine in 2005 (in furtherance of the RICO conspiracy) when the petitioner told his attorney that he was not guilty;" and (2) challenge the constitutionality of this Court's sentence under the Supreme Court's recent rulings in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 6 (2015). (First Extension Mot. 1-2, ECF No. 18.)

On February 10, 2016, Petitioner filed a Motion for Extension of Time to Respond to the Government's January 5th Opposition ("Second Extension Motion"). (Second Extension Mot., ECF No. 15.) In this motion, Petitioner notes that he is still within the one year limit for filing a Section 2255 motion pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214. (Second Extension Mot. 2.)

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II. LEGAL STANDARDS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES- GENERAL

CASE NO.: CV 15-07683 SJO **DATE: February 29, 2016**
CR 10-00923 SJO

A. Section 2255 Motions

Section 2255 allows a federal prisoner to challenge his or her conviction or sentence to confinement on the grounds 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." *Sanders v. United States*, 373 U.S. 1, 2 n.1 (1963) (quoting 28 U.S.C. § 2255) (quotation marks omitted).

The Ninth Circuit has held that "where a petitioner raises a colorable claim of ineffective assistance, and where there has not been a state or federal hearing on this claim" an evidentiary hearing is appropriate. *Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir. 1990); *see also Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998). "If the existing record does not conclusively resolve the issue" the district court should also "order a response from the government." *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000).

However, a prompt hearing on the petitioner's Section 2255 motion is not necessary if "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also Watts v. United States*, 841 F.2d 275, 277 (9th Cir. 1988) (" When section 2255 motions are based on alleged occurrences entirely outside the record, which if true would support relief, the court must conduct a hearing on those allegations unless, viewing the petition against the record, its allegations do not state a claim for relief or are so patently frivolous or false as to warrant summary dismissal."); *Schell v. Witek*, 218 F.3d 1017, 1027 (9th Cir. 2000); *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989). Likewise, district courts may, at their discretion, use discovery, documentary evidence, common sense, and their own notes and recollections to expand the record rather than conduct a hearing. *See Shah v. United States*, 878 F.2d 1156, 1159 (9th Cir. 1989).

Thus, the decision whether to hold a hearing is "committed to the court's discretion," and Section 2255 "requires only that the judge give the [petitioner's] claim 'careful consideration and plenary processing, including full opportunity for presentation of the relevant facts.'" *Watts*, 841 F.2d at 277 (citing *Machibroda v. United States*, 368 U.S. 487, 495 (1962); *Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977)).

B. Ineffective Assistance Claims Involving Guilty Pleas

"[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). This is so because "[a] guilty plea is more than a confession which admits that the accused did various acts. It is an admission that he committed the crime charged against him." *United States v. Broce*, 488 U.S. 563, 570 (1989) (quotation marks omitted). Thus, "when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether

the underlying plea was both counseled and voluntary." *Id.* at 569. Consequently, an unconditional guilty plea "cures all antecedent constitutional defects." *United States v. Lopez-Armenta*, 400 F.3d 1173 (9th Cir. 2005). This includes all pre-plea ineffective assistance of counsel claims, except those that directly bear on the competence to enter and voluntariness in entering a guilty plea. *See United States v. Bohn*, 956 F.2d 208, 209 (9th Cir.1992) (per curiam).[2]

The Supreme Court has declared that competence and voluntariness challenges are assessed under *Strickland v. Washington*'s two-prong test. *See Hill v. Lockhart*, 474 U.S. 52 (1985). Thus, to successfully establish that counsel's performance rendered a petitioner's decision to enter into a guilty plea either unknowing or involuntary, a petitioner must (1) "demonstrate that counsel's performance was deficient and fell below an objective standard of reasonableness" assessed "under prevailing professional norms," *Matylinsky v. Budge*, 577 F.3d 1083, 1090 (9th Cir. 2009) (quotation marks omitted); and (2) "establish prejudice by demonstrating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Hebner v. McGrath*, 543 F.3d 1133, 1137 (9th Cir. 2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)) (quotation marks omitted).

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[2] At the time Petitioner plead guilty in the underlying criminal case, this Court questioned Petitioner and found that Petitioner entered into the plea both knowingly and voluntarily. (*See* Minutes of Change of Plea Hr'g.) Indeed, the Court incorporated into Petitioner's guilty plea his signed Plea Agreement, in which Petitioner made the following assertions: (1) "I have read this agreement in its entirety," (Plea 19 ¶ 29); (2) "I understand and voluntarily agree to those terms," (Plea Agreement 19); (3) "[I understand] that, with the exception of an appeal based on a claim that [my] guilty pleas were involuntary, by pleading guilty [I am] waiving and giving up any right to appeal [my] convictions on the offenses to which [I plead] guilty," (Plea 12); and (4) "I am satisfied with the representation of my attorney in this matter," (Plea 19.)

Because Petitioner's guilty plea was unconditional, all pre-plea ineffective assistance of counsel claims that do not bear directly on the knowing and voluntary nature of his plea are barred. The Court therefore only examines Petitioner's claims as they relates to the intelligence and voluntariness of his guilty plea. Although Petitioner does not expressly assert in his Underlying Motion that Mr. Little's alleged ineffective assistance undermined the knowing and voluntary nature of his guilty plea, (*see generally* Underlying Mot.), Petitioner does raise such an argument in the Supplement, (*see* Suppl. 11). Remaining mindful of the fact that Petitioner is appearing *pro se*, the Court considers the matter as if Petitioner had framed it appropriately. *See Castro v. United States*, 540 U.S. 375, 381-82 (2003).

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DATE: February 29, 2016

Strickland's first prong—deficient performance—requires a petitioner to show that "counsel made errors so serious that counsel was not functional as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See Strickland*, 466 U.S. at 687. "Judicial scrutiny of counsel's performance must be highly deferential" and a court must make "every effort . . . to eliminate the distorting effects of hindsight." *Id.* at 689. Overall, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *id.* (citation omitted), and may not "engage in after-the-fact second-guessing of strategic decisions made by defense counsel." *United States v. Claiborne*, 870 F.2d 1463, 1468 (9th Cir. 1989).

Strickland's second prong—prejudice—requires a petitioner to demonstrate that his attorney's "deficient performance prejudiced [Petitioner's] defense." *See Strickland*, 466 U.S. at 687. Specifically, the prejudice prong requires "show[ing] 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. The Court noted that "[a] reasonable probability" in this case "is a probability sufficient to undermine confidence in the outcome." *Id*. Moreover, "when evaluating the petitioner's claim that ineffective assistance led to the improvident acceptance of a guilty plea, the Court require[s] the petitioner to show that there is a reasonable probability that, but for counsel's errors, [he] would not have pleaded guilty and would have insisted on going to trial." *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012); *see also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) ("[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.").

Additionally, the Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. This is because "[a] petitioner's failure to allege facts sufficient to support both prongs of *Strickland* will result in dismissal of his claims without the need for an evidentiary hearing." *Stepney v. United States*, No. CV 07-01479 MHP, 2008 WL 1766947, at *2 (N.D. Cal. Apr. 17, 2008) (citing *United States v. Birtle*, 792 F.2d 846, 849 (9th Cir. 1986)).

III. DISCUSSION

A. Timeliness of Petitioner's Motions

As noted above, the United States Supreme Court on February 23, 2015 denied Petitioner's petition for writ of certiorari, rendering this Court's judgment in the underlying criminal action final. *Marquis Edwards v. United States*, 135 S.Ct. 1461 (2015). Petitioner filed the Underlying Motion on September 15, 2015, and filed his Supplement ninety-seven days later, on January 5, 2016. (*See* Underlying Motion; Suppl.) On January 29, 2016, Petitioner filed his Discovery Motion, Counsel Motion, and First Extension Motion, and on February 10, 2016, he filed the Second Extension Motion. (*See* Disc. Mot.; Counsel Mot.; First Extension Mot.; Second Extension Mot.)

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Section 2255 motions may be filed one year from the date on which the judgment of conviction becomes final. *See* 28 U.S.C. § 2255(f). Moreover, "[b]efore a responsive pleading is served, pleadings may be amended once as a matter of course, *i.e.,* without seeking court leave." *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (quotations marks omitted). Thus, Petitioner's Underlying Motion was timely filed. Petitioner's subsequent motions, however, were not filed within the time period prescribed by Section 2255, as Petitioner's Supplement was not received before the Government filed its responsive pleading; rather, the two were received on the same date. As such, the decision whether to consider Petitioner's Supplement is left to the Court's discretion.

The Ninth Circuit has noted that "document[s] filed *pro se* [are] to be liberally construed" and must be "held to less stringent standards than formal pleadings drafted by lawyers." *Woods v. Carey*, 525 F.3d 886, 899 (9th Cir. 2008) (quotation marks omitted). Moreover, it is a well acknowledged principle that "a court should freely grant leave to amend when justice so requires." *Foman v. Davis*, 371 U.S. 178, (1962) (citing Fed. R. Civ. P. 15(a)); *Stafford v. Saffle*, 34 F.3d 1557, 1560 (10th Cir. 1994).

Thus, in light of Petitioner's incarceration and limited access to legal resources, the Court **GRANTS IN PART** Petitioner's Motion to Amend and deems the Supplement timely filed.

Petitioner two Extension Motions, however, were filed twenty-four and thirty-six days after the Government filed its Opposition. These motions are not themselves amendments, but instead are untimely requests for additional time to further amend Petitioner's Underlying Motion. (*See* First Extension Mot.; Second Extension Mot.) Moreover, the Court has reviewed Petitioner's proposed amendments, and finds Petitioner's requests for additional time to more fully draft to be facially spurious. Therefore, this Court **DENIES** Petitioner's First and Second Motions for Extension of Time to Amend. The Court nevertheless addresses, where appropriate, why Petitioner's two proposed bases for relief would not have altered the outcome in this case.

B. Claim 1: Ineffective Assistance Due to Counsel's Failure to Raise Jurisdictional Argument

In the Underlying Motion, Petitioner argues that the Government lacked jurisdiction to charge him with a violation of 18 U.S.C. section 1962(d). (*See* Underlying Mot. 3.) Petitioner further argues that if a person begins participating in a criminal conspiracy prior to his eighteenth birthday, he must commit some post-minority, ratifying, affirmative act in furtherance of the conspiracy for a federal trial court to retain jurisdiction over him. (*See* Underlying Mot. 3-4.) Relying on *United States v. Thomas*, 114 F.3d 228 (D.C. Cir. 1997), *United States v. Maddox*, 944 F.2d 1223 (6th Cir. 1991), and *United States v. Tolliver*, 61 F.3d 1189 (5th Cir. 1995), Petitioner insists that only post-minority ratification grants district courts jurisdiction over persons between the ages of eighteen and twenty-one, (Underlying Mot. 4), and that absent such an post-minority act, such offenses should fall exclusively under the JDA, (Underlying Mot. 4-5).

As a preliminary matter, the Government is correct that Petitioner's argument is an improper basis for a Section 2255 motion, for "when a defendant has raised a claim and has been given a full and fair opportunity to litigate it on direct appeal, that claim may not be used as basis for a subsequent § 2255 petition." *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000). Petitioner's first claim for relief pursuant to Section 2255 involves an argument identical to one which was raised before the Ninth Circuit. (*See* Underlying Mot. ¶ 11(a)(3).) Therefore, this matter has already been addressed on direct appeal and may not be re-litigated via Petitioner's Underlying Motion.

Notwithstanding the procedural flaw behind Petitioner's first claim, the Court finds that such an argument lacks substantive merit as well. Petitioner asserts that he did not admit to and was not charged with any ratifying, affirmative acts in furtherance of the RICO conspiracy that occurred on or after his eighteenth birthday. (Underlying Mot. 3-4.) He argues that under *United States v. Bermea*, 30 F.3d 1539 (5th Cir. 1994), his mere presence or association with other gang members cannot establish that he joined a conspiracy after he turned eighteen. (Underlying Mot. 3-4.) He concludes that the JDA stripped this Court of jurisdiction over his felony. (Underlying Mot. 4-5.) Consequently, Petitioner contends that Mr. Little's failure to raise this basic jurisdictional argument constituted ineffective representation that fell below an objective standard of reasonableness and prejudiced his defense. (Underlying Mot. 5.)

Petitioner's argument lacks merit. The Ninth Circuit has explained that "[t]he [JDA] . . . 'creates a special procedural and substantive enclave for juveniles accused of criminal acts'" but "does not create a substantive offense with its own jurisdictional basis." *United States v. Araiza-Valdez*, 713 F.2d 430, 432 (9th Cir. 1980) (per curiam). Instead, "[it] establishes a procedural mechanism for the treatment of juveniles who are already subject to federal jurisdiction because of the commission of acts cognizable under other federal criminal statutes." *Id.* Therefore, an indictment "alleging acts of delinquency occurring prior to the accused's 18th birthday but filed after his or her 21st year is too late to establish JDA jurisdiction." *Id.* at 433; *see also United States v. Lu*, 174 Fed. App'x 390, 396-97 (9th Cir. 2006). Whether or not the indicted party is a "juvenile at the time of the indictment . . . will be dispositive of the question of the District Court's jurisdiction." *Id.* at 432; *see also United States v. Diaz*, 670 F.3d 332, 342 (1st Cir. 2012) (holding that the JDA only strips a district court of jurisdiction "if the record establishes that a defendant was under the age of 18 when the *offense* was committed and under the age of 21 when criminal proceedings were commenced").

Petitioner committed acts cognizable under other federal criminal statutes. This Court's jurisdiction was not stripped, withdrawn, abridged, or transferred pursuant to the JDA because Petitioner was indicted after his twenty-first birthday. Accordingly, Petitioner was initially and continually subject to this Court's jurisdiction. Indeed, as the Government points out, Petitioner raised this same argument in his appeal to the Ninth Circuit, which it rejected in summarily

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affirming his conviction pursuant to the authority stated above. (*See* Underlying Mot. ¶ 11(c)(3); Order Summarily Affirming Judgment.)

Because the jurisdictional challenge Petitioner accuses Mr. Little of not raising would have been meritless, Mr. Little did not provide ineffective assistance by not raising this argument during the criminal case. *United States v. Redd*, 759 F.2d 699, 701 (9th Cir.1985) ("Since [defendant's] challenges would all have been meritless, [defendant] cannot claim that his counsel's failure to raise them constituted ineffective assistance"). Likewise, because the result of Petitioner's proceeding would not have been different had Mr. Little's raised this jurisdictional challenge, his failure to do so did not result in actual prejudice. Consequently, Petitioner's guilty plea was not rendered involuntary or unknowing, and forecloses additional pre-plea ineffectiveness of counsel claims based on such a theory.

For the foregoing reasons, Petitioner's first claim for relief pursuant to Section 2255 is **DENIED**.

C. Claim 2: Ineffective Assistance Due to Counsel's Failure to Raise Jurisdictional Argument

In the Supplement, Petitioner tries a slightly different tack. He no longer claims "that he should have been subject to the JDA and its procedural protection," but instead insists that, in his criminal case, post-majority ratification was a necessary element of a section 1962(d) conviction. (Suppl. 14-15.) He argues that without "some kind of proof" that he committed an overt, post-majority act in furtherance of the alleged RICO conspiracy, the Government lacked a sufficient basis to file an "adult" conspiracy charge. (Suppl. 13-15.) Petitioner further contends that the Government was required to make some "showing" of its "proof," presumably to either or both the Court or the Grand Jury. (Suppl.15.) Because the Government charged Petitioner without alleging any ratifying, post-majority acts and because the Grand Jury never bore witness to a "showing" of such acts, Petitioner concludes that his indictment lacked a necessary element and was therefore invalid. (Suppl. 14-15.)

Petitioner maintains in the Supplement that the invalidity of his indictment divested the Court of subject matter jurisdiction and that Mr. Little's failure to raise an appropriate jurisdictional challenge both (1) constituted ineffective representation that falls below an objective standard of reasonableness; and (2) prejudiced Petitioner's defense. (Suppl. 15-16.)

Petitioner misunderstands the holdings of the authorities cited in the Supplement. Despite Petitioner's assertions to the contrary, post-majority ratification is only relevant in the JDA context because only the JDA can divest a defendant charged with felony conspiracy felony from this court's jurisdiction.

"Conspiracy is a continuing offense. Accordingly, a conspirator commits the crime each day that he remains a member of the conspiracy." *Maddox*, 944 F.2d at 1233. Moreover, conspiracy is a crime unto itself, separate and apart from the underlying crimes that are its aim. *See Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Dennis v. United States*, 341 U.S. 494, 573 (1951) (Jackson, J., concurring). That said, the conspiracy is not the only crime for which a conspirator is held responsible. From the moment he joins a conspiracy until the moment the conspiracy concludes or the participant affirmatively withdraws, a conspirator is **also liable** for any crimes his co-conspirators commit in furtherance of the joint, criminal venture, as well as crimes he personally commits in furtherance of the joint venture. *See Salinas v. United States*, 522 U.S. 52, 63-64 (1997) (emphasis added) (citing *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946)); *United States v. Felix*, 503 U.S. 378, 390 (1992).

As Petitioner has noted, some Courts of Appeals, for example the First, Sixth, and Tenth Circuits, do not impose the burden of affirmative withdrawal on defendants who joined criminal conspiracies prior to their eighteenth birthdays. *See e.g., United States v. Diaz*, 670 F.3d 332 (1st Cir. 2012) (citing *United States v. Welch*, 15 F.3d 1202 (1st Cir. 1993)); *United States v. Gjonaj*, 861 F.2d 143 (6th Cir. 1988) (citing *United States v. Cruz*, 805 F.2d 1464 (11th Cir. 1987)). Provided such defendants have committed no acts in furtherance of the conspiracy beyond their eighteenth birthday, these Courts of Appeals deem such defendants to have successfully withdrawn from their conspiracies prior to reaching majority. *See Welch*, 15 F.3d at 1209. However, this constructive withdrawal does not erase their criminal liability for the period during which they did participate; instead, it merely fixes the terminal date of their criminal liability for the crime of conspiracy itself and for the liability for the crimes of their co-conspirators under *Pinkerton*'s vicarious liability theory.

In the context of the JDA, fixing this end date can be very important. Eighteen- to twenty-year-old defendants whose criminal liability is deemed to have ended before they reached adulthood are entitled to the JDA's protections and prosecution of their various charges is removed from the district courts. *See Diaz*, 670 F.3d at 342. However, any defendant whose conspiracy participation does extend into adulthood–any defendant who ratifies their conspiracy participation post majority–exits JDA protection entirely.

Outside the context of the JDA, the end-date of a defendant's conspiracy liability is unimportant. This is because "Congress has broadly authorized the federal courts to exercise subject-matter jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 505 (2006). Thus, district courts have subject-matter jurisdiction over cases in which violations of federal law are alleged to have occurred. Absent a JDA transfer of jurisdiction to the juvenile court, that original subject-matter jurisdiction remains. *See Araiza-Valdez*, 713 F.2d at 432 ("The JDA establishes a procedural mechanism for the treatment of juveniles who are **already** subject to federal jurisdiction because of the

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commission of acts cognizable under other federal criminal statutes") (emphasis added).

Petitioner was charged with and indicted for knowingly and intentionally conspiring to violate 18 U.S.C. section 1962(c), a law of the United States. As previously mentioned, the JDA does not protect petitioner because he was indicted after his twenty-first birthday. Thus, this Court began with and retained jurisdiction over Petitioner. Jurisdictionally speaking, it does not matter if his 1962(d) conspiracy participation ended prior to or after his eighteenth birthday, as the Court would have subject-matter jurisdiction over Petitioner's criminal case in either event.

Because Petitioner's second jurisdictional argument lacks merit, this Court does not find that Mr. Little's performance was deficient for failing to raise it. Petitioner's second claim for relief pursuant to Section 2255 is accordingly **DENIED.**

C. Claim 3: Ineffective Assistance of Council Due to Failure to File for Dismissal of the Indictment in the Face of Unjust Pre-indictment Delay

Petitioner's third claim for relief centers on allegations that the Government intentionally delayed his indictment. (Suppl. 7.) Petitioner argues in the Supplement that all of the underlying substantive crimes his "conspiracy charges were based on" occurred prior to his eighteenth birthday and were "5-6 years old" by the time of his indictment. (Suppl. 5-6.) Petitioner insists that the Government had "for years" all the information it needed to charge him with these crimes and that there was "no good reason to delay charging [Petitioner]." (Suppl. 7.) According to Petitioner, "[e]ssentially, what the prosecution did was not indict [Petitioner] of conspiracy until he was twenty-one so the protection of the JDA and court precedent would not be allowed." (Suppl. 6-7.) Petitioner argues that the Government's intentional delay in seeking his indictment offended the fundamental conceptions of justice and violated his constitutional Due Process rights. (Suppl. 7.) Accordingly, Petitioner argues that because Mr. Little failed to seek dismissal of Petitioner's indictment on these grounds, he was ineffective and that his deficiency prejudiced Petitioner. (Suppl. 7, 10-11.)

"The Fifth Amendment guarantees that defendants will not be denied due process as a result of excessive pre-indictment delay." *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989). "Delay between commission of the crime and indictment is generally limited by the statute of limitations, but in some circumstances the Due Process Clause requires dismissal of an indictment brought within the limitations period." *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992). The Ninth Circuit applies a two-prong test to determine if a pre-indictment delay has violated a defendant's constitutional rights. *See United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998).

To satisfy the first prong, "a defendant must prove that he suffered actual, non-speculative

prejudice from the delay." *Id.* (quotation marks omitted). Meeting this first prong is difficult, as the burden to "prove actual prejudice is a heavy one" and is "rarely met." *Corona-Verbena*, 509 F.3d 1105, *Doe,* 149 F.3d at 948; *Huntley*, 976 F.2d at 1290.[3] The defendant's proof "must be definite" and based on "non-speculative evidence," because courts "apply the actual prejudice test stringently." *United States v. Martinez*, 77 F.3d 332 (1996); *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995); *Huntley*, 976 F.2d at 1290. The test's second prong applies only if the first is satisfied. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1353 (2007). In fact, a showing of actual prejudice is so indispensable, it is actually "necessary in order to render the claim justiciable." *Howell v. Barker*, 904 F.2d 889, 896 (4th Cir. 1990) (citing *United States v. Lovasco*, 431 U.S. 783, 789 (1977) & *United States v. Gouveia*, 467 U.S. 180, 192 (1984)).

Under the second due process prong, the pre-indictment delay must be "weighed against the reasons for it, and the defendant must show that the delay offends those fundamental conceptions of justice which lie at the base of our civil and political institutions." *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) (quotation marks omitted). To demonstrate this, defendants must show that the "delay was caused by the government's culpability." *Sherlock,* 962 F.2d at 1354. In some circuits, for example the Fourth circuit, this requires "proof that the delay was a deliberate device to gain an advantage over the defendant." *Howell*, 904 F.3d at 896.

In the instant case, Petitioner has failed to demonstrate actual prejudice. He asserts that but for the pre-indictment delay, he would have fallen under the protections of the JDA and presumably achieved a more lenient sentence. (Suppl. 6-7.) The Court finds this assumption to be highly speculative, for had the Government proceeded against Petitioner prior to his twenty-first birthday, as Petitioner insists it should have, juvenile prosecution would not have been the Government's sole option.[4]

The JDA permits the Government to seek certification from the Attorney General to proceed against juveniles who are fifteen years old or older as adults when "the offense charged is a crime of violence that is a felony" and the district court determines that it would be "in the interest of justice" to do so. 18 U.S.C. § 5032; *United States v. Juvenile Male*, 492 F.3d 1046, 1048 (9th Cir. 2007); *see also United States v. Male Juvenile*, 280 F.3d 1008, 1013 (9th Cir. 2002). "Conspiracy to commit a crime of violence also qualifies as a crime of violence." *United States v. Sealed Appellant 1*, 591 F.3d 812, 817 (5th Cir. 2009) (citing *States v. Elder*, 88 F.3d 127, 129 (2d Cir.

[3] In *Huntley,* the court notes that petitioners were held to have met this burden only twice in any Circuit, between 1975 and 1992. 976 F.2d at 1290.

[4] This is not mere speculation, as a number of defendants listed in the Initial Indictment were under the age of twenty-one were at the time it was obtained. (*See* Initial Indictment (noting that William Reed and Natalie Portillo were nineteen at the time it was obtained).)

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1996).

To determine if the transfer to adult status is "in the interests of justice," courts must consider six factors: (1)"the age and social background of the juvenile;" (2) "the nature of the alleged offense;" (3) "the extent and nature of the juvenile's prior delinquency record;" (4) the juvenile's present intellectual development and psychological maturity;" (5) "the nature of past treatment efforts and the juvenile's response to such efforts;" and (6) " the availability of programs designed to treat the juvenile's behavioral problems." 18 U.S.C. § 5032; *United States v. Brandon*, 387 F.3d 969, 975 (9th Cir. 2004). "The []JDA does not instruct courts to weigh one factor more heavily than another, and the weight a court assigns each factor is within its discretion," so "[t]he district court may balance the factors as it deems appropriate." *United States v. Doe*, 94 F.3d 532, 536 (9th Cir. 1996).

Petitioner argues in his Supplement that if he been indicted earlier he "would have had to be certified in order to be tried as an adult." (Suppl. 6.) Assuming the Government had no evidence of post-majority ratification, this may be true. However, Petitioner has not alleged, much less provided definitive proof, that the Government would not or could not have obtained certification to try him as an adult. Indeed, given Petitioner's circumstances, it appears that the Government would have had little difficulty obtaining such certification. (*See* Government's Response to Defendant's Motion for Reconsideration 8 n.3, CR 2774-4.). Petitioner was indicted for violations of 18 U.S.C. sections 1959(a)(1), 1959(a)(3), and 1959(a)(5), all of which are violent felonies. (Superseding Indictment 32.) The conspiracy charge Petitioner eventually plead guilty to incorporated those violent crimes, and therefore likewise constituted a violent felony. (Superseding Indictment 10.) Further, the record indicates Petitioner was close to majority when the most heinous of these offenses were committed, as he was sixteen at the time of the first charged murder and seventeen at the time of the second. (Superseding Indictment 14-15.)

While this Court cannot know for certain that it would have granted a certified request to try Petitioner as an adult, such guesswork is not required. Instead, the burden is on the Petitioner to demonstrate by "definite proof" that either the United States Attorney's Office would not have or could not have obtained certification from the Attorney General, or that this Court would have denied a certified request to deny transfer to the Juvenile Court had it been properly submitted. This Petitioner has not done.[5]

[5] Moreover, given that the first two factors the Court would have been required to analyze weigh heavily against Petitioner, it is unlikely Petitioner could ever provide such proof. Petitioner's social background included membership in the Pueblo Bishop Bloods, a violent street gang heavily involved in narcotics trafficking. (Superseding Indictment 10-11.) The offenses he was charged with were serious violent offenses, including first degree murder, maiming, and assault with a deadly weapon in furtherance of racketeering and conspiracy

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Because Petitioner has offered nothing beyond a bare assertion that had he been indicted at the age of twenty he would have been protected by the JDA, Petitioenr has failed to show actual, non-speculative prejudice. Consequently, Petitioner has not shown that any pre-indictment delay he allegedly endured was excessive, and accordingly, Mr. Little could not have prejudiced Petitioner's defense by not bringing such an argument to the Court's attention. Petitioner's third claim for relief pursuant to Section 2255 is therefore **DENIED**.

D. Claim 4: Ineffective Assistance of Council Due to Failure to Properly Inform Petitioner Concerning Sentence Length

Petitioner's fourth claim for relief centers on the allegation that Mr. Little misinformed Petitioner concerning the length of the sentence he would receive if he accepted the Government's plea agreement. Petitioner asserts that Mr. Little told him signing a plea deal would result in a twenty-five to thirty year sentence. (Suppl. 16.) Petitioner further contends that Mr. Little told him to disregard this Court's questions as mere formalities and "just state he understood that he could receive a harsher sentence if the court decided it was warranted." (Suppl. 17.) Plaintiff further asserts that he was completely unfamiliar with the adult judicial system and federal court, and that for this reason he trusted Mr. Little's assurances and insists that he would not have agreed to a forty-year term. (Suppl. 17-18.)

The Court rejects this claim for relief, for even if Mr. Little made the assurances alleged, this Court's explicit discussion of possible sentences "countered exactly the alleged misinformation." *United States v. Davis*, 428 F.3d 802, 807 (9th Cir. 2005). Moreover, Petitioner's signed plea agreement specifically contemplated a longer sentence, and this further cured any misinstruction. The agreement specifically indicates that the maximum sentence available for the offense to which Petitioner pled is life in prison. (Plea 5.) Moreover, the plea expressly provides "that [should] the Court impose[] a total term of imprisonment on all counts of conviction of not more than 480 months," then Petitioner would waive his right to appeal his sentence. (Plea 13 ¶ 18.) The plea agreement also states that "Defendant understands that the Court . . . need not accept any of the USAO's sentencing recommendations or the parties' agreements to facts or sentencing factors." (Plea 16.) These statements, which were adopted by Petitioner and were addressed by the Court at his change of plea hearing, are simple and clear, and Petitioner has not shown any reason why these statements would not have cured any possible misunderstanding between Petitioner and Mr. Little.

Even if the Court were to assume that Mr. Little expressly guaranteed Petitioner a shorter sentence and were to further assume that Petitioner reasonably believed such a guarantee,

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to commit those crimes. (Superseding Indictment 32-40.)

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Petitioner's erroneous belief should have been exposed twice by the time he entered his guilty plea. Thus, Petitioner's plea cannot fairly be said to have been either involuntary or unknowing.

For the foregoing reasons, Petitioner's fourth claim for relief is **DENIED**.

E. Claim 5: Ineffective Assistance of Council Due to Failure to Investigate or Prepare a Defense

Petitioner next argues that Mr. Little's investigatory and preparatory failures weakened his plea bargaining position. (Suppl. 10.) Specifically, Petitioner insists that Mr. Little (1) did not acquire any discovery; (2) filed no significant motions; (3) only visited Petitioner three or four times during the proceedings and then only for short periods that fell short of meaningful consultation; (4) discussed no defense strategies with him except to insist that if Petitioner did not plead guilty he would receive life in prison; (5) failed to consider the seriousness of the charges Petitioner faced; and (6) generally took no steps to prepare an adequate defense. (*See* Suppl. 8-10.)

Even if each of these allegations were true, the Court would conclude that Petitioner has failed to allege facts that if true would clearly demonstrate Mr. Little made errors so serious that he did not function as "counsel" within the meaning of the Sixth Amendment. "Surmounting *Strickland's* high bar is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Moreover, plea agreements present particularly strong presumption that counsel acted reasonably because:

> [N]either the prosecution nor the defense may know with much certainty what course the case may take. It follows that each side, of necessity, risks consequences that may arise from contingencies or circumstances yet unperceived. The absence of a developed or an extensive record and the circumstance that neither the prosecution nor the defense case has been well defined create a particular risk that an after-the-fact assessment will run counter to the deference that must be accorded counsel's judgment and perspective when the plea was negotiated, offered, and entered.

Premo v. Moore, 562 U.S. 115, 126 (2011). Moreover, delaying the plea for further proceedings—like additional discovery or motion filing—necessarily risks giving the "State time to uncover additional incriminating evidence that could have formed the basis of a capital prosecution." *Id.* This is especially true in prosecutions involving multiple defendants because of the additional risk that another will chose to testify in a detrimental way in exchange for a better deal. *Id.*

Petitioner cites *Mickey v. Ayers*, 606 F.3d 1223, 1236 (9th Cir. 2010) for the proposition that counsel must investigate all relevant defenses. In the context of a full trial, this is certainly true.

Where, as here, counsel is operating in the pretrial context, far more lenient rules apply.

The underlying criminal action involved multiple defendants, and Petitioner was indicted on more than two dozen felony charges. (*See generally* Superseding Indictment.) The aforementioned risks that the Government would continue to acquire incriminating evidence or that a co-defendant might agree to testify against Petitioner in exchange for a better deal were both possibilities. The plea deal that Mr. Little negotiated foreclosed these possibilities and resulted in the Government dismissing all but one of the charges levied against Petitioner. (Plea Deal 3, 14.) Given these circumstances and remaining wary of hindsight bias, the Court cannot say that Mr. Little's choice to negotiate a plea when and how he did fell outside "the wide range of reasonable assistance" presumed under *Strickland.* 466 U.S. at 689.

Moreover, Petitioner has failed to indicate how Mr. Little's decision not to expend time filing significant motions, seeking discovery, consulting with Petitioner a fifth or sixth time, or considering multiple alternative defenses would have changed Mr. Little's strategy, let alone the outcome of Petitioner's criminal case. Indeed, given the record, the Court finds there to have been a significant possibility that expending additional time in the ways Petitioner asserts may have weakened Petitioner's bargaining position and resulted in a disadvantageous plea deal. Thus, Petitioner has failed to allege facts that, if true, would demonstrate actual prejudice.

Petitioner further asserts that Mr. Little dismissed out of hand Petitioner's fervent insistence that he was innocent of one of the charged murders. (Suppl. 8-9.) Petitioner contends that Mr. Little persisted in discounting this possibility despite Petitioner's disclosure that a state court had convicted others of the murder and that all related state charges against Petitioner were dropped. (Suppl. 8-9.) Petitioner insists that these charges were dropped because they lacked any factual basis and because "he had nothing to do with the murder" in the first place. (Suppl. 8-9.) Additionally, Petitioner implies that State records detailing these charges documented his innocence and that Mr. Little failed to look for them. (Suppl. 10.)

This Court agrees that had documentation of Petitioner's innocence been readily available and had Mr. Little been apprised of such proof but refused to look for it, then Mr. Little's representation would have fallen outside the range of permissible conduct. However, Petitioner has failed to meet its burden of alleging facts that, if true, would be sufficient to demonstrate such deficient performance. First, Petitioner's statement that others were convicted of the same drive-by killing would not preclude Petitioner also being liable for the murder. Under California Penal Code section 31, "[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." Cal. Penal Code § 31. Petitioner's plea deal details his role as a "lookout" and "backup" in the March 18 incident. (Plea 9-10.) Thus, if Petitioner aided and abetted the convicted shooters, he would have been equally

liable for the murder. Because the disclosure of alternate convictions to Mr. Little would not have altered Petitioner's criminal liability, the proposition that documentation existed elsewhere that others had been convicted of participating in the same murder was not inconsistent with Petitioner's liability. As such, a choice by Mr. Little's to disregard this information would not have been unreasonable.

Second, Petitioner's insistence that all related State charges against him were dropped in 2010 for lacking any factual basis does not preclude the possibility that, by 2012, the Government might had developed a sufficient factual basis to bring those charges. Petitioner's disclosure to Mr. Little that charges against him had previously been dropped likewise would not indicate that related documents proved his innocence.

Third, Petitioner has failed to identify or even describe the redemptive content contained in the public documents he alleges Mr. Little failed to search for. Instead, Petitioner offers only that the state dropped charges against him because "he had noting to do with the murder" and an assumption that State records somehow back up this assertion. The Court finds that Petitioner's statements directly contradict some of the public documents Petitioner alludes to.[1] For example, in 2010, J.K. Gray, an admitted Pueblo Bishop Bloods gang member, testified that prior to March 18, 2007, an Athens Park gang member shot and injured a member of the Pueblo Bishops gang. *See People v. Sorrels*, 208 Cal. App. 4th 1155, 1158 (2012), *as modified on denial of reh'g* (Sept. 18, 2012). Gray further admitted that on the day of the murder, he and others, including Petitioner, discussed "going and doing something down in Athens," then piled into three cars and drove in that direction. *Id.* At the scene of the murder, Gray observed a caravan member "reach out of the Escalade's front passenger window and fire a gun." *Id.* This testimony directly contradicts Petitioner's contention that public records document his innocence; instead, they tend to demonstrate his culpability. Even more tellingly, Petitioner has failed to request any such redemptive documents in his expansive recent discovery request. (*See generally* Disc. Mot.)

Because Petitioner has not identified, requested, or even specifically described any public documents that call Mr. Little's investigatory efforts into doubt, Petitioner has failed to allege facts that, if true, demonstrate Mr. Little's deficient performance and resulting prejudice. For the foregoing reasons, Petitioner's fifth claim for relief pursuant to Section 2255 is **DENIED.**

F. Claim 6: Ineffective Assistance of Council Regarding Petitioner's Innocence of Crack Cocaine Charges

[1] *See Shah v. United States*, 878 F.2d 1156, 1159 (9th Cir. 1989) (noting that the district court may expand the record to include public documents).

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In his First Extension Motion, Petitioner asserts that Mr. Little provided ineffective assistance by allowing him to plead guilty to crack cocaine distribution charges despite his actual innocence. (*See generally* First Extension Mot.) Petitioner further contends that Los Angeles Police Department reports and videos from local business surveillance cameras reflect that someone else was chased, caught, and arrested for that distribution. (First Extension Mot. 1.)

Even if Petitioner could prove through his proposed amendment that he was innocent of this particular charge and that Mr. Little could have convinced the Government to remove this charge from the plea deal, Petitioner nevertheless would be unable to demonstrate the actual prejudice necessary to render his guilty plea unknowing or involuntary. Given the seriousness of the charges that would have remained and considering that the sentencing hearing focused primarily on the murders and Petitioner's previous criminal history, it is unlikely that the removal of a single drug distribution charge from the plea would not have resulted in a lower sentence. (*See* Sentencing Minutes 2.)

G. Unconstitutional Sentencing

In his First Extension Motion, Petitioner further asserts that he was sentenced for crimes committed when he was a juvenile to a term that "from a numeric standpoint" equates to life without parole. (Second Extension Mot.) He requests time to amend his Section 2255 motion to include an argument that this sentence is unconstitutional under the Supreme Court's recent ruling in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), as applied retroactively through *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).

The Court does not find that *Miller* and *Montgomery* apply to Petitioner. First, Petitioner's sentence was not mandatory. While it is true that *Miller* was a "case in a series of decisions involving the sentencing of offenders who were juveniles when their crimes were committed" and that it held that "life without parole is disproportionate for the vast majority of juvenile offenders," *Miller*'s remedy was not a constitutional bar on all life sentences for juvenile crimes. *Montgomery*, 136 S. Ct. at 725, 736 (quotation marks omitted). Rather, the Supreme Court in *Miller* specifically held that "mandatory life [sentences] without parole for juvenile homicide offenders violate[] the Eighth Amendment's prohibition on cruel and unusual punishments." *Id.* at 726. Petitioner's sentence was not mandatory, but was instead discretionary. This Court ordered Petitioner's sentence after taking into account Petitioner's youth and personal history at the time he committed his most significant crimes. (*See generally* Minutes of Sentencing Hr'g.)

Second, Petitioner was not given a life sentence. The Supreme Court in *Miller* made a special note that a life sentence "is an especially harsh punishment for a juvenile because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender. . . . The penalty when imposed on a teenager, as compared with an older person, is therefore the

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same . . . in name only." *Miller*, 132 S. Ct. at 2466 (internal citations and quotation marks omitted). In this important regard, Petitioner's sentence is fundamentally dissimilar from a life sentence. In to the defendant in *Miller*, Petitioner will not inevitably spend a greater percentage of his life in prison than an adult defendant; instead, both will serve the same 480 months for the crimes committed.

Third, Petitioner's sentence did not "forswear[] altogether the rehabilitative ideal." *Miller*, 132 S. Ct. at 2465. While the Federal system "has abolished parole," it does employ "supervised release to supervise felons after they get out of prison." *United States v. Betts*, 511 F.3d 872, 876 (9th Cir. 2007). These two systems are roughly equivalent insofar as they both contemplate rehabilitation by allowing felons to finish serving their sentences outside of prison, under supervision. *Cf. id.* Petitioner's sentence specifically includes a five year term of supervised release. (Sentencing Minutes 3.) Thus, Petitioner's situation is distinct from that of the juvenile sentenced to life without the possibility of parole in *Miller* because it specifically contemplates rehabilitation.

Fourth, and perhaps most importantly, Petitioner was not a juvenile at the time of his indictment and acceptance of the plea agreement. (Suppl. 13.) While much of the decision in *Miller* was based on the juveniles' "diminished culpability," "lack of maturity," "underdeveloped sense of responsibility," and vulnerability to "negative influences and outside pressures," these considerations did not constitute its entire rationale. *Miller*, 132 S. Ct. at 2464-65. Indeed, the Supreme Court expressed a concern that a juvenile might "have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller*, 132 S. Ct. at 2468. These concerns do not apply to Petitioner's case. Nor does the Supreme Court's fear that "the features that distinguish juveniles from adults" might have put Petitioner at a "significant disadvantage in criminal proceedings." *Id.* at 2468 (citing *Graham v. Florida*, 560 U.S. 48, 74 (2010). Unlike the defendant in *Miller*, Petitioner was an adult during the relevant proceedings, and as a result, the protective concerns espoused in *Miller* apply with little, if any, force in this case. (Suppl. 13.)

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Thus, even if Petitioner was afforded time to submit an additional amendment, the claims he proposes to raise are inapposite and their holdings do not render his sentence unconstitutional.

IV. RULING

For the foregoing reasons, the Court **DENIES** Petitioner's Motion to Vacate, Set Aside, or Correct Sentence. The Court **GRANTS IN PART** and **DENIES IN PART** Petitioner's Motion to Amend/Supplement. The Court **DENIES AS MOOT** Petitioner's Motion for Leave to Pursue

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES- GENERAL

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CASE NO.: **CV 15-07683 SJO**
CR 10-00923 SJO

DATE: **February 29, 2016**

Discovery, Motion for Appointment of Counsel, and Motions for Extension of Time.

IT IS SO ORDERED.

APPENDIX E

Order Dismissing Appeal, Filed April 11, 2014

FILED

APR 11 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MARQUIS EDWARDS, AKA Seal A, AKA Baby Uzi, Defendant - Appellant.	No. 13-50130 D.C. No. 2:10-cr-00923-SJO-42 Central District of California, Los Angeles ORDER

Before: GOODWIN, CANBY, and McKEOWN, Circuit Judges.

A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard); *United States v. Araiza-Valdez*, 713 F.2d 430, 432 (9th Cir. 1980) (per curiam) (holding that the Juvenile Delinquency Act, 18 U.S.C. § 5031, does not apply when a defendant is indicted after the age of 21).

Accordingly, appellee's motion for summary affirmance is granted.

AFFIRMED.

SLL/MOATT