[APPENDIX A]

Court of Appeals for the Second Circuit
Order Denying Petitioner's COA

N.D.N.Y.
11-cr-198-2
Mordue, 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 8th day of May, two thousand nineteen.

Present:

Dennis Jacobs,
Pierre N. Leval,
Christopher F. Droney,
Circuit Judges.

Jarrell Williams

Petitioner-Appellant,

v.

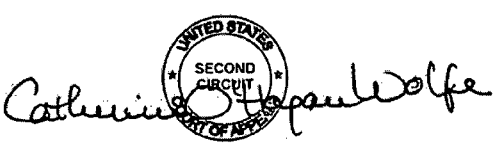
18-2680 (L),
19-298 (Con)

United States of America

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability and in forma pauperis status. 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



[APPENDIX B]

District Court's Order Denying
Petitioner's § 2255 motion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JARRELL WILLIAMS,

Petitioner,

-v-

5:17-CV-860 (NAM)
5:11-CR-198(2) (NAM)

UNITED STATES OF AMERICA,

Respondent.

APPEARANCES:

Jarrell Williams
18993-052
Ray Brook Federal Correctional Institution
PO Box 900
Ray Brook, New York 12977
Petitioner, *pro se*

Office of United States Attorney
Nicolas Commandeur, Esq., of counsel
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Syracuse, New York 13261
Respondent

Hon. Norman A. Mordue, Senior U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

In this habeas corpus proceeding under 28 U.S.C. § 2255 (Dkt. Nos. 568, 598), petitioner Jarrell Williams claims he was afforded ineffective assistance of counsel at trial and on appeal. On June 27, 2013, petitioner entered a plea of guilty (Dkt. No. 268) to the single-count superseding indictment (Dkt. No. 84) charging him and others with conspiring to conduct the affairs of an enterprise, the Bricktown Gang, through a pattern of racketeering consisting of

multiple acts involving murder, robbery, and drug offenses involving crack, cocaine, and marijuana. On November 25, 2013 this Court sentenced petitioner to 420 months imprisonment; judgment was entered December 4, 2013 (Dkt. No. 295). On petitioner's appeal, the Second Circuit affirmed the conviction and sentence, rejecting petitioner's argument that his sentence was substantively unreasonable due to mitigating factors including his youth. *United States v. Evans (Jarrell Williams)*, 633 F.App'x 55, 57 (2d Cir. 2016). Having thoroughly reviewed the record, the Court holds that the § 2255 motion lacks merit. No hearing is required, and the matter is dismissed with prejudice.

TIMELINESS

Petitioner's motion is time-barred. The one-year period within which petitioner was required to file his § 2255 motion began to run when this Court's December 4, 2013 judgment of conviction became final. *See* 28 U.S.C. § 2255(f)(1). Because petitioner did not seek Supreme Court review, the judgment became final on June 2, 2016, when the time to seek Supreme Court review expired 90 days after the Second Circuit's March 4, 2016 affirmance of the December 4, 2013 judgment. The instant motion, dated August 2, 2017, and received by the Court on August 3, 2017, is thus untimely. In any event, as set forth below, the record conclusively shows that petitioner is entitled to no relief.

APPLICABLE LAW

Section 2255 enables a prisoner sentenced by a federal court to petition the sentencing court to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). A "collateral attack on a final judgment in a federal criminal case is generally available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that

constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b).

In evaluating claims of ineffective assistance, courts apply the two-part test in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, to obtain relief on an ineffective assistance claim, a petitioner bears the burden to show (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) "that the deficient performance prejudiced the defense." *Id.* The *Strickland* test applies to cases resolved by guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

To show deficient performance under the first *Strickland* prong, a petitioner's burden "is a heavy one because . . . we must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Harrington v. United States*, 689 F.3d 124, 129 (2d Cir. 2012) (internal quotation marks omitted). To satisfy the performance prong, the petitioner must demonstrate "that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). To satisfy *Strickland's* prejudice prong, a 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." 466 U.S. at 694. A reasonable

probability is "a probability sufficient to undermine confidence in the outcome." *Id.* In the plea context, the prejudice prong turns on whether counsel's alleged "constitutional ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. Where, as here, a defendant pleads guilty, to show prejudice he must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

It is well established that the submissions of a pro se litigant must be construed liberally. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474. The Court must read them to raise the strongest arguments they suggest. *Id.*

PETITIONER'S PLEA PROCEEDING

On April 28, 2011, shortly after the filing of the initial indictment on April 21, 2011, Attorney VanHee was appointed to represent petitioner. A superseding indictment (Dkt. No. 84), was filed November 16, 2011, charging petitioner with one count of conspiring to engage in a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d). On June 27, 2013, pursuant to a written plea agreement (Dkt. No. 268), petitioner pleaded guilty to the superseding indictment, which charges him with conspiracy to engage in a pattern of racketeering activity as part of his membership in the Bricktown Gang, in violation of Title 18, United States Code, Section 1962(d).

The transcript of the June 27, 2013 plea proceeding establishes that the Court ensured that petitioner understood the rights he was waiving by pleading guilty instead of going to trial; the elements of the crime charged and the factual support therefor; the significance of his guilty plea; and the possible sentence. The Court ascertained that petitioner's attorney was well qualified; had spent significant time working on the case; had advised petitioner of his rights; reviewed with

him the nature of the charge in the indictment; was satisfied that petitioner was pleading guilty freely and voluntarily with an understanding of the charge and the consequences of pleading guilty; did not know of any viable defense; and believed the plea was in petitioner's best interest.

At the plea hearing, the following exchange took place between petitioner and the Court:

> THE COURT: . . . Have you had adequate time and opportunity to discuss all aspects of your case with your attorney, Mr. VanHee?
> THE DEFENDANT: Yes, I did.
> THE COURT: Has he been able to answer all questions you have concerning this matter?
> THE DEFENDANT: Yes, sir.
> THE COURT: To your satisfaction?
> THE DEFENDANT: Yes, Your Honor.
> ***
> THE COURT: Are you satisfied with [Attorney VanHee's] representation of you?
> THE DEFENDANT: Yes, sir.
> THE COURT: Has he advised you of your rights?
> THE DEFENDANT: Yes, sir.
> ***
> THE COURT: All right, okay. Has your attorney Mr. VanHee, or has Mr. Katko, the Assistant United States Attorney, or any government agent, or anyone else made any promises to you that you would be treated leniently or any other kind of a promise to induce you to plead guilty this morning?
> THE DEFENDANT: No, sir.
> THE COURT: Has any force or threat been used against you to induce you to plead guilty?
> THE DEFENDANT: No, sir.
> THE COURT: Are you pleading guilty this morning freely and voluntarily?
> THE DEFENDANT: Yes, sir.
> THE COURT: Did you read the superseding indictment containing the charge against you, Count One?
> THE DEFENDANT: Yes.
> THE COURT: And the overt act, overt act 13 in particular?
> THE DEFENDANT: Yes, sir.
> THE COURT: Has your attorney explained those charges to you?
> THE DEFENDANT: Yes.
> THE COURT: Do you understand the charge?
> THE DEFENDANT: Yes.
> THE COURT: And you realize the penalties that could be imposed on the date of sentence?

THE DEFENDANT: Yes, sir.
THE COURT: Has anyone apart from the plea agreement made any promises to you in return for pleading guilty this morning?
THE DEFENDANT: No, sir.

The government prosecutor, John Katko, Esq. ("AUSA Katko"), summarized for the record the elements of the offense:

> First, that an agreement existed between two or more persons. Second, that at some point during the existence of that agreement or conspiracy, the defendant deliberately and intentionally joined that conspiracy. And third, the object of the conspiracy involved the participation in the affairs and enterprise known as the Bricktown Gang, which was engaged in or had some effect on interstate commerce, and which engaged in a pattern of racketeering activity as alleged in the indictment.

He then placed on the record the factual basis for the charge and what the government would prove at trial, including the following:

> As part of his membership in the gang the defendant acknowledges that crack cocaine sales were routine and he also acknowledges as part of his plea his involvement in the following overt acts: Overt act number 11, number 12, number 13, number 14, number 16, number 18, and number 30.
>
> That's what we would prove, Your Honor, if this case were to go to trial. I just want to note for the record, Your Honor, that with respect to the overt acts, the defendant is aware that they drive the sentencing issues in this matter and that if by admitting to these overt acts the defendant is acknowledging his involvement in those acts.

The following exchange then took place:

> THE COURT: Thank you. You just heard, Jarrell, what the government said they could prove if the case had gone to trial. Let me ask you this. Is that what happened in this case? Is that what you did?
> THE DEFENDANT: Yes, sir.
> THE COURT: Any question about that?
> THE DEFENDANT: No, sir.
> THE COURT: And Mr. VanHee, is that also, based upon your investigation and the discovery that you have had, is that also your understanding of what your client's involvement was?
> MR. VANHEE: Yes, Judge.

PETITIONER'S § 2255 MOTION

First, petitioner argues that the Court lacked jurisdiction because petitioner was a juvenile at the time of the murder of Anthony Ford and thus, under the Juvenile Delinquency Act ["JDA"], 18 U.S.C. § 5032, he could not be prosecuted as an adult in the absence of a certification by the United States Attorney that there is a need for the proceedings to take place in federal rather than state court. *United States v. Wong*, 40 F.3d 1347, 1363 (2d Cir. 1994). Such certification is a prerequisite to the exercise of federal jurisdiction over juveniles. *Id.* It is well established, however, that "federal courts have jurisdiction over conspiracies begun while a defendant was a minor but completed after his eighteenth birthday." *Id.* at 1365. The *Wong* court explained that, because the RICO conspiracy in issue was a continuing crime, the defendant's criminal conduct committed after he turned eighteen was sufficient to furnish the district court with jurisdiction over substantive RICO and RICO conspiracy charges. *Id.* at 1366. "'The [JDA] does not ... prevent an adult criminal defendant from being tried as an adult simply because he first became embroiled in the conspiracy with which he is charged while still a minor....'" *Id.* (quoting *United States v. Spoone*, 741 F.2d 680, 687 (4th Cir.1984)). *Wong* continued:

> This concept has been analogized to contract "ratification" doctrine: just as a minor legally incapable of entering a contract may nonetheless be found to have "ratified" a contract by taking actions after attaining majority consistent with an intent to be bound by it, so a defendant may ratify his pre-eighteen participation in a conspiracy by continued participation after attaining majority.

Id. The same analysis applies here.[1]

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[1] *United States v. Geraldo*, 687 F. App'x 101, 108 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 241, 199 L. Ed. 2d 155 (2017), cited by petitioner, does not aid him. In the case at bar – unlike *Geraldo* – petitioner's guilty plea establishes that he ratified his juvenile participation in the conspiracy after he

(continued...)

Certification of need in the instant case was not required because petitioner continued his participation in the conspiracy after attaining majority. Petitioner contends that the only overt act to which he pleaded guilty was overt act 13, the September 4, 2007 murder of Anthony Ford. On that date, petitioner, born August 11, 1990, was 17 years old. This argument is belied by the plea agreement and plea proceeding. The plea agreement (Dkt. No. 268) signed by petitioner stated that he had conspired and agreed to engage in a pattern of racketeering activity that included, among other things, possessing with intent to distribute and distribution of cocaine base (crack) and various acts of violence, and that he was a member of the Bricktown Gang during the conspiracy which began as early as 2000 and continued until April 21, 2011 (the date of the initial indictment). In the plea agreement, petitioner admitted his involvement in the following overt acts committed in furtherance of the racketeering conspiracy, as set forth in the superseding indictment: 11 (jointly possessing a 9 mm handgun on November 15, 2006 with named co-defendants); 12 (shooting a rival gang member on September 4, 2007); 13 (killing Anthony Ford and wounding a female victim by firing several shots from a handgun at them on September 4, 2007); 14 (possessing a .380 caliber handgun on January 8, 2008); 16 (jointly possessing a .9 mm handgun and a .45 caliber handgun on December 13, 2008 with named co-defendants); 18 (possessing a handgun on January 4, 2010 with a named co-defendant); and 30 (being present, along with named co-defendants on January 27, 2011, when a named co-defendant sold crack cocaine to a customer). The plea agreement further provides that petitioner's relevant conduct involved the distribution by the defendant or coconspirators of at least 196 but less than 280

[1](...continued)
passed his eighteenth birthday.

grams of cocaine base (crack) and the possession of dangerous weapons, namely handguns, in connection with the gang's drug trafficking activity.

At the plea proceeding, AUSA Katko made it clear that if the case went to trial, the government would prove:

> At some point from 2000 up to his arrest in April of 2011 . . . the defendant conspired with numerous others as members of a street gang known as the Bricktown Gang to engage in a pattern of racketeering activity as alleged in the indictment.
> ***
> As part of his membership in the gang the defendant acknowledges that crack cocaine sales were routine and he also acknowledges as part of his plea his involvement in the following overt acts: Overt act number 11, number 12, number 13, number 14, number 16, number 18, and number 30.
>
> That's what we would prove, Your Honor, if this case were to go to trial. I just want to note for the record, Your Honor, that with respect to the overt acts, the defendant is aware that they drive the sentencing issues in this matter and that by admitting to these overt acts the defendant is acknowledging his involvement in those acts.

(Emphasis added.) The Court then questioned petitioner:

> THE COURT: Thank you. You just heard, Jarrell, what the government said they could prove if the case had gone to trial. Let me ask you this. Is that what happened in this case? Is that what you did?
> THE DEFENDANT: Yes, sir.
> THE COURT: Any question about that?
> THE DEFENDANT: No, sir.

Clearly, petitioner understood that he was pleading guilty to participation in the conspiracy beginning no later than overt act 11, which occurred on November 15, 2006, until his arrest in April 2011, when he was 20 years old. He explicitly admitted involvement in overt act 16, which took place on December 13, 2008, when petitioner was 18 years old; overt act 18, which took place on January 4, 2010, when he was 19 years old; and overt act 30, which took place on January 27, 2011, when he was 20 years old. Accordingly, petitioner's jurisdictional

argument lacks merit.

Petitioner claims that this Court erred by failing explain the nature of the charge to which he was pleading. Fed. R. Crim. P. 11(b)(1)(G). The plea transcript clearly demonstrates that petitioner was given all necessary information regarding the nature of the charge to which he pleaded. Petitioner stated he had read the superseding indictment, that his attorney had explained the charge to him, and that he understood it. Attorney VanHee stated he had reviewed the charge with petitioner; AUSA Katko explained in detail the elements of the offense charged and how the government would prove each of those elements if the case went to trial; and the Court questioned petitioner extensively and ensured that he understood the nature of the charge and the consequences of his plea. It is plain from the transcript that petitioner's plea was knowing, intelligent, and voluntary. *See generally United States v. Juncal*, 245 F.3d 166, 171 (2d Cir. 2001) (holding that the defendant knowingly and willingly entered into the plea agreement where he waived the reading of the indictment and "testified at his allocution that he had reviewed the indictment and the plea agreement with his attorney, that his attorney had explained those documents to him, and that he understood those documents."); *accord United States v. Kinsey*, 533 F. App'x 36, 38 (2d Cir. 2013); *see also United States v. Rivernider*, 828 F.3d 91, 105 (2d Cir.), *cert. denied sub nom. Ponte v. United States*, 137 S. Ct. 456 (2016) ("[S]worn testimony given during a plea colloquy carries such a strong presumption of accuracy that a district court does not, absent a substantial reason to find otherwise, abuse its discretion in discrediting later self-serving and contradictory testimony as to whether a plea was knowingly and intelligently made." (internal quotation marks omitted)). In any event, any purported variance from the requirements of Fed. R. Crim. P. 11 did not affect petitioner's substantial rights and is harmless.

Fed. R. Crim. P. 11(h). Petitioner is not entitled to relief on this ground, and it does not support a claim of ineffective assistance.

In support of his ineffective assistance claim, petitioner raises a number of issues. He claims that Attorney VanHee gave him deficient advice by telling him he qualified for treatment as a juvenile offender. Petitioner's contentions in this respect are squarely refuted by the plea agreement, the plea proceeding, and the sentencing proceeding. There is no mention in the record of treatment as a juvenile offender, nor did petitioner raise the issue although he had opportunities to do so during his plea and sentencing proceedings. Likewise, nothing in the record supports petitioner's allegation that Attorney VanHee coerced him into pleading guilty by advising him that if he did not sign the plea agreement he would receive a mandatory life sentence. At the plea hearing, AUSA Katko placed on the record the possible sentences of incarceration – "[a] maximum term of imprisonment of life. There is no mandatory minimum." He added: "Your Honor, based on the Guideline base offense level of 43 and his criminal history, his advisory Sentencing Guideline range is 360 to life." Moreover, the transcript shows that the Court gave petitioner ample opportunity to ask questions or otherwise address the Court, and specifically ascertained that no one had made threats or promises to him to induce a plea. In the same vein, petitioner claims that Attorney VanHee wrongly advised him to accept the plea agreement to avoid the risk of a life sentence, whereas, according to petitioner, he could not have been given a life sentence. In support of this claim, petitioner relies on *Miller v. Alabama*, 123 S.Ct. 2455 (2012), which held that sentencing schemes imposing mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes are unconstitutional. In the instant case, however, the sentencing scheme does not impose a mandatory life sentence; thus *Miller*

does not apply.[2] Nothing in the record supports a claim that petitioner entered an involuntary plea or received deficient representation regarding these issues. Attorney VanHee cannot be faulted for failing to raise meritless arguments.

Petitioner also argues that Attorney VanHee should have argued for a lower sentence because of petitioner's youth and involuntary immersion in gang culture at the time of the murder. In fact, Attorney VanHee did raise this argument before this Court and on direct appeal. In affirming, the Second Circuit observed:

> In imposing a mid-Guidelines sentence of 420 months, the district court balanced the mitigating factors cited by Williams against his egregious conduct in murdering Anthony Ford and randomly shooting at other members of the community, and also noted the devastating impact of Williams' actions on his victims and their families. In light of these facts, we cannot say that the sentence was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.

Id. at 57 (citation, quotation marks, and reference to record omitted).

Petitioner also complains that Attorney VanHee did not timely provide him with requested documents, thus depriving him of the opportunity to move in the Second Circuit for rehearing or to petition the Supreme Court for certiorari. The Court has already dealt with this matter, appointing J. Scott Porter, Esq. to represent petitioner for the purpose of seeking rehearing en banc and/or certiorari (Dkt. Nos. 515, 518). *United States v. Williams*, 2017 WL 5479858

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[2] In his letter of July 26, 2018 (Dkt. No. 611), petitioner argues that he is entitled to relief based on a recently-decided Fourth Circuit case, *Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018). Nothing in *Malvo* changes the rule in *Wong* that "federal courts have jurisdiction over conspiracies begun while a defendant was a minor but completed after his eighteenth birthday." 40 F.3d at 1365. *Malvo* held that *Miller* applies in any case where a juvenile homicide offender was sentenced to life imprisonment without possibility of parole. Even accepting *Malvo* as authoritative, petitioner cannot benefit because in fact he was not sentenced to life imprisonment without possibility of parole. Morevoer, even if Attorney VanHee advised petitioner at the time of his plea in 2013 that he could be sentenced to life imprisonment without parole if convicted at trial, such advice was not deficient, because counsel could not reasonably have been expected to foresee the Fourth Circuit's expansion of *Miller* five years later.

(N.D.N.Y. Jan. 5, 2017). The Court also ensured that petitioner received the papers he sought.

The Court has thoroughly reviewed the record, has construed petitioner's *pro se* submissions most liberally, and has read them to assert the strongest arguments they suggest. The Court has considered the issues discussed above and all other issues raised by petitioner, and discerns no argument that does not fail as a matter of law. Petitioner has not demonstrated "that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman*, 477 U.S. at 381. Further, petitioner has not shown any prejudice arising from Attorney VanHee's conduct, because he has not shown a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial, or the result of the proceeding would otherwise have been different. *Hill*, 474 U.S. at 59. For the same reasons, the Court finds that Attorney VanHee provided adequate representation on petitioner's appeal.

Petitioner has failed to carry his burden to show constitutional error, a lack of jurisdiction in the sentencing court, an error of law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice, or any other basis for relief under § 2255. The motion, files, and records of the case conclusively show that petitioner is entitled to no relief. He is not entitled to a hearing. The motion is denied and the proceeding dismissed with prejudice.

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Since petitioner has made no such showing herein, the Court declines to issue a certificate of appealability. *See Hohn v. United States*, 524 U.S. 236, 239–40 (1998).

CONCLUSION

It is therefore

ORDERED that the 28 U.S.C. § 2255 motion (5:11-CR-198, Dkt. Nos. 568, 598) is denied with prejudice; and it is further

ORDERED that the proceeding *Jarrell Williams v. United States* (5:17-CV-860), is dismissed with prejudice and the Clerk of the Court shall mark it closed; and it is further

ORDERED that a certificate of appealability shall not be issued; and it is further

ORDERED that the Clerk of the Court shall serve copies of this Memorandum-Decision and Order in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

August 27, 2018
Syracuse, New York

Norman A. Mordue
Senior U.S. District Judge