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 15th day of April, two thousand nineteen.

Marcel Malachowski,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

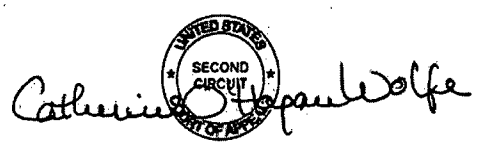
ORDER

Docket No: 18-2316

Appellant, Marcel Malachowski, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



N.D.N.Y.
16-cv-1547
09-cr-125
McAvoy, 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 19th day of December, two thousand eighteen.

Present:

Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Marcel Malachowski,

Petitioner-Appellant,

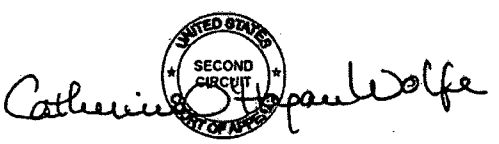
v. 18-2316

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability ("COA"), appointment of counsel, to extend time to file briefs, and to suspend further filings of COA motions. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is 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



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **1:09-cr-125**

MARCEL MALACHOWSKI,

Petitioner/Defendant.

THOMAS J. McAVOY
Senior United States District Judge

DECISION and ORDER

I. INTRODUCTION

Marcel Malachowski ("Petitioner" or "Defendant") was convicted upon his guilty plea of conducting a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848; multiple counts of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841; and multiple counts of importation of marijuana in violation of 21 U.S.C. § 952. He now brings motions to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, Dkt. No. 827, and for leave to conduct discovery. Dkt. # 835. The government opposes the § 2255 motion, asking that it be denied in its entirety. Dkt. # 841. Petitioner filed two briefs in reply to the government's arguments. Dkt. # 845 & # 850.[1] The Court has considered all of the parties' submissions.

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[1]Petitioner's reply memorandum of law filed on December 12, 2017 (Dkt. # 850) contains the case number of this case (1:09-cr-125) and indicates that it is in support of the §2255 motion (Dkt.# 827) in this action. *See* Dkt. # 850, p. 1. However, the memorandum addresses several issues raised by the Government in Petitioner's § 2255 motion in *United States v. Malachowski*, NDNY 5:08-CR-701 (DNH), *aff'd*, 623 F. App'x 555 (2d Cir. 2015), and not raised in this case. A similar Reply memorandum of law was not filed in 5:08-CR-701. Due to Petitioner's *pro se* status, the Court directed the Clerk of the Court to file a copy of Dkt. # 850 in NDNY 5:08-CR-701.

In the § 2255 motion, Petitioner makes the following claims, most of which have been previously raised in some form by Petitioner and rejected by this Court and/or the United States Court of Appeals for the Second Circuit:

1. Petitioner was deprived of his Sixth Amendment right to counsel because his three appointed trial counsel provided ineffective assistance, and because the Court denied his requests to appoint a fourth attorney and adjourn the trial. (*See* Mot. at 4 and Pet. Mem. at 8-22 and Pet. Mem., *passim*[2]))(Ground I).

2. Petitioner's Fifth Amendment due process rights were violated by the government's failure to provide *Brady* material. (*See* Mot. at 5 and Pet. Mem. at 22-36)(Ground II).

3. Petitioner's Fifth Amendment due process rights were violated because his trial counsel misrepresented the law, thereby improperly influencing and coercing Petitioner to plead guilty. (*See* Mot. at 7 and Pet. Mem. at 36-54)(Ground III).

4. Petitioner's appellate counsel provided constitutionally ineffective assistance. (*See* Mot. at 9 and Pet. Mem., 55-58, and Pet. Mem., *passim*)(Ground IV).

Although not contained in the Petition, Petitioner also asserts that the Court's sentence violates the Double Jeopardy Clause. (*See* Pet. Mem. at 58-59).

For the reasons that follow, the motions are denied.

II. PROCEDURAL BACKGROUND

A. The Indictment

[2]Petitioner intersperses throughout his 60-page memorandum of law several ineffective assistance of counsel arguments directed at his third trial counsel, Frederick Rench, Esq., and his appellate counsel, Robin C. Smith, Esq.

On March 3, 2010, a grand jury returned a 64-count superseding indictment against Petitioner and 21 other defendants. Petitioner was charged in Count 1 with conspiracy to distribute and to possess with the intent to distribute more than 1000 kilograms of marijuana, in violation of 21 U.S.C. § 846; in Count 2 with conspiracy to import into the United States from Canada more than 1000 kilograms of marijuana, in violation of 21 U.S.C. §§ 952 and 960; in Count 3 with engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 848; in Counts 5 through 13 with importing more than 100 kilograms of marijuana, in violation of 21 U.S.C. § 952; and in Counts 14 through 24 with possessing with the intent to distribute and distributing more than 100 kilograms of marijuana, in violation of 21 U.S.C. § 846. *See* Superseding Indictment, Dkt. No. 79.

B. Requests for Adjournments of Trial, to Discharge Attorney, and to Proceed *Pro Se*

As the Court previously noted:

> During the prosecution of this case, Defendant sought numerous adjournments of the trial[3] so he could, *inter alia*, challenge his 2009 federal weapons conviction in *United States v. Malachowski*, NDNY 08-CR-701 (DNH).[4] *See e.g.* dkt. #s 583, 599, 602. Trial was eventually scheduled for June 4, 2013. On May 30, 2013, Defendant moved to discharge his third-assigned attorney, Frederick Rench, Esq., so that Defendant could proceed *pro se*. Dkt. # 623. Defendant also sought another adjournment of the trial. *Id.* On June 4, 2013, the Court granted Defendant's motion to discharge Attorney Rench; determined that Defendant could represent himself; appointed Attorney Rench as stand-by counsel; and denied any further adjournment of the trial. *See* 06/04/13 Trans., dkt. # 637.

June 15, 2015 Dec. & Ord, Dkt. # 753 at 5 (footnotes added).

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[3]There were six adjournments from an initial trial date of August 16, 2010, to a final trial date of June 4, 2013. *See* Dkt. Sheet; *see also* Gov. Mem. at 10-14 (setting out docket entries demonstrating the procedural history of this case).

[4]Defendant's weapons conviction was affirmed by the Second Circuit on September 9, 2015. *See United States v. Malachowski*, 623 F. App'x 555 (2d Cir. 2015).

C. Guilty Plea

On June 5, 2013, the second day of trial, appearing *pro se* and without a plea agreement, Petitioner entered guilty pleas to each of the counts of the Superseding Indictment against him. *See* 06/05/13 Docket Entry; *see also* 06/05/13 Plea Hearing Transcript, Dkt. # 638. As relevant here, the government indicated at the change of plea hearing that if the case went to trial, it would

> present evidence through the form of several cooperating witnesses, wiretap evidence, surveillance, and various seizures of both marijuana and currency. What that proof would show is that from approximately 2007 until 2010 the defendant was one of the managers or leaders of a large scale drug trafficking organization designed to smuggle large quantities of marijuana from Canada into the United States and then to distribute that marijuana to various dealers throughout the United States.
>
> The Government would prove that the defendant managed at least at one point or another during the conspiracy at least five or more individuals; specifically Lee Tarbell, Kyle Wesley, Sean Herrmann, Mike Cook, James Chenoweth, among other individuals. During the course of the conspiracy, the defendant directed those individuals to import large loads of marijuana into the United States and then to have the marijuana distributed once it came across the border.
>
> The Government would also prove that the defendant, along with others, imported more than one hundred kilograms of marijuana and then distributed more than one hundred kilograms of marijuana in the months of March, February, April, June, July, August, September, October, and November of 2008.

Plea Trans. pp. 29-30.

The following colloquy then occurred:

> THE COURT: All right. Mr. Malachowski, did you understand what [the prosecutor] said about your participation in this conduct?
>
> THE DEFENDANT: I understand the participation, your Honor. The only thing that I would like to clarify is, some of the names he mentioned, I did not manage some of -- I managed or occupied a position as supervisor or the other term of at least five

people, but there was a couple of names there that –

THE COURT: All right. Well, the elements as to --

THE DEFENDANT: The element I agree to. It's just the names he stipulated.

THE COURT: All right. We can work out the details later on.

THE DEFENDANT: All right.

THE COURT: So is that what you did?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Rench, is that your understanding as well?

MR. RENCH: It is, Judge.

Id. at 30-31.

D. Motions Filed Between Guilty Plea & Sentencing

"Between the date of his guilty plea and the date of the sentencing hearing, Defendant filed 13 *pro se* motions. *See* dkt. #s 651, 653, 660, 663, 666, 667, 677, 681, 682, 686, 694, 695, 696." June 15, 2015 Dec. & Ord. at 6. Most were seeking to withdraw the guilty plea, and several raised issues asserted in the instant § 2255 motion. Relevant decisions are set forth here.

1. First Motion to Withdraw Guilty Plea

On September 3, 2013, Petitioner filed a *pro se* motion to withdraw his guilty plea, arguing, *inter alia*, (1) one of the government's cooperating defendants, Sean Herrmann, provided "false information" that Petitioner held a gun to Herrmann's head during the drug

conspiracy, thereby forcing Petitioner to proceed to trial,[5] (2) the government engaged in prosecutorial misconduct by relying on "false evidence," and (3) stand-by counsel was ineffective for failing to provide the alleged "false information" to Petitioner prior to trial. *See* Dkt. # 663.

The Court construed Petitioner's claim that he was not provided Herrmann's inconsistent statements as alleging due process violations under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). *See* Oct. 21, 2013 Dec. & Ord., Dkt. # 678, at 4 (citing *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Leka v. Portuondo*, 257 F.3d 89, 98 (2d Cir. 2001); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998)).[6] In addressing the motion, the Court indicated that "[i]n the context of pleas, evidence is material if 'there is a reasonable probability that but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial.'" *Id.* at 4 (quoting *Avellino*, 136 F.3d at 256). The Court further indicated that "[a]n assessment of the materiality of the evidence is an objective one that focuses on 'likely persuasiveness of the withheld information.'" *Id.* at 4 (quoting *Avellino*,

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[5] Petitioner asserted that the government offered him a plea agreement requiring a guilty plea to the conspiracy charged in Count 1 but that he would have to stipulate to a firearm enhancement based on the contention that he held a gun to Sean Herrmann's head in the course of the conspiracy. *See* Dkt. No. 663. Petitioner claimed that he could not agree to the stipulation because he did not place a gun to Herrmann's head, so the government withdrew the plea offer. *Id.* at 4, 7. Petitioner contended that after he pled guilty, he learned Herrmann recanted this claim. *Id.* at 6. Petitioner argued that the government's insistence on the firearm enhancement based upon a false allegation improperly deprived him the option of entering a plea agreement involving only one count, and therefore provided a basis to withdraw his guilty plea. *See generally*, *id.* While Petitioner mentioned that other cooperating-defendants also provided "false information," his motion focused on Herrmann's purportedly inconsistent statements about Petitioner threatening him with a gun. *Id.*

[6] Although the government argued that it disclosed any alleged *Brady* or *Giglio* material prior to the plea, the Court presumed for purposes of the motion that the identified material was not provided to Petitioner. *Id.* at 5. The government also argued that the alleged "false statements" were not material, and thus, not *Brady* or *Giglio* material, and were only relevant to impeachment, and thus did not have to be disclosed prior to a plea.

136 F.3d at 256). The Court concluded that "whether someone held a gun to Herrmann's head or not is irrelevant in determining whether Defendant committed the drug trafficking crimes charged in the Superseding Indictment - and thus was not material. It was not the type of statement, in the context of this case, that would seriously undermine the credibility of Herrmann's testimony regarding Defendant's leadership role in a large scale drug trafficking organization." *Id.* at 6. The Court also concluded:

> Herrmann's alleged "false statements" were not *Brady* or *Giglio* evidence because they were not material, and the government is only obligated to disclose material evidence. *United States v. Danzi*, 726 F. Supp.2d 120, 127 (D. Conn. 2010). While the government was required to disclose *Brady* information to Defendant prior to his guilty plea, there is no obligation to disclose purely impeachment evidence pre-plea. *United States v. Ruiz*, 536 U.S. 622, 633 (2002) ("the Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant"); *Danzi*, 726 F. Supp.2d at 127-28; *see also United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009). . . . The alleged false statements are, at best, relevant for impeachment purposes, but do not go to "the heart of the defendant's guilt or innocence." *Avellino*, 136 F.3d at 255. Therefore, assuming the statements were not provided to Defendant prior to his plea (either by the government or Defendant's standby counsel), the failure to disclose this impeachment information does not render Defendant's plea involuntary.

Id. at 6-7.[7]

Furthermore, the Court noted that "Defendant's argument that he should be allowed to withdraw his plea because of the asserted ineffectiveness of his stand-by counsel is somewhat disingenuous in that it runs counter to Defendant's assurances to the Court on

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[7] The Court found that Petitioner failed to demonstrate that his guilty plea was not entered "knowingly and voluntarily." Dkt. # 678, at 7. The Court further found that Petitioner simply wanted to "re-open plea negotiations." *Id.*, at 7-8. The Court weighed against Petitioner that his motion came four (4) months after the entry of his guilty plea, and determined that the government would be prejudiced if Petitioner was permitted to withdraw his plea because the plea was entered after the commencement of trial. *Id.* at 8. The Court also determined that Petitioner did not raise a "significant question about the voluntariness of the original plea, but merely appears to have had a change of heart, reevaluated the evidence against him, or reassessed the sentencing possibilities." *Id.* at 8-9. Finally, the Court found that to "allow Defendant to withdraw his plea on the asserted grounds runs contrary to the public's interest in the finality of guilty pleas, undermines confidence in the integrity of our judicial procedures, unnecessarily increases the volume of judicial work, and delays and impairs the orderly administration of justice." *Id.* at 9.

June 4, 2013 that he was capable of representing himself . . . ." *Id.* at 7, n. 6.

2. Motion to Re-Appoint Attorney Rench

On September 16, 2013, Petitioner moved to re-appoint Attorney Rench as his counsel, Dkt. # 667, which the Court granted the following day. Dkt. # 669. Attorney Rench's re-appointment did not stem the flow of *pro se* motions. *See* Dkt. #s 677, 681, 682, 686, 694, 695, 696.

3. Second Motion to Withdraw Guilty Plea

On October 28, 2013, Petitioner filed a second *pro se* motion to withdraw his guilty plea. Dkt. # 682. This motion was directed to all counts except Count 3. *Id.*, p. 1, ¶¶ 1& 2. Petitioner alleged that he had received ineffective assistance of counsel; he was deceived or coerced into pleading guilty because the prosecutor misrepresented that the only available option was to enter a plea to all counts; and that certain counts were multiplicious. Defendant's ineffective assistance of counsel arguments were based on the contentions that: (1) his attorney failed to file a pre-trial motion asserting double jeopardy; (2) his attorney withheld discovery from him; (3) his attorney "offered no expert opinion pertaining to the government[']s assertion that the only available option . . . was to plea to all counts;" (4) his attorney failed to advise him that he could try to negotiate with the government for a better result, and (5) his attorney failed to file a motion to withdraw his guilty plea.

The Court rejected each of the ineffective assistance of counsel arguments, holding:

> Defendant cannot claim ineffective assistance of counsel [as a basis to withdraw his plea] because, before he decided to plead guilty, Defendant moved to proceed *pro se.* This motion was granted and Attorney Rench was appointed standby counsel. Absent evidence that counsel was "standby" in name only, there can be no ineffective assistance of counsel claim with respect to him. *United States v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998); *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir.

1997).

Dec. 4, 2013 Dec. & Ord., dkt. # 690, at 2.

The Court also rejected Petitioner's argument that he was deceived or coerced into pleading guilty based on the prosecutor's alleged representation that the only available option was to plead guilty to all counts. *Id.* at 3. Further, the Court found that Counts 1, 2, 5-13, and 16-24 were not multiplicious and did not present double jeopardy violations on their face. *Id.* at 3-4. The Court reserved decision on the issue of whether Count 3 posed double jeopardy concerns with respect to Counts 1 and/or 2, and ordered the government to provide further briefing on this issue. *Id.* at 4-6.

On December 13, 2013, the government filed additional briefing indicating that because of double jeopardy concerns, it would move to dismiss Counts 1 and 2 at sentencing. *Id.*

3. January 2, 2014 Motions

On January 2, 2014, Petitioner filed two additional *pro se* motions. In one, Petitioner set forth a litany of arguments purportedly showing that the government had relied upon false information against him, and had failed to disclose information demonstrating that Petitioner had a "valid defense" to the charges to which he pleaded guilty. Dkt. # 695.[8] Petitioner argued that he could discredit the only government witness who could "potentially establish" the "necessary control element" of the CCE charge. *Id.* He provided no

[8] Petitioner argued that he entered his guilty plea in this case because, in his weapons prosecution (NDNY 08-CR-701 (DNH)), he believed that the government relied upon false information from cooperating witnesses, and because he did not feel he was receiving effective assistance from his assigned counsel. *Id.* Petitioner provided a detailed explanation as to why he believed he had a valid defense to the charges to which he pleaded guilty, asserting weaknesses in the evidence that would have been presented from co-defendants and cooperating witnesses if the matter proceeded to trial. *Id.*

explanation why the Court should ignore his sworn admission during the change of plea hearing that he committed each of the elements of the CCE charge. Because the Court had already denied Petitioner's previous motions based on substantially the same arguments, the Court denied the substantive portions of the motion. *See* 01/03/14 Text Order, Dkt. # 697.

The second motion filed on January 2, 2014 included Defendant's account of the procedural history of the case; the "unique circumstances" which he contended warranted a departure from the "statutory minimum" even without a government motion;[9] alleged prosecutorial misconduct in both of Defendant's prosecutions;[10] alleged the government's conduct of depriving him of "substantial exculpatory evidence" and relying on "false allegations" subjected him to an increased statutory minimum; and asserted the ineffectiveness of his three assigned attorneys. Dkt. # 696. Petitioner again complained that he was unable to enter the government's proposed plea agreement because the government wrongly required a stipulation that he used a firearm during the conspiracy in Count 1. *Id.* at 17. Petitioner also claimed that exculpatory material had been withheld from

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[9] These "unique circumstances" consisted of the government's "bad faith" and "unconstitutional motives" in prosecuting the matter, including the government's alleged use of "false information as [a] basis for enhancement."

[10] Petitioner asserted that this alleged prosecutorial misconduct involved *Brady* material violations, and a delay in bringing the indictment in the instant case to allow the government to obtain a "tactical advantage." Dkt. # 696. Petitioner asserted that the government improperly relied on the "false allegations" from co-defendant Herrmann to pursue a "use of firearm" enhancement in the potential plea agreement; that this "forced the defendant to trial" thereby "contributing to a violation of due process;" that because he could not enter the plea bargain he was subjected to "an increased statutory minimum from ten years (U.S.C. § 846) to 20 years (U.S.C. § 848);" that he was not "properly informed and advised on the statutory minimum relating to the plea entered on June 5, 2013" until October 2013; that he was not "informed by defense counsel that this Court has no authority to depart below any statutory minimum unless upon motion by the government based upon substantial assistance" until October 2013; "[h]ad the defendant been fully informed, considering adverse relations with prosecution, and in possession of material discovery, the defendant would have elected to proceed to trial on the C.C.E. count; and that all of these issues resulted in "a violation of due process under the Sixth and Fourteenth Amendments." *Id.* pp. 16-18.

him, rendering his guilty plea involuntary; that his standby counsel participated too fully at the time Petitioner entered his guilty plea; and that the plea allocution failed to identify the five persons Petitioner supervised as part of the continuing criminal enterprise. *Id.* at 18-22. Petitioner did not assert his actual innocence of the crimes to which he pleaded guilty, but rather contended that he would have been able to impeach the government's witnesses had the matter proceeded to trial. Petitioner also argued that "reversal of conviction and dismissal of indictment may be warranted" because the government engaged in prosecutorial misconduct by knowingly using false information from cooperating witnesses in both prosecutions, by delaying the indictment in the instant case to "gain tactical advantage," and by committing *Brady* violations in both prosecutions. *See generally id.* The Court rejected each of these arguments. *See* Text Order, Dkt. # 697.

Petitioner also argued that he would not have pleaded guilty to the CCE count had counsel informed him that the Court's authority to sentence below the statutory mandatory minimum was limited by 18 U.S.C. § 3553. In this motion, Petitioner conceded knowledge of the mandatory minimum at the time of his plea. *See* dkt. # 696, p. 18. The Court construed Petitioner's argument as a claim that Attorney Rench was constitutionally ineffective for failing to advise him of the Court's sentencing limitations in the face of a mandatory minimum. Because the Court had twice previously indicated the critical weaknesses of Petitioner's motions to withdraw his plea on the grounds of ineffective assistance of standby counsel, *see* Oct. 21, 2013 Dec. & Ord., Dkt. # 678, at 7, n. 6; Dec. 4, 2013 Dec. & Ord., dkt. # 690, at 2, the ineffective assistance argument raised in the second January 2, 2014 motion was summarily rejected. *See* Text Order, Dkt. # 697.

E. Sentencing

Petitioner was sentenced on January 7, 2014. *See* Dkt. # 700. At that time, the Court dismissed Counts 1 and 2 as duplicative of the CCE count. The Court determined that Petitioner's conduct in his federal weapons conviction, NDNY 08-CR-701 (DNH), was relevant conduct to the continuing criminal enterprise charged in Count 3. The Court determined Petitioner's United States Sentencing Guidelines offense level to be 36 and his criminal history category to be a I, with a resulting advisory Guidelines range of 188-235 months. Petitioner was, however, subject to a mandatory 240-month term of imprisonment on the CCE count, making that term his Guidelines sentence.

The Court credited Petitioner with the 62 months he already served in connection with his gun-related convictions, and imposed a term of 178 months (240 months minus 62 months) on each of the counts on which Petitioner entered his guilty plea. The Court ordered that the sentence run concurrently with the 78-month sentence imposed following Defendant's gun-related convictions.

F. Motion for an Indicative Ruling

Petitioner filed a notice of appeal on January 9, 2014. Dkt. No. 698. On March 5, 2015, while Petitioner's appeal was pending, he filed a motion requesting that the Court issue an "indicative ruling" on his claims then-pending before the Second Circuit. Dkt. # 725. Petitioner asked the Court to rule that if the case was remanded from the Second Circuit, Petitioner would be allowed to withdraw his guilty plea, or, in the alternative, indicate that his motion raised substantial issues that should be resolved in this court before the appeal was ruled upon. Dkt. # 725. Petitioner contended that such a course was required

because: 1) "the Court completely failed in its duty to advise Malachowski as to the statutory mandatory minimum sentence for [the] continuing criminal enterprise [count];" 2) "even a cursory review of the disclosed discovery materials and review of Malachowski's submissions, establishes *without a doubt* that defense counsel utterly failed in his obligation to review discovery and share it with Malachowski, mount a defense, investigate defensive leads and obtain evidence in support of the defense, violating Malachowski's due process rights and depriving Malachowski of effective assistance of counsel;"[11] and, 3) "Malachowski's conviction of nine distribution counts and nine importation counts violates the Double Jeopardy Clause." *Id.* (emphasis in original). The Court addressed the merits of each claim and rejected them. *See* June 15, 2015 Dec. & Ord., Dkt. # 753.

To the extent the arguments were directed to Attorney Rench's conduct while he was serving as counsel, the Court analyzed them as ineffective assistance of counsel claims under *Strickland v. Washington,* 466 U.S. 668 (1984). *See* June 15, 2015 Dec. & Ord., Dkt. # 753, at 26. In conducting this analysis, the Court explained the well-established test under *Strickland,* which requires a defendant to show both deficient performance by his counsel and prejudice as a result. *Strickland*, 466 U.S. at 687. The Court further explained:

> "[I]n the context of challenging a guilty plea, *Strickland*'s prejudice prong requires a defendant to show that 'there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would

[11]With regard to his claims of his counsel's constitutional ineffectiveness, Petitioner argued: "First, counsel did not discover obvious crucial missing reports that the government has now provided to [appellate counsel]; Second, counsel failed to review discovery that demonstrated that there was a strong likelihood that Sean Herrmann recanted his claim that Malachowski threatened him with a gun a year earlier than the government disclosed the recantation to Malachowski; Third, counsel failed to investigate the single objective witness, Owen Peters, [who] admitted heavy involvement in the marijuana case, and was in government custody twice, but was let go; and ... [F]ourth, counsel failed to utilize scores of discovery material that would have supported Malachowski's defense that he was a mere supplier and not a manager or supervisor to mount Malachowski's defense." Dkt. # 725, p. 5.

> have insisted on going to trial.'" *United States v. Garcia*, 57 Fed. Appx. 486, 489 (2d Cir. 2003)(quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed.2d 203 (1985)). This inquiry "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59. "[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Id.* "[T]hese predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 59-60 (quoting *Strickland*, 466 U.S. at 695).

Dkt. # 753, at 26.

Applying this standard, the Court rejected Petitioner's contention that he received ineffective assistance of counsel because he was denied "crucial" reports, finding no reason to suspect that the discovery materials at issue would have altered the outcome of a trial. *Id.* at 27-30.

The Court also rejected Petitioner's argument that Attorney Rench was ineffective because he failed to discover that Herrmann recanted his claim that Petitioner threatened him with a gun. *Id.* at 30-32. In rejecting this claim, the Court cited to its previous ruling that "[w]hether someone held a gun to Herrmann's head is irrelevant to determining whether Defendant committed the drug trafficking crimes charged in the Superseding Indictment," and that "[t]he alleged false statements are, at best, relevant for impeachment purposes, but do not go to the heart of the defendant's guilt or innocence." *Id.* at 30-31 (quoting Oct. 21, 2013 Dec. & Ord., dkt. # 678, at. 7). Thus, the Court found that "[t]he evidence of Herrmann's recantation was not evidence likely to have changed the outcome of a trial and,

therefore, does not meet the prejudice prong of *Strickland*." *Id.* at 31. The Court also rejected Petitioner's claim that Attorney Rench's failure to discover Herrmann's recantation prejudiced Petitioner by causing him to plead guilty, noting that "there is no constitutional right to a plea bargain," that the plea agreement had already been taken off the table when Petitioner determined to plead guilty, and that due process is not offended by a government's "take-it-or-leave-it" plea offer. Dkt. # 753, at 31-32 (citing *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)).

The Court also rejected Petitioner's claim that Attorney Rench was constitutionally ineffective because he failed to investigate Owen Peters, a co-defendant who purportedly "was in government custody twice, but was let go." *Id.* at 32. (quoting Def. Mot., at 6). The Court found that Attorney Rench's omission in investigating Peters failed to satisfy the prejudice prong of *Strickland*. *Id.*

The Court also rejected Petitioner's argument that Attorney Rench failed to utilize certain evidence, such as an organization chart submitted to the grand jury that purportedly failed to directly link Petitioner to five individuals and would have allowed Petitioner to contest the CCE count. *Id.* at 32-33. The Court rejected this claim because Petitioner agreed with the government's representation at the change of plea hearing that if the case had proceeded to trial, it would have proved through several cooperating witnesses, wiretap evidence, surveillance, and various seizures of both marijuana and currency that during the course of the alleged conspiracies Petitioner managed five or more individuals involved in a large drug smuggling and distribution organization. *Id.* at 33. The Court found that the material Petitioner pointed to would not have changed the outcome of a trial and, therefore,

did not satisfy the prejudice prong of *Strickland*. *Id.*

The Court also rejected Petitioner's argument that Attorney Rench "made an agreement with the government that scores of materials disclosed on May 21, 2013, would not be provided to Malachowski." *Id.* (quoting Def. Mot., at 7). Petitioner was referring to a standard protective agreement in which Attorney Rench (who was representing Petitioner at the time) agreed not disseminate to third parties, or provide hard copies to Malachowski, discovery disclosures that could endanger the safety of individuals or impede the prosecution of others. *Id.* at 33-34.[12] The Court noted that the protective agreement did not prevent Attorney Rench from reviewing the materials with Malachowski while the attorney-client relationship was still in existence, nor did it prevent Rench from providing the material to Malachowski once Rench was discharged and Malachowski proceeded *pro se*. *Id.* at 34. Moreover, the Court found that the allegedly withheld Jenks Act material would not have likely changed the outcome of a trial. *Id.*

Still further, the Court found that none of the allegedly withheld material was exculpatory on its face, but rather, as Petitioner characterized it, was "impeaching information." *Id.* at 36 (quoting Def. Mem. at 5). The Court noted that "because 'impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is voluntary ('knowing,' 'intelligent,' and 'sufficient[ly] aware'),' the Supreme Court held that the failure to disclose such information prior to a guilty plea does not violate the Due Process Clause." *Id.* (quoting *Friedman v. Rehal*, 618 F.3d 142, 153 (2d Cir. 2010) (in turn quoting *United States v. Ruiz*, 536 U.S. 622, 29 (2002)(emphasis in original)). Thus,

[12]This discovery included plea agreements, plea hearing transcripts, cooperation agreements, grand jury transcripts, audio recordings of telephone calls, and notes from a co-defendant's proffer session.

the Court found that even if the material had been withheld by the government, it would not have resulted in a due process violation affecting the voluntariness of Petitioner's guilty plea. *Id.* The Court also found that the information was not the type that would have changed the outcome of a trial, and therefore the claim was denied because it failed on the second prong of *Strickland*. *Id.* at 36-37.

G. Second Circuit Decision

The Second Circuit denied Petitioner's appeal by summary order. *Malachowski*, 623 F. App'x 562. In this appeal, Petitioner "challenge[d] the district court's denial of his motion to withdraw his guilty plea on the ground of procedural defects." *Id.*, at 563. Petitioner contended "that because he was inadequately advised that count three (continuing criminal enterprise) carried a mandatory minimum sentence of 20 years of imprisonment, his plea was involuntary." *Id.* In support of this contention he pointed out that the prosecutor did not use the word "minimum" when asked by the Court during the plea colloquy to advise Petitioner of the maximum and minimum penalties for to counts involved. *Id.*, at 565-64. The Circuit rejected this contention, noting that the prosecutor stated that "for '[c]ount [t]hree, the continuing criminal enterprise, the maximum term of imprisonment is a mandatory 20 years, up to life.'" *Id.*, at 563 (quoting plea colloquy). The Circuit found that "[i]n the context of the prosecutor's statement, 'mandatory' clearly modifies '20 years,' especially considering that the prosecutor was being asked to advise Malachowski as to the minimum and maximum penalties for count three." *Id.*, at 564 (citing *United States v. Cook*, 722 F.3d 477, 482 (2d Cir. 2013) (noting that "[t]he most logical understanding" of the plea colloquy at issue foreclosed defendant's Rule 11 challenge)).

The Circuit also found that, to the extent Petitioner suggested that his attorney was ineffective because he moved at sentencing for a downward departure,[13] Petitioner suffered no prejudice because the Court stated that it could not grant the motion in light of the statutory mandatory minimum. *Id.*

The Circuit rejected Petitioner's argument that his due process rights were violated because the government's proposed plea agreement required that he stipulate to a firearms enhancement, writing:

> It is undisputed that the proposed plea agreement was rejected by Malachowski because he refused to agree to the firearms stipulation. It is well-settled that criminal defendants have "no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed.2d 30 (1977). So, once the government withdrew its plea offer, the government had no obligation to re-offer Malachowski the same deal to account for the falsity in Herrmann's statement. *See United States v. Gonzalez–Vazquez*, 219 F.3d 37, 42 (1st Cir.2000) ("[T]he government was under no obligation to leave its original plea offer open."). More importantly, Malachowski's assertion that Herrmann's statement was the only basis for the firearms enhancement is belied by his counsel's recommendation that Malachowski's gun possession sentence run concurrently, arguing in effect that Malachowski's possession of firearms was relevant conduct to the continuing criminal enterprise at issue in this case.

Id. (record citations omitted).

The Circuit also rejected Petitioner's Fifth Amendment Double Jeopardy Clause challenge "because counts five through 13 charged him with nine different importation charges, at different times, and counts 16 through 24 charged him with nine different distribution charges, again during separate time periods." *Id.* (citing *Blockburger v. United States*, 284 U.S. 299, 301, 52 S. Ct. 180, 76 L. Ed. 306 (1932) and *United States v. Estrada*, 320 F.3d 173, 180 (2d Cir. 2003)). The Circuit also found that "this result is

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[13]It is unclear from the summary order the basis for this ineffective assistance claim.

dispositive of Malachowski's multiplicity claim, which also requires that the charged offenses be the same in law and fact." *Id.* (citing *United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006)).

The Circuit declined to address Petitioner's claim "that counsel was ineffective for failing to withdraw his guilty plea once it became clear that Herrmann's statement was false," finding the claim was "not cognizable on direct appeal." *Id.* at 565 (citing *Massaro v. United States*, 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed.2d 714 (2003) ("[I]n most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance."); *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003) (highlighting the Second Circuit's "baseline aversion to resolving ineffectiveness claims on direct review") (internal quotation marks omitted)). Finally, the Circuit found no merit to Petitioner 's "other arguments." *Id.*

III. STANDARD OF REVIEW

a. Section 2255

A § 2255 challenge is limited to claims 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." 28 U.S.C. § 2255; *see Graziano v. United States,* 83 F.3d 587, 590 (2d Cir. 1996).[14] In a Section 2255 proceeding, the petitioner bears the burden of proof by a preponderance of the evidence, *see Triana v. United States,*

[14](Relief pursuant to section 2255 is available 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.'")(quoting *United States v. Bokun,* 73 F.3d 8, 12 (2d Cir. 1995) (internal quotation marks and citations omitted)).

205 F.3d 36, 40 (2d Cir. 2000), generally setting "forth his or her legal and factual claims, accompanied by relevant exhibits: *e.g.*, an affidavit from the petitioner or others asserting relevant facts within their personal knowledge and/or identifying other sources of relevant evidence." *Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009). To warrant an evidentiary hearing "the 'application must contain assertions of fact that a petitioner is in a position to establish by competent evidence . . . Airy generalities, conclusory assertions and hearsay statements will not suffice.'" *Haouari v. United States*, 510 F.3d 350, 354 (2d Cir. 2007) (quoting *United States v. Aiello*, 814 F.2d 109, 113 (2d Cir. 1987)).

A district court has the authority to dismiss a motion to vacate under Section 2255 without a hearing if the record conclusively shows that the petitioner is not entitled to relief. 18 U.S.C. § 2255; *see also Pham v. United States*, 318 F.3d 178, 184 (2d Cir. 2003) (noting that the district court is entitled to rely on court records, affidavits, and letters in determining how to address a motion to vacate). Furthermore, "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion." *Puglisi*, 586 F.3d at 213 (quoting Rules Governing § 2255 Proceedings for the United States District Courts, Rule 4(b)).

b. Exhaustion Requirements

"A motion under § 2255 is not a substitute for an appeal." *De Jesus v. United States*, 161 F.3d 99, 102 (2d Cir. 1998) (quoting *United States v. Munoz*, 143 F.3d 632, 637 (2d Cir.1998)). "It is well established that a § 2255 petition cannot be used to relitigate questions which were raised and considered on direct appeal." *United States v. Pitcher*, 559 F.3d 120, 123 (2d Cir. 2009) (citations and quotation marks omitted).

Furthermore,

> [i]n general, a defendant is barred from collaterally challenging a conviction under § 2255 on a ground that he failed to raise on direct appeal. *See Yick Man Mui v. United States*, 614 F.3d 50, 53–54 (2d Cir. 2010); *Zhang v. United States*, 506 F.3d 162, 166 (2d Cir. 2007). An exception applies, however, if the defendant establishes (1) cause for the procedural default and ensuing prejudice or (2) actual innocence. *See Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed.2d 828 (1998); *accord Zhang v. United States*, 506 F.3d at 166.

United States v. Thorn, 659 F.3d 227, 231 (2d Cir. 2011).

"The Supreme Court has stated that "cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot be fairly attributed to him.'" *Marone v. United States*, 10 F.3d 65, 67 (2d Cir. 1993) (quoting *Coleman v. Thompson*, 501 U.S. 722 (1991) (emphasis in original)). In order to demonstrate actual innocence, a petitioner must prove his "factual innocence, not mere legal insufficiency," and "demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995)).

c. Ineffective Assistance of Counsel

The "general rule" that "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice" does not apply to claims of ineffective assistance of counsel. *Massaro v. United States*, 538 U.S. 500, 504 (2003). In order to state a Sixth Amendment claim for ineffective assistance of counsel, a petitioner must prove: "(1) counsel's conduct 'fell below an objective standard of reasonableness,' and (2) this incompetence caused prejudice to . . . defendant." *United States v. Guevara*, 277 F.3d 111, 127 (2d Cir. 2001)(quoting *Strickland v. Washington*, 466 U.S. 668, 687-88

(1984)). The general standard for ineffective assistance of counsel articulated in *Strickland* applies to both trial and appellate counsel. *See McKee v. United States*, 167 F.3d 103, 106 (2d Cir. 1999) (*Strickland* standard also applies to effectiveness of appellate counsel).

In analyzing the first prong of *Strickland*, the Court "must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Given this presumption, "the burden rests on the accused to demonstrate a constitutional violation." *United States v. Cronic,* 466 U.S. 648, 658 (1984). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The Court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690. The standard is one of objective reasonableness, and "[t]he first prong of the *Strickland* test is not satisfied merely by showing that counsel employed poor strategy or made a wrong decision. Instead, it must be shown that counsel 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment.'" *Jackson v. Moscicki*, 2000 WL 511642, at * 7 (S.D.N.Y. April 27, 2000)(quoting *Strickland,* 466 U.S. at 687); *see Kimmelman v. Morrison,* 477 U.S. 365, 381 (1985) (Petitioner bears the burden of proving "that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.") (citing *Strickland,* 466 U.S. at 688-89). In evaluating attorney performance "every effort [must] be made to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

perspective at the time." *Strickland*, 466 U.S. at 694.

In the appellate context, "counsel 'need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Sheehan v. United States*, No. 13-CR-186, 2018 WL 1796548, at *2 (E.D.N.Y. Apr. 16, 2018)(quoting *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed.2d 756 (2000)). "Courts should not 'second-guess reasonable professional judgments and impose ... a duty to raise every 'colorable' claim suggested by a client.'" *Id.* (quoting *Jones v. Barnes*, 463 U.S. 745, 754, 103 S. Ct. 3308, 77 L. Ed.2d 987 (1983)). "However, a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Clark v. Stinson*, 214 F.3d 315, 322 (2d Cir. 2000) (citing *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994)).

To satisfy the second prong of *Strickland*, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. As indicated above, "in the context of challenging a guilty plea, *Strickland's* prejudice prong requires a petitioner to show that 'there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial.'" *Garcia*, 57 Fed. Appx. at 489 (2d Cir. 2003)(quoting *Hill*, 474 U.S. at 59). This inquiry "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59.

"[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Id.*

IV. DISCUSSION

A. Sixth Amendment Right to Effective Assistance of Counsel (Ground I)

Petitioner argues that he was deprived of his Sixth Amendment right to counsel because his three appointed trial attorneys provided ineffective assistance, and because the Court denied his requests to appoint a fourth and adjourn the trial. *See* Pet. Mem. at 8-22, and *passim*. These arguments are without merit.

1. Attorney Marc A. Zuckerman

Petitioner argues that his first-appointed attorney, Marc A. Zuckerman, Esq., was constitutionally ineffective because he purportedly advised Petitioner to consider cooperating with the government and enter a plea agreement even though he had not yet reviewed the discovery materials. The claim regarding Mr. Zuckerman fails on the second prong of *Strickland* because, long after Mr. Zuckerman was relieved, Petitioner proceeded *pro se* and pleaded guilty to the charges in the Superseding Indictment. Petitioner fails to establish any deficiency in Mr. Zuckerman's representation that caused Petitioner to determine to plead guilty. The claim in this regard is denied.

2. Attorney Gaspar M. Castillo

Petitioner argues that a second-appointed attorney, Gaspar M. Castillo, Esq., was constitutionally ineffective because he: (1) did not file a Rule 33 motion in NDNY 08-CR-701 (DNH); (2) failed to "unearth" evidence that, in NDNY 08-CR-701 (DNH), the government disclosed two audiotapes that had purportedly been edited; (3) failed to disprove Herrmann's claim related to Petitioner's use of a gun, thereby failing to discover *Brady* material and impeding the plea negotiation process; and (4) advocated that Petitioner accept the government's plea offer that included the firearms enhancement. These arguments are rejected for the following reasons.

First, Mr. Castillo did not represent Petitioner in NDNY 08-CR-701 (DNH). His failure to file a motion in that case (which he had no obligation to do) did not affect the case in this court, and therefore the claim fails on the second prong of *Strickland*. Second, the purportedly edited audiotapes in NDNY 08-CR-701 (DNH), if discovered, would have provided, at most, impeachment material in the instant case.[15] This impeachment material, like the impeachment material addressed in previous decisions, would not have changed the outcome of a trial and, consequently, would not have altered the decision to plead guilty. Thus, Petitioner presents no meritorious ineffective assistance of counsel claim against Mr. Castillo for failing to discover this evidence. Third, Mr. Castillo was relieved as counsel before Petitioner entered his guilty plea *pro se*, thereby preventing Petitioner from demonstrating prejudice from Mr. Castillo's conduct. Fourth, for the reasons discussed with regard to Mr. Rench in the decisions relative to the evidence of Herrmann's recantation and

[15]Petitioner's argument only enforces the conclusion that purportedly altered tapes in NDNY 08-CR-701 (DNH) (which was tried in Utica, New York) would provide, at most, impeachment material in this case. *See* Def. Mem. at 25 ("The materiality of this forensic evidence lends not only *Brady* material *to the Utica matter*, but additionally presents material relevant to the instant matter. . . . Notably this evidence casts an undeniable doubt over the accuracy of the entirety of government evidence.")(emphasis added).

the asserted *Brady* violations, Petitioner states no viable ineffective assistance of counsel claim against Mr. Castillo. Further, Mr. Castillo's purported deficiency in ferreting out the falsity of Mr. Herrmann's claim caused Petitioner no prejudice in the "plea negotiation process" because, as indicated by the Second Circuit, criminal defendants have no constitutional right to plea bargain. And fifth, Petitioner has no viable ineffective assistance counsel claim against Mr. Castillo because he advocated for Petitioner to enter a plea agreement. The uncontested facts indicate Petitioner pleaded guilty to all counts against him without a plea agreement, and was subsequently assessed a firearms enhancement based on his conduct in NDNY 08-CR-701 (DNH). The plea agreement on the table at the time of Mr. Castillo's representation, even with the firearms enhancement, would have avoided the CCE 20-year mandatory minimum sentence. Thus, Petitioner fails to establish that he suffered prejudice by Mr. Castillo's advice to enter the proposed plea agreement. All claims based on Mr. Castillo's representation are denied.

3. Attorney Frederick Rench

Petitioner asserts several claims of ineffective assistance of counsel involving Mr. Rench, most of which have been rejected by this Court and/or the Second Circuit.

a. Conflict of Interest & Breach of Loyalty

Petitioner argues that he received constitutionally ineffective assistance of counsel from Mr. Rench because Rench operated under a "conflict of interest"[16] and breached his

[16]This contention is based on the fact that Mr. Rench had applied for a position with the United States Attorney's Office one year prior to being relieved on June 4, 2013.

"duty of loyalty" to Petitioner.[17] The asserted bases for the alleged "conflict of interest" and "breach of loyalty" were addressed by the Court at the June 4, 2013 pretrial conference and found not to be improper. Dkt. # 637, at 3-5. Nevertheless, the Court granted Petitioner's motion to discharge Mr. Rench and allowed Petitioner to proceed *pro se*.[18] Petitioner fails to demonstrate that he suffered prejudice because of Mr. Rench's alleged conflict of interest or breach of loyalty. *See United States v. Davis*, 239 F.3d 283, 286 (2d Cir. 2001)("[W]here a defendant's ineffective assistance of counsel claim is based on an alleged conflict of interest, a defendant is entitled to a presumption of prejudice if he can demonstrate that his attorney labored under an actual conflict of interest and that the actual conflict of interest adversely affected his lawyer's performance.")(internal quotation marks omitted). Petitioner entered his guilty plea after Mr. Rench was discharged and was serving only as standby counsel. "[W]ithout a constitutional right to standby counsel, a defendant is not entitled to relief for the ineffectiveness of standby counsel." *Morrison*, 153 F.3d at 55; *see Malachowski*, 623 F. App'x at 564, n. 2 ("[B]ecause Malachowski entered his plea of guilty

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[17]Petitioner asserted that Mr. Rench breached his "duty of loyalty" by addressing with the government the evidentiary issue of spousal privilege in relation to the expected testimony of co–conspirator Selena Hooper. Petitioner claims Hooper is his common-law wife.

[18] It should also be noted that after Petitioner pled guilty, he moved to have Mr. Rench reappointed. On this issue, the government argues:

> As Mr. Rench explained more fully in his June 8, 2014 affidavit, it was on May 9, 2013, immediately after Mr. Rench told Petitioner that the Court had denied Petitioner's request for an adjournment, that Malachowski told Rench he intended to represent himself at trial. (*See* United States' Mem. of Law in Opposition to Defendant's Motion for Indicative Ruling, Dkt. No. 747 at Exhibit 1 ¶ 7). This is significant for two reasons: First, it evidences that Petitioner's actual objective was to further delay the trial, and not to address a perceived conflict of interest. Second, Petitioner's reaction upon learning of the Court's denial of the adjournment request was to tell Mr. Rench that he intended to represent *himself*, not that he intended to seek another attorney based upon Mr. Rench's supposed conflict of interest.

Gov. Mem. at 16-17.

pro se and counsel at this point was operating only as standby counsel before being reappointed, Malachowski is precluded from bringing an ineffective assistance claim arising from this conduct.")(citing *Morrison*, 153 F.3d at 55); *see also Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975) ("a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel'"); *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997) ("Because Schmidt proceeded *pro se*, she may not now assign blame for her conviction to standby counsel").

Petitioner's argument that Mr. Rench, although standby counsel, participated "too fully" at the plea proceeding[19] leading Petitioner to believe the Court could sentence below the statutory minimum without a § 3553(e) motion is belied by the record. At the change of plea hearing, the Court asked Petitioner whether he had any discussion with counsel and whether he did any research himself about "what the consequences of pleading guilty or . . . the potential sentences would be." Plea Trans. p. 6. Petitioner responded that he had "done both," and that he understood the consequences of pleading guilty and the potential sentences. *Id.* There is no evidence in the record that Mr. Rench stated anything at the plea proceeding that would have led Petitioner to believe he could be sentenced below the statutory minimum without a § 3553(e) motion. Petitioner's representation that he understood the potential sentences based on his own research defeats any ineffective assistance of counsel claim against Mr. Rench arising from Petitioner's *pro se* decision to

[19]In making this argument, Petitioner cites to the Court's December 4, 2013 Decision and Order where it held that "[a]bsent evidence that counsel was 'standby' in name only, there can be no ineffective assistance of counsel claim with respect to [Mr. Rench]." Dec. 4, 2013 Dec. & Ord., dkt. # 690, at 2 (citing *Morrison*, 153 F.3d at 55; *Schmidt*, 105 F.3d at 90).

plead guilty.

Petitioner also fails to demonstrate that he suffered prejudice by Mr. Rench's representation at sentencing. *See Malachowski*, 623 F. App'x at 564 (finding no merit to a claim that Mr. Rench was ineffective because he moved at sentencing for a downward departure, noting that the Court rejected the motion and thus Petitioner suffered no prejudice by it); *id.* ("Malachowski's assertion that Herrmann's statement was the only basis for the firearms enhancement is belied by his counsel's recommendation that Malachowski's gun possession sentence run concurrently, arguing in effect that Malachowski's possession of firearms was relevant conduct to the continuing criminal enterprise at issue in this case."). Other than Petitioner's conclusory assertion that Mr. Rench's representation at sentencing caused him prejudice, he fails to point to any specific act or omission by Rench causing Petitioner's sentence to be greater than the statutory mandatory minimum. Accordingly, these claims are denied under the second prong of *Strickland*.

b. Racial Hostility

Petitioner argues that Mr. Rench was constitutionally ineffective because he bore a "racially prejudicial view of [P]etitioner" as demonstrated by an email Rench sent to prosecutors when it appeared the Court might move the trial to a date earlier than June 4, 2013, stating that "it's about time to circle the wagons." Def.'s Mem. at 20. Petitioner asserts that he is an American Indian born in Canada. Dkt. # 782. The allegation of racial prejudice being demonstrated by this email is baseless.[20] Moreover, for the reasons

[20]As the government indicates, on March 22, 2013 after the undersigned was assigned this case, a Court representative contacted the prosecutor and Attorney Rench to schedule a telephonic pretrial conference to discuss whether trial would be rescheduled for a date earlier than June 4, 2013. Coffman Aff., ¶ 4. The prosecutor and Mr. Rench apparently had previously discussed their desires to have the trial go (continued...)

discussed above, Petitioner fails to demonstrate that he suffered any prejudice by Mr. Rench's representation.

c. Failure to Move to Withdraw Guilty Plea

Petitioner argues that Mr. Rench was constitutionally ineffective because, once reappointed, he failed to move to withdraw the guilty plea. The argument is without merit. As indicated by the Court's decisions rejecting Petitioner's numerous motions raising the same issues presented here, there was no meritorious basis to withdraw the guilty plea. Thus, the claim fails on *Strickland*'s first prong because, when considering all the circumstances, and making "every effort to eliminate the distorting effects of hindsight," Petitioner cannot demonstrate that Mr. Rench's failure to make such a motion fell "outside the wide range of professionally competent assistance." *Lindstadt v. Keane*, 239 F.3d 191, 198–99 (2d Cir. 2001); *see United States v. Rivernider*, 828 F.3d 91, 108 (2d Cir.), *cert. denied sub nom. Ponte v. United States*, 137 S. Ct. 456, 196 L. Ed. 2d 336 (2016)("[W]e conclude that the proper question, where a defendant's lawyer declines to move on the defendant's behalf to withdraw a guilty plea, is whether the lawyer's judgment fell outside the bounds of professional competence, so as to constitute ineffective assistance of counsel."); *see also Strickland*, 466 U.S. at 694 (In evaluating attorney performance "every

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[20](...continued)
forward on June 4, not an earlier dated. *Id.* ¶ 3. Ten minutes after receiving the telephone call from the Court representative, Attorney Rench sent an email to the government that simply stated: "Well, boys, I guess it's about time to circle the wagons." *Id.*, ex. A. The prosecutor "understood, based upon [his] discussions with Mr. Rench both prior to and after the Court's March 22, 2013 call, that Mr. Rench was referring in his email to our agreement that, if the Court were to consider moving the trial to an earlier date, we would jointly ask that the Court not do so." *Id.* ¶ 5. The prosecutor "did not understand Mr. Rench's use of [the phrase circle the wagons] to be a reference to anyone's race, or a reference to Mr. Malachowski." *Id.* ¶ 6. A review of this email in context indicates that the "circle the wagons" statement was not a reference to anyone's race, but rather a request that he and the government jointly request the Court not to move the trial to an earlier date. Petitioner 's suggestion that Attorney Rench's email reflects a "racially prejudicial" view of the Petitioner is baseless and does not support his ineffective assistance of counsel claim.

effort [must] be made to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

Furthermore, even assuming the failure to make the motion was outside the wide range of professionally competent assistance, the claim fails on *Strickland*'s second prong. Such a motion, if made by counsel, would have been denied for the same reasons that Petitioner's various motions were denied. The motion on this ground is denied.

d. Failure to Conduct Investigation

Petitioner argues that he was deprived of effective assistance of counsel because Mr. Rench failed to conduct a "reasonable investigation" and locate and secure the testimony of co-defendant Owen Peters. Pet Mem. at 53-54. The argument is without merit.

As Petitioner concedes, the government represented at trial that it could not locate Peters, a fugitive believed to be in Canada. *Id.* at 54. Mr. Rench's failure to locate a fugitive that the government could not locate does not constitute conduct falling below an objective standard of reasonableness. Thus, the claim fails on the first prong of *Strickland*.

The claim also fails on the second prong of *Strickland*. Petitioner's arguments is primarily addressed to purported[21] "exculpatory material" that Peters would have provided relative to Petitioner's federal weapons prosecution in NDNY 08-CR-701 (DNH). *See* Pet. Mem., at 53-54; *id.* at 53.[22] Plaintiff fails to demonstrate that he suffered prejudice in this

[21]Petitioner provides no affidavit from Peters, but simply asserts what he believes Peters would have testified to if called as a witness.

[22] ("Peters would have provided exculpatory material completely supporting petitioner's innocence to the Utica matter.")

case by Rench's failure to locate Peters to secure his testimony about the federal weapons prosecution.

To the extent Petitioner contends Peters might have provided impeachment testimony relevant to this case, *see* Pet. Mem. at 54,[23] this type of evidence, as the Court previously indicated, is not evidence likely to have changed the outcome of a trial, and therefore does not meet the prejudice prong of *Strickland.* Petitioner's argument that Peters would have provided *Brady* exculpatory material in this case is based on nothing more than airy generalities and conclusory assertions. *See id.*, at 54.[24] This is insufficient to warrant a hearing on the matter, especially because it appears doubtful that Peters would return to the United States to testify. Moreover, Petitioner's conclusory allegations about Peters' purported testimony are insufficient to rebut Petitioner's sworn statements made during the "grave and solemn act" of pleading guilty that he managed and supervised at least five individuals. *United States v. Hyde*, 520 U.S. 670, 677, 117 S. Ct. 1630, 137 L. Ed.2d 935 (1997); *see United States v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997).[25] Petitioner fails to meet his burden of establishing that there is a reasonable probability that, if Mr. Rench could have had located Peters and secured his testimony, Petitioner would not have pleaded guilty and would have insisted on going to trial. Thus, the claim is denied

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[23] ("Peters would have also provided valuable material contradicting statements and protential testimony provided by key government witnesses . . . .")

[24]("Peters would have proved valuable material contradicting statements and potential testimony provided by key government witnesses. . . . Peters would have proven invaluable . . . confirming individuals involved in the alleged conspiracy worked independently and separately from one another . . . . Peters himself would have been forced to admit working with other individuals independent of . . . working for the petitioner.")

[25] ("A defendant's bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea.")

because it fails on the second prong of *Strickland*.

e. Miscellaneous Conduct

To the extent Petitioner alleges that Mr. Rench was constitutionally ineffective because he "had not visited him prior to May 4, 2013, to prepare for trial; had withheld discovery from him; had not pursued any investigation; had failed to obtain his passport from the government as petitioner had requested; had not pursued defenses related to discovery; and had not sought assistance of an investigator or polygraph expert," Pet. Mem. at 16, the claims are denied because Petitioner fails to demonstrate prejudice arising from this conduct. As indicated, Petitioner determined to plead guilty to each of the charges against him after Mr. Rench was discharged. Moreover, Petitioner admitted at the change of plea hearing that he received sufficient discovery from the government so as to "consciously and intelligently and knowingly make a decision to plead guilty rather than continue to trial," Change of Plea Trans., p. 37, that he did not have any viable defenses to the charges, *id.*, p. 39, and that he engaged in conduct that supported his conviction on each of the charges to which he pled guilty. *Id.*, pp. 29-31.

The fact that Petitioner obtained a forensic analysis in February 2015 that indicated that two of the audiotapes disclosed in NDNY 08-CR-701 (DNH) may have been tampered with does not change this analysis. *See* Dkt. # 146-1 in NDNY 08-CR-701 (DNH)(02/19/15 Forensic Report). As explained with regard to a similar claim against Mr. Castillo, the evidence from the weapons prosecution was at most impeachment material that would not have changed the outcome of a trial, and, consequently, provides an insufficient basis to conclude that Petitioner would not have pled guilty.

Petitioner's other claims of Attorney Rench's alleged constitutional ineffectiveness are rejected for the reasons stated by the Court in the previous decisions in this matter, and by the Second Circuit. Because Petitioner fails to establish prejudice arising from Mr. Rench's representation, his claims of constitutional ineffectiveness against this attorney fail on the second prong of *Strickland*.

4. Appointment of Fourth Trial Counsel

There are two critical weaknesses with Petitioner's argument that his Sixth Amendment rights were violated by the Court's failure to appoint a fourth attorney. First, Petitioner did not request such an appointment. *See* Dkt. # 623; 06/04/13 Trans., Dkt. # 637, p. 12. Rather, after the Court denied Petitioner's seventh request for a trial adjournment, Petitioner filed a motion to remove Mr. Rench as counsel, proceed *pro se*, and for a 90-day adjournment of the trial. Dkt. # 623. Petitioner did not request in his motion or at the at the June 4, 2013 pretrial conference that a fourth attorney be appointed. *See* 06/04/13 Trans., Dkt. # 637, p. 12. It is disingenuous to now argue that he was deprived of his Sixth Amendment right to counsel because a fourth attorney was not appointed when Petitioner indicated his desire to proceed *pro se.*

Second, the denial of the appointment of a fourth attorney is not an ineffective assistance of counsel claim within the meaning of *Strickland*. It does not challenge the conduct of an attorney, but rather assigns error to the Court's decision to proceed without such an appointment. Because it is not a *Strickland* claim, Petitioner could have raised the issue on direct appeal but apparently did not. Petitioner fails to demonstrate cause for failing to raise the claim or resulting prejudice, and therefore the claim is procedurally

barred.[26]

5. Denial of Trial Adjournment

Petitioner also argues that the Court's decision to deny him a further adjournment of the trial reflected "an unreasoning and arbitrary insistence upon expeditiousness." *Id.* at 10. In light of the exceedingly lengthy period of time that this matter had been pending and Petitioner's previous adjournment requests made on the eve of trial,[27] the Court sees no error in denying Petitioner's May 30, 2013 request for further adjournment of the June 4, 2013 trial date. Furthermore, this claim is barred because Petitioner either did not raise the issue in his appeal and fails to establish (1) cause for the procedural default and ensuing prejudice, or (2) actual innocence; or because he raised it on appeal and the Second Circuit rejected it.

B. Deprivation of Fifth Amendment Due Process Rights as a Result of *Brady* Violations (Ground II)

Petitioner argues that newly discovered forensic evidence establishes that agents of the government deliberately altered exculpatory evidence, and that the government withheld *Brady* material, causing a Fifth Amendment due process violation. Pet. Mem. at 39. His argument that the government withheld *Brady* material has, in large part, already been considered by this Court and rejected. *See* June 15, 2015 Dec. & Ord. Dkt. No. 746. To the extent the motion raises new matters that Petitioner contends reflect a deprivation of

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[26]If the claim was raised on appeal, it was evidently rejected in the final paragraph of the Circuit's decision and cannot be reasserted here.

[27]Petitioner had twice earlier obtained adjournments of the trial date just five days prior to trial. First, immediately following the aborted July 12, 2012 change of plea hearing, *see* Dkt. No. 533, and later, in October 2012, based upon his allegations that Attorney Castillo had provided ineffective assistance of counsel. *See* Dkt. No. 563.

Brady material, he focuses his arguments on what is, at most, impeachment material. As this Court noted in its earlier decision, "because 'impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is voluntary ('knowing,' 'intelligent,' and 'sufficient[ly] aware'),' the Supreme Court held that the failure to disclose such information prior to a guilty plea does not violate the Due Process Clause." *Friedman*, 618 F.3d at 153 (quoting *Ruiz*, 536 U.S. at 29 (emphasis in original)). Furthermore, the forensic report on which Petitioner relies was sent to his appellate counsel in February 19, 2015. This was well in advance of the Second Circuit's decision in this case, leading to the conclusion that this issue could have been raised with the Second Circuit. If it was not, Petitioner is barred from raising it now because he fails to establish cause and prejudice, or his actual innocence. If it was raised to the Second Circuit, the claim is barred because Petitioner cannot relitigate the issue here. For these reasons, the motion in this regard is denied.

C. Deprivation of Fifth Amendment Due Process Rights Because Guilty Plea was Improperly Influenced and Coerced by a Misrepresentation of Law by Trial Counsel (Ground III)

Petitioner argues that his due process rights were violated as a result of his conversation with standby counsel just prior to his entry of the guilty plea. *See* Pet. Mem. at 51. The thrust of Petitioner's argument is that he did not understand at the time of his guilty plea that his plea would subject him to a mandatory minimum 20 year sentence. This argument has already been considered and rejected by this Court, *see* June 15, 2015 Dec. & Ord., Dkt. No. 753, at 17-24, and the Court of Appeals. *See Malachowski*, 623 Fed. Appx. 562. Based on the reasoning stated in these decisions, the claim on this ground is

denied.

D. Appellate Counsel Provided Ineffective Assistance (Ground IV)

Petitioner argues that his appellate counsel provided ineffective assistance in pursuing the appeal of his conviction. Petitioner provides a number of arguments that he suggests appellate counsel should have made, see Pet. Mem., at 25-36, 55-58, the majority of which are issues rejected by this Court in its decisions in this matter. The claims fail under the first prong of *Strickland* because Petitioner fails to establish that appellate counsel opted not to raise "significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo*, 13 F.3d at 533. Indeed, as shown by the rejection of Petitioner's various pre-appeal motions and of his instant claims of trial-counsel ineffectiveness, the substantive claims that Petitioner urges should have been advanced on appeal are meritless. *See Mena v. Heath*, No. 11CV3681-ALC-FM, 2016 WL 7767005, at *14 (S.D.N.Y. May 31, 2016) ("Mena's appellate counsel consequently could not have been ineffective merely because he declined to raise nonmeritorious ineffective assistance claims as part of Mena's direct appeal."), *report and recommendation adopted*, No. 11CV03681ALCFM, 2017 WL 167915 (S.D.N.Y. Jan. 13, 2017); *Lewin v. Ercole*, No. 05 Civ. 10339(BSJ)(MHD), 2012 WL 2512016, at *8 (S.D.N.Y. June 28, 2012) ("Since the Court has found that Petitioner's Sixth Amendment claim regarding his trial counsel's performance is meritless, Petitioner's appellate counsel cannot be found ineffective for choosing not to pursue this claim on appeal."); *Feliciano v. United States*, Nos. 01 Civ. 9398, 95 Cr. 941(PKL), 2004 WL 1781005, at *8 (S.D.N.Y. Aug. 10, 2004) ("Because petitioner's ineffective assistance claim is without merit, counsel's decision not to pursue the

claim on appeal was certainly not an omission of a significant issue.").

Moreover, other than making airy generalities about the strength of most of the arguments not raised, Petitioner fails to establish that any would have affected the outcome of the appeal. As indicated, the majority of these arguments were issues already rejected by the Court in its decisions in this matter. Accordingly, even if Petitioner could establish that appellate counsel's representation fell below an objective standard of reasonableness in failing to raise these arguments, he is unable to establish that he suffered prejudice because the claims were not raised.

There is also no merit to Petitioner's argument that the Second Circuit "misapplied" *United States v. Cook*, 722 F.3d 477 (2d Cir. 2013) in determining that the Petitioner was properly advised of the CCE mandatory minimum, or that appellate counsel was constitutionally ineffective because she failed to convince the Circuit Court that the Rule 11 plea colloquy was improper. *See* Pet. Mem., at 57-58. A section 2255 motion is not the proper forum to appeal a decision of the Court of Appeals. Petitioner's desire to reargue the merits of his appeal does not make out a viable ineffective assistance of appellate counsel claim. For these reasons, Petitioner's claims of appellate-counsel ineffectiveness are denied.

E. The Sentence Violates the Fifth Amendment's Double Jeopardy Clause.

Finally, Petitioner's argument that the Court's sentence violates the Double Jeopardy Clause has already been adjudicated by this court, *see* June 15, 2015 Dec. & Ord., Dkt. No. 753, at pp. 24-25, and the Court of Appeals. *Malachowski*, 623 Fed. Appx. 562. For the reasons discussed in these decisions, and because Petitioner cannot re-litigate in a § 2255

motion an issue decided by the Second Circuit, Petitioner 's argument in this regard is rejected.

F. Conclusion - Section 2255 Motion

For the reasons set forth above, Petitioner's § 2255 motion is denied in its entirety, and the § 2255 petition is dismissed.

V. MOTION FOR DISCOVERY

Because Petitioner's §2255 motion is denied without the need for a hearing, Petitioner's motion to conduct discovery is denied as moot.

VI. CERTIFICATE OF APPEALABILITY

The Court finds that Petitioner fails to present viable issues upon which reasonable jurists could debate whether: (a) the sentence was imposed in violation of the Constitution or laws of the United States; (b) the Court was without jurisdiction to impose such sentence; (c) the sentence was in excess of the maximum authorized by law; or (d) the sentence is otherwise subject to collateral attack. Therefore, a Certificate of Appealability pursuant to 28 U.S.C. § 2253 is denied. *See Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1039-40 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

VII. CONCLUSION

For the foregoing reasons, Petitioner's motion pursuant to 28 U.S.C. § 2255 [Dkt. # 827] is **DENIED** and his petition is **DISMISSED**. Petitioner's motion to conduct discovery [Dkt. # 835] is **DENIED as moot**. A Certificate of Appealability pursuant to 28 U.S.C. § 2253 is **DENIED**.

IT IS SO ORDERED.

Dated: June 11, 2018

Thomas J. McAvoy
Senior, U.S. District Judge

MANDATE

N.D.N.Y.
16-cv-1547
09-cr-125
McAvoy, 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 19th day of December, two thousand eighteen.

Present:

Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Marcel Malachowski,

Petitioner-Appellant,

v. 18-2316

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability ("COA"), appointment of counsel, to extend time to file briefs, and to suspend further filings of COA motions. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is 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

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 04/24/2019