E.D.N.Y.-Bklyn
99-cr-520
06-cv-3743
Korman, 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 26th day of June, two thousand nineteen.

Present:

Pierre N. Leval,
Rosemary S. Pooler,
Denny Chin,
Circuit Judges.

Fabrizio DeFrancisci,

Petitioner-Appellant,

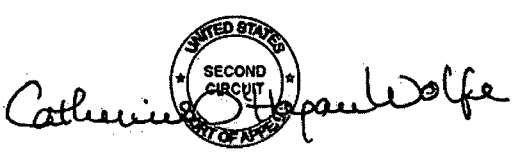
v. 19-363

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability and appointment of counsel. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has failed to show that "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a constitutional right." *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001).

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



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 13th day of September, two thousand nineteen.

Fabrizio Defrancisci,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee

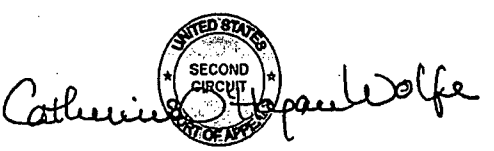
ORDER

Docket No: 19-363

Appellant Fabrizio Defrancisci, 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



MANDATE

E.D.N.Y.-Bklyn
99-cr-520
06-cv-3743
Korman, J.

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

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

MANDATE ISSUED ON 10/04/2019

2d 2255

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

FABRIZIO DEFRANCISCI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

----------X

JUDGMENT
06-CV- 3743 (ERK)

A Memorandum and Order of Honorable Edward R. Korman, United States District Judge, having been filed on February 20, 2009, denying the petition for a writ of habeas corpus; it is

ORDERED and ADJUDGED that petitioner take nothing of the respondent; and that judgment is hereby entered denying the petition for a writ of habeas corpus.

Dated: Brooklyn, New York
February 23, 2009

ROBERT C. HEINEMANN
Clerk of Court

By s/Terry Vaughn
Chief Deputy

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

----------X

FABRIZIO DEFRANCISCI,

- against -

UNITED STATES OF AMERICA

MEMORANDUM & ORDER

No. 06-CV-3743 (ERK)

----------X

KORMAN, J.:

I assume familiarity with the underlying background of this case. Briefly, pursuant to a plea agreement, which enabled petitioner to avoid pleading guilty to a count of the indictment that carried a mandatory life sentence, petitioner pled guilty to Count One of a seven count superseding indictment (99-CR-520) which alleged that he and others were persons employed by and associated with the Bonanno Family, an enterprise engaged in, and the activities of which, affected interstate commerce through a pattern of racketeering activity. The activity in which petitioner engaged included predicate acts of murder, conspiracy to commit murder, extortion, and conspiracy to distribute cocaine and cocaine base. Petitioner also pled guilty to four counts of bank burglary contained in a separate thirty-four count indictment. (00-CR-824). Notwithstanding a sentencing guideline range of life imprisonment, petitioner was initially sentenced to fifty years in prison.

Subsequently, he and a co-defendant, Thomas Reynolds, who received the same sentence, filed petitions for writs of habeas corpus. Reynolds, who filed first, alleged that a comment made by my case manager led him to believe that he would be sentenced to a lesser sentence that had been offered as part of a global plea bargain, and later withdrawn by the Assistant U.S. Attorney after one of the defendants declined to accept the offer. I granted

A-4

Reynolds' petition. Subsequently, Reynolds pled guilty pursuant to a plea agreement which provided for a stipulated guideline range of thirty-six to forty-two years. I imposed a sentence of forty-two years.

Petitioner then filed his first petition essentially alleging that the assurances that were made to Reynolds were subsequently related to him. Before I acted on his petition, the petitioner entered into an agreement that the petition would be granted to the extent of vacating his sentence and permitting him to be resentenced within a range of thirty-six to forty-two years. I sentenced him to thirty-six years incarceration. The resentencing occurred February 5, 2005—twenty-four days after the Supreme Court held that the Sentencing Guidelines were advisory.

On December 12, 2005, petitioner filed a pro se petition alleging that his attorney, John Pollack, was ineffective at the resentencing because he failed to argue that I had "the discretion to depart below the 36 year plea agreement." (Petr.'s Br. 2.) This claim was without merit, because the agreement petitioner entered into limited my discretion to the imposition of a sentence within a range of thirty-six to forty-two years.

Before I ruled on the petition, petitioner advanced a second theory in support of his claim that Mr. Pollack was ineffective. Specifically, in an affidavit that I treated as an amended petition, *see* Tr., 2-3 Dec. 21, 2007, petitioner alleged that Mr. Pollack was ineffective because:

> At no time prior to my entering the Agreement did my then attorney, John Pollok, Esq., discuss with me the option and potential benefits of (a) allowing the Court to decide my first § 2255 motion on the merits, as it had with respect to Reynolds; (b) my pleading guilty to the entire indictment without an agreement in the probable event that, like Reynolds, I were to win the motion and my conviction were vacated; and (c) thereafter letting the Court sentence me in the exercise of its newfound discretion under *United States v. Booker*, 543 U.S. 220 (2005), handed down just a month earlier.

(DeFrancisci Aff. ¶ 4.) The affidavit was filed after petitioner had retained counsel.

Subsequently, in a telephone conference to address one aspect of the motion after the issues had been briefed and orally argued, the Assistant U.S. Attorney suggested that the second petition was without merit for a reason he had not previously argued. (Tr., 11-12, Jan. 11, 2008.) Specifically, he argued that, if petitioner had succeeded on his initial habeas corpus proceeding, which sought to set aside his plea of guilty, it would have been absurd for Mr. Pollack to have advised him to plead guilty to "the entire indictment without an agreement," because one count of that indictment contained a mandatory life sentence. Indeed, the principal benefit of the plea agreement was avoiding such a sentence. Subsequently, in a letter dated April 13, 2008, petitioner's counsel acknowledged that the Assistant U.S. Attorney was correct and that the ineffective assistance of counsel claim as pleaded in the amended petition could not provide a basis for relief. Letter dated Apr. 3, 2008, at 4 n.5.

Nevertheless, petitioner's present counsel sought leave to yet again amend the petition, to allege that Mr. Pollack was ineffective based on yet another theory. The claim this time was that he should have pressed for a decision of the merits of the petition which would have resulted in vacating the original judgment of conviction. On the not unreasonable assumption that such relief would have been obtained, Mr. Pollack "should have had DeFrancisci plead to the Count One RICO conspiracy without a stipulated Guideline range—thus enabling a straight *Booker* resentencing—rather than to the indictment itself, as previously alleged." Letter dated Apr. 3, 2008, at 4 n.5. Passing over the issue whether the petitioner can obtain relief on a claim of ineffective assistance of counsel in a habeas corpus proceeding, the problem with this argument is that such relief could not have been obtained without the agreement of the Assistant U.S. Attorney. In order to overcome this problem, petitioner's current counsel claims that "[i]t is inconceivable that the government would not have accepted such an open plea agreement in

satisfaction of the indictment." Letter dated Apr. 3, 2008, at 4 n.5. If the Assistant U.S. Attorney should argue otherwise, he requests "a hearing on the deficient performance issue should the Court first determine that a lower sentence was possible." *Id.*

I do not believe that any additional proceedings are necessary. In the affidavit of John Pollack, which petitioner submitted in support of the petition on July 21, 2006, Mr. Pollack averred that he sought to persuade the Assistant U.S. Attorney to agree to a lower stipulated guideline sentence after *Booker* was decided, and the Assistant U.S. Attorney refused to do so. Indeed, it seems clear to me that the reason for the stipulated guideline range was to insure that petitioner would not receive a sentence of less than thirty-six years, a disposition that essentially reflects the overwhelming evidence of petitioner's guilt and the risk of a mandatory life sentence if petitioner went to trial.

Moreover, notwithstanding petitioner's efforts to tie his latest claim of ineffective assistance of counsel to *Booker*, this argument really has nothing to do with the holding in that case. Instead, it amounts to a claim that petitioner's counsel should have negotiated a more favorable resolution of his initial habeas corpus petition. Indeed, notwithstanding a life sentence mandated by the Sentencing Guidelines, petitioner and his co-defendant Reynolds negotiated a plea that provided for a sentence of thirty-six to forty-two years, before *Booker* was decided. [1] There was nothing to prevent the negotiation of a lesser sentence here, before or after *Booker*, except for the bargaining power of the Assistant U.S. Attorney.

Accordingly, I decline to allow the petition to be amended for a second time, to raise yet a third claim of ineffectiveness of counsel. The course of action in which petitioner has engaged borders on an abuse of the writ, although I recognize that it technically does not fit within that

[1] Petitioner's plea agreement was negotiated and executed before *Booker*. (Pollack Aff., annexed to Petr.'s Br., docketed as July 21, 2006.) The document was undated when it was presented to me, and I filled in the date of February 5, 2005. (Sentencing Tr., 5, Feb. 5, 2005.)

description. More significantly, the third claim of ineffectiveness is unrelated to the holding in *Booker*, on which the initial petition turned, *see Mayle v. Felix*, 545 U.S. 644, 664 (2005), and even if the petition is amended to include this claim, it would be futile. Applying "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), it cannot be said that it was unreasonable for petitioner's counsel to have undertaken the course that he did.

I add these additional words. Petitioner's counsel has made it clear that he would not press the petition if I indicated I would impose the same sentence if petitioner is resentenced. While I initially entertained this suggestion, I have concluded that it would not be an appropriate way to proceed. If the petitioner were to be resentenced based on a claim of post-offense rehabilitation, I would need an updated presentence report and I would also need to hear from him in person.[2] Under these circumstances, the appropriate way to proceed is to put the horse before the cart and decide the merits of the petition at the threshold.

The petition is denied.

SO ORDERED.

Brooklyn, New York
February 18, 2009

Edward R. Korman
Edward R. Korman
Senior United States District Judge

[2] I did reject, and I continue to reject the argument that a lesser sentence is warranted to reflect more fully the difference in culpability between petitioner and his co-defendant. *See* Mem. of Tony Garoppolo, Ch. Probation Officer, Jan. 10, 2008.

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--Case Participants: Marc A Fernich (maf@fernichlaw.com), Matthew Jacobs
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jennifer_shulkin@nyed.uscourts.gov, paulamarie_susi@nyed.uscourts.gov,
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Order
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U.S. District Court

Eastern District of New York

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Case Name: Defrancisci v. United States of America
Case Number: 1:06-cv-03743-ERK
Filer:
WARNING: CASE CLOSED on 02/20/2009
Document Number: No document attached

Docket Text:
ORDER * I deny a Certificate of Appealability. Ordered by Judge Edward R. Korman on 2/20/2019. (Susi, PaulaMarie)**

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Marc A Fernich maf@fernichlaw.com

Matthew Jacobs matthew.jacobs@usdoj.gov, caseview.ecf@usdoj.gov

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Greg D Andres
United States Attorneys Office
Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201

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--Case Participants: Matthew Jacobs (caseview.ecf@usdoj.gov,
matthew.jacobs@usdoj.gov), Judge Edward R. Korman
(giselle_almonte@nyed.uscourts.gov, jacob_arber@nyed.uscourts.gov,
jennifer_shulkin@nyed.uscourts.gov, paulamarie_susi@nyed.uscourts.gov,
stephen_yanni@nyed.uscourts.gov)
--Non Case Participants: Pro Bono Clerk - Brooklyn - NYED (pbclkb@nyed.uscourts.gov)
--No Notice Sent:

Message-Id:<13543804@nyed.uscourts.gov>
Subject:Activity in Case 1:06-cv-03743-ERK Defrancisci v. United States of America
Order on Motion for Reconsideration
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U.S. District Court

Eastern District of New York

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Case Number: 1:06-cv-03743-ERK
Filer:
WARNING: CASE CLOSED on 02/20/2009
Document Number: No document attached

Docket Text:
ORDER denying [37] Motion for Reconsideration ; finding as moot [38] Motion to Appoint Counsel. c/m Ordered by Judge Edward R. Korman on 1/25/2019. (Susi, PaulaMarie)

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Matthew Jacobs matthew.jacobs@usdoj.gov, caseview.ecf@usdoj.gov

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motions but part of the routine of a resentence.

First, I assume since I asked you this when I sentenced you, that you've read the original presentence report that was prepared in this case.

THE DEFENDANT: Yes, but I never got a chance to argue that or fight any of the things that are in there because they told us from the beginning from the first time that if we argued them or fought them, we would get you mad.

MR. POLLACK: The question is, did you read it?

THE DEFENDANT: Yes, I read it.

THE COURT: Well, I don't know what to do with that but since we have an agreed upon guideline range --

MR. POLLACK: Right.

THE COURT: -- I assume that we can proceed as we did before.

Do you wish to say anything before I impose sentence beyond what --

THE DEFENDANT: That's it.

MR. ANDRES: Judge, I will be very

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FABRIZIO DEFRANCISCI,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SECOND CIRCUIT COURT OF APPEALS

APPENDICES

Fabrizio Defrancisci, pro se
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