Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 20th day of January two thousand twenty-two.

Present: ROSEMARY S. POOLER,
DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges.

JOHN A. BURKE,

Petitioner-Appellant,

v. 20-4034-cv

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appearing for Appellant: Justin C. Bonus, Forest Hills, N.Y.

Appearing for Appellee: Whitman G.S. Knapp, Assistant United States Attorney (Jo Ann M. Navickas, Assistant United States Attorney, *on the brief*), *for* Jacquelyn M. Kasulis, Acting United States Attorney *for* the Eastern District of New York, Brooklyn, N.Y.

Appeal from the United States District Court for the Eastern District of New York (Johnson, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of said District Court be and it hereby is **AFFIRMED**.

John A. Burke appeals from the November 30, 2020 order of the United States District Court for the Eastern District of New York (Johnson, *J.*) denying Burke's motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

We review a district court's legal conclusions in denying a habeas petition de novo and its factual findings for clear error. *Drake v. Portuondo*, 553 F.3d 230, 239 (2d Cir. 2009). Burke first argues that he suffered ineffective assistance of counsel because his counsel failed to put him on the stand to testify during trial. The question of "whether a defendant's lawyer's representation violates the Sixth Amendment right to effective assistance of counsel is a mixed question of law and fact and is reviewed de novo." *Chang v. United States*, 250 F.3d 79, 82 (2d Cir. 2001) (internal quotation marks and citation omitted). To establish a prima facie case of ineffective assistance, Burke must set forth a colorable claim under the two-prong test put forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a defendant show that "(1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the deficiency, the outcome of the proceeding would have been different." *Flores v. Demskie*, 215 F.3d 293, 300 (2d Cir. 2000) (internal quotation marks omitted). A petitioner's claim is not plausible if it "fails to meet either the performance prong or the prejudice prong." *Bennett v. United States*, 663 F.3d 71, 85 (2d Cir. 2011). "[A]ny claim by the defendant that defense counsel has not discharged this responsibility—either by failing to inform the defendant of the right to testify or by overriding the defendant's desire to testify—must satisfy the two-prong test established in *Strickland*." *Brown v. Artuz*, 124 F.3d 73, 79 (2d Cir. 1997).

In support of his habeas petition, Burke submitted an affidavit in which he averred that told his counsel he wanted to testify at trial, that counsel decided against it and never informed him that it was his choice to make. Howard Jacobs, Burke's lead trial counsel, passed away shortly before Burke filed his habeas petition. However, Burke's remaining two counsel, Richard Jasper and Ying Stafford, rebut this in affidavits averring that during their numerous conversations, Burke never expressed a desire to testify on his own behalf. Jasper stated that Burke "did testify at his pre-trial Suppression hearing which did not assist his case," and that "the consensus of the team that included Mr. Burke was that it was not worth the risk for Mr. Burke to testify at his trial." App'x 112 ¶ 4. Jasper and Stafford also averred that Jacobs never told them that Burke had any desire to testify.

Even if Burke wanted to testify but counsel prevented it, he cannot show he was prejudiced by the denial. As detailed by the district court, the government set forth an overwhelming amount of evidence, including testimony from five cooperating witnesses who were associates of Burke's and testified as to his participation in the crimes, crime scene evidence, and circumstantial evidence. The record well-supported the jury's verdict. In the face of the government's strong case, it cannot be said that Burke was prejudiced by the decision to

not have him take the stand. The defenses that Burke wished to testify about were rebutted by copious evidence, and defense counsel put his alibi and withdrawal defenses into evidence without Burke's testimony. Thus, Burke cannot show he was prejudiced within the meaning of the *Strickland* test. *See Artuz*, 124 F.3d at 79.

Burke's second claim is that he received ineffective assistance of counsel because Stafford, the most junior member of his defense team, was fearful of Burke, and this fear created an actual conflict of interest and led to the denial of his right to testify. "The right to the effective assistance of counsel also includes the right to be represented by an attorney who is free from conflicts of interest." *United States v. Perez*, 325 F.3d 115, 125 (2d Cir. 2003). In evaluating this type of Sixth Amendment claim, this Court delineates three levels of conflicts of interest: "(1) a per se conflict requiring automatic reversal without a showing of prejudice; (2) an actual conflict of interest that carries a presumption of prejudice; and (3) a potential conflict of interest that requires a finding of both deficient performance by counsel and prejudice, under the standard established in *Strickland*." *United States v. John Doe No. 1*, 272 F.3d 116, 125 (2d Cir. 2001). Ineffective assistance of counsel based on conflict of interest is met if the defendant shows: "(1) a potential conflict of interest that results in prejudice to the defendant, or (2) an actual conflict of interest that adversely affects the attorney's performance." *Perez*, 325 F.3d at 125 (alterations omitted).

We have developed a three-stage analysis to determine if prejudice is presumed for an actual conflict of interest. First, the defendant must establish that an actual conflict of interest existed, which arises "when the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *United States v. Moree*, 220 F.3d 65, 69 (2d Cir. 2000) (internal quotation marks and citations omitted). Second, the defendant must establish an "actual lapse in representation" that resulted from the conflict, which is demonstrated by "some plausible alternative defense strategy not taken by counsel." *Id.* (internal quotation marks and citations omitted). "The defendant need not show that the alternative defense would necessarily have been successful[,] only that it possessed sufficient substance to be a viable alternative." *Id.* (internal quotation marks omitted). Third, the defendant must show causation by demonstrating "that the alternative defense was inherently in conflict with or not undertaken *due to* the attorney's other loyalties or interests." *Id.* (internal quotation marks omitted and emphasis in original).

Burke satisfies none of the prongs. There is no evidence Stafford was fearful during her representation of him at trial. Nor is there any evidence to suggest a divergence of interest between Stafford and Burke with respect to a material factual or legal issue or to a course of action. Burke suggests that the decision to not put him on the stand was a result of Stafford's fear, but there is no support for that assertion in the record. There is also no suggestion in the record that the decision would have been Stafford's to make, and it is unlikely that it would be, considering she was the most junior attorney on the trial team. In fact, the record suggests that it was a joint decision that Burke himself was party to, based in part on his less-than-compelling testimony at his pre-trial suppression hearing and his criminal record. Furthermore. Burke's original petition for habeas relief before the district court placed the blame for not allowing him to testify squarely on his deceased attorney. Burke also argues fear led to Stafford's failure to file a petition for a writ of certiorari before the Supreme Court after appealing his underlying

conviction and lying about doing so. This issue, however, is separate and apart from the trial strategy that led the team, including Burke, to forgo Burke testifying on his own behalf. Burke's argument that Stafford admitted she was fearful while handling his petition for certiorari does not lend itself to a finding of actual conflict, either during or after the trial. As the government points out, and as we similarly found in *John Doe*, if Burke truly had insisted on testifying at trial, an attorney's fear would have actually created an incentive for that attorney to do whatever she could to further Burke's desired course of action. *John Doe*, 272 F.3d at 126 (discussing how, if the attorney was fearful due to threats, it would encourage the attorney to obtain an acquittal to placate the defendant and not cause harm to befall the attorney or his family).

Finally, Burke contends that the district court abused its discretion in failing to hold a hearing with respect to his Section 2255 petition. We review a district court's denial of a request for a hearing for abuse of discretion. *Chang*, 250 F.3d at 82. Under Section 2255, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law." 28 U.S.C. § 2255(b). However, a district court is not required to hold a hearing, especially in instances such as these where the defendant claims after the fact that he was not permitted to testify. *See Chang*, 250 F.3d at 81, 86. District courts may choose not to hold a hearing to avoid delay, the unnecessary expenditure of judicial resources, and burdening trial counsel and government. *See id.* at 86.

Here, the district court did not abuse its discretion by denying a hearing. The district court presided over Burke's criminal trial and was well-acquainted with Burke and trial counsel, but stated that, even despite this, it had reviewed "the entire record anew" in reaching its decision. App'x at 157. Additionally, the district court had a written record, including Burke's affidavit and the affidavits of his two available trial counsel. As we stated in *Chang*, the district court acted within the bounds of its discretion in deciding that the testimony of Burke and his trial counsel "would add little or nothing to the written submissions." 250 F.3d at 86.

We have considered the remainder of Burke's arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

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

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOHN A. BURKE,

Petitioner,

MEMORANDUM & ORDER
09-CR-135 (SJ) (JO)

v.

UNITED STATES OF AMERICA,

Respondent.

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STERLING JOHNSON, JR., United States Senior District Judge:

Petitioner John A. Burke ("Petitioner") has petitioned this Court for a writ of habeas corpus, pursuant to 28 U.S.C. § 2255 ("§ 2255"), requesting that the Court vacate, set aside, or correct the conviction and sentence imposed under criminal docket number 09-cr-135 (SJ) (JO). Based on the submission of the parties, the oral argument held on April 22, 2020, and for the reasons stated below, the petition for habeas corpus is denied. However, the Court grants a certificate of appealability on the sole claim raised in the petition.

BACKGROUND

I. Prior Proceedings

On April 25, 2012, a grand jury returned a four-count superseding indictment against Petitioner: one count of Racketeering Conspiracy, one count of Murder in-Aid-of Racketeering, one count of Murder—Continuing Criminal Enterprise, and

one count of Using, Carrying, and Possessing a Firearm, all in connection with his affiliation with the Gambino Crime family. On June 8, 2012, a jury found Petitioner guilty on all four counts. At a sentencing hearing held on January 25, 2013, this Court sentenced Petitioner to three concurrent terms of life imprisonment for the first three counts, and a term of ten years imprisonment on the fourth count to run consecutive to the life imprisonment terms for the first three counts. Petitioner filed a notice of appeal on February 7, 2013. The Second Circuit affirmed the convictions on January 21, 2014. *See United States v. Burke*, 552 F. App'x 60, 60 (2d Cir. 2014).

Petitioner did not petition the Supreme Court for certiorari. However, Petitioner asserts that his appellate counsel falsely told him that she had petitioned the Supreme Court for certiorari, and that the Supreme Court had denied his petition on October 6, 2014. Petitioner alleges that counsel provided him with a falsified letter, purportedly from the Supreme Court, denying his petition for certiorari. Petitioner further alleges that he confirmed in writing with the Supreme Court Clerk's Office that the letter counsel provided to Petitioner "appears to have been altered."

II. Request for Collateral Relief

Petitioner filed the instant petition for post-conviction relief under § 2255 on October 2, 2015. Petitioner argues that his trial counsel were constitutionally ineffective because—according to Petitioner's affidavit—although he desired to

testify in his own defense, none of his three defense attorneys informed him that he alone would make the decision of whether to do so.

In response, the government put forward affidavits from two of Petitioner's three trial counsel[1] in which the two attorneys assert that Petitioner never expressed a desire to testify in his own defense. Additionally, one of the two affidavits states that Petitioner "did testify at his pre-trial Suppression hearing which did not assist his case. The cross-examination of [Petitioner] at the Suppression hearing was effective and the consensus of the team that included [Petitioner] was that it was not worth the risk for [Petitioner] to testify at his trial." The government also argues that the evidence at trial against Petitioner was so overwhelming that testimony from Petitioner himself would not have affected the outcome.

Petitioner retained counsel for his § 2255 motion and oral argument and was permitted time for additional briefing. That briefing concluded on September 29, 2020.

This Court was assigned this case in 2009, tried this case in 2012, and has reviewed the entire record anew. Notwithstanding the allegations that counsel was untruthful about the status of Burke's petition for *writ of certoirari*, the instant petition must in any event be denied.

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[1] Petitioner's third attorney passed away after trial.

DISCUSSION

I. Procedural Issues and Standard of Review

To qualify for relief under 28 U.S.C. § 2255, a petitioner must show that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. "[A] collateral attack on a final judgment in a federal criminal case is generally available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Cuoco v. United States*, 208 F.3d 27, 30 (2d Cir. 2000) (internal citations omitted). To meet this standard, the constitutional error must have had a "substantial and injurious effect" on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (applying this standard of review to habeas petitions from state prisoners); *Underwood v. United States*, 166 F.3d 84, 87 (2d Cir. 1999) (*Brecht* standard applies to § 2255 petitions).

Habeas petitions are governed by strict procedural rules. Most claims must first be exhausted on direct appeal. *United States v. Frady*, 456 U.S. 152, 165 (1982); *Zhang v. United States*, 506 F.3d 162, 166 (2d Cir. 2007). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citation omitted). However, the procedural default rule does not apply

to claims of ineffective assistance of counsel, which "may be brought in a collateral proceeding under § 2255 whether or not the petitioner could have raised the claim on direct appeal." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

II. Timeliness

The parties dispute whether the petition is timely. Because the Court denies the petition on the merits, the Court assumes without deciding that Petitioner filed his petition within the applicable time-frame.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") established a one-year statute of limitations for filing a petition. In most cases, the limitations period runs from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). A conviction becomes "final" when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527 (2003). A petition for a writ of certiorari is timely when filed within 90 days after entry of judgment. *See* 28 U.S.C. § 2101(d); Sup. Ct. R. 13(1).

The timeliness of this petition is in dispute. Petitioner filed his petition for post-conviction relief on October 2, 2015. The Second Circuit affirmed Petitioner's convictions on January 21, 2014. *See United States v. Burke*, 552 F. App'x 60, 60 (2d Cir. 2014). Petitioner's convictions became final 90 days later (on April 21, 2014) because Petitioner did not file a petition for certiorari. Ordinarily, the Court

would dismiss the petition as untimely because Petitioner filed it after the statute of limitations expired on April 21, 2014.

However, Petitioner contends that he was misled by his appellate counsel into believing that she had filed, and that the Supreme Court had denied his certiorari petition on October 6, 2014. If the limitations period actually ran from this date, Petitioner's post-conviction petition would have been timely because Petitioner filed on October 2, 2015, less than one year after October 6, 2014.

After learning of Petitioner's allegations that his appellate counsel deceived Petitioner as to counsel's filings before the Supreme Court, the government asked the Court not to deny the post-conviction petition on timeliness grounds. Although the government did not concede that these circumstances warranted equitable tolling of the statute of limitations, the government nonetheless asked the Court to deny the petition on its merits rather than dismiss it on timeliness grounds. Accordingly, the Court assumes without deciding that Petitioner timely filed his post-conviction petition.

III. Ineffective Assistance of Counsel

A. Standard

The Sixth Amendment guarantees a defendant's right to counsel, including the right to effective counsel. In *Strickland v. Washington*, the Supreme Court established a two-part test to determine whether counsel's assistance was ineffective.

First, a petitioner must show that counsel's performance "fell below an objective standard of reasonableness" under "prevailing professional norms." 466 U.S. 668, 687–88 (1984). Second, the deficient performance must be shown to be prejudicial. *Id.* at 691–92. This second prong requires the petitioner to establish that a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The prejudicial effect of counsel's ineffective performance may depend on the strength of the evidence against the defendant: counsel's inadequate representation may not be grounds for habeas relief where the conviction is supported by overwhelming evidence of guilt, whereas "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (internal citations omitted).

A petitioner must prove both *Strickland* prongs, and a failure of either will defeat the claim.

> [T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."

Strickland, 466 U.S. at 697.

In considering the reasonableness of counsel's performance, the court must consider the facts of the particular case, viewed as of the time of counsel's conduct,

and considered within the wide range of professionally competent assistance. *Id.* at 690. The court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* Just because a chosen strategy was not successful does not make the strategic choice unreasonable or give cause for the court to second-guess the attorney's judgment. *See Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983). However, the Second Circuit has noted that "if certain omissions cannot be explained convincingly as resulting from a sound trial strategy, but instead arose from oversight, carelessness, ineptitude, or laziness, we would find the quality of representation sufficiently deficient to grant the writ." *Eze v. Senkowski*, 321 F.3d 110, 112–113 (2d Cir. 2003).

Courts must tread carefully in considering trial counsels' decisions to call particular witnesses. "The decision not to call a particular witness is typically a question of trial strategy that [reviewing] courts are ill-suited to second-guess." *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998) (per curiam). However, this general rule does not apply when the accused himself or herself is the witness: only the defendant himself or herself may decide whether to testify in his or her own defense; defense counsel may not make the choice for the defendant. *See United State v. Gomez*, 705 F.3d 68, 80 (2d Cir. 2013). Additionally, "defense counsel has a duty to inform the defendant of [his or her] right" to testify in his or her own defense. *Bennett v. United States*, 663 F.3d 71, 84 (2d Cir. 2011).

B. Merits

Petitioner's claim for ineffective assistance of counsel—the only claim in his petition—must fail because he has suffered no prejudice. Even if none of his three defense attorneys informed him of his right to testify in his own defense, the evidence against Petitioner was so overwhelming that there is no reasonable probability that the result of his trial would have been different had he testified. Additionally, Petitioner's testimony at his suppression hearing demonstrated his unbelievability as a testifying witness, suggesting that a jury would not have credited his testimony had he testified.

Among other evidence, Petitioner's trial featured testimony from five cooperating witnesses who were also associated with the Gambino crime family and who each testified to having committed crimes with Petitioner: Pasquale Andriano ("Andriano"), Michael Malone ("Malone"), Anthony Ruggiano, Jr. ("Ruggiano"), Bruce Vackner ("Vackner") and Peter Zuccaro ("Zuccaro"). Their testimony, along with other evidence and testimony presented at trial, demonstrated Petitioner's involvement with the criminal activities of the Gambino crime family for several decades through the time of the indictment.

The evidence at trial demonstrated that Petitioner had a long association with the Gambino crime family as a soldier reporting to Anthony "Fat Andy" Ruggiano, Anthony "Tony Lee" Guerrieri, and later Tony Lee's brother Michael "Mikey Gal" Guerrieri. As part of his association with the Gambino crime family, Petitioner both

sold drugs and acted as an enforcer. Petitioner sold marijuana in the 1970s with Gambino associate (and son of Fat Andy and brother of Ruggiano, Jr.) Albert Ruggiano and later sold cocaine with Gambino associate Damien Ross. This activity lead to Petitioner's 1981 arrest and subsequent conviction on drug charges.

In 1982, Petitioner conspired with others to murder marijuana and cocaine dealer Daniel Zahn ("Zahn"). The murder followed a prior drug-related dispute between Zahn and Petitioner, which culminated in Zahn shooting Petitioner in the throat while Petitioner was outside the Flight bar in Queens where Zahn regularly conducted his drug business. Testimony at trial from Ruggiano, Jr. revealed that after being shot, Petitioner told several people of his intention to kill Zahn. Testimony from Ruggiano, Jr., Andriano, and Vackner also revealed that after Zahn's murder, Petitioner admitted to several associates that he had killed Zahn, while Zahn's friend Susan Raio testified to having observed Petitioner following Zahn on the night of the murder, and shortly thereafter found Zahn shot to death outside his car a short distance away.

In addition to the witnesses' testimony, the government presented crime scene evidence to corroborate the witnesses' accounts of the murder, including evidence concerning the murder weapon. However, Petitioner was acquitted of the Zahn murder in the Supreme Court of Queens County. He did serve a term of imprisonment for related drug charges, and was released in 1990.

Burke returned to the district and promptly resumed his drug dealing enterprise. Among other locations, Petitioner operated from bars around Jamaica Avenue in Queens, including Jagermeister and Lenihan's. As part of his illicit business, Petitioner enforced debts and inhibited competition by force or threats of force.

During this time, Petitioner and others conspired to murder Bruce Gotterup ("Gotterup"), another Gambino associate. Gotterup worked at the Jagermeister bar in Queens, and also sold drugs there. In 1990, Gotterup had gotten into trouble at the Jagermeister by stealing from other drug dealers. Additionally, Gotterup had shot an AK-47 into the Jagermeister's roof during an altercation with the nephew of a Gambino soldier. Gotterup's wife Debra testified that prior to Gotterup's murder, she observed Petitioner hold a gun to Gotterup's head and state, "I could blow you the fuck away right here." Vackner testified that Petitioner and others planned to take Gotterup out for drinks to "butter him up," drive him away and shoot him. Petitioner rejected a suggestion from the witness that they merely assault Gotterup without killing him. Vackner testified Petitioner and others left for the bar when they heard Gotterup was there, and that Petitioner admitted to murdering Gotterup when the two spoke the next day. Zuccaro, too, testified that Petitioner admitted murdering Gotterup.

Further, Andriano testified that Petitioner's criminal associates told Andriano that Petitioner had committed the murder in Rockaway Beach in light of Gotterup's

altercation with the Gambino soldier's nephew and because Gotterup "messed up money in the drug trade." Police found Gotterup's body in 1991 on the boardwalk in the Far Rockaways. Gotterup appeared to have been shot while urinating on the boardwalk. Autopsy results showed that Gotterup died from multiple gunshot wounds to the head and had a toxic mixture of substances in his blood, including ethanol (alcohol) and cocaine.

In 1996, Petitioner conspired with others to murder John Gebert ("Gebert"). A successful drug dealer in the 1970s and 1980s, Gebert was incarcerated in the late 1980s through the mid-1990s, so his brothers ran his drug dealing business in his absence. Gebert's brothers and Petitioner were involved in a drug-related dispute shortly before Gebert was scheduled to be released from custody. In the course of that dispute, Petitioner was run over by a car.

Afterwards, Andriano testified that Petitioner suggested killing Gebert, and Malone testified that Petitioner was ordered to kill Gebert. Petitioner and several associates planned the murder, which called for Petitioner to drive a white Grand Am at the scene to act as a look-out, back-up shooter, and to crash into any vehicle attempting to pursue the primary shooters, who would be located in a separate getaway vehicle. Andriano testified that during the planning, Petitioner explained to Andriano exactly where on Gebert's body to shoot—one shot to the chest and, upon approaching a disabled Gebert—another to the head. And in that manner, Gebert was killed.

Cooperator testimony at trial was consistent with crime scene evidence and results from the autopsies. Zuccaro testified that following Gebert's murder, Petitioner gained increasing control of the Jamaica Avenue marijuana and cocaine trade.

Testimony at trial from Andriano, Malone, and Albano also revealed Petitioner's role in the attempted robbery of a Queens apartment belonging to the girlfriend of a Gambino associate. Petitioner and his co-conspirators believed that the apartment contained the proceeds of another robbery by the Gambino associate. Petitioner and two others pretended to be delivering flowers in order to deceive the girlfriend into opening the door. Once inside, they searched the apartment, found nothing, and left. Andriano and Zuccaro testified that they heard Petitioner may have in fact located the money while falsely claiming not to have found it.

Beyond these incidents, the government introduced significant evidence to rebut Petitioner's main trial defense: that Petitioner had halted his association with the Gambino organization and organized crime before July 31, 2003, and that therefore the statute of limitations barred the prosecution. For instance, the government introduced federal and state prison records from after the statute of limitations date, showing telephone communications with and packages received from known Gambino associates such as Frank Scaturro, Robert Greco, Joseph Panzella, and John Brancaccio. Petitioner even received two packages and two visits from Brancaccio. These prison records also show that Petitioner received telephone

calls and commissary deposits from Noel Pineda, who spoke frequently with another known Gambino associate James Cadicamo.

Moreover, Ruggiano, Jr. and Zuccaro—themselves Gambino associates—testified that they had never heard that Petitioner had renounced his organized crime ties, and Zuccaro testified that Petitioner in fact associated in prison with other organized crime figures. In fact, while incarcerated in the Metropolitan Detention Center in 2005, Petitioner received an invitation to sit at the "Italian table" and received commissary account deposits and other financial benefits from organized crime figures.

Petitioner's defense counsel presented their own witnesses to contest the government's case. For instance, fellow state prison inmate Patrick Sutherland and Petitioner's former defense counsel Richard Leff testified that Petitioner had told them he'd left organized crime. Petitioner's brother-in-law John Gianesses and cousin Laura Dezago testified that Petitioner asked them to communicate to Gambino associates that Petitioner wanted to leave the Gambino organization. Petitioner also called two alibi witnesses—his ex-wife Danielle Vaccaro and former mother-in-law Diana Napolitano—to testify that they were with Petitioner on the night of Gebert's murder and that Petitioner could not have been a getaway driver because his primary mode of transportation at the time was a bicycle. The jury rejected this testimony and found Petitioner guilty on all counts.

There is no reasonable probability that Petitioner's testimony would have altered the outcome of his trial. By finding Petitioner guilty on all counts, the jury credited not only the testimony of the cooperating witnesses but also the corroborating crime scene evidence, autopsy reports, and prison records, among other sources. Petitioner's testimony would not have tipped the balance, not only given the strength of the government's case, but also given Petitioner's credibility problems as a testifying witness.

When Petitioner testified at his pretrial suppression hearing, Judge Orenstein found Petitioner's "testimony [to be] less than persuasive: he was combative on certain points, inconsistent on others, and at times said things that did not have the ring of truth." *United States v. Burke*, No. 09-CR-135(SJ)(JO), 2011 WL 2609839, at *4 (E.D.N.Y. Feb. 26, 2011), *report and recommendation adopted*, 2011 WL 2609837 (E.D.N.Y. July 1, 2011), *aff'd*, 552 F. App'x 60 (2d Cir. 2014). Because, in the face of the overwhelming evidence of Burke's guilt, a jury would likely reach the same conclusion about Petitioner's credibility, Petitioner's testimony in his own defense would not have benefited his case. Accordingly, this Court finds that there is no reasonable probability that Petitioner's testimony would have altered the outcome of his trial.

III. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) Gov'g Sec. 2255 Cases in

the U.S. Dist. Cts. Having denied the petition for a writ of habeas corpus, this Court issues a certificate of appealability.

This Court must issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means that a habeas petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

"This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). "Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed,'" and "[courts] should not decline the application . . . merely because [they] believe[] the applicant will not demonstrate an entitlement to relief." *Welch v. United States*, 136 S. Ct. 1257, 1263–64 (2016) (quoting *Miller-El*, 537 U.S. at 337). In fact, a certificate of appealability may issue even if "every jurist of reason might agree, after the [certificate of appealability] has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 337–38.

The Court grants a certificate of appealability because of the subjective nature of the determination of prejudice in the analysis of Petitioner's claim for ineffective assistance of counsel. Reasonable jurists could debate the merits of this Court's finding that there is no reasonable likelihood of a different result if Petitioner had testified in his own defense. While the Court doubts that any reasonable jurist would come to a different conclusion given the strength of the government's case, the weakness of Petitioner's own case, and Petitioner's credibility problems as a witness, this Court must nonetheless issue the certificate so long as the issue is debatable. *See Miller-El*, 537 U.S. at 337–38. Accordingly, the Court issues a certificate of appealability.

CONCLUSION

For the foregoing reasons, the petition for habeas corpus is denied. Because Petitioner has made a substantial showing of the denial of a constitutional right, the Court issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2).

SO ORDERED:

signed Sterling Johnson, Jr.,
STERLING JOHNSON, JR.
United States Senior District Judge

Dated: November 30, 2020
Brooklyn, New York