UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LARRY CORBETT,	:	
	:	
Petitioner,	:	
	:	
v.	:	Case No. 3:15-cv-1461 (RNC)
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

RULING AND ORDER

Petitioner Larry Corbett, a federal inmate, brings this action pro se under 28 U.S.C. § 2255 challenging his life sentence arising from the January 2008 kidnapping, robbery, and murder of George McPherson. Corbett argues that his convictions were imposed in violation of his Sixth Amendment right to effective assistance of counsel and that he is innocent of the crimes. He also moves to amend the petition. Finally, several procedural motions are pending. For reasons that follow, the motion to amend the petition is granted in part; however, the petition and the remaining motions are denied.

I. Procedural Background

In February 2010, a grand jury returned a superseding indictment charging Corbett with six counts: (I) kidnapping resulting in death (18 U.S.C. § 1201(a)(1)); (II) premeditated murder (id. § 924(j)(1)); (III) felony murder (id. § 924(c), (j)(1)); (IV) interference with commerce through the use of

violence (id. § 1951(a)); (V) possession with intent to distribute marijuana (21 U.S.C. § 841(a)(1), (b)(1)(D)); and (VI) using a firearm in relation to a drug trafficking offense (18 U.S.C. § 924(c)(1)(A)(iii)). Before trial, he moved to suppress inculpatory statements he made during a post-arrest interrogation. United States v. Corbett, 762 F. Supp. 2d 428, 429-30 (D. Conn. 2011). Judge Christopher Droney denied the motion. Id. at 437. Following a bench trial, Judge Droney found Corbett guilty on all counts except premeditated murder. United States v. Corbett, No. 3:10-CR-28 (CFD), 2011 WL 2144659, at *8 (D. Conn. May 31, 2011). Corbett received a total effective sentence of life plus ten years. On direct appeal, the Second Circuit affirmed both the district court's rejection of Corbett's motion to suppress and Corbett's conviction and sentence. United States v. Corbett, 750 F.3d 245, 246-47 (2d Cir. 2014). The Supreme Court denied Corbett's petition for writ of certiorari on October 6, 2014. Corbett v. United States, 135 S. Ct. 261 (2014).

In August 2015, Corbett moved for an extension of time in which to file his habeas petition. The Court ruled that it lacked jurisdiction to consider a motion for extension of time because Corbett had not yet filed a § 2255 motion. The Court noted that "[a] motion for extension of time can be treated as a section 2255 motion if it includes allegations that support a

claim for relief under that section," but found no grounds on which to so construe Corbett's motion. See Green v. United States, 260 F.3d 78, 82 (2d Cir. 2001). Corbett timely filed his § 2255 petition on October 5, 2015. See 28 U.S.C. § 2255(f)(1). The petition requested appointment of counsel.

In April 2016, Corbett moved to vacate and replace his § 2255 petition. In June, he asked the Second Circuit for leave to file a successive habeas petition. In July, the Court of Appeals stayed the motion pending decisions in two similar cases. See United States v. Barrett, 903 F.3d 166 (2d Cir. 2018), vacated and remanded, No. 18-6985, 2019 WL 2649797, at *1 (U.S. June 28, 2019); United States v. Hill, 890 F.3d 51 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019). The Court instructed Corbett that he would have 30 days from the date of those decisions to file a letter addressing their impact on his successive habeas motion.

In September 2016, Corbett moved the Second Circuit to provide him with copies of the decisions in Hill and Barrett once they were docketed; to extend his response deadline from 30 to 90 days from the date of the decisions; and for appointment of counsel. Later that month, the appellate court recognized that the initial § 2255 motion was pending before this Court and denied the motion for leave to file a successive § 2255 motion as unnecessary. The Second Circuit vacated the stay and

transferred the proceeding to this Court. Pending are Corbett's initial § 2255 motion (ECF No. 1); his motion to modify the initial petition (ECF No. 10, 14); his motions for copies of, and an extension to respond to, Hill and Barrett (ECF No. 13); and his request for appointment of counsel (ECF No. 1, 13).

II. Legal Standard

To obtain relief under § 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 claim is cognizable under § 2255 if it involves a "fundamental defect which inherently results in a complete miscarriage of justice." Davis v. Hill, 417 U.S. 333, 346 (1974) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). Pursuant to the "mandate rule," a § 2255 motion generally does not provide an opportunity to relitigate issues that were raised and considered on direct appeal. Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010). The mandate rule also "precludes re-litigation of issues impliedly resolved by the appellate court's mandate." Id. (citing United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir. 2001)). In addition, if a petitioner failed to raise a claim that was ripe for review on direct appeal, the claim is procedurally barred unless he "establishes (1) cause for the procedural default and ensuing prejudice or (2) actual

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

To avoid dismissal, a motion under § 2255 "must contain assertions of fact that a petitioner is in a position to establish by competent evidence." United States v. Aiello, 814 F.2d 109, 113-14 (2d Cir. 1987). A hearing is not required to adjudicate a § 2255 motion "where the allegations are insufficient in law, undisputed, immaterial, vague, conclusory, palpably false or patently frivolous." United States v. Malcolm, 432 F.2d 809, 812 (2d Cir. 1970). Even where a "claim is not so clearly bereft of merit as to be subject to dismissal on its face," courts may decide a § 2255 motion on the basis of documentary evidence and affidavits. Chang v. United States, 250 F.3d 79, 85 (2d Cir. 2001).

III. Procedural Motions

In April 2016, Corbett moved to amend his § 2255 petition to retract unspecified "incomplete and confusing" claims and to add claims under Johnson v. United States, 135 S. Ct. 2551 (2015). He also raised Johnson in his motion before the Second Circuit. "[I]n general, when a § 2255 motion is filed before adjudication of an initial § 2255 motion is complete, the district court should construe the second § 2255 motion as a motion to amend the pending § 2255 motion" under Federal Rule of Civil Procedure 15. Ching v. United States, 298 F.3d 174, 177

(2d Cir. 2002). Accordingly, I will construe the April 2016 motion (ECF No. 10) and the purported successive habeas petition transferred to me by the Second Circuit (ECF No. 14) as motions to amend.

The motions are granted in part and denied in part. "The court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The government has provided no reason why the amendment should not be permitted.[1] Moreover, the Court has an obligation to construe pro se filings "liberally" and to interpret such filings "to raise the strongest arguments that they suggest." Williams v. Annucci, 895 F.3d 180, 187 (2d Cir. 2018) (quoting Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam)). Accordingly, I will consider Corbett's Johnson claim. However, the motion to retract unnamed other claims is denied for lack of specificity. This ruling accords with my obligation to construe Corbett's filings liberally because it allows me to consider all his arguments.

Also pending are Corbett's motions for an extension of time to update the Court after the decisions in Hill and Barrett and

[1] Rather, the government incorrectly argues that the standard for second or successive petitions applies, citing 28 U.S.C. § 2255(h). As discussed, "a habeas petition submitted during the pendency of an initial § 2255 motion should be construed as a motion to amend the initial motion," not as a second or successive motion. Ching, 298 F.3d at 175.

for copies of those rulings (ECF No. 13). The motions are rendered moot by this order. Finally, Corbett's request for appointment of counsel is denied (ECF Nos. 1, 13). Appointment of counsel in habeas cases is discretionary. Counsel should be appointed when the interests of justice so require or an evidentiary hearing is warranted. See 18 U.S.C. § 3006A(a)(2)(B); Rules Governing Section 2255 Proceedings for the United States District Courts, R. 8(c). There is no particular need for counsel here.

IV. Habeas Petition

A. Predicate Crimes

Corbett raises a Johnson challenge to his conviction and sentence. The Supreme Court's decision in Johnson pertained to the Armed Career Criminal Act ("ACCA"), which created a sentencing enhancement when a violator has three or more convictions for a "serious drug offense" or a "violent felony." Johnson, 135 S. Ct. at 2555 (citing 18 U.S.C. § 924(e)(1)). The statutory definition of "violent felony" included a "residual clause" that Johnson held to violate due process. Id. at 2557.

Corbett's sentence did not include the ACCA enhancement, so Johnson does not directly apply. However, under 18 U.S.C. § 924(c) and (j)(1), either a crime of violence or a drug trafficking offense may serve as the predicate crime for felony murder through use of a firearm (count III). Judge Droney found

the elements of felony murder to be satisfied by a crime of violence: Hobbs Act robbery under 18 U.S.C. § 1951 (count IV). Corbett argues that under the rationale of Johnson, 18 U.S.C. § 924(c)'s reference to a "crime of violence" is unconstitutional.

This argument is precluded by binding precedent. Section 924(c)(3) includes two definitions of a "crime of violence": the crime must be a felony that either (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "elements clause") or (B) "by its nature[] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (the "residual clause"). The Supreme Court recently held the residual clause to be unconstitutionally vague. United States v. Davis, No. 18-431, 2019 WL 2570623, at *13 (U.S. June 24, 2019) (citing § 924(c)(3)(B)); see also id. at *4 n.2 (abrogating Barrett on this point). But the Second Circuit has held that Hobbs Act robbery categorically qualifies as a crime of violence under the elements clause. Hill, 890 F.3d at 53 (citing § 924(c)(3)(A)). This holding is not disturbed by Davis. Like the Second Circuit in Hill, the Fifth Circuit held in Davis that Hobbs Act robbery can serve as a predicate crime under the elements clause. United States v. Davis, 903 F.3d 483, 485 (5th Cir. 2018). The Supreme Court granted certiorari only to review the

constitutionality of the residual clause. Davis, 2019 WL 2570623, at *4 & n.2; see also id. at *13. Accordingly, Corbett's Johnson challenge fails.[2]

B. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of trial or appellate counsel, a petitioner must establish that (1) his counsel's performance fell below an objective standard of reasonableness and (2) but for his counsel's errors, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); see also Bennett v. United States, 663 F.3d 71, 84 (2d Cir. 2011); Forbes v. United States, 574 F.3d 101, 106 (2d Cir. 2009) (applying Strickland in the appellate context). This is a "highly demanding" and "rigorous" standard. Bennett, 663 F.3d at 85. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011) (quoting Strickland, 466 U.S. at 690). When evaluating claims of ineffective assistance, courts apply a "strong presumption

[2] Even if count III were to be eliminated entirely from consideration, Corbett's sentence of life imprisonment plus ten years would remain intact. His life sentence under count I was mandatory and his consecutive ten-year sentence under count VI used the drug trafficking offense in count V as the predicate offense.

that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Ultimately, "[t]he habeas petitioner bears the burden of establishing both deficient performance and prejudice." Greiner v. Wells, 417 F.3d 305, 319 (2d Cir. 2005). While Corbett raises numerous grounds for ineffective assistance of counsel, both at trial and on appeal, each is unavailing.

i. Previously Litigated Claims

Corbett argues that his counsel unreasonably failed to advance arguments that his counsel did in fact raise. For example, he challenges his counsel's alleged failure to advance arguments related to the investigation; the police interrogation; and the elements of the crimes charged, including insufficiency of the evidence for each charge. These issues were each briefed by both trial and appellate counsel. A § 2255 petition cannot be used to "relitigate questions which were raised and considered on direct appeal." Cabrera v. United States, 972 F.2d 23, 25 (2d Cir. 1992) (quoting Barton v. United States, 791 F.2d 265, 267 (2d Cir. 1986) (per curiam)).

ii. Meritless Arguments

Several of Corbett's arguments are unavailing because they relate to claims that would have been meritless had counsel raised them. "The failure to include a meritless argument does not fall outside the 'wide range of professionally competent

assistance' to which [p]etitioner was entitled." Aparicio v. Artuz, 269 F.3d 78, 99 (2d Cir. 2001).

Corbett argues that the district court lacked jurisdiction because the case was only investigated by state authorities.[3] But the source of the investigation is irrelevant to a court's jurisdiction. The district court has jurisdiction pursuant to 18 U.S.C. § 3231 wherever a federal crime is charged. "The indictments here charged violations of federal criminal statutes, and thus brought the cases within the jurisdiction of the United States courts." United States v. Ingram, 397 F. App'x 691, 692 (2d Cir. 2010); see also United States v. Ucciferri, 960 F.2d 953, 955 (11th Cir. 1992); Melvin v. United States, No. 12-CR-727 (DAB), 2015 WL 10792023, at *4 (S.D.N.Y. Aug. 26, 2015) (rejecting § 2255 petitioner's argument that the federal court lacked jurisdiction because he was investigated originally by city police and noting that "federal courts had exclusive jurisdiction over the prosecution of th[e federal] crimes . . . , regardless of whether city or state law enforcement investigated the offense conduct"). This is so even if, as petitioner argues, he could have received a lesser sentence in state court. E.g., United States v. Hinton, 386 F.

[3] Corbett also argues that he was "kidnapped" by federal authorities when he was transferred to federal prison. A review of the docket shows that Judge Mark Kravitz signed a writ of habeas corpus ad prosequendum on January 27, 2010.

App'x 190, 194 (3d Cir. 2010) (affirming district court's rejection of a similar argument at sentencing); Love v. United States, No. 2:03-CR-00187-01, 2009 WL 5064586, at *12 (S.D.W. Va. Dec. 16, 2009) (rejecting the same argument as "frivolous"), motion for relief from judgment granted on other grounds, No. 2:03-CR-00187-01, 2010 WL 152136 (S.D.W. Va. Jan. 12, 2010).

Corbett similarly contends that it was unfair for the federal government to prosecute him after the state's prosecution ran into roadblocks, and that his counsel should have challenged this practice. However, the state and federal government are separate sovereigns and may each prosecute crimes over which they have jurisdiction. See Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1871 (2016) ("If two entities derive their power to punish from wholly independent sources . . . , then they may bring successive prosecutions."); United States v. Douglas, 336 F. App'x 11, 14 (2d Cir. 2009) ("Pursuant to the 'dual sovereign' doctrine, neither double jeopardy nor collateral estoppel precluded the federal government from bringing charges based on the same events that inspired the state law charges for which [defendant] was previously tried and acquitted.").

Corbett faults his counsel for not challenging the statutes of conviction under the Tenth Amendment pursuant to Bond v. United States, 564 U.S. 211 (2011). This argument is

unavailing.[4] Congress appropriately enacted each of Corbett's statutes of conviction under the Commerce Clause. See Taylor v. United States, 136 S. Ct. 2074, 2078 (2016) (Hobbs Act robbery, 18 U.S.C. § 1951(a)); Gonzales v. Raich, 545 U.S. 1, 15 (2005) (drug trafficking, 21 U.S.C. § 841); United States v. Chambers, 751 F. App'x 44, 48 (2d Cir. 2018) (kidnapping, 18 U.S.C. § 1201(a)(1) (citing United States v. Chambers, 681 F. App'x 72, 80-81 (2d Cir. 2017)); United States v. Miller, 283 F.3d 907, 914 (8th Cir. 2002) (felony murder, 18 U.S.C. § (j)(1)); Castro v. United States, 993 F. Supp. 2d 332, 345 (E.D.N.Y. 2014) (citing United States v. Walker, 142 F.3d 103, 111 (2d Cir. 1998)) (use of a firearm in relation to narcotics trafficking, 18 U.S.C. § 924(c)(1)).

Finally, Corbett alleges that his counsel should have argued that he was prejudiced by the presence during the bench trial of the State's attorney who initially prosecuted the case and the lead detectives. He states that their presence created

[4] To the extent Corbett argues that his counsel should have challenged the constitutionality of the jurisdictional statute, 18 U.S.C. § 3231, this too fails. "Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231, and there can be no doubt that Article III permits Congress to assign federal criminal prosecutions to federal courts." United States v. Acquest Dev., LLC, 932 F. Supp. 2d 453, 458-59 (W.D.N.Y. 2013) (quoting Hugi v. United States, 164 F.3d 378, 380 (7th Cir. 1999)); see also United States v. Farmer, 583 F.3d 131, 151 (2d Cir. 2009) (rejecting a challenge to § 3231 as not having been validly enacted by Congress).

"compassion" in Judge Droney for the government's case. He also suggests that witnesses had illicit contact with each other. But he provides no evidence for these claims.[5] He cannot satisfy his burden under Strickland to establish either deficient performance or prejudice. See Greiner, 417 F.3d at 319.

iii. Tactical Decisions

Corbett also attacks decisions by his counsel that were tactical choices falling "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

1. Trial Counsel

Corbett first takes issue with his trial counsel's decision not to move for a new trial under Federal Rule of Criminal Procedure 33.[6] Whether to raise a Rule 33 motion is committed to the attorney's discretion. "A counseled defendant . . . has no automatic right to insist that his lawyer make motions that he would prefer be made . . . . Only a few decisions in connection with trial strategy are reserved to the defendant to make personally; for the rest, strategic decisions are confided to

[5] Nor does he provide any evidence for the very serious accusation, which he makes in passing, that "[i]t seems that the Judge had a pecu[ni]ary interest in the Movant's case."

[6] Corbett claims that this decision was made against his wishes, though he provides no evidence for that claim. Accordingly, no hearing is required on that issue. See Flaquer v. United States, No. 3:11-CV-713 (MRK), 2011 WL 6010254, at *6 (D. Conn. Dec. 1, 2011) (citations omitted), aff'd, 518 F. App'x 35 (2d Cir. 2013).

counsel." United States v. Rivernider, 828 F.3d 91, 107 (2d Cir. 2016) (citations omitted). Decisions that the defendant must make himself include whether to enter a guilty plea, waive a jury trial, pursue an appeal, and testify on his own behalf. Brown v. Artuz, 124 F.3d 73, 77-78 (2d Cir. 1997). This list does not include the decision to move for a new trial. See United States v. Muyet, 985 F. Supp. 440, 440 (S.D.N.Y. 1998) (applying Brown to post-trial motions).

Furthermore, trial counsel moved orally for a judgment of acquittal and submitted a detailed post-trial brief. Corbett has not explained why a Rule 33 motion was necessary; rather, he raises only points of disagreement with the district court's decision, each of which was briefed by trial counsel in the post-trial brief and rejected by the district court. A Rule 33 motion on any of those grounds would have been redundant. Cf. Tagliaferri v. United States, No. 13-CR-115 (RA)(GWG), 2018 WL 3752371, at *33 (S.D.N.Y. Aug. 8, 2018) ("[Petitioner] has failed to indicate a single potentially meritorious basis for [a Rule 33] motion, and instead conclusorily alleges that he was prejudiced by [counsel]'s failure to discuss this motion with him . . . ."), report and recommendation adopted, No. 13-CR-115 (RA), 2019 WL 498361 (S.D.N.Y. Feb. 8, 2019).[7]

[7] Corbett also argues that his trial counsel could have moved for reconsideration of the denial of the motion for acquittal but

Similarly, Corbett faults his trial counsel for not renewing his motion to suppress oral and written statements he made to police officers following his arrest. The district court denied the motion after briefing, a three-hour evidentiary hearing, and an hour-long oral argument. Corbett, 762 F. Supp. 2d at 430. Corbett has not suggested any grounds on which it would have been appropriate for his attorney to seek to renew this motion.[8] In fact, appellate counsel briefed the issue of Corbett's post-arrest statements and the Second Circuit affirmed the district court's ruling. Corbett, 750 F.3d at 252-53.

Additionally, Corbett challenges the sufficiency of his counsel's attacks on the credibility of witness Noel Fuller. But the record shows that trial and appellate counsel vigorously sought to undermine Fuller's credibility. Corbett also suggests that trial counsel should have challenged the search warrants for insufficient probable cause, but he provides no basis for such a challenge except by taking issue with the investigation's

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fails to identify any grounds on which counsel could have based such a motion. "[S]trategic decisions are confided to counsel," particularly "when the counsel's reason for declining to make a motion is that there are no legal grounds upon which to do so." Rivernider, 828 F.3d at 107–08.

[8] Corbett suggests that his counsel could have argued that his statements to police were inadmissible hearsay. This is incorrect; when offered by the government, the statements were not hearsay, but rather were statements of an opposing party. Fed. R. Evid. 801(d)(2)(A); see United States v. Blake, 195 F. Supp. 3d 605, 609 (S.D.N.Y. 2016).

handling of telephone records -– an issue that both trial and appellate counsel briefed at length.

Corbett also faults trial and appellate counsel for not raising a Fourth Amendment challenge to the government's warrantless use of a GPS tracker on his car shortly before his arrest. Trial counsel were unaware of the issue during the motion to suppress stage. When they became aware of the use of the GPS, they moved for an evidentiary hearing. The trial court granted the motion and held the hearing on March 16, 2011. During the hearing, counsel extensively cross-examined two government witnesses regarding the circumstances of the GPS monitoring and of Corbett's arrest. Afterward, trial counsel made the strategic decision not to argue that Corbett's jailhouse confession had to be suppressed as fruit of the illegal search. This tactical choice can be seen in a portion of an internal memorandum by Corbett's attorneys that Corbett filed as an exhibit (ECF No. 9-1 at 11). The memorandum, which dates from when the case was on appeal, demonstrates that appellate counsel considered whether to make an argument related to the GPS monitoring in light of a then-recent Supreme Court ruling but decided against it. The evidence shows that counsel considered at all stages how to proceed but determined that attacking the GPS monitoring -- which took place after the crimes for which Corbett was charged occurred -– was not a

worthwhile tactic. Corbett has provided no reason to believe that this strategic decision fell outside the range of competent assistance to which he was entitled.

Next, Corbett alleges that he instructed his trial counsel to interview his wife to establish his alibi for the time of the alleged crime. However, Corbett made statements after his arrest clearly conceding his presence at the crime scene. Counsel moved to suppress those statements, but the motion was dismissed. There was also significant circumstantial evidence implicating Corbett, such as the presence of McPherson's blood in a van registered to Corbett's wife. Counsel's tactical decision to use Corbett's statements placing him at the crime scene to counter other witness testimony and to explain the circumstantial evidence was reasonable.

Additionally, Corbett argues that his counsel ineffectively failed to object to the introduction of an unsworn, out-of-court statement by his minor stepson, Basir Hargrave. He contends that this decision prejudiced him because Hargrave did not speak under oath and was not subject to cross-examination. He also alleges that the government sprang the evidence on him, unfairly surprising him with a statement recorded shortly before its introduction. However, trial counsel protected Corbett from surprise by requesting that the Court direct the government to provide more details than it initially gave as to the content of

the proposed testimony. After the government recorded a more detailed interview with Hargrave, trial counsel filed an objection seeking to preclude the testimony as irrelevant, unduly prejudicial, improper character evidence, and potentially traumatic to the child. On April 4, 2011, the district court orally ruled that the testimony was admissible, at which point trial counsel made the tactical decision to request that the Court consider the recorded interview in lieu of live testimony. The Court canvassed Corbett to ensure he had been properly advised regarding his right to cross-examine Hargrave. Corbett told the Court that he had been so advised and that he consented to admission of the live interview. Accordingly, trial counsel was not ineffective for failing to object to use of the recorded interview; rather, trial counsel opted to request its use, a decision to which Corbett assented. Counsel made sure to clarify for the Court that Corbett was not waiving any appellate rights by allowing the introduction of the recorded testimony, and on appeal, counsel pursued his objection to the relevance and propriety of Hargrave's testimony. Counsel's decisions were well within the range of acceptable choices.

Finally, Corbett argues that counsel should have interviewed Hargrave, but there is no reason to believe the outcome of the trial would have been different had he done so. Judge Droney, in presiding over the bench trial, was well aware

of the potential flaws in relying too heavily on Hargrave's out-of-court testimony, both through his judicial experience and through counsel's submission objecting to the testimony. A separate interview was unnecessary to probe those defects.

2. Appellate Counsel

One of Corbett's trial attorneys, Craig Raabe, also represented him before the Second Circuit. Appellate counsel need not raise every possible argument. In fact, the "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." See Smith v. Murray, 477 U.S. 527, 536 (1986) (internal quotation marks omitted). There are no grounds, for example, to fault appellate counsel's failure to question whether defendant's actions had a sufficient nexus with interstate commerce to implicate the Hobbs Act.[9] This issue was raised by trial counsel and ruled on by the district court. See Corbett, 2011 WL 2144659, at *4, *7. Given that "the jurisdictional requirement of the Hobbs Act requires only a 'de minimis' or 'very slight' effect on interstate commerce," it was reasonable

[9] Appellate counsel challenged the interstate commerce prong of the kidnapping statute by arguing that McPherson was deceased when he was transported across state lines and accordingly could not be viewed as having been seized unwillingly.

for appellate counsel to focus on other arguments. Id. (citing United States v. Parkes, 497 F.3d 220, 230 (2d Cir. 2007)).[10]

A similar analysis applies to appellate counsel's decisions not to emphasize the lack of a co-conspirator; challenge aider and abettor liability; or raise a Sixth Amendment argument related to detectives' attempts to get another inmate, Craig Frasca, to interrogate Corbett.[11] Trial counsel raised arguments on those grounds. Appellate counsel's decision to focus on other issues was acceptable, particularly because any such arguments would have lacked merit. First, whether there was evidence of a co-conspirator (or someone to aid and abet) turned on a credibility determination of the competing witnesses, which is committed to the discretion of the factfinder.[12] See United

[10] Additionally, appellate counsel effectively challenged the district court's decision on this point -– which relied on the marijuana as a commodity moving in interstate commerce -- by arguing that there was insufficient evidence that Corbett took possession of the marijuana.

[11] Corbett also takes issue with his appellate counsel's failure to raise unspecified "sentencing issues." Such a conclusory claim cannot satisfy Corbett's burden under Strickland. Cf. United States v. Atherton, 846 F. Supp. 170, 174 (D. Conn. 1994) (finding that the petitioner had not "identified with the requisite specificity the prejudice that resulted from [an] alleged error" for the Court to be able to evaluate the claim under Strickland (citing U.S. ex rel. Partee v. Lane, 926 F.2d 694, 701 (7th Cir. 1991))).

[12] Furthermore, "there is no requirement that the [i]ndictment name co-conspirators." United States v. Ahmed, 94 F. Supp. 3d 394, 431 (E.D.N.Y. 2015) (internal quotation marks omitted); see also, e.g., United States v. Vargas, 885 F. Supp. 504, 504 (S.D.N.Y. 1995); cf. United States v. Reinhold, 994 F. Supp. 194, 200-01 (S.D.N.Y. 1998).

States v. Delacruz, 862 F.3d 163, 176 (2d Cir. 2017); United States v. Freeman, 498 F.2d 569, 571 (2d Cir. 1974). Second, the addition of an aiding and abetting charge will almost never constitute a constructive amendment of an indictment. See Corbett, 2011 WL 2144659, at *4 n.11 (citing United States v. Mucciante, 21 F.3d 1228, 1234 (2d Cir. 1994)). Third, the detectives did not follow through with the plan to have Frasca elicit information from Corbett. The record shows that appellate counsel carefully considered which arguments would be strongest and fully briefed those issues. That the Second Circuit was unconvinced does not provide a basis for a claim of ineffective assistance.

iv. Waiver of Rights to a Jury Trial and to Testify

Criminal defendants have a constitutional right to a jury trial and to testify if they wish. Whether to waive these basic rights is a decision reserved to the defendant personally. Brown, 124 F.3d at 77-78. Corbett argues that he waived these rights after receiving bad advice and being subjected to coercive techniques by counsel. The record does not support his contentions.

"The right of the accused to a trial by a constitutional jury must be jealously preserved. At the same time, however, an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by

jury." McMahon v. Hodges, 382 F.3d 284, 289 (2d Cir. 2004) (internal quotation marks and brackets omitted) (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942); Patton v. United States, 281 U.S. 276, 312 (1930)); see also United States v. Carmenate, 544 F.3d 105, 107 (2d Cir. 2008) ("It is settled that a criminal defendant may waive his constitutional right to trial by jury if the waiver is 'knowing, voluntary, and intelligent.'" (quoting Marone v. United States, 10 F.3d 65, 67 (2d Cir. 1993)). "[A] district court must evaluate a defendant's waiver of his right to a jury trial under all the circumstances of the case to ensure that it is knowing, voluntary, and intelligent." Carmenate, 544 F.3d at 108. Additionally, "[e]very criminal defendant . . . is privileged to testify in his own defense, or to refuse to do so. And it is well established both (a) that counsel must inform the defendant that the ultimate decision whether or not to testify belongs to the defendant, and (b) that counsel must abide by the defendant's decision on this matter." United States v. Gomez, 705 F.3d 68, 80 (2d Cir. 2013) (internal quotation marks and brackets omitted) (citing Harris v. New York, 401 U.S. 222, 225 (1971); Brown, 124 F.3d at 79).

Corbett contends that his trial counsel misled him as to the factors he should consider in determining whether to waive his rights to a trial by jury and to testify on his own behalf.

Specifically, he argues that counsel presented a highly biased view of the options and threatened to abandon Corbett if he did not waive these rights because counsel was not prepared for the complications that came with a jury trial or with Corbett's testimony. He also alleges that his trial counsel never explained how a bench trial works and what rights he would be waiving by giving up a jury trial.[13] He states that he strongly desired to testify on his own behalf but that counsel manipulated and coerced him into waiving that right.

The record shows that Corbett waived his right to a jury trial knowingly and voluntarily after receiving advice from counsel. The district court thoroughly canvassed the defendant on this issue to ensure that the waiver was "knowing, voluntary, and intelligent." Carmenate, 544 F.3d at 108. Corbett told the Court he had spent two hours discussing with his attorney whether to proceed with a jury trial. Attorney Raabe agreed that they had discussed the issue for about two hours, including reviewing the advantages and disadvantages of the different types of trials. The Court explained in detail, and Corbett

[13] Part of Corbett's argument is inapposite. He suggests that his trial counsel never explained that in a jury trial "there are instructions that must be followed in order to find Movant guilty of each element in the charges he faced." While a judge does not provide himself with instructions in a bench trial, he nevertheless still must determine whether the government has sustained its burden as to each element of each crime charged.

stated he understood, the rights he would be giving up by proceeding with a bench trial. Corbett then executed a written waiver of his right to a jury trial.

Though the transcript of the colloquy shows that Corbett and Attorney Raabe were in agreement at the time Corbett waived his right to a jury trial, and that Corbett did so knowingly and voluntarily, I determined that it would be helpful to further develop the record. Accordingly, I ordered the government to obtain an affidavit from Attorney Raabe addressing the circumstances leading to Corbett's waivers of his rights to a jury trial and to testify. See Chang, 250 F.3d at 85-86 (holding that no evidentiary hearing is necessary to decide an ineffective assistance claim where the record has been supplemented by trial counsel's affidavit); see also id. at 80 ("[A] hearing was required. However, . . . the district court's review of the submitted papers constituted a sufficient evidentiary hearing on the facts of this case."). In his affidavit, Attorney Raabe states that he provided Corbett with a detailed explanation of how criminal trials work, including the government's burden to prove each element of each crime, and the ways in which a bench trial differs from a jury trial. He recounts the benefits and drawbacks he saw in a bench trial: a bench trial would mean giving up the right to a unanimous jury verdict on each charge; however, Judge Droney was a former

United States Attorney and might view the Greenwich Police Department's poor investigation unfavorably; and furthermore, a jury might be unable to avoid an emotional reaction to some of the evidence, such as video of Corbett dumping McPherson's body from his van. Attorney Raabe states he advised Corbett it was Corbett's choice, not counsel's, which type of trial to pursue. He also states that he did not threaten or coerce Corbett to waive his right to a jury.

Considering the record before me –- including the colloquy transcript, Corbett's allegations, and Attorney Raabe's affidavit –- I find that Corbett's waiver of his right to a jury trial was knowing and voluntary. I credit Attorney Raabe's representations about his advice to Corbett and the reasons for that advice. Attorney Raabe's version of events is consistent with the colloquy transcript and with his zealous advocacy for Corbett throughout his trial and appeal. Corbett's conclusory allegations that Attorney Raabe manipulated and coerced him into forfeiting his rights are irreconcilable with the record. See id. at 85 (affirming dismissal of a habeas petition where no full testimonial hearing was held but "the record was supplemented by a detailed affidavit from trial counsel credibly describing the circumstances concerning [the petitioner's] failure to testify").

Attorney Raabe's affidavit also discusses Corbett's decision not to testify. The affidavit states that Attorney Raabe counseled Corbett as to the advantages and disadvantages of testifying. Benefits included being able to provide his own live testimony regarding what occurred on the day McPherson died and his denial of killing him. Among the drawbacks were providing the government with an opportunity to impeach him with prior inconsistent statements, a likelihood of needing to admit to some or all elements of certain offenses, and a possibility of being forced to admit to some or all elements of felony murder. Attorney Raabe's affidavit also represents that he discussed the question of testifying with Corbett numerous times and emphasized the decision was Corbett's; that Corbett indicated at the outset of trial that he was unlikely to testify; that the development of the evidence during trial lessened the need for his testimony; that Corbett decided not to testify after the government rested; and that Attorney Raabe never threatened or coerced Corbett or indicated that he was not prepared for Corbett's testimony. I credit the representations in Attorney Raabe's affidavit as consistent with his efforts on behalf of Corbett throughout the trial.

I find that Corbett's waiver of his right to testify was valid. "A defendant's claim that he was denied the right to testify is . . . reviewed under the two-part Strickland

standard. Accordingly, courts are entitled to presume, unless the defendant can overcome the presumption, that defense counsel was effective and did not fail to advise the defendant of his right to testify." United States v. Montilla, 85 F. App'x 227, 230 (2d Cir. 2003) (citation omitted). Corbett has provided only "bald assertions" that he was improperly advised regarding this issue, which are insufficient to overcome the presumption of effectiveness. Id.

C. Actual Innocence

Corbett repeatedly asserts his actual innocence. To the extent that he seeks to argue that his counsel's representation was inadequate, that issue is addressed above. Otherwise, the Supreme Court "has recognized that, in rare cases, an assertion of innocence may allow a petitioner to have his accompanying constitutional claims heard despite a procedural bar." Rivas v. Fischer, 687 F.3d 514, 540 (2d Cir. 2012) (emphasis omitted) (citing Schlup v. Delo, 513 U.S. 298, 315 (1995); Herrera v. Collins, 506 U.S. 390, 404 (1993)).

"To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." Bousley v. United States, 523 U.S. 614, 623 (1998) (internal quotation marks omitted). This standard is "demanding." McQuiggin v. Perkins, 569 U.S. 383, 401 (2013). "The gateway should open

only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" Id. (quoting Schlup, 513 U.S. at 316).

Corbett presents only conclusory assertions of actual innocence. He reiterates previously rejected arguments regarding the insufficiency of the evidence presented at trial without providing any new evidence. Accordingly, his claim is unavailing.

V. Conclusion

Accordingly, the petition is hereby denied. No certificate of appealability will issue. The Clerk may enter judgment and close the file.

So ordered this 30th day of September 2019.

/s/ RNC
Robert N. Chatigny
United States District Judge