UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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KUO CHEN,

Petitioner,

MEMORANDUM & ORDER
13-CV-3903 (KAM)

-against-

UNITED STATES OF AMERICA,

Respondent.
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MATSUMOTO, United States District Judge:

On October 11, 2013, petitioner, proceeding *pro se*, filed the instant habeas petition under 28 U.S.C. § 2255 challenging his convictions for extortion conspiracy and attempted extortion. For the reasons set forth below, the petition is DENIED.

BACKGROUND

The court assumes familiarity with the facts and history of this case, as set forth in earlier decisions. *See United States v. Kuo Chen*, No. 10-CR-671, 2011 WL 2708355, at *1–11 (E.D.N.Y. July 11, 2011) (providing description of trial testimony and evidence in denying petitioner's post-trial motion for a judgment of acquittal); *see also United States v. Shi Xing Dong et al.*, 513 F. App'x 70, 72-74 (2d Cir. 2013) (affirming petitioner's conviction over challenges to the sufficiency of the evidence and the substantive reasonableness of his 108-month incarceratory sentence).

The charges in this case stem from a plan devised by petitioner, Jiang Yan Hua ("Jiang"), and Shi Xing Dong ("Dong") –

who together operated the Lan Qi Bus Company ("Lan Qi") – to force a rival bus service owned by De Mao Huang ("Huang") out of business through violence and intimidation. The government's chief witnesses were Dong, who cooperated with the government and provided detailed testimony about petitioner's involvement in the offenses (Tr. 367-491), and Huang, who testified, *inter alia*, that petitioner, along with others, attacked him on June 21, 2010 (*id.* 177-269). On January 31, 2011, after a four-day trial, a jury convicted petitioner of conspiracy to extort and attempted extortion in violation of 18 U.S.C. §§ 1951(a) and 3551 *et seq.* (*See* No. 10-CR-671, ECF No. 96, Jury Verdict; Trial Transcript ("Tr.") 715-16.)

On October 11, 2013, petitioner timely filed the instant habeas petition.[1] (ECF No. 1, Petition ("Pet.").) He also included a memorandum of law. (ECF No. 1, Memorandum of Law in Support of Motion ("Pet. Mem.").) Because petitioner alleged ineffective

[1] Petitioner also filed a motion seeking leave to proceed *in forma pauperis*. Habeas petitions filed under 28 U.S.C. § 2255, however, do not require filing fees. *See* Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 3, Advisory Committee Notes ("There is no filing fee required of a movant under these rules. This . . . is done to recognize specifically the nature of a § 2255 motion as being a continuation of the criminal case whose judgment is under attack."); *see also Rodriguez v. United States*, No. 11-CV-163, 2012 WL 253330, at *2 (D. Conn. Jan. 26, 2012) ("[A] movant is not required to submit a filing fee when filing a petition pursuant to 28 U.S.C. § 2255.").

assistance of counsel, the court directed both trial and appellate counsel to respond to petitioner's claims. (ECF No. 4, Order to Show Cause.) Both subsequently filed affidavits. (ECF No. 5, Stuart J. Grossman Affidavit in Response to Order to Show Cause ("Grossman Aff."); ECF No. 7, Benjamin B. Xue Affidavit in Response to Order to Show Cause ("Xue Aff.").) The government subsequently filed a memorandum in opposition to the petition (ECF No. 8, Memorandum in Opposition to Petition ("Gov't Mem.")), to which petitioner replied.[2] (ECF No. 9, Reply to Government's Opposition ("Pet. Reply").)

DISCUSSION

"[L]egal representation violates the Sixth Amendment if it falls 'below an objective standard of reasonableness' as indicated by 'prevailing professional norms,' and the defendant suffers prejudice as a result." *Chaldez v. United States*, 133 S. Ct. 1103, 1107 (2013) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88, (1984)). "Recognizing the 'tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence,' the Court established that counsel should be 'strongly presumed to have rendered adequate assistance and made

[2] Citations to page numbers in petitioner's initial memorandum of law and his reply brief do not correspond to his own pagination because he did not include a page number on the first pages of the two documents. The court's citations count the first page of his respective submissions as the first page of the document.

all significant decisions in the exercise of reasonable professional judgment.'" *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (alteration in original) (quoting *Strickland*, 466 U.S. at 689, 690).

Petitioner seeks habeas relief on four grounds that each arise from purported ineffective assistance of trial and appellate counsel. First, petitioner argues that counsel were ineffective for failing to challenge the admissibility of Dong's testimony against him under Federal Rule of Evidence ("Fed. R. Evid.") 801(d)(2)(E). (Pet. at 5-6.) Second, petitioner contends that counsel were ineffective because they did not seek jury instructions clarifying that "mere association" and "mere presence" could not support a conspiracy conviction. (*Id.* at 6-7.) Third, petitioner claims that counsel were ineffective for failing to impeach Huang concerning prior inconsistent testimony he gave to a grand jury. (*Id.* at 7-9.) Fourth, petitioner maintains that counsel were ineffective because they did not challenge a sentencing enhancement based on petitioner's role in the offense. (*Id.* at 9-10.) The court addresses petitioner's arguments in turn.

I. Admissibility of Dong's Testimony

Petitioner first argues that Dong's "post-arrest statements" were inadmissible under Fed. R. Evid. 801(d)(2)(E), which provides that a statement is not hearsay if it "is offered

against an opposing party and . . . was made by the party's coconspirator during and in furtherance of the conspiracy." Petitioner contends that because Dong's "post-arrest statements" were made after the conspiracy had concluded, and were therefore not "in furtherance of the conspiracy," Dong's statements were not admissible against petitioner. (Pet. at 5-6; Pet. Mem. at 2-3; Pet. Reply at 2-3.)

Fed. R. Evid. 801(d)(2)(E) applies to "out of court statements made by co-conspirators," *United States v. Marsh*, No. 14-4352-CR, 2016 WL 1086355, at *2 (2d Cir. Mar. 21, 2016), not to testimony by co-conspirators at trial. *Davis v. United States*, No. 04-CV-0085, 2010 WL 3036984, at *1 (E.D.N.Y. July 30, 2010), provides a useful illustration of the distinction between out-of-court co-conspirator statements and co-conspirator trial testimony. In *Davis*, a habeas petitioner had been convicted of, *inter alia*, conspiracy to violate 18 U.S.C. § 1951. *Id.* The petitioner argued that his trial counsel was ineffective for failing to challenge the admissibility of an accomplice's testimony against the petitioner under Fed. R. Evid. 801(d)(2)(E). *Id.* at *2. The accomplice, however, had testified at trial. *Id.* The court rejected petitioner's claim, explaining that the claim

> defies comprehension. [The accomplice] testified in person, so 801(d)(2)(E) is not applicable to [the accomplice's] "statements." In any event, where the rule

> applies, it *authorizes* admission, so how it might have been the source of a defense objection during [the accomplice's] testimony is not readily apparent . . . .

Id.

Like the petitioner in *Davis*, the petitioner here misapprehends the applicability of Fed. R. Evid. 801(d)(2)(E) when the relevant co-conspirator testifies. Dong — pursuant to a cooperation agreement — testified at trial and was subject to cross-examination. (*See* Tr. 367-500.) The government did not seek to introduce any of Dong's out-of-court statements. Any objection to Dong's testimony on the basis of Fed. R. Evid. 801(d)(2)(E) would have been fruitless.

Accordingly, petitioner's trial and appellate attorneys were not ineffective for failing to challenge Dong's testimony or statements under Fed. R. Evid. 801(d)(2)(E). *See United States v. Mobile Materials, Inc.*, 881 F.2d 866, 871 (10th Cir. 1989) ("The *direct testimony* of a conspirator . . . describing his participation in the conspiracy and the actions of others is not hearsay, and the cases concerning co-conspirator hearsay under Rule 801(d)(2) are inapplicable." (citation omitted)); *see also United States v. Williams*, 14 F. App'x 469, 474 (6th Cir. 2001) ("[Defendant] misunderstands the distinction between 'non-hearsay' admissions of co-conspirators as retold by witnesses on the stand and the direct testimony of co-conspirators."); *Debreus v. United*

States, No. 03-CR-0474, 2012 WL 3686250, at *10 (D.S.C. Aug. 24, 2012) ("The petitioner's co-conspirators testified directly, at trial, to their involvement, and the petitioner's involvement, in the conspiracy. Rule 801(d)(2)(E) does not apply to the co-conspirators' testimony *at trial*."); *McCullers v. United States*, No. 07-CR-49, 2012 WL 1942068, at *8 (E.D. Va. May 29, 2012) ("Co-conspirators . . . testified directly, at trial, to their and [defendant's] involvement in the conspiracy; Rule 801(d)(2)(E) is not applicable to their testimony because it was given at trial.").

II. "Mere Association" and "Mere Presence" Charges

Petitioner next argues that counsel should have requested that the court — in charging the jury on the law of conspiracy — provide instructions concerning "mere association" and "mere presence." (Pet. at 6-8; Pet. Mem. at 4-5.) Petitioner alleges that Jiang and Dong had a "plan in motion months before petitioner was employed as a driver for Lan Qi Bus Company" and that he was merely a driver for Lan Qi. (Pet. Mem. at 4-5.)

"Mere association with those implicated in an unlawful undertaking is not enough to prove knowing involvement" in a conspiracy. *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008). Similarly, "'a defendant's mere presence at the scene of a criminal act or association with conspirators does not constitute intentional participation in the conspiracy, even if the defendant

has knowledge of the conspiracy.'" *Id.* at 159-60 (quoting *United States v. Samaria*, 239 F.3d 228, 235 (2d Cir. 2001)). "A conviction will not be overturned for refusal to give a requested charge . . . unless that requested instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States v. Han*, 230 F.3d 560, 565 (2d Cir. 2000) (internal quotation marks, citation, and alterations omitted). If the court's instruction conveys the "substance of a defendant's request . . . the defendant has no cause to complain." *United States v. Taylor*, 562 F.2d 1345, 1364 (2d Cir. 1977); *see also Han*, 230 F.3d at 565.

First, the court in this case explicitly instructed the jury on "mere presence." The court explained to the jury that "in the context of the conspiracy charge, I want to stress that merely being present at a place where criminal conduct is underway does not make a person a member of conspiracy to commit the crime." (Tr. 670-71.) "In sum," the court continued, "a defendant with an understanding of the unlawful character of the conspiracy must have intentionally agreed to, engaged in, advised or assisted in it for the purpose of furthering the illegal undertaking."[3] (*Id.*

[3] The court also explained, in charging the jury on the concept of aiding and abetting, that the "mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a

672.) Petitioner's counsel were therefore not deficient for failing to request a "mere presence" charge. *See Matista v. United States*, 885 F. Supp. 634, 638 (S.D.N.Y. 1995) ("[P]etitioner contends that counsel was ineffective because 'trial counsel failed to make a request that the defense theory of "mere association" be read into the jury instructions.' Petitioner's contention is meritless for the simple reason that this Court did, in fact, charge the jury regarding the mere-association theory.").

Second, as to the "mere association" charge, although the court did not explicitly instruct the jury about "mere association" the court's instructions adequately provided the jury with an understanding that "mere association" with individuals involved in criminal activity was insufficient to support a conspiracy conviction. Under similar circumstances, in *United States v. Coppola*, 671 F.3d 220, 247 (2d Cir. 2012), a defendant challenged a conspiracy conviction on the grounds that the district court failed to charge "mere association." The Second Circuit upheld the conviction:

> Although the district court did not state in so many words that more than mere association with others engaged in criminal activity is necessary to support a conviction, it effectively conveyed that essential idea. In its conspiracy instruction, the court "stress[ed]" that "merely being present[ ] at a place where criminal

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crime is being committed or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting." (Tr. 676.)

> conduct is underway doesn't make a person a member of a conspiracy" and that "the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of its unlawful ends." In its aiding and abetting instruction, the court stated that "the mere presence of a defendant where a crime is being committed, . . . even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient" and that the jury must find that defendant "participate[d] in the crimes charged as something he wished to bring about." Further, it conveyed that more than mere association was necessary to support conviction for substantive racketeering by its instruction that the jury must find that [the defendant] "played some part in the operation or management of the enterprise." Thus, we identify no error warranting a new trial.

Id. at 247-48 (citations omitted).

The court's instructions in this case strikingly resemble the instructions held to be adequate in *Coppola*, despite the absence of an explicit "mere association" charge regarding conspiracy. Aside from the instructions discussed above, the court also provided the following instruction about conspiracy in this case: "[T]he fact that a person without any knowledge that a crime is being committed, merely happens to act in a way that furthers the purposes or objectives of the conspiracy, does not make a person a member of the conspiracy. More is required under the law. What is required is that a defendant must have participated with knowledge that at least some of the purposes or objectives of the

conspiracy and with the intention of aiding in the accomplishment of those unlawful ends." (Tr. 671.) The court conveyed the "substance of [the] defendant's request," *Taylor*, 562 F.2d at 1364, for a "mere association" charge. *See Coppola*, 671 F.3d at 247. Accordingly, petitioner's contention that his counsel were ineffective for failing to raise an issue regarding "mere presence" and "mere association" charges is meritless.

III. Adequacy of Cross-Examination of Huang

Petitioner next argues that his trial and appellate counsel were ineffective for failing to attack the credibility of Huang, the victim of the assault. (Pet. at 7-9; Pet. Mem. at 5-6.) The government argues that petitioner's trial counsel exhaustively cross-examined Huang and raised credibility issues, and petitioner's appellate counsel notes that he "thoroughly attacked the credibility of Huang" in his briefing before the Second Circuit.[4] (Gov't Mem. at 9-12; Xue Aff. at ¶ 6.)

"The decision whether to engage in cross-examination, and if so to what extent and in what manner is generally viewed as a strategic decision left to the sound discretion of trial counsel." *Lavayen v. Duncan*, 311 F. App'x 468, 471 (2d Cir. 2009) (internal quotation marks and citation omitted); *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987) (recognizing that

[4] The case was not orally argued in the Second Circuit.

decision whether to cross-examine a witness, as well as the extent and manner of any cross-examination, is "strategic in nature"). When "there is no strategic or tactical justification for the course taken" on cross-examination, however, the court may conclude that counsel was ineffective. *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998).

In this case, Huang testified at trial that three men attacked him. (Tr. 218-20, 251.) Huang stated that he only saw the face of one of his attackers and identified that individual as petitioner. (Tr. 219, 226-27, 268-69, 272-73.) At a grand jury hearing in November 2010, however, Huang testified that he saw the faces of two of his three attackers. (*See* 3500-DMH-2; *see also* 3500-DMH-8; 3500-DMH-22; 3500-DMH-23; 3500-DMH-24; *cf.* Tr. 266.) Before the grand jury, Huang identified one of the two individuals whose faces he had seen as petitioner and the other as Zhen Pan.[5] (3500-DMH-2, at 9-10.) Pan was prosecuted in New York state court in part based on Huang's identification, but the prosecution was apparently discontinued. (3500-DMH-2, 3500-DMH-8, Tr. 628.)

During the trial, the government sought to pre-empt the issue of Huang's inconsistent testimony. On direct examination,

[5] Notably, FBI records indicate that, "[a]ccording to Huang, Huang's identification of [Zhen Pan] to the police was based on [Zhen Pan's] body type (and not facial features) fitting the body type of one of his June 21, 2010 attackers." (3500-DMH-24.)

Huang admitted that he had identified another individual as a perpetrator of the attack based on his "body type." (Tr. 226-27.) On cross-examination, petitioner's trial counsel took up Huang's identification of Zhen Pan in detail:

> Q: You have also identified another individual besides Mr. Chen -- we're not talking about him anymore -- as being part of this attack; is that correct?
>
> A: Yes.
>
> Q: And at some point in time, you came to know that man's name as Zhen, Z H E N, second name Pan, P A N; correct?
>
> A: Yes. The police told me.
>
> Q: But you came to know that name?
>
> A: Yes. The police told me, so I know that name.
>
> Q: And you say that Mr. Zhen Pan is one of your three attackers; correct?
>
> A: Yes.
>
> Q: And you identified Mr. Zhen Pan based on his body type; correct?
>
> A: Yes.
>
> Q: You did not identify him based on his facial features; correct?
>
> A: Yes.
>
> Q: In fact, you testified before a grand jury in Kings County, Brooklyn State Court, on November 22 of 2010; correct?
>
> A: Yes. I went there.

Q: And you told us that as time has progressed, your memory of the incident is better than it was closer to the incident; correct?

A: Because I can slowly think about the people that beat me, their looks -- their looks, their build, as I think about it slowly, I'm able to remember.

Q: You told the grand jurors on November 22 of last year that a car pulled up and three people got out of the car; is that correct?

A: I don't remember exactly what it was. I remember having gone into this place and talked about it.

Q: You just told us a couple of minutes ago that you identified Mr. Zhen Pan based on his body type and not his facial features; is that correct?

A: Yes.

Q: And did you tell the grand jury, on November 22, 2010, that you recognized the faces of two of the people who attacked you?

A: I did not.

Q: Do you recall being asked this question and giving this answer on page nine, line 21: "QUESTION: And did you have an opportunity to see the faces of any of these individuals? "ANSWER: After, when they run away, I saw two of their faces." The question is, Mr. Huang: Do you recall giving that answer to that question before the Kings County grand jury on November 22, 2010.

A: I do not remember that. I do remember having gone into court to talk about this.

Q: How many of the faces of the individuals that attacked you did you see that night?

A: I saw one.

Q: So, when you told the grand jury you saw two, you were mistaken; is that correct?

A: I don’t know if that’s what I said. I don’t remember.

[Defense Counsel]: Judge, I would like the government to stipulate that I have read an accurate question and answer from the grand jury testimony which was provided to me by the government in this case.

[The Government]: So stipulated.

THE COURT: All right. Thank you.

[Defense Counsel]: Thank you.

Q: So, based on your testimony in the grand jury, you identified Mr. Zhen Pan as one of your assailants; is that correct?

A: Yes.

(Tr. 264-66.)

Petitioner’s trial counsel also addressed Huang’s identification of Zhen Pan during his closing argument:

The final and I think most important reason Mr. Huang is mistaken about his identification of my client as a perpetrator is because of his identification of Zhen Pan as a perpetrator.

Remember, Mr. Huang testified he identified Mr. Zhen Pan as the perpetrator based on his body type and not his facial features. How do you identify somebody in a criminal case based on their body type and not their facial features? How do you do that?

He says he sees him driving at some point in time, maybe early November of 2010, has him arrested. That seems to be a pattern with Mr. Huang. I’ll get to that in a second.

Mr. Huang has Mr. Pan prosecuted in state court Brooklyn by the Brooklyn DA’s Office down the block; IDs him in his testimony before a grand jury but we know Mr. Zhen

> Pan is not part of this assault. According to Mr. Dong, these are the assaulters. We know the names, the true names of the first two people and we know the nicknames of perpetrators 3 and 4 according to Mr. Dong, but none of these resemble Pan.
>
> How do we know perpetrators 3 and 4 aren't Zhen Pan? Because Mr. Dong was shown a photograph of Zhen Pan by Agent Wu and did not identify him as being one of the perpetrators. So, Mr. Huang prosecutes an innocent man believing he's guilty. I'm not saying he did this maliciously or anything like that. He made a mistake and he made a mistake with my client also.

(*Id.* 627-28.)

Trial counsel appropriately used the discrepancies in Huang's testimony to undermine his credibility, both on cross-examination and in closing argument. Further, although there were inconsistencies in Huang's testimony before the grand jury and his testimony at trial, Huang consistently identified petitioner as one of his attackers at both proceedings and also testified in both proceedings that he had seen petitioner's face. (3500-DMH-2, at 9-10; Tr. 219, 226-27, 268-69, 272-73.) Accordingly, trial counsel's performance was not deficient with regard to his cross-examination of Huang.

Petitioner's appellate counsel also addressed Huang's inconsistencies in his briefing before the Second Circuit. Petitioner's appellate counsel argued that "other than Dong, the only person to identify [petitioner] as an attacker was Huang, who has made inconsistent identifications of individuals since the

alleged attack. . . . Huang identified an individual, Zhen Pan, as an attacker, even though it is undisputed Pan was not involved in the attack at all." Brief for Petitioner at 9, *United States v. Shi Xing Dong et al.*, 513 F. App'x 70 (2d Cir. 2013) (No. 11-4015), 2012 WL 3150916, at *9. Like petitioner's trial counsel, petitioner's appellate counsel recognized the discrepancies in Huang's testimony and addressed them directly. Appellate counsel was therefore not deficient for failing to challenge Huang's credibility on appeal.

IV. Application of § 3B1.1(b) Role Enhancement

Petitioner's final argument is that his trial and appellate counsel were ineffective for failing to object to the court's application of a sentencing enhancement for his role as a manager or supervisor under U.S.S.G. § 3B1.1(b). (Pet. at 4; Pet. Mem. at 6-7; Pet. Reply at 3-4.) Specifically, petitioner argues that: (1) there was insufficient evidence to establish his role as a manager or supervisor under § 3B1.1(b) and (2) the district court failed to make adequate factual findings to support its imposition of the enhancement. The court addresses petitioner's arguments in turn.

Applicability of the Role Enhancement

Guideline § 3B1.1(b) provides that if "the defendant was a manager or supervisor (but not an organizer or leader) and the

criminal activity involved five or more participants or was otherwise extensive, increase [the offense level] by 3 levels." A defendant may be considered a manager or supervisor under § 3B1.1(b) if he "exercised some degree of control over others involved in the commission of the offense or played a significant role in the decision to recruit or to supervise lower-level participants."[6] *United States v. Blount*, 291 F.3d 201, 217 (2d Cir. 2002) (internal quotation marks, citation, and alterations omitted. Recruitment of even a single other individual to engage in criminal activity is sufficient to justify the imposition of a role enhancement under § 3B1.1. *See United States v. Al–Sadawi*, 432 F.3d 419, 427 (2d Cir. 2005). "The fact that other persons may play still larger roles in the criminal activity does not preclude a defendant from qualifying for a § 3B1.1(b) enhancement." *United States v. Hertular*, 562 F.3d 433, 449 (2d Cir. 2009).

Here, the role enhancement was properly applied. First, there was testimony that at least five individuals — Jiang, Dong, petitioner, and two other individuals (Ah Bui and Xing Xing)[7] —

[6] "Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1 Application Note 4.

[7] Petitioner himself is included in determining whether five individuals were involved in the criminal activity. *See United States v. Paccione*,

were involved in the conspiracy. (*E.g.*, Tr. 382-83, 403-05.) Second, there was testimony that petitioner recruited Dong, Ah Bui, and Xing Xing into the conspiracy. Dong testified that petitioner recruited him to start the bus business and that petitioner called Dong to bring Dong along each time that petitioner attempted to attack Huang, including for the actual attack. (*Id.* 381-83, 398, 475.) After Dong expressed an unwillingness to participate in the beating that led to an aborted attempt, Dong testified that petitioner "called [Ah Bui]" — petitioner's roommate — "and told him to come out" to participate in the attack on Huang. (Tr. 403-04, 421.) Dong also testified that petitioner called Xing Xing, a friend of petitioner's, for assistance in the attack.[8] (*Id.* 404-05, 421.) The criminal activity involved five participants. Petitioner's recruitment of each individual, standing alone, would justify the role enhancement. *See Al-Sadawi*, 432 F.3d at 427 ("Since the . . . role enhancement

202 F.3d 622, 625 (2d Cir. 2000) ("We hold that a defendant may properly be included as a participant when determining whether the criminal activity 'involved five or more participants' for purposes of a leadership role enhancement under § 3B1.1.").

[8] In addition, Huang testified that three individuals participated in his attack. (*E.g.*, Tr. 219.) The government also introduced evidence that a phone recovered from petitioner listed Jiang and Dong's phone numbers as contacts. (Tr. 515-16.) There were also a number of calls, before and after the attack, between an additional phone that likely belonged to petitioner and phones belonging to Jiang and Dong. (Tr. 523-25, 528-30.)

would have been justified upon [defendant's] recruitment of his father alone, the court was justified in imposing it.").

Even if petitioner were correct that Jiang was the "mastermind" behind the plan to attack Huang (Pet. Mem. at 7), such a finding would not preclude the imposition of a § 3B1.1(b) enhancement to petitioner's sentence. *See Hertular*, 562 F.3d at 449 ("The fact that other persons may play still larger roles in the criminal activity does not preclude a defendant from qualifying for a § 3B1.1(b) enhancement."); *cf. United States v. Garcia*, 936 F.2d 648, 656 (2d Cir. 1991) ("[E]ven if [the appellant's co-defendant] were an organizer, the district court would not be precluded from finding [appellant] to have been an organizer as well."). Accordingly, no error arose from any failure to object to the § 3B1.1(b) enhancement.[9]

[9] Although petitioner's trial counsel concedes that he did not object to the § 3B1.1(b) enhancement (Grossman Aff. at ¶ 6; *see also* No. 10-CR-671, ECF No. 124, Defendant's Sentencing Memorandum), petitioner's appellate counsel did object to the enhancement. (Xue Aff. at ¶ 7.) In his initial brief before the Second Circuit, appellate counsel challenged the substantive reasonableness of his sentence. Appellate counsel argued that "[petitioner] was by no means the leader of the alleged conspiracy. In fact, [petitioner] was, at most, an accomplice or accessory, who has no apparent disposition to such alleged conduct, and was induced by the other alleged co-conspirators to participate." Brief for Petitioner at 22, *United States v. Shi Xing Dong et al.*, 513 F. App'x 70 (2d Cir. 2013) (No. 11-4015), 2012 WL 3150916, at *22. Appellate counsel more directly addressed the application of § 3B1.1(b) in his reply brief, arguing that Jiang was in fact the true organizer. Reply Brief for Petitioner at 1-2, *United States v. Shi Xing Dong et al.*, 513 F. App'x 70 (2d Cir. 2013) (No. 11-4015), 2012 WL 5893995, at *1-2 ("Additionally, the three points added by the Court for being a manager in an offense that involved five or more people (U.S.S.G. 3B1.1(b)), is . . .

Factual Findings Supporting the Role Enhancement

Petitioner's argument that his counsel were ineffective for failing to challenge the adequacy of the court's factual findings on the § 3B1.1(b) enhancement (*see* Pet. Mem. at 8; Pet. Reply at 2-3) is equally meritless.

"A court must . . . make two specific factual findings before it can properly enhance a defendant's offense level under § 3B1.1(a): (i) that the defendant was 'an organizer or leader,' and (ii) that the criminal activity either 'involved five or more participants' or 'was otherwise extensive.'" *United States v. Patasnik*, 89 F.3d 63, 68 (2d Cir. 1996). To permit meaningful appellate review, the "district court must make specific factual findings to support the application of a sentencing enhancement, and in some cases may do so by explicitly adopting the factual findings set forth in the presentence report." *United States v. Russell*, 513 F. App'x 67, 69 (2d Cir. 2013) (internal quotation marks and citation omitted); *see also United States v. Espinoza*, 514 F.3d 209, 212 (2d Cir. 2008) ("Our precedents are uniform in requiring a district court to make specific factual findings to support a sentence enhancement under U.S.S.G. § 3B1.1." (internal quotation marks and citation omitted)).

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unwarranted."). Petitioner, appellate counsel argued, "was an employee of the bus company and was not involved in any planning or conspiracy to obtain the victim's business." *Id.* at 1, 2012 WL 3150916, at *1.

The factual findings necessary to support a role enhancement need not be unduly exhaustive. In *United States v. Escotto*, 121 F.3d 81, 85-86 (2d Cir. 1997), for example, the court upheld the imposition of a 3B1.1(b) enhancement where the district court merely adopted the presentence investigation report's findings that: (1) more than five participants were involved in the charged conspiracy and (2) the defendant's "leadership role was demonstrated by the cooperating witnesses' testimony that he supplied 'leads' for potential customers and that he, along with others, set up all three of the [fraudulent telemarketing] companies." *Id.*; *see also United States v. Thomas*, 273 F. App'x 103, 104 (2d Cir. 2008) (holding that district court's factual findings were sufficient where it stated on the record at sentencing that the defendant "had a number of people working for him as is set forth quite explicitly on the call reports, the transcripts of which I reviewed for this sentencing. . . . He says that quite specifically in the phone calls, and I find that he is an organizer or a leader").

In applying the enhancement in this case, the court stated:

> Now, with respect to Mr. Chen's role in the offense: Because the defendant was a manager in the offense which involved five or more participants, in that he recruited others for the beating and distributed weapons and urged the other participants to engage in the beating,

> pursuant to Advisory Guideline 3B1.1(b), the offense level is increased by three levels.[10]

(Sent. Tr. 29.) The district court also recognized at sentencing that although petitioner "has said today that Mr. Jiang may have been the initial person who recruited and gave him marching orders, [petitioner] played an active role in managing other participants in the beating, recruiting those participants and directed that they beat Mr. Huang when the opportunity arose." (*Id.* 39.)

The court provided adequate reasons to substantiate application of the enhancement. As discussed earlier (*see supra* pp. 18-19), there was no confusion or serious dispute regarding the number of participants. (*See* Grossman Aff. at ¶ 6 ("Dong testified that Chen recruited him, 'Ah Bui' and 'Xing Xing' to assault Huang. Since Yan Hua Jiang was also a member of the conspiracy, there was no rational basis to challenge the 3-level enhancement under U.S.S.G. § 3B1.1(b)."). *Compare, e.g.*, *United States v. Lanese*, 890 F.2d 1284, 1294 (2d Cir. 1989) (remanding where there was a lack of clarity surrounding which individuals

[10] The Probation Department's presentence investigation report recommended a three-level increase on essentially the same grounds: "The defendant recruited three others for the beating, distributed the weapons amongst the participants, and instructed them on when to meet and what to do. Per Guideline 3B1.1(b), the offense level is increased by 3 levels, as the defendant was a manager in the offense, which involved five or more participants." (Presentence Investigation Report, at 9.) The court did not, however, explicitly adopt the report.

the district court considered "participants" for purposes of a § 3B1.1(b) enhancement).

As to the "manager or supervisor" finding, the district court's findings that petitioner "recruited others for the beating," "distributed weapons," "urged the other participants to engage in the beating," "directed that [others] beat Mr. Huang when the opportunity arose," and "played an active role in managing other participants in the beating" were more than sufficient to justify the enhancement. (Sent. Tr. 29, 39.) *See Escotto*, 121 F.3d at 85-86; *see also United States v. Eyman*, 313 F.3d 741, 745 (2d Cir. 2002) (affirming where district court adopted presentence investigation report's findings that the defendant "was the leader of a fraudulent scheme and that more than five participants were involved"). Accordingly, petitioner's counsel were not deficient for failing to challenge the § 3B1.1(b) sentencing enhancement.

For all of the foregoing reasons the court finds that petitioner's trial and appellate counsels' conduct, measured by an "objective standard of reasonableness," was not deficient and did not undermine the proper functioning of the adversarial process. *See Strickland*, 466 U.S. at 686-88.

CONCLUSION

For the reasons stated above, the petition for habeas corpus is DENIED. The Clerk of Court is respectfully directed to enter judgment and close this case.

SO ORDERED.

Dated: October 7, 2016
Brooklyn, New York

_____/s/_____
KIYO A. MATSUMOTO
United States District Judge
Eastern District of New York