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United States District Court,
E.D. New York.

Avaldo AUSTIN, Petitioner,
v.
William BROWN, Respondent.

No. 07 Civ. 0960(SJF). | Oct. 29, 2008.

Attorneys and Law Firms

Robert L. Moore, Quesada & Moore, LLP, West Hempstead, NY, for Petitioner.

Karen Wigle Weiss, Kew Gardens, NY, for Respondent.

OPINION & ORDER

FEUERSTEIN, District Judge.

***1** On March 6, 2007, petitioner Avaldo Austin ("Petitioner") filed the instant petition ("Petition") seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (" § 2254"). Before the Court is the motion of respondent William Brown ("Respondent") to dismiss the Petition for failure to commence this proceeding within the statute of limitations period provided under § 2254(d). For the reasons set forth herein, Respondent's motion is granted.

I. Background

On September 26, 2000, a judgment of conviction was entered against Petitioner in the Supreme Court of the State of New York, Queens County (Cooperman, J.), upon a jury verdict finding him guilty of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree. By Order dated April 28, 2003 ("April 2003 Order"), the Supreme Court of the State of New York, Appellate Division, Second Judicial Department ("Appellate Division") affirmed the Petitioner's judgment of conviction. *See People v. Austin,* 304 A.D.2d 835, 757 N.Y.S.2d 876 (2d Dept.2003). On May 20, 2004, the New York Court of Appeals denied leave to appeal the order of the Appellate Division. *See People v. Austin,* 2 N.Y.3d 795, 814 N.E.2d 466, 781 N.Y.S.2d 294 (2004).

On August 1, 2005, Petitioner sought a writ of error coram nobis on the ground of ineffective assistance of appellate counsel, [1] which was denied by the Appellate Division on November 28, 2005. *See People v. Austin,* 23 A.D.3d 672, 804 N.Y.S.2d 275 (2d Dept.2005). On January 24, 2006, the Court of Appeals denied leave to appeal the order of the Appellate Division. *See People v. Austin,* 6 N.Y.3d 773, 844 N.E.2d 795, 811 N.Y.S.2d 340 (2006).

On August 4, 2005, petitioner moved pursuant to New York Criminal Procedure Law § 440.10 to vacate the judgment of conviction. Petitioner claimed that his trial counsel had provided ineffective assistance, and that the prosecution's failure to disclose exculpatory material in their possession violated *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). On November 8, 2006, after a hearing, the New York State Supreme Court denied Petitioner's motion. By Order dated February 2, 2007, Petitioner's application for leave to appeal to the Appellate Division was denied.

On March 6, 2007, Petitioner filed the instant Petition seeking a writ of habeas corpus pursuant to § 2254.

II. Discussion

A. Legal Standard

The Anti–Terrorism and Effective Death Penalty Act ("AEDPA") governs applications of incarcerated state court defendants seeking federal habeas corpus relief. The AEDPA imposes a one-year statute of limitations on the filing of federal habeas petitions. 28 U.S.C. § 2244(d)(1).

> Pursuant to the AEDPA, the limitations period runs from the latest of-(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly

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> recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

***2** 28 U.S.C. § 2244(d)(1).

The one-year statute of limitations period under the AEDPA may be statutorily tolled. Section 2244(d)(2) provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."28 U.S.C. § 2244(d)(2). Although the "proper calculation of Section 2244(d)(2)'s tolling provision excludes time during which properly filed state relief applications are pending," the provision "does not reset the date from which the one-year statute of limitations begins to run."*Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000).

The one-year statute of limitations period under the AEDPA may also be tolled for equitable reasons. *See Rodriguez v. Bennett,* 303 F.3d 435, 438 (2d Cir.2002) (holding that even though a petitioner is not entitled to automatic tolling mandated by section 2244(d)(2), under appropriate circumstances the petitioner may be entitled to equitable tolling); *see also Cole v. Greiner,* No. 01 Civ. 1252, 2003 WL 21812023, at *2 (E.D.N.Y. Jul. 23, 2003) (holding that the ADEPA statute of limitations is not jurisdictional and may be tolled equitably). "Equitable tolling applies only" in "rare and exceptional circumstance[s]." *Smith,* 208 F.3d at 17 (citations and quotation marks omitted)."In order to equitably toll the one-year period of limitations," a petitioner "must show that extraordinary circumstances prevented him from filing his petition on time" and "the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll."*Id.* (citing *Johnson v. Nyack Hosp.,* 86 F.3d 8, 12 (2d Cir.1996)); *see also Smaldone v. Senkowski,* 273 F.3d 133, 138 (2d Cir.2001) (stating that "[t]o merit application of equitable tolling, the petitioner must demonstrate that he acted with reasonable diligence during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances beyond his control prevented successful filing during that time") (citations and quotation marks omitted).

B. Application

The one-year statute of limitations runs from the date on which the judgment became final. A conviction becomes "final" under AEDPA when the highest state court concludes its direct review or when the time to seek direct review in the United States Supreme Court by writ of certiorari expires (which is ninety (90) days after entry of the judgment of conviction or of the order denying discretionary review).*See Williams v. Artuz,* 237 F.3d 147, 151 (2d Cir.2001); *Valverde v. Stinson* 224 F.3d 129, 132 (2d Cir.2000). Here, the New York Court of Appeals denied leave to appeal on May 20, 2004; thus, the conviction became "final" ninety (90) days later, on August 18, 2004.

Nevertheless, Petitioner contends that the one-year statute of limitations runs from May 6, 2005. On that date, Petitioner obtained the trial transcript from the trial of Petitioner's co-defendant Pablo Thompson ("Thompson"), which was conducted subsequent to Petitioners' trial. Petitioner contends that *Brady* was violated, *inter alia,* by the prosecutor's failure to disclose a witness's testimony including the witness's inability to identify Petitioner during a line-up.

***3** However, it is undisputed that, before Petitioner's trial, the prosecutor provided Petitioner's trial counsel with the police reports, which reflected the witness's inability to identify Petitioner and "included a rough sketch of the testimony" the witness provided at Thompson's trial. (Mem. of Law in Reply to Respt's Mot. to Dismiss the Pet., filed Nov. 14, 2007 ("Reply Mem."), at p. 8 n. 14;*see also* Mem. of Law in Supp. of Mot. to Dismiss the Pet., filed October 1, 2007, (Mot. to Dismiss"), p. 15 n. 5; Reply Mem. at p. 6 n. 12.)During Petitioner's trial, the prosecutor offered to make the witness available. (*See* Mot. to Dismiss at p. 15 n. 5; Reply Mem. at p. 6 n. 12.)Although Petitioner's present counsel alleges that he was unaware that the witness could not identify Petitioner or the substance her testimony, a review of the police reports would have disclosed this information.

Petitioner also alleges that the nondisclosure of the witness's testimony at Thompson's trial violates *Brady.*However, since the testimony occurred after Petitioner's trial, the failure to disclose the testimony to the Petitioner could not violate *Brady.See Brady,* 373 U.S. at 87.In any event, the testimony was given on September 26, 2000, approximately four years before Petitioner's conviction became final and almost five years before Petitioner moved to vacate the judgment in state court. Thus, the one-year statue of limitations began on August 18, 2004, the date which the judgment became final.

The parties agree that the statute of limitations should be tolled during the pendency of the state relief applications. Petitioner contends that the tolling began on July 22, 2005, the date that Petitioner initially attempted to file a writ of error coram nobis. However, the statue is tolled during the time "properly filed state relief applications are pending."28 U.S.C. § 2244(d)(2); *see also Smith,* 208 F.3d at 17."An application is 'filed,' ... when it is delivered to, and accepted by, the appropriate court officer for placement into the official record."*Artuz v. Bennett,* 531 U.S. 4, 4, 121 S.Ct. 361, 362, 148 L.Ed.2d 213 (2000). An application is " 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings, e.g., requirements concerning the form of the document, applicable time limits upon its delivery, the court and office in which it must be lodged, and payment of a filing fee."*Id.* Here, the Appellate Division rejected the July 22, 2005 filing and the petition was not properly filed until August 1, 2005. Therefore, the tolling period began to run from August 1, 2005.

Petitioner also claims that although Petitioner's application for leave to appeal the Appellate Division was denied on February 2, 2007, that the Order of the Appellate Division was not entered until February 9, 2007. However, even assuming that the Court were to agree that the statute of limitations should be tolled until February 9, 2007, the Petition would still be untimely.

***4** Finally, Petitioner claims that the statute of limitations should be equitably tolled but he has not demonstrated "rare and exceptional circumstance [s]" to justify equitable tolling. *Smith,* 208 F.3d at 391–92;*see also Hizbullahankhamon v. Walker,* 255 F.3d 65, 75 (2d Cir.2001) (stating that "petitioner must 'demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances.'") (quoting *Valverde v. Stinson,* 224 F.3d 129, 134 (2d Cir.2000). Counsel for petitioner concedes that he knew that he wanted to review the transcript from the Thompson trial as of December 2004. Although Petitioner did not receive the transcripts until May 6, 2005, counsel for Petitioner first contacted the New York Supreme Court directly to obtain the transcripts in April 2005. Insofar as Petitioner contends that the statute should be tolled because he requested his file from his trial counsel in December 2004 but did not receive it until March 2005, the delay can not be a basis to toll the statute since the receipt of the file in March 2005 concededly did not provide any "new issues" and Petitioner did not attempt to file the Application for a writ of error coram nobis until July 22, 2005. (Reply Motion, p. 12.) Nor is there any indication that during that period that Petitioner was foreclosed from otherwise pursuing the writ of coram nobis.

Based upon the foregoing, the statute of limitations began to run on August 18, 2004. Petitioner did not file a post-conviction motion until August 1, 2005, more than eleven (11) months after the date Petitioner's conviction became final. The limitations period was tolled from August 1, 2005 through February 2, 2007, the time during which properly filed state relief applications were pending. *See*28 U.S.C. § 2244(d)(2); *see also Smith,* 208 F.3d at 17.The one-year statute of limitations period expired on February 20, 2007. Petitioner, however, did not file the instant Petition until March 6, 2007, fourteen days after the statute of limitations expired.

Accordingly the Petition seeking a writ of habeas corpus pursuant to § 2254 is denied.

II. Conclusion

The Petition for writ of habeas corpus is DENIED in its entirety and the proceeding is dismissed. Since Petitioner has failed to make a substantial showing of a denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; *see also Miller–El v. Cockrell,* 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Luciadore v. New York State Div. of Parole,* 209 F.3d 107, 112 (2d Cir.2000); *Kellogg v. Strack,* 269 F.3d 100, 102 (2d Cir.2001). Petitioner has a right to seek a certificate of appealability from the Court of Appeals for the Second Circuit. *See*28 U.S.C. § 2253. The Clerk of the Court is directed to close.

***5 SO ORDERED.**

All Citations

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Footnotes

1 The Appellate Division rejected Petitioner's initial filing on July 22, 2005 for various reasons, including, *inter alia,* failure to: (1) include proof of service of papers upon opposing parties; (2) to make the motion returnable to the proper Courthouse address; and (3) to include a return date.

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United States District Court,
N.D. New York.

Vaughn AVERY, Petitioner,
v.
Harold D. GRAHAM, Superintendent,
Auburn Correctional Facility, Respondent.

No. 9:12–cv–01347–JKS. | Signed July 2, 2014.

Attorneys and Law Firms

Vaughn Avery, Auburn, NY, pro se.

Lisa E. Fleischmann, New York State Attorney General, New York, NY, for Respondent.

MEMORANDUM DECISION

JAMES K. SINGLETON, JR., Senior District Judge.

***1** Vaughn Avery, a New York state prisoner proceeding *pro se,* filed a Petition for a Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. Avery is currently in the custody of the New York State Department of Corrections and Community Supervision and is incarcerated at Auburn Correctional Facility. Respondent has answered, and Avery has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

On July 26, 1996, Avery was charged with one count of second-degree murder based on a felony murder theory, two counts of first-degree attempted robbery under two different legal theories, and one count of fourth-degree criminal possession of stolen property in connection with the killing of a grocery store clerk. On direct appeal of his conviction, the Appellate Division summarized the following facts underlying the indictment:

> On an evening in 1996, [Avery], Jason Clark and Antonio Spears gathered near a grocery store in the City of Albany. They encountered an acquaintance of Spears who answered some questions about the store after exiting. After the acquaintance left the area, [Avery] and Clark, armed with handguns, entered the store. The store owner was stocking shelves and the victim was working at the front counter. The owner testified that he heard two shots, looked up, and saw two men with covered faces standing near the store entrance, one of whom was holding a gun. He threw jars at the men and they fled. A resident of an upstairs apartment heard the shots, ran downstairs and saw two men fleeing on foot. The victim had been fatally shot by Clark. The next morning police went to the home of Clark and [Avery] and placed both men in custody. Clark directed police to two handguns concealed in his bedroom.

People v. Avery, 80 A.D.3d 982, 915 N.Y.S.2d 356, 357–58 (N.Y.App.Div.2011).

Clark pled guilty to all but one count of an eight-count indictment and inculpated both Avery and Spears in his plea allocution. Spears was tried separately and acquitted of felony murder and attempted robbery in connection with the grocery store incident, but admitted and was convicted of an unrelated gun store robbery.

Avery proceeded to jury trial in May 1997. After the conclusion of the People's case-inchief, Avery moved to dismiss all counts in the indictment for failing to present legally sufficient evidence to the jury. The court denied the motion in its entirety after the conclusion of the defense's case and submitted to the jury each count of the indictment relating to Avery. The jury found Avery guilty of second-degree murder (felony murder) and two counts of first-degree attempted robbery. The jury acquitted him of the criminal possession of stolen property charge.

On July 30, 1997, the court sentenced Avery to an imprisonment term of 25 years to life for the felony murder conviction. The court also sentenced him to two 71/2–to–15–year indeterminate prison sentences for the attempted robbery convictions.

Over a decade later, Avery, proceeding through new counsel, moved to vacate the judgment pursuant to New York Criminal Procedure Law ("CPL") § 440.10, arguing that trial counsel was ineffective because he failed to: 1) conduct a reasonable pre-trial investigation; 2) interview and call Spears as an alibi witness; 3) investigate whether the acquaintance, who testified for the prosecution, committed perjury based on bias against Spears; 4) investigate Gloria Aleman, an eyewitness who testified for the prosecution and who Avery claimed later recanted her trial testimony; 5) interview the owner of the grocery store who Avery alleged stated in a later interview that there had only been one robber; 6) interview Clark and Spear's girlfriend which, according to Avery, would have revealed that Clark's statements to the police and during his plea allocution were not truthful; and 7) call an expert witness on cross-racial identification.

***2** At an evidentiary hearing on the matter, Clark testified that he was by himself when he shot and killed the grocery store clerk. Clark acknowledged that his version of events contradicted his trial testimony and prior statements he made to the police and at his plea allocution. He testified that, at the time of the murder, he was sixteen years old and scared and that his attorney told him that his statement at the plea allocution had to match the statement he had given to police. Clark further denied discussing with Avery a plan to rob the store. On cross-examination, Clark stated that Avery could have been in the store at the time of the shooting but that Clark did not see him. The prosecutor also impeached Clark with his testimony from the plea allocution in which Clark stated that he and Avery had both entered the grocery store with guns drawn and that all three men had discussed the robbery and planned to split any proceeds equally.

Gloria Aleman testified with the assistance of an interpreter and noted that she did not have an interpeter at trial. She rated her English as a "0" at the time of the trial and stated that her English was "a little better" at the evidentiary hearing. She testified that she was watching television with her boyfriend's children when she heard what sounded like firecrackers. She went to the bedroom where her boyfriend was sleeping, and he told her that the sound was gunshots. Her boyfriend went down to see what had happened and told Aleman to stay in the apartment. She went down four steps of the staircase outside their apartment and saw two young men holding the door to the grocery store open and then running away.

The grocery store owner testified that, on the night of the shooting, he heard shots and saw one person at the door. He then began throwing what was in his hands. On cross-examination, he testified that he did not remember if he saw one person or two people in the store and acknowledged that he testified at trial that he had seen two guys near the entrance of the store.

A private investigator also testified that he met with Aleman on April 26, 2004. He opined that, based on his conversation with Aleman and the layout of her apartment, it would have taken approximately 35 to 45 seconds for Aleman and her boyfriend to go downstairs after hearing the gunshots.

Avery submitted a counseled post-hearing memorandum of law arguing that: 1) Clark's recantation of his police statements, plea allocution, and trial testimony was newly-discovered evidence warranting a new trial; 2) Aleman's trial testimony was unrealiable because, without an interpreter, she could not have understood the questions she had been asked; 3) Aleman's hearing testimony showed that the two boys that she saw running away from the grocery store could not have been Avery and Clark; 4) Aleman's 2004 affidavit, which was obtained in the presence of the private investigator, was not tainted because she had not received information about the case before providing the affidavit; 5) the hearing evidence suggested a likelihood of police fabrication; 6) the verdict would have been different if the jury had heard the newlydiscovered evidence; and 7) trial counsel's ineffectiveness caused prejudice to Avery.

***3** On December 4, 2009, the court denied the motion in its entirety. The court concluded that Aleman did not recant her trial testimony but rather "confirmed the critical elements of her trial testimony, namely that after hearing shots or firecrackers, she came downstairs and witnessed two males running from the grocery store."The court likewise held that a review of the trial transcript demonstrated that Aleman understood and appropriately responded to the questions posed at trial and that the hearing testimony, with the assistance of an interpreter, confirmed the trial testimony. In finding no issue with Aleman's comprehension of the English language, the court found it significant that the investigator interviewed Aleman in English and without the assistance of an interpreter and that Aleman's affidavit was in English. The court also found Clark's hearing testimony not credible and thus rejected it. The court likewise rejected Avery's ineffective assistance of counsel claim, holding that trial counsel's performance as a whole demonstrated meaningful assistance of counsel and thus satisfied the constitutional requirements. The court rejected all remaining contentions.

Again proceeding through counsel, Avery appealed his conviction, arguing that: 1) the evidence at trial was legally insufficient to support the conviction; 2) the trial court erred by failing to convey jury instructions with the appropriate legal standard; 3) the prosecution violated Avery's confrontation rights by failing to provide an interpreter for Aleman; 4) the prosecution violated their *Brady* [1] obligations by failing to disclose to the defense that Aleman had requested an interpreter for trial; 5) the prosecution violated *Brady* by failing to disclose a police statement made by Aleman; 6) the § 440 court erred in rejecting Clark's testimony; 7) trial counsel was ineffective for failing to conduct reasonable investigations and to interview an alibi witness; 8) the prosecution's weak identification evidence failed to identify Avery; 9) the police fabricated statements attributed to Clark, Spears, Avery, and Aleman; 10) the verdict would have been different had the jury heard the newly-discovered evidence; and 11) trial counsel's "multiple failures" prejudiced Avery.

The Appellate Division unanimously affirmed the judgment against Avery in a reasoned opinion. *Avery,* 915 N.Y.S.2d at 362. Avery filed a counseled leave application in the Court of Appeals, raising the following claims: 1) counsel was ineffective for failing to preserve the legal sufficiency claim and the evidence was legally insufficient to support the conviction; 2) the jury instructions were improper; 3) the prosecution withheld Aleman's written statement to the police; 4) the prosecution failed to disclose Aleman's request for an interpreter; 5) police fabrication of witness statements violated Avery's constitutional rights; 6) Avery received the ineffective assistance of trial counsel; and 7) the cumulative effect of the trial errors deprived Avery of a fair trial. The Court of Appeals summarily denied the leave request on June 7, 2011. *People v. Avery,* 17 N.Y.3d 791, 929 N.Y.S.2d 99, 952 N.E.2d 1094 (N.Y.2011).

***4** Avery timely filed a Petition for a Writ of Habeas Corpus to this Court on August 27, 2012. He subsequently filed an Amended Petition.

II. GROUNDS RAISED

In his *pro se* Amended Petition before this Court, Avery raises four claims for relief. First, he contends that trial counsel was ineffective for failing to investigate and call certain witnesses. He additionally contends that the evidence was legally insufficient to sustain his robbery and felony murder convictions. Third, he claims that he was denied *Brady* material which deprived him of a fair trial. Finally, he asserts that the court's ruling on his CPL § 440.10 motion was objectively unreasonable.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), this Court cannot grant relief unless the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"§ 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,"§ 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor,* 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke,* ––– U.S. ––––, ––––, 131 S.Ct. 859, 863, 178 L.Ed.2d 732 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied). It is a fundamental precept of dual federalism that the states possess primary authority for defining and enforcing the criminal law. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (a federal habeas court cannot reexamine a state court's interpretation and application of state law); *Walton v. Arizona,* 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Under the AEDPA, the state court's findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller–El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

In applying these standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *Ylst v. Nunnemaker,* 501 U.S. 797, 804, 111 S.Ct. 2590, 115

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L.Ed.2d 706 (1991); *Jones v. Stinson,* 229 F.3d 112, 118 (2d Cir.2000). Where there is no reasoned decision of the state court addressing the ground or grounds raised on the merits and no independent state grounds exist for not addressing those grounds, this Court must decide the issues de novo on the record before it. *See Dolphy v. Mantello,* 552 F.3d 236, 239–40 (2d Cir.2009) (citing *Spears v. Greiner,* 459 F.3d 200, 203 (2d Cir.2006)); *cf. Wiggins v. Smith,* 539 U.S. 510, 530–31, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (applying a de novo standard to a federal claim not reached by the state court). In so doing, the Court presumes that the state court decided the claim on the merits and the decision rested on federal grounds. *See Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Coleman v. Thompson,* 501 U.S. 722, 740, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *see also Jimenez v. Walker,* 458 F.3d 130, 140 (2d Cir.2006) (explaining the *Harris–Coleman* interplay); *Fama v. Comm'r of Corr. Servs.,* 235 F.3d 804, 810–11 (2d Cir.2000) (same). This Court gives the presumed decision of the state court the same AEDPA deference that it would give a reasoned decision of the state court. *Harrington v. Richter,* ––– U.S. ––––, –––– – ––––, 131 S.Ct. 770, 784–85, 178 L.Ed.2d 624 (2011) (rejecting the argument that a summary disposition was not entitled to § 2254(d) deference); *Jimenez,* 458 F.3d at 145–46.

IV. DISCUSSION

A. Exhaustion

***5** Respondent correctly contends that one of Avery's claims is unexhausted. This Court may not consider claims that have not been fairly presented to the state courts. 28 U.S.C. § 2254(b)(1); *see Baldwin v. Reese,* 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (citing cases). Exhaustion of state remedies requires the petition to fairly present federal claims to the state courts in order to give the state the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. *Duncan v. Henry,* 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). A petitioner must alert the state courts to the fact that he is asserting a federal claim in order to fairly present the legal basis of the claim. *Id.* at 365–66.An issue is exhausted when the substance of the federal claim is clearly raised and decided in the state court proceedings, irrespective of the label used. *Jackson v. Edwards,* 404 F.3d 612, 619 (2d Cir.2005). As Respondent notes, Avery raised his claim that the trial court erred in denying the CPL § 440 motion solely on the basis of state law. This unexhausted claim is procedurally barred. Because Avery's claim is based on the record, the federal nature of his claim could have been raised in his direct appeal but was not; consequently, Avery cannot bring a motion to vacate as to this claim. N.Y. CRIM. PROC. LAW § 440.10(2)(c) ("[T]he court must deny a motion to vacate a judgment when[,][a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal ...."). Moreover, Avery cannot re-assert this claim on direct appeal because he has already filed the direct appeal and leave application to which he is entitled. *See Grey v. Hoke,* 933 F.2d 117, 120–21 (2d Cir.1991) Because Avery may not now return to state court to exhaust this claim, the claim may be deemed exhausted but procedurally defaulted from habeas review. *See Ramirez v. Att'y Gen.,* 280 F.3d 87, 94 (2d Cir.2001).

Despite Avery's failure to exhaust this claim, this Court nonetheless may deny the claim on the merits and with prejudice. *See*28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). This is particularly true where the grounds raised are meritless. *See Rhines v. Weber,* 544 U.S. 269, 277, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). Accordingly, this Court declines to dismiss the unexhausted claim solely on exhaustion grounds and will instead reach the merits of the claim as discussed below.

B. Merits

Claim 1. Ineffective Assistance of Trial Counsel

Avery first argues that his trial counsel "failed to do reasonable investigations, prepare the case for trial, and failed to call available [ ] witnesses that could have exonerated [Avery] as a matter of law."He further contends that "[c]ounsel's conduct prejudiced [him] beyond all doubt."

***6** To demonstrate ineffective assistance of counsel under *Strickland v. Washington,* a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A deficient performance is one in which "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth

Amendment."*Id.* The Supreme Court has explained that, if there is a reasonable probability that the outcome might have been different as a result of a legal error, the defendant has established prejudice and is entitled to relief. *Lafler v. Cooper,* ––– U.S. ––––, –––– – ––––, 132 S.Ct. 1376, 1385–86, 182 L.Ed.2d 398 (2012); *Glover v. United States,* 531 U.S. 198, 203–04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001); *Williams,* 529 U.S. at 393–95. Thus, Avery must show that his trial counsel's representation was not within the range of competence demanded of attorneys in criminal cases, and that there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *See Hill v. Lockhart,* 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). An ineffective assistance of counsel claim should be denied if the petitioner fails to make a sufficient showing under either of the *Strickland* prongs. *See Strickland,* 466 U.S. at 697 (courts may consider either prong of the test first and need not address both prongs if the defendant fails on one).

New York's test for ineffective assistance of counsel under the state constitution differs slightly from the federal *Strickland* standard. "The first prong of the New York test is the same as the federal test; a defendant must show that his attorney's performance fell below an objective standard of reasonableness."*Rosario v. Ercole,* 601 F.3d 118, 123 (2d Cir.2010) (citing *People v. Turner,* 5 N.Y.3d 476, 806 N.Y.S.2d 154, 840 N.E.2d 123 (N.Y.2005)). The difference is in the second prong. Under the New York test, the court need not find that counsel's inadequate efforts resulted in a reasonable probability that, but for counsel's error, the outcome would have been different. "Instead, the 'question is whether the attorney's conduct constituted egregious and prejudicial error such that the defendant did not receive a fair trial." *Id.* at 123 (quoting *People v. Benevento,* 91 N.Y.2d 708, 674 N.Y.S.2d 629, 697 N.E.2d 584, 588 (N.Y.1998)). "Thus, under New York law the focus of the inquiry is ultimately whether the error affected the 'fairness of the process as a whole." *Id.* (quoting *Benevento,* 674 N.Y.S.2d 629, 697 N.E.2d at 588). "The efficacy of the attorney's efforts is assessed by looking at the totality of the circumstances and the law at the time of the case and asking whether there was 'meaningful representation." *Id.* (quoting *People v. Baldi,* 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400, 405 (N.Y.1981)).

The New York Court of Appeals views the New York constitutional standard as being somewhat more favorable to defendants than the federal *Strickland* standard. *Turner,* 806 N.Y.S.2d 154, 840 N.E.2d at 126. "To meet the New York standard, a defendant need not demonstrate that the outcome of the case would have been different but for counsel's errors; a defendant need only demonstrate that he was deprived of a fair trial overall."*Rosario,* 601 F.3d at 124 (citing *People v. Caban,* 5 N.Y.3d 143, 800 N.Y.S.2d 70, 833 N.E.2d 213, 222 (N.Y.2005)). The Second Circuit has recognized that the New York "meaningful representation" standard is not contrary to the federal *Strickland* standard. *Id.* at 124, 126.The Second Circuit has likewise instructed that federal courts should, like the New York courts, view the New York standard as being more favorable or generous to defendants than the federal standard.*Id.* at 125.

***7** Avery's claim must fail, however, even under the more lenient New York standard. First, as both the County Court and Appellate Division noted, "the record reveals that [Avery's] trial counsel made appropriate pretrial motions, participated actively in hearings, and carried out vigorous cross-examination of the People's witnesses, among other things."*Avery,* 915 N.Y.S.2d at 361. The state courts' conclusion that trial counsel rendered meaningful representation that satisfies the constitutional requirements therefore does not contravene or unreasonably apply federal law. *See Rosario,* 601 F.3d at 123.

Moreover, Avery cannot show that counsel's alleged failures were actual deficiencies or that they deprived Avery of a fair trial. Although he does not specify what conduct he challenges in his Petition, Avery claimed on direct appeal that Spears and Clark should have been called as alibi witnesses and that counsel should have conducted a pretrial interview of Aleman. The appellate court rejected these contentions:

> [Avery] contends that, if his trial counsel had interviewed [Aleman], he would have determined that she could not have gotten downstairs in time to see [Avery] running away. However, [Avery's] trial counsel cross-examined [Aleman] in some detail as to her actions before coming downstairs and the extent of her opportunity to see the fleeing men. Further, [Avery] himself testified that he ran away from the scene with Spears, although he denied wearing a red jacket. Thus, nothing in [Aleman's] CPL 440.10 testimony ... indicates that a pretrial interview would have provided trial counsel with information that would have undermined her trial testimony to an extent demonstrating ineffective assistance.
>
> [Avery] next contends that Spears, if interviewed, would have furnished [Avery] with an alibi by stating that [Avery] was outside the store and walking away from it when Clark

> shot the victim. Spears made this claim in a 2008 affidavit supporting [Avery's] CPL 440.10 motion; however, it contradicts his own prior statement as well as all of the other information available to defense counsel at the time of trial. A few hours after the crime, Spears told police that after watching [Avery] and Clark enter the store, he walked away and then heard gunshots. On the morning after the crime, [Avery] told police that he was inside the store when the shots were fired; at trial, he testified that he was at the store entrance. Thus, as of the time of the representation, trial counsel had no reason to believe that Spears would state that [Avery] was outside the store or otherwise furnish an alibi.
>
> [Avery] further contends that Spears would have provided defense counsel with information enabling him to impeach the acquaintance they had encountered before the robbery who, according to [Avery], gave false testimony as part of a vengeful effort to wrongfully implicate Spears.[4] At [Avery's] trial, the acquaintance testified that Spears asked him several questions about cameras and other people inside the store, that he believed that Spears, [Avery] and Clark intended to do something wrongful in the store such as "shoplift, or something of that nature," and that [Avery] was wearing a red jacket. Given the consistency between this testimony and the acquaintance's prior statements—as well as Clark's and [Avery's]—any allegation that Spears could have impeached him or revealed the plot in which he was allegedly engaged is too speculative to serve as a basis for a finding of ineffective assistance of counsel.
>
> ***8** [Avery's] final claim of ineffective assistance of counsel—that further investigation would have revealed that Clark was lying about [Avery's] involvement—necessarily fails as a result of County Court's well-founded conclusion that Clark's recantation was not credible.
>
> *Avery,* 915 N.Y.S.2d at 360–61 (internal citations and quotation marks omitted).

The Appellate Division's denial of Avery's ineffective assistance of counsel claim was neither contrary to nor an unreasonable application of *Strickland.See McKee v. United States,* 167 F.3d 103, 106 (2d Cir.1999) ("Actions or omissions by counsel that might be considered sound trial strategy do not constitute ineffective assistance, and a court may not use hindsight to second-guess counsel's tactical choices."(citations and internal quotation marks omitted)). Accordingly, Avery is not entitled to relief on his ineffective assistance of counsel claim.

Claim 2. Legal Sufficiency of the Evidence

Avery next contends that the "[p]rosecution failed to meet their burden of proof in establishing [Avery's] guilty beyond a reasonable doubt, as the evidence was legally insufficient to convict [him] of murder or attempted robbery."He further asserts that, "[g]iven the best view of all the evidence presented in the court, the evidence could not establish beyond a reasonable doubt[ ] that [Avery] was guilty of robbery, and surely not murder, as factual [ ] and actual evidence presented to the court clearly exonerated [him] of committing those crimes."

As an initial matter, on direct appeal the Appellate Division rejected Avery's sufficiency of the evidence claim as unpreserved for appellate review. *See Avery,* 915 N.Y.S.2d at 358. When a state court concludes that a claim is unpreserved for appellate review, this is "an independent and adequate state ground that bars a federal court from granting habeas relief."*Butler v. Cunningham,* 313 F. App'x 400, 401 (2d Cir.2009) (citing *Coleman,* 501 U.S. at 750);*see also Reid v. Senkowski,* 961 F.2d 374, 377 (2d Cir.1992).

In any event, Avery's claim is without merit. As articulated by the Supreme Court in *Jackson,* the constitutional standard for sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."*Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in the original); *see McDaniel v. Brown,* 558 U.S. 120, 132–33, 130 S.Ct. 665, 175 L.Ed.2d 582 (2010) (reaffirming this standard). This Court must therefore determine whether the New York court unreasonably applied *Jackson.*In making this determination, this Court may not usurp the role of the finder of fact by considering how it would have resolved any conflicts in the evidence, made the inferences, or considered the evidence at trial. *Jackson,* 443 U.S. at 318–19. Rather, when "faced with a record of historical facts that supports conflicting inferences," this Court "must presume-even if it does not affirmatively appear in the record-that the trier of fact resolved any such conflicts in favor of the prosecution, and defer to that resolution."*Id.* at 326.

***9** It is a fundamental precept of dual federalism that the States possess primary authority for defining and enforcing the criminal law. *See Engle v. Isaac,* 456 U.S. 107, 128, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Consequently, although the sufficiency of the evidence review by this Court is

grounded in the Fourteenth Amendment, it must take its inquiry by reference to the elements of the crime as set forth in state law. *Jackson,* 443 U.S. at 324 n. 16. A fundamental principle of our federal system is "that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."*Bradshaw v. Richey,* 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005); *see West v. AT & T,* 311 U.S. 223, 236, 61 S.Ct. 179, 85 L.Ed. 139 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law ....")."Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."*Sanchez–Llamas v. Oregon,* 548 U.S. 331, 345, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006) (quoting *Smith v. Philips,* 455 U.S. 209, 221, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)) (internal quotation marks omitted). It is through this lens that this Court must view an insufficiency of the evidence claim.

In this case, to establish second-degree murder, the People had to prove that Avery, acting with another person (Clark), attempted to commit robbery and in the course of and in furtherance of such crime or of immediate flight therefrom, Clark caused the death of a non-participant to the crime. *See*N.Y. PENAL LAW § 125.25(3). With respect to the attempted robbery charges, the People had to prove that Avery acted as an accomplice to Clark and that Clark engaged in conduct which tended to effect the commission of forcibly stealing property and in the course of the commission of the crime Clark caused serious physical injury to a nonparticipant, *id.* §§ 110/160.15(1), and was armed with a deadly weapon, *id.* §§ 110/160.15(2).

Here, Avery gave the police a written statement indicating that he needed cash to pay child support and a fine for loitering and that he, Clark, and Spears decided to rob a store. The statement further indicated that all three men were armed with guns that they were going to use for the robbery and that, when the store emptied out, Clark and Avery went in and Spears stayed out as a lookout. Spear's acquaintance testified that Spears asked him if there were people in the store and if the store had cameras. The store owner testified that he heard gunshots and saw two masked men, one of whom was holding a gun. Aleman testified that she also heard the gunshots, came down from her apartment above the store, and saw two young men running from the store entrance.

Avery nonetheless argues that there was insufficient proof of his involvement in the crime, focusing primarily on the lack of credibility of the prosecution's witnesses and lack of corroboration. But this Court is precluded from either re-weighing the evidence or assessing the credibility of witnesses. Under *Jackson,* this Court's role is simply to determine whether there is any evidence, if accepted as credible by the trier of fact, sufficient to sustain conviction. *See Schlup v. Delo,* 513 U.S. 298, 330, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Although it might have been possible to draw a different inference from the evidence, this Court is required to resolve that conflict in favor of the prosecution. *See Jackson,* 443 U.S. at 326. Avery bears the burden of establishing by clear and convincing evidence that these factual findings were erroneous. 28 U.S.C. § 2254(e)(1). He has failed to carry such burden. The record does not compel the conclusion that no rational trier of fact could have found proof that Avery was guilty of felony murder and attempted robbery, especially considering the double deference owed under *Jackson* and the AEDPA. Avery is therefore not entitled to relief on this claim.

Claim 3. Brady Violation

***10** Avery additionally asserts that the "prosecution failed to disclose that the People's witness, Gloria Aleman, required an interpreter at the time of giving evidence in this case, and the People still haven't disclosed who the alleged interpreter was, and the People failed to turn the witness's statement to police over to the defense."

To constitute a *Brady* violation, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."*Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). On direct appeal, Avery contended that the withheld evidence constituted favorable *Brady* material because it could have been used to impeach Aleman's testimony. The appellate court rejected that contention, concluding that disclosure of Aleman's request for an interpreter "would have done nothing more than to demonstrate her limited ability to communicate in English, which was already self-evident" and that the police statement would have "little or no impeachment value" because although it is "somewhat more detailed than the trial testimony ... it corresponds accurately to the essentials of that testimony and contradicts none of it."*Avery,* 915 N.Y.S.2d at 359. The appellate court's determination is reasonable,

and Avery therefore fails to show that the withheld evidence constituted favorable *Brady* material.

As the appellate court further recognized, the prosecution's failure to disclose to the defense Aleman's police statement violates the prosecution's obligations under *People v. Rosario,* 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 (N.Y.1961). Under *Rosario,* codified in CPL § 240.45, the prosecution must turn over to the defendant all written or recorded testimony of any person the prosecutor intends to call as a witness. 213 N.Y.S.2d 448, 173 N.E.2d at 883. *Rosario* claims, however, are state law claims, not founded on either the federal constitution or federal laws, which are not cognizable in a federal habeas proceeding. *See, e.g., Young v. McGinnis,* 411 F.Supp.2d 278, 329 (E.D.N.Y.2006); *Randolph v. Warden, Clinton Corr. Facility,* No. 04 Civ. 6126, 2005 WL 2861606, at *5 (S.D.N.Y. Nov. 1, 2005) ("the failure to turn over *Rosario* material is not a basis for habeas relief as the *Rosario* rule is purely one of state law"). Avery therefore cannot prevail on any claim that the prosecution failed to produce mandatory discovery.

Claim 4. Denial of CPL § 440 Motion

Finally, Avery argues that "[t]he court ruling on [his] CPL § 440.10 motion was objectively unreasonable, and [an] unreasonable application of well established Supreme Court law[ ] on a material of law[ ] and facts."He contends that "[t]he evidence presented to the court [is] clearly relevant, significant, and clear[ ] that [Avery] was not guilty of the crimes charged, and the lack of evidence of his guilt. The newly discovered evidence presented a[n] actual[ ] and factual innocence of [his] guilt worthy of dismissal of the crimes charged, as a matter of law[ ] and facts."

***11** In his CPL § 440.10 motion, Avery raised a litany of complaints about his trial attorney, arguing that counsel should have undertaken pre-trial investigations and called alibi witnesses which would have uncovered the recantation and additional evidence that was presented during the § 440.10 hearing. As previously discussed, however, Avery fails to show that his trial counsel was ineffective and thus he cannot show that the CPL § 440.10 court's denial on that ground was unreasonable or contrary to federal law.

Construing Avery's *pro se* Amended Petition liberally, *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam), this Court may discern that Avery asserts a freestanding claim of actual innocence. While a federal habeas petitioner may assert a claim of actual innocence to overcome a procedural bar to review, *Schlup,* 513 U.S. at 326, or to overcome the AEDPA's one-year statute of limitations, *McQuiggin v. Perkins,* ––U.S. ––––, ––––, 133 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013), the Supreme Court has not resolved whether a non-capital prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence, *McQuiggin,* 133 S.Ct. at 1931;*see House v. Bell,* 547 U.S. 518, 554–55, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); *Dist. Attorney's Office v. Osborne,* 557 U.S. 52, 71–72, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). The Supreme Court has instead declined to answer the question, noting that where a "[p]etitioner has failed to make a persuasive showing of actual innocence[,] ... the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence."*Herrera v. Collins,* 506 U.S. 390, 427, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring). Although the Second Circuit has also not ruled on whether a claim of actual innocence is cognizable on habeas review, *see Friedman v. Rehal,* 618 F.3d 142, 159 (2d Cir.2010) (citing *Osborne,* 557 U.S. at 71, and noting that whether an actual innocence claim is cognizable is an open question), it has "come close" to granting habeas relief on grounds of actual innocence, *see DiMattina v. United States,* 949 F.Supp.2d 387, 417 (E.D.N.Y.2013) (citing cases).

Assuming, but not deciding, that a freestanding actual innocence claim is cognizable in a § 2254 proceeding, the Supreme Court has described the threshold showing of evidence as "extraordinarily high." *Herrera,* 506 U.S. at 417. "The sequence of the Court's decisions in *Herrara* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that *Herrara* requires more convincing proof of innocence than *Schlup."House,* 547 U.S. at 555.

Measured against this standard, Avery has fallen short of establishing his actual innocence. Avery's claim is based on the purported recantations of Clark and Aleman, which he contends constitute newly discovered evidence. The Second Circuit has recognized that "due process is violated if a state leaves in place a criminal conviction after a credible recantation of material testimony and the recantation would 'most likely' have changed the outcome."*Quezada v. Smith,* 624 F.3d 514, 521 (2d Cir.2010) (citing *Sanders v. Sullivan,* 863 F.2d 218, 222 (2d Cir.1988)). However, "[i]t is axiomatic that witness recantations 'must be looked upon with utmost suspicion.' " *Haouari v. United States,* 510 F.3d 350, 353 (2d Cir.2007) (quoting *Ortega v. Duncan,* 333 F.3d 102,

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107 (2d Cir.2003)). This rule exists because recantations upset society's interest in the finality of convictions and are very often unreliable and given for suspect reasons. *Id.* The presumption of correctness afforded to state-court findings on federal habeas review applies to "historical facts, that is, recitals of external events and the credibility of the witnesses narrating them." *Smith v. Mann,* 173 F.3d 73, 76 (2d Cir.1999). Those findings will be overturned if the material facts were not adequately developed by the state court or if the factual determination is not adequately supported by the record. *Id.*

***12** In this case, the court held an evidentiary hearing on the motion, and Clark was questioned at length about his version of the events as well as his prior statements during his plea allocution and his prior trial testimony. The CPL § 440 court had the opportunity to assess his credibility and demeanor firsthand and subsequently found Clark's recantation testimony not credible and thus rejected it. Likewise, the CPL § 440 court found, and the appellate court agreed, that Aleman did not recant her trial testimony. As both courts noted, the record indicates that Aleman's trial testimony and hearing testimony are consistent as to the critical element that there were two individuals inside the grocery store at the time of the shooting. Therefore, the state court fully developed the material facts through the evidentiary hearing, and the record supports the court's factual findings. Thus, no basis exists to overturn the state court's findings as to either Clark or Aleman's testimony, and neither of the alleged recantations support a claim of actual innocence here.

V. CONCLUSION

Avery is not entitled to relief on any ground raised in his Amended Petition.

IT IS THEREFORE ORDERED THAT the Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus is **DENIED.**

IT IS FURTHER ORDERED THAT the Court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c); *Banks v. Dretke,* 540 U.S. 668, 705, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" (quoting *Miller–El,* 537 U.S. at 327)). Any further request for a Certificate of Appealability must be addressed to the Court of Appeals. *See*FED. R.APP. P. 22(b); 2D CIR. R. 22.1.

The Clerk of the Court is to enter judgment accordingly.

All Citations

Slip Copy, 2014 WL 2986910

Footnotes

1 *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The term *"Brady"* is a shorthand reference to the rules of mandatory discovery in criminal cases under federal law.

4 Notably, when [Avery] was tried, Spears had already been acquitted of involvement in the grocery store crimes.

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United States District Court,
S.D. New York.

Shateek BILAL, Petitioner,
v.
Harold D. GRAHAM, Superintendent of
Auburn Correctional Facility, Respondent.

No. 11–cv–04195 (SAS). | Signed June 22, 2015.

Attorneys and Law Firms

Bilal Shateek, Bronx, NY, pro se.

John J. Carmody, Robert K. Sauer, Assistant District Attorneys, Westchester County, White Plains, NY, for Respondent.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge.

I. INTRODUCTION

***1** Petitioner Shateek Bilal brings this pro se habeas corpus petition pursuant to section 2254 of Title 28 of the United States Code challenging his state court conviction following a jury trial in New York County Court, Westchester County.[1] After being convicted of two counts each of the Criminal Sale of a Controlled Substance in or Near School Grounds,[2] the Criminal Sale of a Controlled Substance in the Third Degree,[3] the Criminal Possession of a Controlled Substance in the Third Degree,[4] and the Criminal Possession of a Controlled Substance in the Seventh Degree,[5] Bilal was sentenced to eight years of imprisonment to be followed by three years of supervision.[6]

Bilal's Petition challenges his conviction on the following grounds: (1) the jury's verdict was against the weight of the evidence and/or not supported by sufficient evidence; (2) the trial court improperly permitted opinion hearsay evidence; (3) the trial court improperly precluded demonstrative evidence in the form of Bilal's tattoos, gold teeth, and a distinctive bum mark; (4) the prosecutor's remarks on summation denied him a fair trial; (5) the trial court improperly refused to conduct a retrospective competency hearing; (6) the People's failure to disclose certain discovery materials violated *People v. Rosario;*[7] (7) his trial counsel was ineffective for failure to move to suppress physical evidence (cocaine) on Fourth Amendment Grounds, failure to introduce photographs taken by a private investigator, failure to discredit the testimony of Officer Osorio, and failure to object to the prosecutor's comments during summation; (8) the trial court's rulings violated the Confrontation Clause; (9) he did not receive a fair trial because he was incompetent to stand trial; (10) he did not receive a fair trial because material evidence testimony was false and known to the prosecution to be false prior to the entry of the judgment; and (11) he was prejudiced as a result of an amendment of the bill of particulars during trial.[8]

II. BACKGROUND

A. The Offending Conduct

From April 2005 to the end of October 2005, the Yonkers Police Narcotics Unit, under the supervision of Detective Sergeant Kevin Tighe, participated in Operation Impact, a multi-agency effort targeting high-crime areas, including Nodine Hill, a neighborhood beset by drug-related crimes.[9] Three undercover officers, including Angela Osorio, were part of the team, and nine officers were assigned as backup.[10] Officer Osorio participated in roughly eighty narcotics transactions during the six-month operation, making two to three undercover buys each day.[11]

On July 12, 2005, at approximately 3:20 p.m., while in the vicinity of 169 Oak Street in Nodine Hill, Bilal and Officer Osorio had a conversation during which Bilal offered to sell her crack cocaine.[12] This conversation was observed by a member of the backup team. "Officer Osorio was also in possession of a Kell transmitter which allowed the nine officers assigned as backup to hear her while she was out in the field."[13] Officer Osorio then followed Bilal into an alley where he sold her a bag of crack cocaine for ten dollars.[14] "As she proceeded to a prearranged meeting location, Officer Osorio continually repeated the description of petitioner for the benefit of a backup team: black male, bald head, white tank top, about 5′9″ tall, in his mid-thirties."[15] Minutes after the sale, in the same area where it had taken place, backup officer Detective Brian Menton took a digital picture of Bilal.[16] Later that day, Officer Osorio viewed the digital picture and identified Bilal as the person from whom she had purchased crack cocaine.[17]

***2** The next day, July 13, 2005, at approximately 4:25 p.m., near 160 Willow Street in Nodine Hill, Bilal again sold Officer Osorio a bag of crack cocaine. [18] After the sale, Bilal told the officer to call him "Slim," handed her a piece of paper on which the name Slim and a telephone number were written, and told her to call him if she needed anything. [19] "Officer Osorio then proceeded to the pre-arranged meeting location with her back-up team, again repeating out loud the description of petitioner through the Kell transmitter she was carrying—same male from yesterday, bald head, blue t-shirt." [20] Detective Sargeant Tighe, who was positioned as a backup officer, then spotted Bilal walking southbound on Willow . [21]

Later that same day, at approximately 10:00 p.m., two uniformed officers, who were also part of the backup team, arrested Bilal on an outstanding warrant out of Bronx County for a probation violation . [22] Upon arrival at the precinct, police checked the backseat of the patrol car and recovered thirteen twists of crack cocaine from the location where Bilal was seated, which resulted in a separately filed criminal action in the Yonkers City Court. "This case was adjourned several times for various reasons (including primarily the filing of [the] Westchester County Indictment [ ]), until October 31, 2006, when it was dismissed following the County Court's finding that defendant was incompetent." [23] At Bilal's request, the details surrounding his arrest were not elicited at trial, so as to preclude mention of this other crime. [24]

B. Procedural History

1. State Court Proceedings

Bilal was arraigned on December 8, 2005. Pre-trial Bilal moved to preclude identification testimony. [25] The trial court denied the motion with respect to the in-person identification of Bilal made by Officer Osorio during the first drug sale and with respect to Officer Osorio's identification of Bilal from the photograph on that same day, holding that these identifications were confirmatory in nature. [26] A hearing on whether the identification of Bilal from a photograph during the grand jury proceeding was confirmatory in nature was held on June 26, 2006, after which the court denied the motion to suppress. [27]

The trial began with jury selection on June 27, 2006, and continued to July 12, 2006, when the jury returned its verdict. [28] At trial, Officer Osorio identified Bilal as the man who sold her crack cocaine on July 12 and 13, 2005. [29] Officer Osorio also identified Bilal as the seller by pointing him out in the Disputed Photograph taken by backup officer Detective Menton on July 12, 2005. [30] Additional proof at trial consisted of the testimony of backup officers who corroborated Officer Osorio's identification of Bilal as the seller by placing him in the area of the drug sales on both days; the officers who brought the drugs to the laboratory for analysis; and the forensic chemist who determined that the two substances sold by Bilal contained cocaine. [31]

***3** Bilal advanced a misidentification defense. Bilal's younger sister, the only witness called by the defense, testified that Bilal had a tattoo of a girl's name on one arm, that he had a burn mark on his other arm, and that he had six gold teeth, which he had had for sixteen years. Bilal's counsel used this testimony to challenge the credibility and reliability of Officer Osorio's identification of Bilal as the seller, as Officer Osorio had not included any of these characteristics in her descriptions of Bilal. [32]

Following his conviction, he was scheduled to be sentenced on September 7, 2006. However, in late August Bilal filed a peculiar pro se motion in which he claimed, among other things, to be the King of Uganda, and sought to be put to death for murder. [33] After a psychiatric examination pursuant to CPL section 730, Bilal was found to be incompetent and was committed to the Mid–Hudson Forensic Psychiatric Center on October 26, 2006. [34]

Less than a month later, on November 17, 2006, Bilal was declared competent by his treating doctors, who found that Bilal suffered no "[i]mpairment of understanding of the trial process and roles of participants" and no "[i]mpairment of [his] ability to establish [a] working relationship with an attorney." [35] On December 29, 2006, Bilal filed another odd motion, seeking "tubal litigation." [36] Another competency hearing was held, at the conclusion of which the trial court ordered another section 730 examination. Bilal was again found to be incompetent, and on March 27, 2007, the trial court ordered that he remain in state custody pending further observation and treatment. [37] On April 27, 2007, Bilal's treating doctors found him to be competent and he was returned to the trial court for further proceedings. [38] On May

29, 2007, the trial court confirmed that determination of fitness without objection from Bilal. [39]

On June 18, 2007, Bilal, represented by counsel, filed a motion pursuant to CPL section 330.30 seeking to set aside the jury verdict on several grounds, including that Bilal was incompetent to stand trial; that the police testimony at trial was false and that the prosecutor knew that it was; and that trial counsel was ineffective for failing to investigate alibi witnesses and for not sufficiently impeaching the testimony of Detective Menton at trial. [40] The State opposed the motion on the ground that the issues raised were outside the record, and thus not cognizable under section 330.30(1) as a matter of law. [41] With respect to Bilal's claim of incompetence during his trial, the State also argued that Bilal's claim lacked merit from the standpoint of the observations of the trial prosecutor. The trial prosecutor noted that during pre-trial hearings and jury selection, Bilal appeared to consult with his trial counsel for the purpose of responding to factual assertions about his prior record and selecting a qualified jury; and, during the trial itself, the prosecutor observed that Bilal exhibited a rational demeanor and appearance at all times. [42] The State further argued that Bilal's experienced trial counsel never sought a CPL section 730 examination before or during trial or otherwise noted on the record that petitioner might have a problem understanding the proceedings, and that Bilal's pro se motions for discovery and to represent himself reflected his competence shortly before the trial began. Finally, the State argued that the subsequent findings of Bilal's incompetence pending sentencing, but after trial, did not detract from, nor were they inconsistent with, a finding that he was competent at an earlier time in the proceedings. [43] The trial court adopted the "People's arguments in their entirety" and denied petitioner's motion. [44]

***4** Defendant was sentenced on August 20, 2007. Before his direct appeal was perfected, Bilal moved pursuant to CPL section 440.10 to vacate his judgment of conviction on the exact grounds raised in his previous CPL section 330.30 motion. [45] The trial court denied the motion because it raised the "exact issues" which were previously determined on the merits, was procedurally barred under CPL section 440.10, and the claims lacked merit. [46]

Bilal's direct appeal was perfected in March 2009. [47] He asserted that (1) the jury's verdict was against the weight of the evidence and not supported by sufficient evidence; (2) the introduction of "improper opinion (hearsay) evidence" required reversal; (3) the trial court improperly precluded demonstrative evidence; (4) "the prosecutor's summation required reversal, in the interest of justice;" and (5) the trial court improperly denied defendant a "retrospective competency hearing." [48] Bilal also submitted a supplemental pro se brief in which he raised the following claims: (1) that he was prejudiced by the trial court's decision allowing the People to amend the bill of particulars to correct an error concerning the site of the first drug sale; (2) that the People failed to disclose a record of money used by Officer Osorio to purchase narcotics from him, and that this record constituted *Rosario* material; (3) that the People failed to disclose when the police first learned of petitioner's outstanding Bronx County arrest warrant; (4) that the People failed to provide him with the memory card from the digital camera used in this case; and (5) that his attorney was ineffective for failing to move to suppress physical evidence in the form of cocaine on Fourth Amendment grounds, failing to introduce into evidence photographs of Bilal taken by a private investigator and various police reports, and failing to object to certain comments made by the prosecutor during summation (the same remarks objected to in counsel's appellate brief); (6) that the prosecutor suborned perjury; (7) that he was not competent at the time of trial and that the trial court erred in not conducting a hearing to retroactively determine his competency at that earlier time (also raised in counsel's appellate brief); (8) that the counts of Criminal Possession of a Controlled Substance in the Third Degree should be dismissed; and (9) that his right to confrontation was violated by the trial court's *in limine* ruling precluding Bilal from eliciting from Officer Osorio the precise location on her body where the Kell transmitter was positioned. [49] In addition, Bilal claimed that the counts of Criminal Possession of a Controlled Substance in the Seventh Degree must be dismissed, as included in the two counts of Criminal Possession of a Controlled Substance in the Third Degree pursuant to CPL section 300.40(3)(B), a point the State later conceded. [50]

On December 14, 2010, the Appellate Division, Second Department, modified the judgment of conviction by vacating Bilal's convictions of Criminal Possession of a Controlled Substance in the Seventh Degree, vacating the sentences imposed on them, and dismissing those counts of the indictment. As so modified, the judgment was otherwise affirmed. [51] On April 7, 2011, the New York Court of Appeals

denied leave to Appeal.[52] On August 25, 2011, the New York Court of Appeals denied reconsideration.[53]

2. Habeas Proceedings

***5** On May 25, 2011, Bilal filed the instant Petition, raising the eleven grounds described above. On December 1, 2011, he sought an extension of time to respond to the Opposition Memorandum, stressing that he sought "to obtain other documents and photos that adequately would disprove those submitted by the People;" Magistrate Judge Lisa Margaret Smith extended Bilal's time to reply to February 29, 2012.[54] Bilal timely filed a reply.[55]

On April 9, 2012, Judge Smith held a conference at which she deemed the Petition amended to include the claims set forth in Bilal's section 440.10 and 330.30 motions, and set a briefing scheduling in light of the amendment. On April 25, 2012, respondent filed a letter in response to the Amended Petition.[56] On May 23, 2012, Bilal requested and received an extension of time to file a reply, indicating that he was "awaiting affidavits [and] photographs taken by a private investigator that will prove some of my claims [,] to wit: Perjury."[57] In November 2012, Bilal filed his reply ("Bilal Reply"), attaching an affidavit from a private investigator, additional photographs, and several medical reports.

III. LEGAL STANDARDS

A. Deferential Standard for Federal Habeas Review

This petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). The AEDPA provides that a federal court may not grant a writ of habeas corpus to a prisoner in custody pursuant to the judgment of a state court with respect to any claim, unless the state court's adjudication on the merits of the claim: "(1) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;"[58] or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[59]

A state-court decision is contrary to clearly established federal law, as determined by the Supreme Court, in the following two instances:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.[60]

With regard to the "unreasonable application" prong, the Supreme Court has stated:

> [A] state-court decision can involve an "unreasonable application" of this Court's clearly established precedent in two ways. First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a statecourt decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.[61]

***6** In order for a federal court to find a state court's application of Supreme Court precedent to be unreasonable, the state court's decision must have been more than incorrect or erroneous. Rather, "[t]he state court's application of clearly established law must be *objectively unreasonable,"*[62] This standard " 'falls somewhere between merely erroneous and unreasonable to all reasonable jurists.' "[63] While the test requires " '[s]ome increment of incorrectness beyond error, ... the increment need not be great; otherwise habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence.' "[64] Furthermore, section 2254(d) applies to a defendant's habeas petition even where the state court order does not include an explanation of its reasoning.[65]

> Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for [section] 2254(d) applies when a "claim," not a component of one, has been adjudicated. [66]

Section 2254(d) also applies where a state court does not explicitly state in its opinion that it is adjudicating a claim on the merits. [67] "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." [68]

The deferential standard of review created by the AEDPA also extends to state-court factual determinations. Such determinations are presumed to be correct, and the petitioner must rebut them by clear and convincing evidence. [69]

B. Exhaustion Requirement

Section 2254 provides that a habeas petition by a state prisoner may not be granted unless "the applicant has exhausted the remedies available in the courts of the State." [70] In order to satisfy this exhaustion requirement, a prisoner must have " 'fairly presented to an appropriate state court the same federal constitutional claim that he now urges upon the federal courts,' " [71] either in the form of "explicit constitutional arguments" or simply by "alleging facts that fall 'well within the mainstream of constitutional litigation.' " [72] Fair presentation of a claim, for exhaustion purposes, includes petitioning for discretionary review in the state's highest appellate court. [73] However, "a federal habeas court need not require that a claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." [74] In such cases, a district court may deem the claims to be exhausted. [75]

When a habeas petition under the AEDPA contains both exhausted and unexhausted claims, a district court "can offer the petitioner 'the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims.' " [76] A district court may also deny a petition on the merits, even if it contains unexhausted claims. [77] The Supreme Court has noted that "plainly meatless" claims should be denied on the merits rather than dismissed for failure to exhaust. [78] Finally, in limited circumstances, a district court may stay a mixed petition and hold it in abeyance until it has been properly presented to the state courts. [79]

C. Procedural Bar

***7** Under the adequate and independent state ground doctrine, if the last state court to render judgment clearly and expressly states that its judgment rests on a state procedural bar, federal habeas review is precluded. [80] Even if the state court alternatively rules on the merits of the federal claim, federal habeas review is precluded if an adequate and independent state ground would bar the claim in state court. [81] Federal habeas review of procedurally barred claims is foreclosed unless the prisoner can demonstrate either (1) " 'cause for the default and actual prejudice;' " or (2) " 'that failure to consider the claims will result in a fundamental miscarriage of justice.' " [82] To show cause for a default, a prisoner must put forth some objective factor, external to the defense, explaining why the claim was not previously raised. [83] The Supreme Court has provided little guidance as to what constitutes "prejudice," but it can be inferred that prejudice is shown when the claim, if proven, would bear on the petitioner's guilt or punishment. [84] The fundamental miscarriage of justice exception to the procedural bar rule is available only upon a showing of actual innocence. [85] Finally, a habeas petitioner may not avoid the exhaustion requirement by waiting until federal habeas review to bring claims properly raised in state court. If such claims would be procedurally barred on the state level, they are deemed exhausted and procedurally defaulted for the purposes of federal habeas review. [86]

D. Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel, a petitioner must show that: (1) his attorney's performance fell below "an objective standard of reasonableness" under "prevailing professional norms" and (2) that he suffered prejudice as a result of that representation. [87] Both elements must be proven by the petitioner to assert a valid claim. When considering the first factor, a court must apply a "strong presumption" that counsel's representation fell within the "wide range" of reasonable professional assistance. [88] "[S]trategic choices made after

thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." [89]

"Even if a defendant shows that particular errors of counsel were unreasonable, ... the defendant must show that they actually had an adverse effect on the defense." [90] Thus, to establish prejudice

> [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [91]

In other words, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' " [92]

Finally, the order of analysis of the two *Strickland* prongs—performance and prejudice—is at the discretion of the court. As explained by the Supreme Court:

> ***8** [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even 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. The object of an ineffectiveness claim is not to grade counsel's performance. 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. [93]

Accordingly, if a court finds that there is no prejudice, it need not reach the performance prong. [94]

E. State Law and Evidentiary Errors

As a general matter, "[f]ederal habeas relief does not lie for errors of state law." [95] The United States Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." [96] "A federal court examining a habeas corpus petition does not have jurisdiction to interpret whether the state courts correctly applied state law." [97]

Similarly, "erroneous evidentiary rulings do not automatically rise to the level of constitutional error sufficient to warrant issuance of a writ of habeas corpus." [98] A writ of habeas corpus would only issue where an erroneous state evidentiary ruling "deprived [petitioner] of a *fundamentally fair* trial." [99]

IV. DISCUSSION

A. Procedurally Barred Claims

1. Sufficiency of the Evidence (Ground 1)

Bilal contends that the jury's verdict is against the weight of the evidence and/or insufficient. Both claims must be denied. *First,* unlike a claim based on sufficiency of the evidence, a claim based on the "weight of the evidence" cannot be addressed by a federal habeas court. This is because "the 'weight of the evidence' argument is a pure state law claim ... whereas a legal sufficiency claim is based on federal due process principles." [100]

Second, Bilal's failure to preserve his legal sufficiency claim for review by the State appellate courts acts as a bar to habeas review. On direct appeal, the Appellate Division, Second Department held that Bilal's "contention that his convictions were not supported by legally sufficient evidence is unpreserved for appellate review, as defense counsel's motion for dismissal lacked any specificity." [101] Under well-established New York law, in order to preserve for appellate review a challenge to the legal sufficiency of a conviction, defendant must move for a trial order of dismissal, "and the argument must be 'specifically directed' at the error being urged." [102] The New York Court of Appeals has "repeatedly made clear ... general motions simply do not create questions of law for this Court's review." [103]

***9** As such, Bilal's failure to challenge the sufficiency of the evidence in a timely manner is an independent and adequate

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state procedural ground which prevents federal habeas corpus review unless he can establish cause for his failure to raise the argument and prejudice or that a fundamental miscarriage of justice would result. Bilal argues that he is "entitled to relief based on the ineffectiveness of counsel" and because "he is actually innocent." [104] However, Bilal does not argue prejudice, and his cause argument is defective because he never raised and exhausted his ineffective assistance of counsel claim as a separate claim. [105] Furthermore, Bilal has not supported his claim of actual innocence with any "new reliable evidence ... that was not presented at trial." [106] The affidavit and photographs submitted by Bilal with his Reply do not amount to "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence...." [107] Viewing the entire record, this is simply not an extraordinary case warranting relief.

Bilal's claims regarding the weight and sufficiency of the evidence are therefore denied.

2. Prosecutor's Remarks (Ground 4)

Bilal contends that certain remarks made by the prosecutor during summation require reversal of his conviction in the interest of justice. [108] However, the Appellate Division, Second Department disposed of this claim based on an adequate and independent finding of procedural default, which bars federal habeas review of this claim. Specifically, the Appellate Division held that Bilal's "challenge to certain remarks made by the prosecutor during her summation is not preserved for appellate review, as no objection was made at the time." [109]

New York's contemporaneous objection rule, "require[s], at the very least, that any matter which a party wishes the appellate court to decide have been brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error." [110] The Second Circuit has repeatedly held that New York's contemporaneous objection rule is firmly established and regularly followed such that the failure to abide by it constitutes an adequate and independent state ground. [111] Accordingly, Bilal's claim regarding the prosecutor's remarks is procedurally barred; and, as discussed above, Bilal has not offered an adequate basis to overcome that procedural bar.

Thus, Bilal's claim relating to the prosecutor's remarks in her closing statement is denied.

3. *Rosario* Violation (Ground 6)

Bilal alleges that the prosecution's failure to disclose a record of the money used by Officer Osorio to purchase the narcotics, information as to when the police first learned of Bilal's outstanding Bronx County warrant, and the memory card from the digital camera used in his case constitutes a *Rosario* violation. However, it is well settled that *Rosario* violations are based wholly on New York law and do not present a federal constitutional question subject to federal habeas review. [112]

***10** Bilal's *Rosario* claim is therefore denied.

B. The Due Process Claims Lack Merit

1. Competency to Stand Trial (Grounds 5 and 9 and Amended Petition)

Petitioner maintains that he was mentally incompetent to stand trial, and that the trial court violated his rights by failing to conduct a retrospective competency hearing on the issue of his competence. Under well-established Supreme Court precedent, "the criminal trial of an incompetent defendant violates due process." [113] The meaning of competency is also well-established: "a defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him." [114] "[T]he right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." [115] Furthermore, as a matter of procedural due process, "state procedures must be adequate to protect this right." [116]

New York law mandates that the trial court "issue an order of examination when it is of the opinion that the defendant may be an incapacitated person." [117] The CPL defines an "incapacitated person" as "a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense." [118] According to the Second Circuit, "a hearing must be held when there is reasonable ground for a trial court

to conclude that the defendant may not be competent to stand trial." [119]

Applying the deferential standard under the AEDPA, the record does not support a finding that it was objectively unreasonable not to order a retroactive competency hearing in this case. The Appellate Division held that the trial court:

> providently exercised its discretion in denying, without a hearing, the defendant's application, submitted as part of his CPL 330.30 motion, for a reconstruction hearing to determine retrospectively his mental competency during the trial. A defendant is presumed competent and the court is under no obligation to issue an order of examination unless it has reasonable ground to believe that the defendant was an incapacitated person. The presumption of competency cannot be rebutted by a mere showing that the defendant has a history of mental illness, nor is a subsequent finding of mental illness evidence of a lack of competency during the subject time period. Here, there is nothing in the record to indicate that during trial the defendant did not have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or have a rational as well as factual understanding of the proceedings against him. [120]

The record supports this determination. At no time during the one-year period from his arrest on July 12, 2005 to the return of the verdict on July 13, 2006, did either Bilal or his counsel indicate to the trial court that defendant was not competent to stand trial, and he did not appear incompetent to the prosecution or the trial court. As explained by the trial court:

> ***11** In the instant case, Defendant was present through his trial; Defendant did not exhibit any unusual or bizarre behavior that would have suggested to this Court that he was incompetent. Nor did trial counsel ever make a motion or indicate to the Court that Defendant was unable to assist in his defense due to a lack of mental capacity. It was not until the jury rendered a guilty verdict that Defendant, in an indirect way, challenged the presumption of sanity; Defendant filed two motions, pro se, one for "immediate death" and another for "tubal litigation." Trial counsel requested a competency hearing and moved to be relieved. The Court granted both requests. After several psychiatric evaluations and two competency hearings, the Court determined on May 29, 2007, that Defendant was competent to be sentenced; Defendant did not contest the final psychiatric findings. The Court has extensively explored Defendant's contentions regarding his competency and finds [ ] Defendant's assertions and arguments to be without merit. [121]

I therefore cannot conclude that the appellate court's determination that the trial court was not required to order a competency hearing was either an unreasonable application of clearly established law or an unreasonable determination of the facts in light of the evidence. [122] *First,* as the Second Circuit has pointed out, "since competency involves an inability to assist in the preparation of a defense or rationally to comprehend the nature of the proceedings, failure by trial counsel to indicate the presence of such difficulties provides substantial evidence of the defendant's competence." [123] *Second,* the Second Circuit has made clear that, "the failure to conduct a full competency hearing is not a ground for reversal when the defendant appeared to be competent during trial, and the [trial] court's view of the defendant's competency based on its observations at trial is entitled to deference." [124] Finally, the trial court had the benefit of the post-trial psychiatric evaluations in making the determination that a competency hearing was not required. [125] In short, because "[t]he question of competency focuses on a defendant's abilities at the time of trial," and the record indicates that there was little or no basis to conclude

that Bilal's abilities were in any way impaired at trial, habeas relief is not warranted on this claim. [126]

2. Evidentiary Rulings (Grounds 2 and 3)
Bilal alleges that the trial court improperly permitted the prosecution's use of hearsay evidence and precluded his attempt to use demonstrative evidence to establish his mistaken identity defense. As a general matter, a state court's evidentiary rulings, even if erroneous under state law, only present constitutional issues cognizable on habeas review when the ruling deprives petitioner of his due process right to "a *fundamentally fair* trial." [127]

The evidentiary rulings did not deprive Bilal of a fundamentally fair trial. I will first consider the hearsay challenge. Bilal argues that the trial court violated New York hearsay rules by permitting the backup officers to testify as to what they learned of the drug transactions through police radio communications, thus improperly bolstering Officer Osorio's testimony. The Appellate Division held that this challenge was properly preserved but "without merit, as in each instance, the testimony that, at some point, the witness learned a transaction had been completed, was offered not as proof that there had been a transaction, but to provide necessary background information to the jury." [128]

***12** Bilal's claim fails for several reasons. *First,* while "bolstering" is prohibited under New York law, it is not prohibited by the Federal Rules of Evidence and, as a general matter, the practice of bolstering does not deprive a defendant of a due process right to a fair trial. *Second,* as suggested by the Appellate Division, admission of the evidence was not a hearsay violation. The testimony was not offered for the truth of the matter asserted—*i.e.,* that drug sales had occurred—but for the purpose of establishing the reasons behind the actions of the officers, including the relevance of police observation of Officer Osorio and Bilal both before and after each drug transaction, to help establish the chain of custody for the drugs. Finally, even if the trial court erroneously allowed hearsay evidence, that error did not infuse Bilal's trial with unfairness so as to deny him due process of the law. The evidence at trial was that only Officer Osorio had been a witness to the drug sales and that she had radioed her fellow officers with information regarding the completed sale and Bilal's description, and the trial court's limiting instruction in its final charge to the jury reiterated that the statements were not offered for their truth.

I turn next to Bilal's contention that he was deprived of a fair trial by the trial court's refusal to allow him to display for the jury his tattoo, bum mark, and gold teeth. Bilal claims that this evidence is significant because Officer Osorio had failed to include these characteristics in her contemporaneous descriptions of him, and this failure implicated Officer Osorio's credibility and her ability to identify a suspect.

Under New York law, a court may refuse to allow the admission of demonstrative evidence, such as the displaying of tattoos and other physical features, when there is an insufficient foundation that these features existed at the relevant time. [129] The trial court denied Bilal's request on the grounds that he was, in effect, asking to give testimonial evidence without subjecting himself to cross-examination and without laying the proper foundation—*i.e.,* independent evidence that the features were present on the date of the crime and that the witness would have had reason to notice them during the incident. [130] At the same time, the trial court permitted Bilal's sister, who was subject to cross-examination, to testify about Bilal's tattoos and gold teeth. The Appellate Division held that Bilal "was not deprived of a fair trial by the Supreme Court's refusal to allow him to display his bums, tattoos, and gold teeth in support of his defense of mistaken identity, since his sister was permitted to testify regarding these features." [131]

Bilal's claim fails for at least two reasons. *First,* as just described, the trial court had a valid reason for excluding the evidence. *Second,* there was no prejudice to Bilal as a result of that ruling. Bilal's sister testified about Bilal's tattoos and gold teeth and Bilal was sitting in plain sight of the jury during the twoweek trial. While Bilal was precluded from offering these characteristics as *demonstrative* evidence, he was clearly not precluded from presenting his mistaken identity defense based on these characteristics. For all these reasons, the Appellate Division's decision was not an unreasonable application of clearly established law.

3. False Testimony (Ground 10 and Amended Petition)
***13** Bilal claims that he was deprived of a fair trial because the prosecutor obtained a conviction through the knowing use of false testimony given by police witnesses at trial. Bilal first claims that Detective Menton offered false testimony regarding the Disputed Photograph. According to Bilal, Detective Menton's claim that he took the photograph while Bilal was standing in front of 160 Willow Street is false because the facade of the building in the Disputed Photograph

is different from the facade in another photo of 160 Willow Street. Bilal claims that this discrepancy proves that Detective Menton lied about the location where he had seen Bilal when he photographed him. Bilal further speculates that since the prosecutor introduced the photograph, she must have known Detective Menton was lying.

Bilal next claims that Officer Osorio lied about having purchased drugs from him on July 12, 2005, because the backup officers did not observe the actual transaction. Bilal argues that it is not possible for the drug sale to have taken place unnoticed by the two officers on backup. Lastly, Bilal states that testimony concerning the particulars of his arrest was false. Specifically, he claims that the officer who arrested him because of the outstanding warrant from Bronx County falsely testified that he was part of the backup team and that he had taken Bilal into custody as a result of Bilal's drug transaction with Officer Osorio. The Appellate Division concluded that these claims were "without merit." [132]

It is clearly established "that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair." [133] To challenge a conviction because of a prosecutor's knowing use of false testimony, a defendant must establish that "(1) there was false testimony, (2) the Government knew or should have known that the testimony was false, and (3) there was any reasonable likelihood that the false testimony could have affected the judgment of the jury." [134] Bilal's claim fails for the simple reason that he has not established that any of the testimony was false. [135]

First, the photographs used by Bilal to show that the Disputed Photograph was not taken at 160 Willow Street are inconclusive. But even assuming they were not inconclusive, the fact that the facades are different would only demonstrate that Detective Menton was mistaken about where the photograph was taken. However, there is no dispute that Bilal is in the Disputed Photograph and that shortly after the photograph was taken Officer Osorio identified Bilal as being the person who sold her drugs earlier that day. *Second,* Bilal's assertion that the backup officers should have seen the drug transaction is not based on any facts or evidence concerning Operation Impact. It is purely speculation on Bilal's part. Finally, the reason that the details surrounding his arrest, including the Bronx County warrant, were not elicited at trial is because those details were excluded from evidence at Bilal's request. [136] For all these reasons, the Appellate Division's decision was not an unreasonable application of clearly established law.

4. Amendment to Bill of Particulars (Ground 11)

***14** Bilal claims that he was prejudiced by the trial court's decision allowing the prosecutor to amend the bill of particulars to correct an error concerning the site of the first drug sale. Following opening statements at trial, defense counsel brought to the trial court's attention that the People, in their opening statement, had mentioned 169 Oak Street as the address for the first drug sale, whereas the bill of particulars listed the address as 169 Elm Street. Defense counsel then asked that further mention of Oak Street be precluded. The prosecutor responded that the correct address had been provided in discovery. The trial court denied defense counsel's application. The prosecutor later moved to amend the bill of particulars to reflect the correct address. Citing lack of prejudice, the trial court granted the prosecutor's application. [137]

It is clear from the record that the defense knew the correct address, and knew the address in the bill of particulars was incorrect, prior to trial. As such, the incorrect address was no more than a clerical mistake and amending the bill of particulars did not result in prejudice. Accordingly, it cannot be said that Bilal was deprived of a fundamentally fair trial or that the state court's decision was an unreasonable application of clearly established law.

Bilal's due process claims based on incompetency, evidentiary rulings, prosecutorial misconduct, and amendment of the bill of particulars are therefore denied.

C. The Confrontation Clause Claim Is Without Merit (Ground 8)

Bilal contends that his Sixth Amendment right of confrontation was violated by the trial court's ruling that he could not elicit the precise position of the Kell transmitter on Officer Osorio's body during the drug transactions. Bilal's theory, which also implicates due process rights, is that the precise location of the transmitter was important to both impeach Officer Osorio and to support his misidentification defense. This is because the Kell transmitter apparently did not pick up his voice during the two drug sales. [138] On direct appeal, the Appellate Division summarily rejected this claim as "without merit." [139] This decision is entitled to the deference specified in section 2254. [140]

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution “to be confronted with the witnesses against him.”But not every curtailment of the right to cross-examine a witness violates the Confrontation Clause. As explained by the Supreme Court, the right to confront and cross-examine a witness “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process .” [141] One example of when it may be appropriate to curtail the right is to protect a witness's safety. [142]

Here, the trial court did not preclude all questions concerning the Kell transmitter. The only limitation was that Bilal could not inquire about the exact location of the transmitter on Officer Osorio's body. That narrow limitation does not appear to be arbitrary or disproportionate because it was aimed at protecting the safety of undercover officers who were using Kell devices as part of ongoing undercover work. Nor does preclusion of the testimony suggest that Bilal was deprived of the opportunity to cross-examine Officer Osorio on the fact that his voice was not picked up by the Kell transmitter. Likewise, Bilal could still advance his misidentification defense based on the failure of the People to produce a recording of his voice. For all these reasons, the Appellate Division's decision was not an unreasonable application of clearly established law.

***15** Thus, Bilal's Confrontation Clause claim is denied.

D. The Ineffective Assistance of Counsel Claims Are Without Merit (Ground 7 and Amended Petition)

On direct appeal, Bilal argued that his trial attorney rendered ineffective assistance counsel on four grounds: (1) failure to move to suppress physical evidence—*i.e.,* the crack cocaine—on Fourth Amendment grounds; (2) failure to introduce photographs taken by a private investigator; (3) failure to use several police reports to discredit the testimony of Officer Osorio; and (4) failure to object to the prosecutor's comments during summation. The Appellate Division summarily rejected these claims as “without merit.” [143] In addition, Bilal was permitted to add claims raised in his section 440.10 and 330.30 motions. These include claims of ineffective counsel based on counsel's alleged failure to investigate alibi witnesses and to sufficiently impeach the testimony of Detective Menton at trial. Bilal is not entitled to relief as he has not shown an unreasonable application of *Strickland v. Washington.* [144]

Bilal's claim based on suppression is wholly without merit as no drugs were recovered from Bilal—the cocaine was recovered from Officer Osorio. Bilal's first claim concerning the use of alibi witnesses is that counsel should have presented evidence that the other person in the Disputed Photograph had been arrested for criminal possession of a controlled substance. His second is that there were witnesses who could testify that he was in the Bronx on the dates of the alleged sales. [145] As explained by Bilal, his counsel determined not to pursue these so-called alibi witnesses based on her belief that it would look bad for Bilal to have been hanging around with a known drug user/dealer given the charges in the case, and that in her judgment it would be better not to attempt to claim Bilal was in the Bronx during the drug sales. [146] These are precisely the type of strategic choices that fall within the “wide range” of professional assistance. [147]

For the same reason, Bilal has not shown that counsel's failure to use his “photographic evidence,” including for the purpose of impeaching Detective Menton, was ineffective. As previously noted, the photographs are inconclusive; at most they show that Detective Menton was mistaken about the exact location at which he took the photograph of Bilal shortly after the drug sale on July 12, 2005. Accordingly, not using the photographs to discredit the Disputed Photograph or to impeach Detective Menton is a reasonable strategic choice. Likewise, Bilal has not stated a claim that counsel was ineffective for not using all available evidence—*i.e.,* their respective police reports—to impeach Officer Osorio and Detective Menton. This is because Bilal has not identified any inconsistencies or exculpatory information in these reports. Accordingly, Bilal has not shown that his counsel's decision not to use the reports was objectively unreasonable under prevailing professional norms.

***16** There is also no basis to conclude that Bilal received ineffective assistance of counsel based on the remarks made by the prosecutor in her summation. *First,* counsel may have elected not to object to the statements based on her determination that there were no grounds for an objection. *Second,* even if there were something objectionable about the prosecutor's comments, counsel may have had other valid reasons for not objecting, such as not wanting to highlight the very point being made by the prosecutor.

Lastly, Bilal has not shown prejudice. This case involves two sales of crack cocaine on successive days to an undercover officer. Officer Osorio testified that Bilal was the person who

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sold her the crack cocaine on those consecutive days; there was evidence confirming that the substance she purchased contained cocaine; and Officer Osorio testified that Bilal was in the Disputed Photograph. Based on this overwhelming evidence of guilt, Bilal has failed to demonstrate how any of the purported grounds for a claim of ineffective assistance of counsel caused him prejudice. For all these reasons, the Appellate Division's decision was not an unreasonable application of clearly established law.

Bilal's ineffective assistance of counsel claims are therefore denied. [148]

V. CONCLUSION

For the foregoing reasons, the Petition is denied. The remaining issue is whether to grant a certificate of appealability ("COA"). For a COA to issue, a petitioner must make a "substantial showing of the denial of a constitutional right." [149] A "substantial showing" does not require a petitioner to show that he would prevail on the merits, but merely that reasonable jurists could disagree as to whether "the petition should have been resolved in a different manner or [whether] the issues presented were 'adequate to deserve encouragement to proceed further.' " [150] Bilal has made no showing. Thus, I decline to grant a COA. The Clerk of the Court is directed to close this Petition and this case.

SO ORDERED.

All Citations

Slip Copy, 2015 WL 3854705

Footnotes

1 *See* Petition for a Writ of Habeas Corpus ("Pet."); Memorandum of Law in Opposition to the Petition for Writ of Habeas Corpus ("Opp.Mem.").

2 *See*New York Penal Law § 220.44.

3 *See id.* § 220.39.

4 *See id.* § 220.16.

5 *See id.* § 220.03.

6 Specifically, Bilal was sentenced to concurrent terms of eight years of imprisonment to be followed by three years of supervision on all counts except for the two counts of Criminal Possession of a Controlled Substance in the Seventh Degree, for which he received concurrent one-year terms, with all terms to run concurrently. *See* 8/5/09 Decision and Order of the Honorable Susan M. Capeci, County Court Judge, Ex. T to Opp. Mem., at 3.

7 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 (1961).

8 In addition, on April 9, 2012, the petition was deemed amended to include the grounds raised in motions made by Bilal pursuant to sections 440.10 and 330.30 of New York's Criminal Procedure Law ("CPL"). Many of these grounds are duplicative of those listed above, but include additional ineffective assistance of counsel claims.

9 *See* 11/22/11 Affidavit in Opposition to Petition for Writ of Habeas Corpus of John Carmody, Assistant District Attorney, County of Westchester ("Carmody Aff."), at 1–2.

10 *See id.* at 2 & n. 3, 213 N.Y.S.2d 448, 173 N.E.2d 881.

11 *See id.* at 2, 213 N.Y.S.2d 448, 173 N.E.2d 881.

12 *See id.*

13 *Id.* at 2 n. 3, 213 N.Y.S.2d 448, 173 N.E.2d 881.

14 *See id.*

15 *Id.*

16 *See id.*I will refer to the digital picture of Bilal that is attached as Exhibit BB to the Opposition Memorandum as the "Disputed Photograph."

17 *See* Carmody Aff. at 2.

18 *See id.* at 3, 213 N.Y.S.2d 448, 173 N.E.2d 881.

19 *See id.*

20 *Id.*

21 *See id.*

22 *See id.*

23 *Id.* at 4, 213 N.Y.S.2d 448, 173 N.E.2d 881.
24 *See id.*
25 *See id.*
26 *See id.* 4–5, 213 N.Y.S.2d 448, 173 N.E.2d 881.
27 *See id.* at 6, 213 N.Y.S.2d 448, 173 N.E.2d 881.
28 *See id.* at 7, 213 N.Y.S.2d 448, 173 N.E.2d 881.
29 *See id.*
30 *See id.; see also* Disputed Photograph.
31 *See* Carmody Aff. at 7.
32 *See id.* at 8, 213 N.Y.S.2d 448, 173 N.E.2d 881.
33 *See* Bilal pro se motion, Ex. I to Opp. Mem.
34 *See* 10/26/06 Order of Commitment, Ex. D to Opp. Mem.
35 11/17/06 Notification of Fitness to Proceed, Ex. E to Opp. Mem.
36 Carmody Aff. at 10.
37 *See id.*
38 *See generally* 4/27/07 Notification of Fitness to Proceed, Ex. G to Opp. Mem.
39 *See* Carmody Aff. at 10.
40 *See id.*
41 *See id.* at 11, 213 N.Y.S.2d 448, 173 N.E.2d 881.
42 *See id.*
43 *See id.*
44 *See* 8/3/07 Decision and Order of the Honorable Rory J. Bellantoni, County Court Judge (“August 2007 Decision”), Ex. J to Opp. Mem., at 4.
45 *See* Carmody Aff. at 14.
46 *See* 2/24/09 Decision and Order of the Honorable Rory J. Bellantoni, County Court Judge, Ex. N to Opp. Mem., at 2, 3. Bilal's request for leave to appeal this ruling to the Appellate Division, Second Department was denied by the Appellate Division on May 11, 2009.
47 *See* Carmody Aff. at 18 (citing 2/26/09 Brief for Appellant by John Brian Mcreery, appellate counsel for Bilal, Ex. U to Opp. Mem.).
48 *See id.*
49 *See* 1/18/10 Supplemental Brief for Defendant–Appellant (“Bilal Supp.”), Ex. W to Opp. Mem.
50 *See* Carmody Aff. at 18–20.
51 *See generally* *People v. Bilal,* 79 A.D.3d 900, 912 N.Y.S.2d 678 (2d Dep't 2010).
52 *See* *People v. Bilal,* 16 N.Y.3d 856, 923 N.Y.S.2d 418, 947 N.E.2d 1197 (2011).
53 *See* *People v. Bilal,* 17 N.Y.3d 813, 929 N.Y.S.2d 802, 954 N.E.2d 93 (2011).
54 Docket No. 23.
55 *See* Response to Opposition to Writ of Habeas Corpus (“Bilal Response”).
56 *See* 4/25/12 Letter from Carmody to Judge Smith.
57 Docket No. 36.
58 28 U.S.C. § 2254(d)(1).
59 *Id.* § 2254(d)(2).
60 *Williams v. Taylor,* 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).
61 *Id.* at 407.
62 *Lockyer v. Andrade,* 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (emphasis added).*Accord* *Renico v. Lett,* 559 U.S. 766, 773, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) (stating that “[t]his distinction creates ‘a substantially higher threshold’ for obtaining relief than *de novo* review”) (quoting *Schriro v. Landrigan,* 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)); *Williams,* 529 U.S. at 409; *Harris v. Kuhlman,* 346 F.3d 330, 344 (2d Cir.2003).
63 *Overton v. Newton,* 295 F.3d 270, 276 (2d Cir.2002) (quoting *Jones v. Stinson,* 229 F.3d 112, 119 (2d Cir.2000)).
64 *Francis v. Stone,* 221 F.3d 100, 111 (2d Cir.2000) (quoting *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 889 (3d Cir.1999)).

65 *See Harrington v. Richter,* 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

66 *Id.* (citing, *inter alia, Sedan v. Kuhlman,* 261 F.3d 303, 311–12 (2d Cir.2001) ("[W]hen a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an unreasonable application of clearly established Supreme Court precedent."(quotation marks and citation omitted))).

67 *See id.*

68 *Id.* at 99.

69 *See*28 U.S.C. § 2254(e)(1).

70 *Id.* § 2254(b)(1)(A).

71 *Turner v. Artuz,* 262 F.3d 118, 123 (2d Cir.2001) (quoting *Klein v. Harris,* 667 F.2d 274, 282 (2d Cir.1981)).

72 *Levine v. Commissioner of Corr. Servs.,* 44 F.3d 121, 124 (2d Cir.1995) (quoting *Dave v. Attorney Gen.,* 969 F.2d 186, 192 (2d Cir.1982) (en banc)).

73 *See O'Sullivan v. Boerckel,* 526 U.S. 838, 847–48, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *see also Galdamez v. Keane,* 394 F.3d 68, 74 (2d Cir.2005) (stating that in New York, exhaustion requires that a "criminal defendant ... first appeal his or her conviction to the Appellate Division, and then ... seek further review of that conviction by applying to the Court of Appeals for a certificate granting leave to appeal").

74 *Reyes v. Keane,* 118 F.3d 136, 139 (2d Cir.1997).

75 *See id.*

76 *McKethan v. Mantello,* 292 F.3d 119, 122 (2d Cir.2002) (quoting *Rose v. Lundy,* 455 U.S. 509, 510, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)).

77 *See*28 U.S.C. § 2254(b)(2).

78 *Rhines v. Weber,* 544 U.S. 269, 277, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005) (noting that in light of the discretion to deny unexhausted claims on the merits, the decision to stay a habeas petition to allow a petitioner to exhaust plainly meritless claims would be an abuse of discretion).

79 *See id.* at 277–78.

80 *See Jones v. Duncan,* 162 F.Supp.2d 204, 210 (S.D.N.Y.2001) (citing *Jones v. Vacco,* 126 F.3d 408, 415 (2d Cir.1997)).

81 *See, e.g., Harris v. Reed,* 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Garcia v. Lewis,* 188 F.3d 71, 72–82 (2d Cir.1999); *Glenn v. Bartlett,* 98 F.3d 721, 724–25 (2d Cir.1996).

82 *Glenn,* 98 F.3d at 724 (quoting *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).*Accord Ylst v. Nunnemaker,* 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Epps v. Commissioner of Corr. Servs.,* 13 F.3d 615, 617–18 (2d Cir.1994).

83 *See Restrepo v. Kelly,* 178 F.3d 634, 638 (2d Cir.1999).

84 *See Banks v. Dretke,* 540 U.S. 668, 671, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (stating that "prejudice within the compass of the 'cause and prejudice' requirement exists when suppressed evidence is 'material' for *Brady* purposes" (quoting *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999))).

85 *See Murray v. Carrier,* 477 U.S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

86 *See Coleman,* 501 U.S. at 735 n. 1; *see also Woodford v. Ngo,* 548 U.S. 81, 92–93, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006).

87 *Strickland v. Washington,* 466 U.S. 668, 687–88, 693–94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

88 *Id.* at 689. *Accord Bell v. Cone,* 535 U.S. 685, 697–98, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

89 *Strickland,* 466 U.S. at 690. *Accord Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.1994) ("In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, 'viewed as of the time of counsel's conduct,' and may not use hindsight to second-guess his strategy choices.") (quoting *Strickland,* 466 U .S. at 690).

90 *Strickland,* 466 U.S. at 693.

91 *Id.* at 694.

92 *Harrington v. Richter,* 562 U.S. 86, 104, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quoting *Strickland,* 466 U.S. at 693).

93 *Strickland,* 466 U.S. at 697.

94 *See Farrington v. Senkowski,* 214 F.3d 237, 242 (2d Cir.2000) (stating that courts need not resolve the *Strickland* performance prong if the prejudice prong is more readily resolved).

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95 *Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).
96 *Bradshaw v. Richey,* 546 U.S. 74, 6, ––S.Ct. –––, –––, –– L.Ed.2d –––, ––– (2005).
97 *Sutton v. Herbert,* 39 F.Supp.2d 335, 338 (S.D.N.Y.1999) (citing *Estelle,* 502 U.S. at 71–72).
98 *Rosario v. Kuhlman,* 839 F.2d 918, 925 (2d Cir.1988).
99 *Taylor v. Curry,* 708 F.2d 886, 891 (2d Cir.1983) (emphasis in original) (citing *Chambers v. Mississippi,* 410 U.S. 284, 302–03, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)).
100 *Douglas v. Portuondo,* 232 F.Supp.2d 106, 116 (S.D.N.Y.2002).*Accord McKinnon v. Superintendent,* 422 Fed. App'x. 69, 75 (2d Cir.2011) (explaining that "the argument that a verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus") (citing *Estelle,* 502 U.S. at 67–68).
101 *Bilal,* 79 A.D.3d at 901, 912 N.Y.S.2d 678.
102 *People v. Hawkins,* 11 N.Y.3d 484, 491–92, 872 N.Y.S.2d 395, 900 N.E.2d 946 (2008).
103 *Id.*
104 Bilal Response at 5.
105 *See Murray,* 477 U.S. at 489 (explaining that the exhaustion requirement "generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default"). Bilal also suggests that the possibility he was incompetent during the trial constitutes cause. *See* Bilal Reply at 5–6. However, the record does not support the claim that Bilal was incompetent at trial.
106 *Schlup v. Delo,* 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). As explained by the Supreme Court, "the *Schlup* standard is demanding and permits review only in the extraordinary case."*House v. Bell,* 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (internal quotation marks omitted).
107 *Schlup,* 513 U.S. at 324.
108 In response to defense counsel's closing remarks—which had challenged Officer Osorio's credibility and implied that she would say anything in order to help the People's case—the prosecutor made the following remarks about which petitioner complains:

> Well again, if they are going to be untruthful, every single person has to be untruthful. You would have to believe that every single officer, Detective Menton, Officer Osorio, Detective Sergeant Kevin Tighe, Officer Devitt, Detective Dolan, Detective Moynihan, and Detective Mueller, you would have to believe that each one of those people got up and walked over here and put their hands on the Bible and swore, took the oath and the stand, you would have to believe that every single person was untruthful.

Trial Transcript at 914–915.
109 *Bilal,* 79 A.D.3d at 901, 912 N.Y.S.2d 678 (citing CPL § 470.05[2], which provides in part that "[f]or purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same").
110 *People v. Luperon,* 85 N.Y.2d 71, 78, 623 N.Y.S.2d 735, 647 N.E.2d 1243 (1995).*Accord People v. Thomas,* 50 N.Y.2d 467, 471, 429 N.Y.S.2d 584, 407 N.E.2d 430 (1980) (explaining that "points which are not raised at trial may not be considered for the first time on appeal" (citing CPL § 470.05[2]).
111 *See Whitley v. Ercole,* 642 F.3d 278, 286–87 (2d Cir.2011) (explaining that Second Circuit "case law has long made clear that New York's contemporaneous objection rule is ... a 'firmly established and regularly followed' rule" sufficient to constitute an adequate and independent state ground"); *Downs v. Lape,* 657 F.3d 97, 104 (2d Cir.2011) ("[W]e have held repeatedly that the contemporaneous objection rule is a firmly established and regularly followed New York procedural rule.").
112 *See United States ex rel. Butler v. Schubin,* 376 F.Supp. 1241, 1247 (S.D.N.Y.1974), *aff'd,*508 F.2d 837 (2d Cir.1975); *see also Velazquez v. Poole,* 614 F.Supp.2d 284, 335 (E.D.N.Y.2007) (stating that an allegation that the prosecution violated *Rosario*"is a state law claim not cognizable on federal habeas review" (citation omitted)).
113 *Cooper v. Oklahoma,* 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (explaining that "[c]ompetence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so").
114 *Ryan v. Gonzales,* –– U.S. –––, –––, 133 S.Ct. 696, 703, 184 L.Ed.2d 528 (2013) (internal quotation marks and alterations omitted).
115 *Cooper,* 517 U.S. at 354 n. 4.

116 *Pate v. Robinson,* 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) (holding that due process had been violated where trial court failed to order a determination of defendant's sanity as required under state statute).

117 CPL § 730.30.

118 *Id.* § 730.10.

119 *Harris v. Kuhlmann,* 346 F.3d 330, 350 (2d Cir.2003) (internal quotation marks and alterations omitted).

120 *Bilal,* 79 A.D.2d at 901–02 (internal quotation marks, citations, and alterations omitted).

121 August 2007 Decision at 5. The record also contains compelling evidence that Bilal was competent prior to trial. For example, Bilal filed a pro se pretrial motion on April 10, 2006. In that motion he accurately recited the charges against him, indicating that they were "serious crime(s)" for which he "face[d] a substantial prison sentence," stated that he was aware of who and what his attorney had done, and expressed his dissatisfaction with his legal representation, noting that he and his attorney had differing views as to his defense. Carmody Aff. at 4–5.

122 *See Drope v. Missouri,* 420 U.S. 162, 180, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) ("The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts."); *Harris,* 346 F.3d at 352 ("Considering all of the evidence before the state trial court at the time of the October 17, 1984 hearing, we cannot conclude that it was objectively unreasonable for the court to have denied Harris's motion for a competence hearing.").

123 *United States v. Varnos,* 797 F.2d 1146, 1150 (2d Cir.1986).

124 *United States v. Kirsh,* 54 F.3d 1062, 1070 (2d Cir.1995).

125 Likewise, the dismissal of the separately filed criminal action in the Yonkers City Court based on incompetency was *after* the trial and conviction of Bilal in Westchester County.

126 *Kirsh,* 54 F.3d at 1070.

127 *Taylor v. Curry,* 708 F.2d 886, 891 (2d Cir.1983) (emphasis in original).*Accord Freeman v. Kadien,* 684 F.3d 30, 35 (2d Cir.2012) (same).

128 *Bilal,* 79 A.D.3d at 901, 912 N.Y.S.2d 678 (internal quotation marks omitted).

129 *See People v. Rodriguez,* 64 N.Y.2d 738, 741, 485 N.Y.S.2d 976, 475 N.E.2d 443 (1984) (holding that "the trial court did not abuse its discretion in refusing to allow defendant to display his tattooed hands in evidence or defense counsel to testify as to the appearance of defendant's hands four days after the theft inasmuch as defendant offered no proof regarding the presence of the tattoos on the date in issue").

130 *See* Trial Transcript at 824, 825, 845–847. The court also noted that if "you have to actually walk [Bilal] in front of the jury and point out these distinguishing features for the jury, one wonders how distinguishing they are [ ] in the first place."*Id.* at 824, 485 N.Y.S.2d 976, 475 N.E.2d 443.

131 *Bilal,* 79 A.D.3d at 901, 912 N.Y.S.2d 678.

132 *Id.* at 902, 912 N.Y.S.2d 678.

133 *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).*Accord United States v. Cromitie,* 727 F.3d 194, 221 (2d Cir.2013).

134 *United States v. Helmsley,* 985 F.2d 1202, 1205–06 (2d Cir.1993).

135 *See* Opp. Mem. at 60.

136 *See* Carmody Aff. at 4.

137 *See* Opp. Mem. at 61–63. Under New York law, a bill of particulars may generally be amended at any time, provided that "no undue prejudice would accrue to defendant and that the prosecutor has acted in good faith."CPL § 200.95.

138 *See*Bilal Response at 3; Bilal Supp. at 30.

139 *Bilal,* 79 A.D.3d at 902, 912 N.Y.S.2d 678.

140 *See Grayton v. Ercole,* 691 F.3d 165, 174 (2d Cir.2012) ("Where, as here, a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.") (quotation marks omitted); *Wilson v. Mazzuca,* 570 F.3d 490, 499 (2d Cir.2009) ("Where, as here, a state court fails to articulate the rationale underlying its rejection of a petitioner's claim, and when that rejection is on the merits, the federal court will focus its review on whether the state court's ultimate decision was an unreasonable application of clearly established Supreme Court precedent.") (quotation marks omitted).

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141 *Rock v. Arkansas,* 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (internal quotation marks omitted).

142 *See* *United States v. Crowley,* 318 F.3d 401, 417 (2d Cir.2003) (collecting cases).*Accord* *United States v. Apazidis,* 523 Fed. App'x 17, 19 (2d Cir.2013) ("Trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.") (internal quotation marks omitted).

143 *Bilal,* 79 A.D.3d at 902, 912 N.Y.S.2d 678.

144 *See Grayton,* 691 F.3d at 174; *Wilson,* 570 F.3d at 499.

145 While Bilal has asserted that these individuals saw him in the Bronx on the dates of the drug sales, he has not attempted to substantiate that claim with evidence, such as affidavits.

146 *See* Motion to Set Aside Verdict, Ex. H to Opp. Mem., at Point E.I.

147 *Strickland,* 466 U.S. at 689.

148 All of Bilal's contentions and claims not specifically mentioned here are denied on grounds that Bilal has not shown an unreasonable application of clearly established law.

149 28 U.S.C. § 2253(c)(2).

150 *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (quotation marks and citation omitted)).*Accord* *Middleton v. Attorneys Gen. of the States of New York and Pennsylvania,* 396 F.3d 207, 209 (2d Cir.2005) (denying COA where reasonable jurists could not debate whether the district court's dismissal of the petition was correct).

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152 Fed.Appx. 15
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals, Second Circuit.

Everton BROWN, Petitioner-Appellant,
v.
Daniel SENKOWSKI, Respondent-Appellee.

Docket No. 04-4145. | Sept. 22, 2005.

Synopsis

Background: Following affirmance of his convictions for attempted murder in first degree, criminal possession of weapon in second degree, and resisting arrest, 236 A.D.2d 254, 653 N.Y.S.2d 339, state inmate filed petition for writ of habeas corpus. The United States District Court for the Southern District of New York, Lawrence M. McKenna, J., 2004 WL 1043091, denied petition, and petitioner appealed.

[Holding:] The Court of Appeals held that petitioner did not fairly present his federal constitutional claims to New York Court of Appeals.

Affirmed.

West Headnotes (2)

[1] **Habeas Corpus**
Necessity and Sufficiency of Identification of Federal Constitutional Issue

Federal habeas petitioner did not fairly present his federal constitutional claims to New York Court of Appeals, as required to exhaust state remedies, where petitioner's application for leave to appeal made only hypothetical reference to federal constitutional claim, and categorically disavowed any reliance on non-state law claims. 28 U.S.C.A. § 2254(b)(1).

13 Cases that cite this headnote

[2] **Habeas Corpus**
Sufficiency of Presentation; Fair Presentation

Federal habeas petitioner's inclusion of briefs he submitted to intermediate appellate court in his application for leave to appeal did not fairly present his federal constitutional claims to New York Court of Appeals, as required to exhaust state remedies, even though inclusion of those briefs was mandated by state procedural rules, where petitioner did not explicitly alert Court of Appeals to each claim. 28 U.S.C.A. § 2254; N.Y.McKinney's Judiciary Law § 14.

9 Cases that cite this headnote

***16** Appeal from a judgment of the United States District Court for the Southern District of New York (Lawrence M. McKenna, Judge).

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

Attorneys and Law Firms

Vida M. Alvy, Alvy & Jacobson, New York, NY, for Appellant.

T. Charles Won, Assistant District Attorney (Joseph N. Ferdenzi, Allen H. Saperstein, Assistant District Attorneys, Robert T. Johnson, District Attorney, Bronx County, on the brief), Bronx County District Attorney's Office, Bronx, NY, for Appellee, of counsel.

PRESENT: MESKILL, CABRANES Circuit Judges, and MUKASEY, District Judge. [*]

SUMMARY ORDER

****1** Petitioner-appellant Everton Brown appeals the order of the District Court, entered May 6, 2004, adopting the Report and Recommendation of Magistrate Judge Michael H. Dolinger and denying Brown's petition for a writ of *habeas corpus. See Brown v. Senkowski,* No. 98 Civ. 7560, 2004 WL 1043091 (S.D.N.Y. May 6, 2004). We assume that the parties are familiar with the facts, the procedural history, and the scope of the issues presented on appeal.

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On July 14, 1994, petitioner was convicted after a jury trial in New York State Supreme Court, Bronx County, of three counts of attempted murder in the first degree, one count of criminal possession of a weapon in the second degree, and one count of resisting arrest. *People v. Brown,* 236 A.D.2d 254, 653 N.Y.S.2d 339, 340 (1st Dep't 1997). Petitioner argues on appeal that the District Court erroneously rejected his habeas claim that petitioner was denied his right to due process under the United States Constitution based on ***17** the failure of the presiding state trial judge, Justice Frank Diaz, to recuse himself after criminal charges were brought against the Justice in the middle of petitioner's criminal trial. The Magistrate Judge, in a Report and Recommendation concurred in by the District Court, denied petitioner's claim of a federal due process violation on the grounds that (1) petitioner had failed to exhaust his state remedies by presenting his claim of a federal constitutional violation to the New York Court of Appeals; (2) the state court denial of petitioner's challenge to the continued involvement of Justice Diaz in petitioner's criminal trial was based on an independent and adequate state ground; and (3) petitioner's claim of a federal constitutional violation failed on the merits because the state court judgment was not contrary to, or an unreasonable application of, clearly established federal law and was not based on an unreasonable determination of the facts. For the following reasons, we affirm.

I.

To be eligible for habeas relief, "a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese,* 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (internal quotation marks omitted). In order to satisfy this requirement, "the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review [such as the New York Court of Appeals]), thereby alerting that court to the federal nature of the claim." *Id.* (quoting *Duncan v. Henry,* 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam)); *Cotto v. Herbert,* 331 F.3d 217, 237 (2d Cir.2003) (noting that "[t]his exhaustion requirement is rooted in considerations of comity, and is codified by statute").

****2 [1]** In this case, petitioner contends that he exhausted his state court remedies because he (1) referred, albeit "inartfully," to a federal constitutional claim in his application for leave to appeal to the New York Court of Appeals; and (2) asserted a federal constitutional claim in his briefs to the Appellate Division, which were included by reference in his application to the Court of Appeals. Both claims are without merit. First, any fair reading of petitioner's application for leave to appeal to the New York Court of Appeals indicates that petitioner's application rested exclusively on state law grounds, specifically that Justice Diaz's failure to recuse himself violated New York Judiciary Law § 14. In his application for leave to appeal, petitioner contrasted the actual basis of the Appellate Division's opinion, *see People v. Brown,* 236 A.D.2d 254, 653 N.Y.S.2d 339 (1st Dep't 1997), with a hypothetical scenario that "would have" established a federal claim:

> [T]he Appellate Division *did not* hold that the *particular* circumstances of the trial judge's arrest and acquisition of an interest in these proceedings did not implicate [New York Judiciary Law] § 14-because it could not, without reading § 14 in an inappropriately narrow way that *would have* left New York jurisprudence fundamentally at odds with *federal law and the requirements of constitutional due process....* Instead, the Appellate Division ducked this issue-never before considered *in New York*-and fudged a result based on impermissible considerations.

J.A. at 126 (second emphasis in original). Even more telling than this passing, hypothetical reference to a federal constitutional claim, however, is footnote one of petitioner's leave application, which categorically ***18** disavowed any reliance on non-state law claims. *Id.* at 125 n. 1, 653 N.Y.S.2d 339 ("The Appellate Division also appears to have considered the trial judge's *general obligation* to recuse himself, *independent of Judiciary Law § 14,* and rejected any such obligation, but *we did not press that argument before the Appellate Division and do not do so here."*) (emphases added). In other words, not only did petitioner's application for leave to appeal fail to alert the New York Court of Appeals as to the federal constitutional nature of petitioner's recusal claim, *see Baldwin,* 541 U.S. at 29, 124 S.Ct. 1347, it unequivocally asserted that petitioner was *not* raising any claims "independent of Judiciary Law § 14." *Cf. Rosa v. McCray,* 396 F.3d 210, 218 (2d Cir.2005) (concluding that,

unlike here, petitioner's "letter in support of his application for leave to appeal to the New York Court of Appeals claimed that his rights under the Fifth and Fourteenth Amendments of the Federal Constitution had been violated").

[2] Moreover, even if we were to disregard petitioner's explicit focus on his state law claims before the New York Court of Appeals, petitioner's additional grounds for asserting exhaustion of state remedies are unavailing. The mere inclusion, for example, in petitioner's leave application of the briefs he submitted to the Appellate Division did not alert the Court of Appeals as to the federal nature of his claim, even if the inclusion of those briefs was mandated by state procedural rules. *See Baldwin,* 541 U.S. at 31-32, 124 S.Ct. 1347 (noting that "state appellate courts, particularly those with discretionary review powers .... have heavy workloads, which would be significantly increased if their judges had to read through lower court opinions or briefs in every instance"); *Jordan v. Lefevre,* 206 F.3d 196, 199 (2d Cir.2000) ("[A]ttaching an appellate brief without explicitly alerting the [New York Court of Appeals] to each claim raised does not fairly present such claims for purposes of the exhaustion requirement underlying federal habeas jurisdiction."); *see also* J.A. at 126 (asserting only that lower court briefs demonstrated "a clear violation of Judiciary Law § 14").

****3** Likewise, petitioner has failed to demonstrate that "the legal standards for his federal and state claims were so similar that by presenting his state claim, he also presented his federal claim." *Jackson v. Edwards,* 404 F.3d 612, 621 (2d Cir.2005); *see Bracy v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) ("[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar.") (citation omitted); *cf. Henry,* 513 U.S. at 366, 115 S.Ct. 887 ("[M]ere similarity of claims is insufficient to exhaust."). Accordingly, we conclude that petitioner did not exhaust his federal due process claim by invoking arguments for judicial recusal based in state law.

II.

Where, as here, a petitioner's claims are unexhausted, the petitioner will be permitted to return to state court to exhaust his claims unless no state corrective procedure remains available. *See Grey v. Hoke,* 933 F.2d 117, 120 (2d Cir.1991). In this case, because petitioner can no longer obtain state-court review of his federal constitutional claim on account of a procedural default, *see id.* (applying New York procedural rules), that claim is now to be deemed exhausted. *See* ***19** *Harris v. Reed,* 489 U.S. 255, 263 n. 9, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Grey,* 933 F.2d at 120-21. However, because of the procedural default, petitioner is not entitled to have his claims entertained in a federal habeas proceeding unless he can show "cause" for the default and actual "prejudice" resulting therefrom, *Murray v. Carrier,* 477 U.S. 478, 485, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), or show that he is "actually innocent," *id.* at 496, 106 S.Ct. 2639; *Smith v. Murray,* 477 U.S. 527, 537, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (internal quotation marks omitted). Because petitioner has failed to argue, much less demonstrate, that he meets any of these grounds, petitioner's claim is procedurally barred.

III.

Because we find that petitioner's federal constitutional claim is procedurally barred, we need not consider whether the state court judgment rested on an independent and adequate state ground. However, even assuming petitioner was able to overcome the various procedural hurdles to his habeas claim and show a violation of his federal constitutional rights on the merits, we conclude that the state court judgment was not "contrary to" or an "unreasonable application" of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1); *see Johnson v. Carroll,* 369 F.3d 253, 260 (3d Cir.2004) ("Even a generalized reading of the [Supreme Court's] holding [in *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)], that a judge cannot adjudicate a case where he has an interest in the outcome, does not stand for the conclusion ... that a judge with an appearance of bias, without more, is required to recuse himself *sua sponte* under the Due Process Clause."); *Del Vecchio v. Ill. Dep't of Corr.,* 31 F.3d 1363, 1372 (7th Cir.1994) (en banc) ("When the Supreme Court talks about the 'appearance of justice,' it is not saying that bad appearances alone require disqualification; rather, it is saying that when a judge is faced with circumstances that present 'some [actual] incentive to find one way or the other' or 'a real possibility of bias,' a court need not examine whether the judge actually was biased.") (alteration in original) (citations omitted).

****4** In addition, petitioner has failed to demonstrate that the state court judgment-specifically, the factual findings that petitioner "clearly and expressly waived" the trial judge's offer to recuse himself or grant a mistrial, and that petitioner's "subsequent, ambiguous *pro se* application did not constitute a retraction of these waivers," *People v. Brown,* 236 A.D.2d 254, 653 N.Y.S.2d 339, 340 (1st Dep't 1997)-was based on an unreasonable determination of the facts in light of the evidence developed in the state court proceedings. *See* 28 U.S.C. § 2254(d)(2); *Overton v. Newton,* 295 F.3d 270, 275 (2d Cir.2002) ("A state court determination of a factual issue is ... presumed to be correct, and is unreasonable only where the petitioner meets the burden of rebutting the presumption of correctness by clear and convincing evidence.") (citation omitted) (internal quotation marks omitted).

* * * * * *

We have considered all of petitioner's arguments and have found each of them to be without merit. Accordingly, the judgment of the District Court is hereby AFFIRMED.

All Citations

152 Fed.Appx. 15, 2005 WL 2323187

Footnotes

* The Honorable Michael B. Mukasey, Chief Judge, United States District Court for the Southern District of New York, sitting by designation.

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United States District Court,
N.D. New York.

Pierre COSBY, Petitioner,
v.
Thomas LaVALLEY, Superintendent of Clinton Correctional Facility, Respondent.

No. 9:12–CV–0704 (LEK/ATB). | Signed July 28, 2014.

Attorneys and Law Firms

Pierre D. Cosby, pro se.

Lisa E. Fleischmann, AAG, for the Respondent.

MEMORANDUM–DECISION and ORDER

LAWRENCE E. KAHN, District Judge.

I. INTRODUCTION

***1** Pro se Petitioner Pierre Cosby ("Petitioner") has filed a Petition for a writ of habeas corpus. Dkt. No. 1 ("Petition"). The Honorable Andrew T. Baxter, United States Magistrate Judge, issued a Report–Recommendation recommending that the Petition be denied. Dkt. No. 19 ("ReportRecommendation"). Petitioner has filed Objections. Dkt. No. 25 ("Objections"). For the following reasons, the Court approves and adopts the Report–Recommendation.

II. BACKGROUND

On May 26, 2006, after a jury trial in New York State Supreme Court, Onondaga County, Petitioner was convicted of rape in the first degree and two counts of menacing in the second degree. Pet. at 1–2. Petitioner did not testify. *Id.* Petitioner appealed the judgment of conviction to the Appellate Division, Fourth Department, arguing that he was denied a fair trial on the following grounds: (1) the government's expert witness was permitted to speculate as to the lack of injuries; (2) the trial court refused to supplement its response to a jury question of how to weigh the evidence during deliberations; (3) identification testimony was improperly bolstered; and (4) the trial court improperly prevented Petitioner from testifying in its decision at a *Sandoval* hearing. Pet. ¶¶ 9–12. That action was consolidated with a post-conviction Criminal Procedure Law § 440.10 action, which alleged that Petitioner was denied the effective assistance of trial counsel, as she prevented Petitioner from testifying and did not inform Petitioner that it was Petitioner's choice. Counsel was also ineffective for not calling witnesses who could have provided exculpatory information. Pet. ¶ 16; *see People v. Cosby,* 916 N .Y.S.2d 689 (App.Div.), *appeal denied,*947 N.E.2d 1198 (N.Y.2011). The Appellate Division affirmed Petitioner's convictions and the New York Court of Appeals denied leave to appeal. *Id.*

On April 26, 2011, Petitioner filed a 28 U.S.C. § 2254 Petition for a writ of habeas corpus. *See* Pet. The Petition alleges that: (1) Petitioner was denied his constitutional right to effective assistance of counsel because his trial attorney prevented Petitioner from testifying and failed to call witnesses; (2) Petitioner was denied a fair trial when the trial court refused to supplement its response to a jury question as to how to weigh the evidence during deliberations; (3) Petitioner was denied a fair trial by improper bolstering of the identification testimony; and (4) Petitioner was denied a fair trial when the prosecution's expert witness was permitted to speculate as to the victim's lack of injuries. Pet. ¶¶ 19, 21, 23, 25. Magistrate Judge Baxter issued a ReportRecommendation denying the Petition. Report–Rec.

III. LEGAL STANDARD

A. Review of Report–Recommendation

"28 U.S.C. § 636(b)(1) provides for 'a *de novo* determination of the portions of the report or specified proposed findings or recommendations [of a Magistrate Judge] to which objection is made' and a review for clear error of those portions to which no objection has been raised. In so doing, the district judge 'may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.' " *Velazquez v. Poole,* 614 F.Supp.2d 284, 289 (E.D.N.Y.2007) (quoting 28 U.S.C. § 636(b)(1) and citing FED. R. CIV. P. 72(b)).

B. Habeas Corpus

***2** Habeas corpus is a "writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal."BLACK'S LAW DICTIONARY 728 (8th ed.2004). Congress authorized federal courts to review cases "where any person may be restrained of his or her liberty in violation of the constitution

[sic], or of any treaty or law of the United States ."28 U.S.C. § 2241. When a state court has adjudicated the merits of a petitioner's claim, a federal court may grant an application for a writ of habeas corpus only if "the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on the unreasonable determination of the facts in light of the evidence presented in the State court proceeding."28 U.S.C. § 2254(d). The framework for a valid habeas claim is as follows:

1. Procedural Requirements

Habeas petitioners must "seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error."*Rose v. Lundy,* 455 U.S. 509, 518–19 (1982)."Because of comity and federalism concerns and the requirement that States have the first opportunity to correct their own mistakes, federal habeas courts generally may not review a state court's denial of a state prisoner's federal constitutional claim[s] if the state court's decision rests on a state procedural default that is independent of the federal question and adequate to support the prisoner's continued custody."*Epps v. Chamber of Corr. Servs.,* 13 F.3d 615, 617 (2d Cir.1994)."A procedurally defaulted claim may still be reviewed by a federal court, however, if the petitioner can demonstrate 'cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.' " *Beverly v. Walker,* 899 F.Supp. 900, 907 (N.D.N.Y.1995) (quoting *Coleman v. Thompson,* 501 U.S. 722, 750 (1991)).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") further restricts a prisoner's ability to bring claims in habeas actions. 28 U.S.C. § 2254. Under AEDPA, the state court's factual findings are presumed correct, unless that presumption is rebutted by clear and convincing evidence. *Id.* § 2254(e)(1). In the event that a petitioner does not meet the procedural requirements, he or she needs to establish both cause for the default and prejudice from the alleged federal law violation, or a fundamental miscarriage of justice. *Beverly,* 899 F.Supp. at 907 (quoting *Coleman,* 501 U.S. at 750).

2. Substantive Requirements

"When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254, it must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.' " *Coleman,* 501 U.S. at 730 (citing 28 U.S.C. § 2254). The constitutional violation must have "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). Where a state court has rendered its interpretation or application of federal law, deference should be given in subsequent federal habeas proceedings. *See*28 U.S.C. 2254(d). A federal habeas court may not issue a writ simply because it concludes upon independent review that the state court's ruling is erroneous or incorrect. *Lockyer v. Andrade,* 538 U.S. 63, 75–76 (2003) (quoting *Williams v. Taylor,* 529 U.S. 362, 411 (2000) (internal quotations omitted)). Rather, the state court's determination must be "objectively unreasonable." *Lockyer,* 538 U.S. at 76 (citing *Williams,* 529 U.S. at 409; *Bell v. Cone,* 535 U.S. 685, 699 (2002); *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002)).

IV. DISCUSSION

***3** Petitioner objects to the Report–Recommendation on the following grounds: (1) appellate counsel's failure to reassert a portion of the ineffectiveness claim on appeal was "inexcusable"; (2) the failure to give the specific requested *falsus in uno* charge denied Petitioner his constitutional due process right to a fair trial under the Fourteenth Amendment; (3) allowing a nurse to testify that a lack of injuries can be attributed to the Petitioner holding his victim at gunpoint was inadmissible under New York law and "[t]his error rose to the level of a constitutional violation"; and (4) the admission of the victim's out-of-court identification statement denied Petitioner a fair trial. *See* Objs.

A. Ineffective Assistance of Counsel

The ineffective assistance of counsel claim is deemed exhausted and procedurally defaulted because, although Petitioner raised the issue at some levels of his appeal, he did not raise the issue at *every* level. *See**People v. Cosby,* 947 N.E.2d 1198 (N.Y.2011). In order to overcome the procedural default, Petitioner must show cause for failing to raise the remaining portions of the claim and prejudice resulting from the federal law violation or a fundamental miscarriage of justice. *Beverly,* 899 F.Supp. at 907 (quoting *Coleman,* 501 U.S. at 750). Petitioner asserts that both cause and prejudice exist here. Objs. at 7–8.

Cause exists if "the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule."*Murray v. Carrier,* 477 U.S. 478, 488 (1986). Prejudice exists if there is a "reasonable probability" that the result of the proceeding would have been different absent the alleged constitutional violation. *Stickler v.. Greene,* 527 U.S. 263, 289 (1999). Fundamental miscarriage of justice requires a petitioner to establish by probative evidence that "he has a colorable claim of factual innocence."*Sawyer v. Whitley,* 505 U.S. 333, 339 (1992) (quoting *Kuhlmann v. Wilson,* 477 U.S. 436, 454 (1986)). This exception also applies to procedurally defaulted claims. *Sawyer,* 505 U.S. at 339 (citing *Murray,* 477 U.S. at 496).

Petitioner incorrectly states that appellate counsel's failure to raise one portion of the ineffective assistance of counsel claim is proper cause. *Id.* at 3. Cause "must be something *external* to the petitioner"; attorney omission "is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation."*Coleman,* 501 U.S. at 753 (citing *Murray,* 477 U.S. at 488) (emphasis in the original)."In the absence of a constitutional violation,"*i.e.,* ineffective assistance of counsel, "the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation."*Coleman,* 501 U.S. at 754. Here, the omission by the appellate counsel did not constitute a constitutional violation because it did not rise to the level of a constitutional right-to-counsel violation. An appellate counsel does not have to argue every point requested by the client "if counsel, as a matter of professional judgment, decides not to present those points."*Jones v. Barnes,* 463 U.S. 745, 752 (1983). Petitioner fails to show cause to overcome the procedural default.

***4** Petitioner additionally alleges that he is actually innocent and was precluded from establishing innocence because the trial counsel called certain witnesses. Objs. at 7–8. Actual innocence "means factual innocence, not mere legal insufficiency."*Bousley v. United States,* 523 U.S. 614, 623–24 (1998) (citing *Sawyer,* 505 U.S. at 339)."The gateway should open only when a petitioner 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.' " *McQuiggin v. Perkins,* 133 S.Ct. 1924, 1936 (2013) (citing *Schlup v. Delo,* 513 U.S. 298, 316 (1995)). Here, Petitioner merely proposes that testimony from Larry Cosby, Lorisha Boyd, Stephnie Platts, and Annette Thomas would have exculpated Petitioner; he presents no other extrinsic evidence to corroborate his innocence. Objs. at 7. This claim is better interpreted as an argument on the merits of his claim, rather than a cause-and-prejudice argument to overcome procedural default. However, interpreted liberally as a cause-and-prejudice argument, witness testimony is not evidence "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." *McQuiggin,* 133 S.Ct. at 1926, 1936.

B. *Falsus in uno* Jury Charge/Nurse's Testimony/ Identification/Bolstering Claims

A federal court judge may not issue a writ of habeas corpus if an adequate and independent state law ground justifies the prisoner's detention, regardless of the federal claim. *See Wainwright v. Sykes,* 433 U.S. 72, 81–85 (1977). A federal court generally will not consider a federal issue if the last state court decision to address the issue "rests on a state law ground that is independent of the federal question and adequate to support the judgment."*Lee v. Kemna,* 534 U.S. 362, 375 (2002). This rule applies whether the independent state law ground is substantive or procedural. *Id.*

Here, Judge Baxter correctly concluded that the provided jury instructions, bolstering of identification testimony, and admission of putatively speculative testimony are issues are matters of state law. Report–Rec. at 25–27. Even if the Court were to construe the above claims as matters of federal law, they are procedurally defaulted. A mere citation to the Fourteenth Amendment or a resemblance to a federal claim is not sufficient to alert the state court that a federal due process claim is being asserted. *See Kirksey v. Jones,* 673 F.2d 58, 60 (2d Cir.1982)."Alleging a lack of a fair trial does not convert every complaint about evidence or a prosecutor's summation into a federal due process claim."*Id.* Petitioner did no more in state court than cite the Fourteenth Amendment, and therefore these claims are also procedurally defaulted. *Oquendo v. Senkowski,* 452 F.Supp.2d 359, 368 (S.D.N.Y.2006) (citing *Spence v. Superintendent,* 219 F.3d 162, 169–70 (2d Cir.2000); *Grey v. Hoke,* 933 F.2d 117, 120 (2d Cir.1991)). Because the Petition and the Objections raise no arguments that could be construed as cause and prejudice for failure to assert a federal claim in state court, *see generally* Pet.; Objs., the Court could not reach the merits of Petitioner's remaining claims even if they presented a federal issue.

V. CONCLUSION

***5** Accordingly, it is hereby:

ORDERED, that the Report–Recommendation (Dkt. No. 19) is **APPROVED** and **ADOPTED** in its entirety. Pierre Cosby's Petition (Dkt. No. 1) is **DENIED.**No certificate of appealability shall issue in this case because Petitioner has failed to make a "substantial showing of the denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c)(2); [1] and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum–Decision and Order on all parties.

IT IS SO ORDERED.

REPORT–RECOMMENDATION

ANDREW T. BAXTER, United States Magistrate Judge.

This matter has been referred to me for Report and Recommendation, pursuant to 28 U.S.C. § 636(b) and Local Rules N.D.N .Y. 72.3(c), by the Honorable Lawrence E. Kahn, Senior United States District Judge.

Presently before this court is a petition, seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. (Petition ("Pet.")) (Dkt. No. 1). Petitioner brings this action, challenging a judgment of conviction rendered on August 21, 2006, after a jury trial in the Supreme Court, Onondaga County. Petitioner was convicted of one count of Rape, First Degree and two counts of Menacing, Second Degree. He was sentenced to twenty five years incarceration plus five years post-release supervision. He received unconditional discharges on the two menacing counts.

Petitioner was assigned new counsel for his appeal. Prior to filing the direct appeal, counsel filed a motion to vacate petitioner's conviction pursuant to N.Y.Crim. Proc. Law § 440.10. After a hearing, the trial judge denied the motion, and the appeal of the motion to vacate was consolidated with petitioner's direct appeal. On February 10, 2011, the Appellate Division, Fourth Department affirmed petitioner's conviction and the denial of the section 440.10 motion, and the New York Court of Appeals denied leave to appeal on April 20, 2011. *People v. Cosby.* 82 A.D.3d 63 (4th Dep't), *lv. denied,*16 N.Y.3d 857 (2011).

Petitioner raises the following grounds for habeas review:

(1) Petitioner's trial counsel was ineffective for failing to advise petitioner that the decision to testify was his alone and for failing to call witnesses.

(2) The trial court erred in failing to issue a *falsus in uno* instruction in response to a note from the jury.

(3) The trial court denied petitioner a fair trial by allowing the victim to testify that she identified petitioner in an out-of-court proceeding.

(4) The prosecutor's expert was improperly permitted to testify as to the reason for the victim's lack of injury.

Respondent has filed an answer, together with the pertinent state court records and a memorandum of law. (Dkt.Nos.9, 10, 12). Respondent argues for denial of the petition on both substantive and procedural grounds. (Dkt. No. 9). Petitioner has filed a traverse. (Dkt. No. 17). For the following reasons, this court agrees with respondent and will recommend denial of the petition.

DISCUSSION

I. *Relevant Facts*

A. The Trial

***6** The conviction in this case resulted from the sexual assault on A .S. [1] on September 23, 2005. Petitioner had been attempting to contact A.S. prior to the incident. A.S. testified that one day during the summer of 2005, petitioner parked in front of A.S.'s home and asked one of her siblings if petitioner would speak with A.S. A.S. stepped out on to an outside porch on the second floor, and petitioner called to A.S., but because she did not know him, she went back inside the house. (Trial Transcript ("T") 344–46—A.S.)

A.S. testified that a few days later, she pulled into a gas station, and petitioner approached her while she was getting gas. (T. 346–47—A.S.) Petitioner told her that his name was "Alfie," that he had been the one who came to A.S.'s home the other day, and encouraged A.S. to take his cell phone number. (T. 347—A.S.) A.S. entered the number into her cell phone, but then erased it because she did not want to have it. (*Id.*)

A.S. testified that, later that night, she was parked outside a home where a party was taking place, petitioner pulled up to her parked car, and insisted that A.S. call him. (T. 348—

A.S.) A.S. did not call petitioner because she had erased his number. A.S. pulled away from petitioner's car, and petitioner drove behind her flashing his high beams and driving "real fast." A.S.'s aunt, K.S. was with her in the car and told A.S. to pull over. When she stopped and rolled down her window, petitioner asked why she had not called. A.S. simply stated, "because." (*Id.*) Although petitioner again insisted that A.S. call him, she did not. One month later, petitioner again approached A.S. in a gas station. (T. 349—A.S.) Some friends of A.S.'s were in the car with her and suggested that she ask petitioner for money. A.S. did as her friends suggested, and petitioner gave her eight dollars. (T. 350—A.S.) However, A.S. testified that she was not "interested" in petitioner. She only asked him for money because her friends "hyped" her up. (T. 350–51—A.S.)

A few days prior to September 23, 2005, A.S. was staying with her twenty-yearold cousin, S.S. While A.S. was sitting on the porch at S .S.'s home, petitioner pulled up in his car, gave A.S. his number on a piece of paper and told her that she should call him if she wanted to "chill." (T. 351—A.S.) A.S. took the number and looked at it, but later ripped up the paper. (*Id.*) On the night of September 23, K.S. dropped A.S. off at S.S.'s home at approximately 1:00 a.m. (T. 357—A.S.) A.S. testified that, when she arrived, her boyfriend and one of his friends were watching television in the living room. (T. 358–59—A.S.) The men decided to go out, and A.S. had a discussion with her boyfriend about his return. After the men left, A.S. fell asleep on the couch, and S.S. went to her bedroom. (T. 359–60—A.S.)

At approximately 4:00 a.m., petitioner went to S.S.'s house and rang the doorbell. The doorbell woke A.S., but it was S.S. who answered the door. [2] (T. 362–63—A.S.) Petitioner told S.S. that A.S. had invited him over, but S.S. told petitioner that A.S. was sleeping. (T. 572–74, 609—S.S.) Petitioner entered the house and started to go upstairs to the apartment . [3] (T. 574—S.S.) S.S. testified that she did not say anything. She just followed petitioner up the stairs and into the apartment. (T. 574–76—S.S.) S.S. testified that "everything looked like it was ok, so she returned to her bedroom. (T. 575—S.S.) Petitioner found A.S. on the couch and sat at her feet. A.S. testified that she thought it was her boyfriend, who had returned. She was still angry with him, so she pretended to be sleeping. (T. 365—A.S.) However, she then felt someone unbuckle her belt and lick her neck and back. (*Id.*) She realized it was not her boyfriend when she felt petitioner's mustache. (T. 366—A.S.) She opened her eyes and started "yelling." Petitioner said, "it's me, Alfie, let me eat you out."(*Id.*) As A.S. was yelling at petitioner, he got up and started walking quietly into S.S.'s bedroom. (T. 367—A.S.) A.S. testified that, at that time, she opened her eyes to look to see who it was.(*Id.*)

***7** S.S. testified that petitioner slid into her bed and rubbed her leg. (T. 576–77—S.S.) S.S. tried to get out of bed, but petitioner told her to lie back down, but S.S. told him that she had to use the bathroom. (T. 578—S.S.) Petitioner stayed in S.S.'s room, and S.S. went into the livingroom and asked A.S. who petitioner was. A.S. told S.S. that she had not called him, and that she did not know who he was, although A.S. testified that she knew petitioner from "looking at him." (T. 368—A.S.; 579—S.S.) While petitioner was still in S.S.'s room, the women made telephone calls, using A.S.'s cellular telephone to find out if someone was playing a joke on them . [4] (T. 579—S.S.) Both women testified that, at first, when S.S. came out of her room, they were not frightened or concerned about petitioner's presence. (T. 369—A.S.; 579–80—S.S.)

As she was calling her friends, A.S. looked out the window and recognized the car that was parked out front. (T. 371—A.S.) A.S. testified that the friend to whom she was speaking on the telephone told her to look out the window and see if the car was "a blue Oldsmobile Cutlass." (*Id.*) A.S. stated that she recognized the car in which she had seen "Alfie" a few days before and earlier that night. (T. 371–72—A.S.) While A.S. was on the telephone, sitting on the couch, petitioner walked into the livingroom, turned off the kitchen light, and ran toward A.S., screaming at her to give him the telephone. (T. 373–74—A.S.) Petitioner then punched A.S. twice, hurting her eye, and cutting the inside of her mouth. [5] (*Id.*) When S.S. saw petitioner run toward A.S., S.S. tried to run for the door, but petitioner pulled her back, threw her to the floor, and told them to be quiet. (T. 375–77—A.S.; 586—S.S.) A.S. testified that he then dragged both of the women into the bedroom by their legs. (T. 378—A.S.) S.S. testified that she was not sure how petitioner grabbed A.S., but testified that he grabbed S.S. by her arm and dragged her that way. (T. 588—S.S.) He pushed S.S. into a closet and rigged the door so that she could not get out. (T. 379–80—A.S.; 589, 593—S.S.)

Petitioner told A.S. that if she did not calm down, he would kill her. (T. 381, 382—A.S.) He pulled "something" silver out of his pocket and told A.S. that it was a gun. (T. 381—A.S.) He ordered A .S. into the livingroom, told her to sit on the couch, and said that if S.S. was not in the closet, he would kill her too. He ordered A.S. to undress and lay down. He raped A.S. vaginally while holding the gun to her head.

(T. 383—A.S.) A.S. asked petitioner why he was doing this, and told him that she had a son. Petitioner then stopped what he was doing, said “aw man,” got dressed, and ordered A.S. to get dressed. (T. 384—A.S.) S.S. testified that she heard A .S. tell petitioner that she had a baby, “and everything just stopped.” (T. 593, 594—S.S.)

Petitioner ordered A.S. into the closet. (T. 385—A.S.) Petitioner told the women that his name was not Alfie, that he was from the “east side,” and that “this is because they killed my man.” [6] (T. 404—A.S.) A.S. testified that she heard petitioner in the livingroom, shouting “where all the money at?” Petitioner then told A.S. and S.S. to count to 100, left the apartment, and drove away. (T. 402–403—A.S.; 595–96—S.S.) During her testimony, A.S. identified petitioner, sitting in the courtroom. (T. 406–407—A.S.)

***8** A.S. called K.S. and told her that she had been raped. (T. 407–408—A.S.; 276–77—K.S.) A.S. testified that she called K.S. rather than calling the police because she and S.S. were scared. (T. 407—A.S.) K.S. put her children in the car and drove over to S.S.'s apartment. (T. 278—K.S.) En route to the apartment, K.S. was stopped for speeding by Officer Jenny Terrero. (T. 269—Terrero; 279—K.S.) K.S. testified that when she was pulled over, she was calling 9–1–1. (T. 279—K.S.) When K.S. explained why she was speeding, Officer Terrero escorted K.S. to S.S.'s apartment and called the information in to the Syracuse Police Department. (T. 270–72—Terrerro).

A.S. was taken to Upstate Medical Center, where she was examined by certified sexual assault nurse examiner (“SANE”) and nurse practitioner, Terese Barr (“Barr”). (T. 492–97, 528). Barr testified that A.S. was sad, weepy, sullen, and quiet, but made very good eye contact and answered questions appropriately. (T. 529). During the examination, Barr noticed that A.S. was wearing her T-shirt inside-out. (T. 533). A.S. told Barr that she had been raped, hit, dragged, and pushed, and that petitioner had not used a condom. (T. 532). Barr noted that A.S. had a sclera hemorrhage, which is a bruise that causes bleeding in the eye. (T. 534). A.S. also had fresh lacerations in her mouth, consistent with the use of blunt force. (T. 535). However, A.S. sustained no vaginal trauma. Barr testified that she would not expect to see trauma to the vaginal area, and that she only sees trauma in 10–20% of sexual assault victims. (T. 520–23). Barr explained that the fact that A.S. had previously given birth and the type of contraceptive she was using would also influence the lack of trauma. (T. 545). Barr also stated that if petitioner had a gun, A.S. would have been less likely to struggle, contributing to the lack of injury. (T. 545–47).

On re-direct examination, A.S. testified that after the incident, but before petitioner's arrest, she was at a garage having her taillight repaired, when petitioner pulled up and asked her why she was going around telling people that she was raped? (T. 475–76—A.S .) A.S. told petitioner that she saw his car outside of S.S.'s apartment that night, but petitioner said that someone else had used it. (*Id.*) A.S. then called Detective Pauline Burnett to report the exchange with petitioner. (T. 477—A.S.)

Petitioner was arrested on January 12, 2006, and Detective Burnett took a bucal swab for a DNA sample. (T. 630–31–Burnett). New York State Police forensic seriologist Gabriel Caceres testified that he analyzed the vaginal swabs taken from A.S. and found the presence of sperm, and that the dry swabs from A.S.'s neck and back tested positive for amylase, which would indicate the presence of saliva. (T. 715, 717—Caceres). Forensic scientist Kathleen Hum determined that the DNA profile from the sperm found on the vaginal swab matched the profile from petitioner's bucal swab. (T. 684–88—Hum). The likelihood that the profiles would match an unrelated individual was less than one in 66.9 trillion. (T. 686–87). However, she could not generate profiles from the neck and back swabs. (T. 676—Hum).

***9** Petitioner's counsel did not call any witnesses, and petitioner did not testify.

B. Motion to Vacate

Linda Campbell, Esq., the attorney assigned to handle petitioner's appeal, filed a motion to vacate petitioner's conviction in the trial court. The basis for the motion to vacate was that petitioner's trial counsel, Patricia Campbell, Esq., was ineffective because she did not inform petitioner that, regardless of counsel's advice, the ultimate decision of whether to testify was his, and not his attorney's. Linda Campbell also argued that petitioner's trial attorney was ineffective in failing to call witnesses who would have allegedly testified that petitioner and A.S. had a prior relationship and had been seen together before the assault.

The trial judge, Hon. John Brunetti, held a hearing on the motion and took testimony from Patricia Campbell, petitioner, and various of petitioner's family members in an effort to determine the facts relevant to the motion to vacate. After the hearing, Judge Brunetti issued very specific,

numbered findings of fact, together with a lengthy decision analyzing those facts in relation to the law governing effective assistance of counsel. (Dkt. No. 12 at CM/ECF pp. 412–42 (Decision and Order)) [7]. Judge Brunetti found that trial counsel failed to tell petitioner that, notwithstanding counsel's advice not to do so, the ultimate decision whether to testify belonged to the defendant, not counsel. Even though this failure was error, Judge Brunetti also found that, even if petitioner had been properly advised, he still would not have testified, or would not have testified to the facts as he described them when he took the stand at the section 440.10 hearing.

With respect to petitioner's claim that his attorney failed to call witnesses who would have testified that petitioner had an ongoing relationship with the victim, Judge Brunetti found that petitioner did not tell his trial attorney about what happened on the evening of the assault, so his trial counsel could not effectively pursue this defense. [8] The court also found that none of the proffered witnesses had any admissible or even relevant evidence regarding the incident. [9] (Dkt. No. 12 at CM/ECF p. 412). Because of these facts, counsel's trial strategy was necessarily limited to attacking the credibility of the prosecutor's witnesses. Judge Brunetti denied the petitioner's motion to vacate.

C. Petitioner's Appeal

Petitioner's direct appeal and the appeal of Judge Brunetti's denial of petitioner's motion to vacate were consolidated. The Appellate Division affirmed both the conviction and Judge Brunetti's decision, and the New York Court of Appeals denied leave to appeal. *People v. Cosby, supra.*

II. *Generally Applicable Law*

A. The AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that, when a state court has adjudicated the merits of a petitioner's claim, a federal court may grant an application for a writ of habeas corpus only if "the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *See also, e.g., Noble v. Kelly,* 246 F.3d 93, 98 (2d Cir.2001); *Brown v. Alexander,* 543 F.3d 94, 100 (2d Cir.2008). [10] This is a "difficult to meet," and "highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt." *Cullen v. Pinholster,* ––– U.S. ––––, 131 S.Ct. 1388, 1398 (2011) (citations omitted).

***10** Under section 2254(d)(1), a state-court decision is contrary to clearly established Supreme Court precedent if its "conclusion on a question of law is 'opposite' to that of the Supreme Court or if the state court decides a case differently than the Supreme Court's decision 'on a set of materially indistinguishable facts.' " *Id.* (quoting *Williams v. Taylor,* 529 U.S. 362, 413 (2000)). A state court decision involves an unreasonable application of clearly established Supreme Court precedent if it correctly identifies the governing legal principle, but unreasonably applies or unreasonably refuses to extend that principle to the facts of a particular case. *See Williams,* 529 U.S. at 413; *Ramdass v. Angelone,* 530 U.S. 156, 166 (2000).

Under the AEDPA, a state court's factual findings are presumed correct, unless that presumption is rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). If the state court failed to decide a claim "on the merits," the pre-AEDPA standard of review applies, and both questions of law and mixed questions of law and fact are reviewed *de novo. Washington v. Shriver,* 255 F.3d 45, 55 (2d Cir.2001).

B. Exhaustion

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, ... thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese,* 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry,* 513 U.S. 364, 365 (1995) (internal quotation and other citations omitted)); 28 U.S .C. § 2254(b)(1). The prisoner must "fairly present" his claim in each appropriate state court, including the highest court with powers of discretionary review, thereby alerting that court to the federal nature of the claim. *Id.; Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994).

"A habeas petitioner has a number of ways to fairly present a claim in state court without citing 'chapter and verse' of the Constitution, including '(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as

to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation."*Hernandez v. Conway,* 485 F.Supp.2d 266, 273 (W.D.N.Y.2007) (quoting *Daye v. Attorney General,* 696 F.2d 186, 194 (2d Cir.1982)).

C. Procedural Bar

A federal judge may not issue a writ of habeas corpus if an adequate and independent state-law ground justifies the prisoner's detention, regardless of the federal claim. *See Wainwright v. Sykes,* 433 U.S. 72, 81–85 (1977). A federal habeas court generally will not consider a federal issue if the last state court decision to address the issue " 'rests on a state law ground that is independent of the federal question and adequate to support the judgment."*Garvey v. Duncan,* 485 F.3d 709, 713 (2d Cir.2007) (quoting *Lee v. Kemna,* 534 U.S. 362, 375 (2002)) (emphasis added). This rule applies whether the independent state law ground is substantive or procedural. *Id.*

***11** There are certain situations in which the state law ground will not be considered "adequate": (1) where failure to consider a prisoner's claims will result in a "fundamental miscarriage of justice," *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); (2) where the state procedural rule was not " 'firmly established and regularly followed,' " *Ford v. Georgia,* 498 U.S. 411, 423–24 (1991); *James v. Kentucky,* 466 U.S. 341, 348–349 (1984); and (3) where the prisoner had "cause" for not following the state procedural rule and was "prejudice[d]" by not having done so, *Wainwright v. Sykes,* 433 U.S. at 87. In *Garvey v. Duncan,* the Second Circuit stated that, in certain limited circumstances, even firmly established and regularly followed rules will not prevent federal habeas review if the application of that rule in a particular case would be considered "exorbitant." *Garvey v. Duncan,* 485 F.3d at 713–14 (quoting *Lee v. Kemna,* 534 U.S. at 376).

A state prisoner who has procedurally defaulted on a federal claim in state court may only obtain federal habeas review of that claim if he can show both cause for the default and actual prejudice resulting from the alleged violation of federal law, or if he can show that he is "actually innocent." *Clark v. Perez,* 510 F.3d 382, 393 (2d Cir.2008) (internal quotation and citations omitted). "Cause" exists if "the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule."*Murray v. Carrier,* 477 U.S. 478, 488 (1986). Prejudice exists if there is a "reasonable probability" that the result of the proceeding would have been different absent the alleged constitutional violation.*Stickler v.. Greene,* 527 U.S. 263, 289 (1999).

To demonstrate "actual innocence," a habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him, but for the alleged constitutional violation. *Murden v. Artuz,* 497 F.3d 178, 194 (2d Cir.2007), *cert. denied sub nom.Murden v. Ercole,* 552 U.S. 1150 (2008); *Schlup v.. Delo,* 513 U.S. 298, 327 (1995). "Actual innocence" requires factual innocence, not "legal" innocence. *Murden v. Artuz,* 497 F.3d at 194. A claim of actual innocence requires petitioner to put forth new, reliable evidence that was not presented at trial. *Cabezudo v. Fischer,* 05–CV–3168, 2009 WL 4723743, at * 13 (E.D.N.Y. Dec. 1, 2009) (citing *Lucidore v. N.Y.S. Div. of Parole,* 209 F.3d 107, 114 (2d Cir.2000)); *Schlup v. Delo,* 513 U.S. at 316, 327–328.

III. *Ineffective Assistance of Trial Counsel*

A. Exhaustion

In his petition for habeas corpus, petitioner raises two grounds for ineffective assistance of trial counsel. He claims that counsel was ineffective because she failed to advise petitioner that the decision to testify was his alone and based on her failure to call witnesses, who would have testified that petitioner and the victim were romantically involved and had been seen together before and after the rape. Petitioner raised both of these grounds in his section 440.10 motion to vacate, and Judge Brunetti denied both on the merits.

***12** In the consolidated appeal, petitioner's counsel raised the following six grounds:

1. Trial counsel was ineffective because she "thwarted" petitioner's right to testify. (Resp't's Ex. A at CM/ECF pp. 24–34).

2. The trial court's *Sandoval* ruling was incorrect. (Resp't's Ex. A at CM/ECF pp. 35–41).

3. The court erred in refusing to give the jury a Falsus in Uno instruction in response to one of the jury's questions. (Resp't's Ex. A at CM/ECF pp. 41–44).

4. The court erred in allowing the prosecution's expert to speculate on the reason for the victim's lack of injuries. (Resp't's Ex. at CM/ECF pp. 44–47).

5. The court erred in denying petitioner's motion for a mistrial after the victim mentioned her out-of-court

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identification of petitioner. (Resp't's Ex. A at CM/ECF pp. 47–49).

6. The petitioner's sentence was harsh and excessive. (Resp't's Ex. A at CM/ECF pp. 49–51).

(Dkt. No. 12). Although counsel specifically asserted ineffective assistance of counsel, the ***only*** basis for the argument was counsel's error in failing to properly advise petitioner about his right to testify. There was no mention in counsel's brief of counsel's alleged failure to call witnesses. The prosecutor specifically mentioned the trial court's finding regarding the failure to call witnesses and stated that "Defendant concedes as much by *failing to reassert this portion of his ineffective assistance claim in his brief on appeal before this Court.*" (Dkt. No. 12; Resp't's Ex. C at CM/ECF pp. 503). The Appellate Division's decision mentioned only the issue of petitioner's right to testify. *People v. Cosby,* 82 A.D.3d at 64–68.

In her application for leave to appeal to the New York Court of Appeals, counsel submitted a letter-brief, emphasizing the issue of petitioner's right to testify and sought review of the issues "as were presented to the Appellate Division ... in the briefs which are hereby incorporated by reference thereto and of the arguments as are presented herein."(Dkt. No. 12; Resp't's Ex. F at CM/ECF p. 537–44). The New York Court of Appeals denied leave to appeal in both the direct appeal and the section 440.10 appeal, stating that there was no question of law presented which ought to be reviewed by the court. (Resp't's Exs. H & I at CM/ECF p. 549, 551).

In his traverse, petitioner argues that because he appealed Judge Brunetti's denial of the motion to vacate, the Appellate Division was "given the opportunity" to consider the claim. (Dkt. No. 17 at CM/ECF p. 11). Petitioner was represented by new counsel at his section 440.10 motion and on appeal. The issue of petitioner's witnesses was conspicuously absent from counsel's brief, and the prosecution reasonably interpreted this absence as an intentional omission. Because petitioner failed to raise the claim that counsel was ineffective for failure to call witnesses in the Appellate Division and in the New York Court of Appeals, he has failed to exhaust that portion of his ineffectiveness claim.

B. Procedural Default

***13** Although there is no state court decision, specifically finding a procedural default because petitioner failed to exhaust his state court remedies, petitioner cannot return to state court to raise this issue. He cannot return to the trial court because he has already raised the issue and had full consideration of the issue in his section 440.10 motion, and because the issue was specifically omitted from the appeal of his section 440.10 motion. [11] He cannot return to the Court of Appeals because he did not raise the issue in the Appellate Division, and New York permits only one application for direct review. *Oquendo v. Senkowski,* 452 F.Supp.2d 359, 368 (S.D.N.Y.2006) (citing *Spence v. Superintendent,* 219 F.3d 162, 169–70 (2d Cir.2000); *Grey v. Hoke,* 933 F.2d 117, 120 (2d Cir.1991)); N.Y. Rules of Court, Court of Appeals § 500.20.

When petitioner has failed to exhaust his state court remedies, but return to state court is foreclosed, the claim is "deemed" exhausted, but is subject to the procedural default analysis discussed above. *Bossett v. Walker,* 41 F.3d 825 (2d Cir.1994) (citing *Grey v. Hoke,* 933 F.2d at 120–21). In order to overcome the procedural default, petitioner would have to show cause for his failure to raise this issue and prejudice resulting from the constitutional violation.

In this case, petitioner has shown no cause for his failure to raise his second basis for ineffective trial counsel. The reason for new appellate counsel's failure to raise the issue in the Appellate Division is likely, as the prosecutor noted in the People's appellate brief, that based upon the trial court's factual finding in the motion to vacate, petitioner's counsel conceded the issue by her failure to raise it. Appellate counsel justifiably focused on the issues that she believed were petitioner's strongest claims. *See e.g. Jones v. Barnes,* 463 U.S. 745 (1983) (appellate counsel not ineffective for failing to raise every nonfrivolous issue on appeal). [12] Because petitioner has shown no cause for his failure to raise the issue, the court need not consider prejudice. Finally, petitioner has not shown that he is "actually innocent" by presenting new and reliable evidence that was not presented at trial. Thus the court will consider only the merits of petitioner's claim that trial counsel was ineffective for failing to inform petitioner that he had the ultimate authority to decide whether to testify at trial.

C. Merits

1. Legal Standard

The constitutional standard for ineffective assistance of counsel was articulated by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 687–696 (1984). This test

requires an affirmative showing that counsel's performance fell below an objective standard of reasonableness, and that prejudice resulted because there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.,* 466 U.S. at 688, 694. An ineffectiveassistance claim "must be rejected if the defendant fails to meet either the performance prong or the prejudice prong."*Bennett v. United States,* 663 F.3d 71, 85 (2d Cir.2011) (citing *Strickland,* 466 U.S. at 697).

***14** When assessing counsel's performance, courts " 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *Jackson v. Leonardo,* 162 F.3d 81, 85 (2d Cir.1998) (quoting *Strickland,* 466 U.S. at 689). Courts should not use hindsight to second-guess sound tactical decisions made by attorneys. *McKee v. United States,* 167 F.3d 103, 106 (2d Cir.1999) (citing *Strickland,* 466 U.S. at 689).

In evaluating the prejudice component of *Strickland,* a "reasonable probability" that the outcome of the proceeding would have been different means "a probability sufficient to undermine confidence in the outcome."*Strickland* 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable."*Santone v. Fischer,* 689 F.3d 138, 155 (2d Cir.2012) (citing *Strickland,* 466 U.S. at 693). Unlike the performance determination, the prejudice analysis may be made with the benefit of hindsight. *McKee v. United States,* 167 F.3d at 106–107 (citing, *inter alia, Lockhart v. Fretwell,* 506 U.S. 364, 372 (1993)).

2. Application

As a result of the section 440.10 hearing, the court found that petitioner established that, although he informed his trial attorney that he wished to testify, counsel did not advise petitioner that he had the "final say in that regard." The Appellate Division gave deference to the trial court's fact finding in its decision. The Appellate Division properly cited to *Strickland* standard. The court then found that defense counsel committed error by failing to properly advise the petitioner that the final decision was his to make. Notwithstanding counsel's error, the Appellate Division found that petitioner "either would not have testified or would not have given the testimony that he gave at the CPL article 440 hearing," and essentially concluded that counsel's error did not prejudice the petitioner.

This court finds that the Appellate Division did not unreasonably apply *Strickland* in its decision, nor was the court's decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. First, petitioner had an adverse *Sandoval* ruling. The trial court ruled that if petitioner took the stand, he could be cross-examined regarding a prior conviction for criminal possession of a weapon in the third degree, including the facts underlying that conviction. Because the rape occurred at gunpoint, the possibility of such cross examination should have discouraged petitioner from taking the stand.

At the section 440.10 hearing, petitioner testified at length that on the night of September 23, 2005, petitioner was at a club, selling drugs, and A.S. called him to come over to her house. (H. at 105–106). Petitioner testified that, after he arrived, he and A.S. had consensual sex twice, once in S.S.'s apartment and once during a subsequent walk in the park. (H. at 108–110). He testified that he told this to his attorney prior to trial, and that he wanted the jury to hear "his side." (H. at 111). However, if petitioner had taken the stand to testify to these facts, he would have been admitting to being a drug dealer, and would have been subjected to cross-examination regarding his former weapons conviction, based on the court's *Sandoval* ruling.

***15** Additionally, Judge Brunetti credited trial counsel's testimony at the section 440.10 hearing that petitioner never gave this account to his attorney, and in fact, did not give counsel any information about what happened on the evening in question. The Appellate Division held that the record supported the trial court's finding, based upon petitioner's attorney's opening and her strategy throughout the prosecution. This is a factual finding to which this court must adhere unless petitioner rebuts the finding by "clear and convincing" evidence under 28 U.S.C. § 2254(e)(1). Petitioner has not done so. He is simply rearguing the same facts as he raised in state court, claiming that the courts' decisions were incorrect.

At trial, defense counsel made a very generic, and very short, opening statement. (T. 265–67) (Dkt. No. 12–1). Counsel focused on the prosecution's witnesses' credibility, simply stating that "their story just doesn't hold up."(T. 266). Counsel also mentioned the DNA evidence stating that "you may or may not hear something about DNA."(*Id.*) Counsel then stated that "you'll determine DNA or no DNA, nothing changes the fact that the story of the accusing witnesses just doesn't hold up."(T. 267). If petitioner told counsel that he had consensual sex with A.S. twice that evening, there would be no need to refute DNA evidence because one would expect

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the DNA to match that of petitioner if he admitted having sex with the victim. If petitioner told his attorney that the sex was consensual, counsel would have made more of this fact, rather than simply alluding to the lack of the girls' lack of credibility. [13]

Defense counsel's closing statement was much more detailed, but continued to focus on the womens' lack of credibility and the lack of evidence showing the violent struggle that they described. (T. 736–63). Counsel implied that A.S. may have had consensual sex that night, in more than one location and perhaps with more than one individual. (T. 758–59). Counsel implied that the vegetation found in the underwear bag could mean that A.S. had sex "outside some time earlier that night." [14] (T. 759). Counsel also argued that while lack of serious injury could occur in a rape situation, lack of injury also exists in a consensual situation. (T. 760–61). Related to this argument was counsel's statement that the room where the girls testified that they fought, were thrown, punched, and dragged was remarkably and inexplicably neat for such conduct to have occurred there. (T. 756–57). Counsel also argued that it was incredible that petitioner was avenging a killing, but that the women were not seriously injured. (T. 762). There were no bruises to A.S. other than the slight bleeding in one eye and the lacerations in her mouth. (T. 762).

In focusing on lack of evidence, and the inconsistencies and implausibility of the girl's testimony, counsel was attempting to put doubt in the jury's mind about the events of the night in question. The jury essentially was presented with a similar scenario as if petitioner had testified. However, if petitioner had testified, the jury would also have heard that he was a drug dealer and was previously convicted of possession of a weapon. The fact that petitioner did not testify probably helped his chances more than hurt them. The Appellate Division's finding that petitioner was not prejudiced by counsel's error was not an unreasonable application of *Strickland,* and petitioner's ineffective assistance of counsel claim may be dismissed in its entirety.

IV. *Jury Instruction/Evidentiary Ruling/Identification Testimony*

***16** Petitioner alleges that the trial court erred in failing to issue a *falsus in uno* instruction in response to a note from the jury. Petitioner also argues that the court erred in allowing Nurse Barr to testify as to the reason for the victim's lack of injuries. Finally, petitioner argues that petitioner was deprived of a fair trial when the victim was allowed to testify that she previously identified petitioner. Respondent argues that none of these claims are exhausted, but they should be deemed exhausted and subject to dismissal based on procedural default, and in the alternative that none of the claims are cognizable in federal habeas corpus.

A. Jury Instruction

During deliberations, the jurors sent out a note asking the following question:

> As a juror, do I have to believe in witness's credibility first, in order to make an evaluation of the full evidence? (i.e. can't make a judgment because I don't believe the witnesses). Can credibility *evolve* with evaluation of physical evidence?

(Dkt. No. 12 at CM/ECF p. 301). Defense counsel requested that the court include a *falsus in uno* charge [15] in its response to the question (T. at 830), but the court instructed the jury only that in evaluating a witness's credibility, the jurors could consider whether that witness's testimony is consistent with the physical evidence. (T. 832–33). The court disagreed that the *falsus in uno* instruction was exactly responsive to the question, and stated that "I'd be happy [to give the instruction], but I just don't know how to segue ... it in there, I'd have to fit it in with a shoe horn...." (T. 830).

On appeal, petitioner argued that the failure to give this instruction denied petitioner a "fair trial" because credibility of the witnesses was a central issue in the case. (Pet'r's App. Br. at 31–34; Dkt. No. 12 at 41–44). Counsel did not cite the federal constitution, and did not cite to any federal constitutional principles. The prosecutor's brief did not cite any federal constitutional cases or principles. The mere mention of the denial of a "fair trial" is not sufficient for purposes of exhaustion. *See Delesline v. Conway,* 7 F.Supp.2d 487, 497 (S.D.N.Y.2010) (the exhaustion requirement is not automatically satisfied every time an alleged trial error is claimed to deny the defendant a 'fair trial.") (citing *Kirksey v. Jones,* 673 F.2d 58, 60 (2d Cir.1982)).*See also Petrucelli v. Coombe,* 735 F.2d 684, 688 (2d Cir.1984) (mere statement that due process right to a fair trial has been denied is not sufficient to fairly alert the state court to a federal constitutional claim).

Challenges to jury instructions are generally matters of state law that are not cognizable in a habeas corpus action. *See*

Cupp v.. Naughten, 414 U.S. 141, 146, (1973); *United States ex rel. Smith v. Montanye,* 505 F.2d 1355, 1359 (2d Cir.1974) (The propriety of a state trial court's jury instruction is ordinarily a matter of state law that does not raise a federal constitutional question.) Thus, the assertion of a challenge to jury instructions is not, without more, well within the mainstream of constitutional litigation, nor does it call to mind a specific right protected by the Constitution. [16]

B. Evidentiary Ruling

***17** During the trial, Nurse Barr was allowed to testify, over counsel's objection, that the lack of injury to A.S. could be attributable to the lack of a struggle, due to petitioner's use of a weapon. (T. 546–47). On appeal, petitioner's counsel argued that this testimony was erroneously admitted because Barr was not qualified as an expert. (Pet'r's Br. at 34–37; Dkt. No. 12 at CM/ECF pp. 44–47). Counsel cited only New York State cases, and her argument contained no federal constitutional analysis. The prosecutor's brief was also based upon state law arguments. (People's Br. at 54–58; Dkt. No. 12 at CM/ECF pp. 518–522).

Erroneous evidentiary rulings do not automatically rise to the level of a constitutional violation. *Rosario v. Kuhlman,* 839 F.2d 918, 924 (2d Cir.1988). An evidentiary ruling is only redressable in a federal habeas corpus proceeding if there is a showing an error "of constitutional dimension," that deprived him of "fundamental fairness." *Id.* Thus, the mere claim based on an erroneous evidentiary ruling does not serve to exhaust the claim for federal habeas corpus purposes. Petitioner in this case has, therefore, failed to exhaust his state court remedies regarding his evidentiary claim.

C. Identification/Bolstering Claim

Petitioner claims that the trial court denied petitioner a fair trial when the victim was allowed to testify that she identified petitioner in an out-of-court proceeding. On appeal, petitioner's counsel argued that absent the defendant "opening the door" to such evidence, it was improper bolstering for the prosecution to elicit from an identifying witness the fact that he or she previously identified the defendant. (Pet'r's Br. at 37–39; Resp't's Ex. A at CM/ECF pp. 47–49).

Petitioner's appellate counsel did not cite to the federal constitution, nor did she cite to any state cases citing to, or analyzing, federal constitutional principles. The prosecutor also did not cite to any federal case law or principles. Thus, the bolstering claim is not exhausted. [17]

D. Procedural Default

Although petitioner's jury instruction and evidentiary ruling claims, and bolstering claims are not exhausted, petitioner cannot return to state court to raise either claim. Petitioner raised all three record-based claims in his direct appeal. He cannot return to raise the same claims in the Appellate Division, and as stated above, the New York Court of Appeals only allows one request for review. Because his claims are record-based, he cannot return to the trial court and assert them in a second section motion to vacate. Thus, petitioner's claims are "deemed" exhausted, but subject to a procedural default analysis.

Petitioner has shown neither cause nor prejudice for failing to raise any of these claims as violations of the federal constitution, and as stated above, has not produced any new evidence showing that he is "actually innocent" of the charges. Thus, petitioner's second, third, and fourth claims may be dismissed.

***18 WHEREFORE,** based on the findings above, it is

RECOMMENDED, that the petition be **DENIED and DISMISSED,** and it is

RECOMMENDED, that a certificate of appealability be **DENIED.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. These objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.****Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of HHS,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b) (1); Fed.R.Civ.P. 72.

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Footnotes

1 *See Miller–El v. Cockrell,* 537 U.S. 322, 336 (2003) (holding that " § 2253 permits the issuance of a [certificate of appealability] only where a petitioner has made a 'substantial showing of the denial of a constitutional right.'"); *Richardson v. Greene,* 497 F.3d 212, 217 (2d Cir.2007) (holding that, if the court denies a habeas petition on procedural grounds, "the certificate of appealability must show that jurists of reason would find debatable two issues: (1) that the district court was correct in its procedural ruling, *and* (2) that the applicant has established a valid constitutional violation") (emphasis in original).

1 The court will refer to the victim and her family by their initials in order to maintain confidentiality.

2 A.S. testified that she did not answer the door because she thought it was her boyfriend, and they had argued before he left. (T. 363—A.S.) A.S. told him that she was not going to open the door when he returned. (*Id.*)

3 A.S. testified that there were some stairs outside the door to S.S.'s apartment that you had to climb in order get to the outside door. (T. 360—A.S.)

4 A.S. testified that she was making telephone calls to friends who could come and pick her up because she wanted to leave. (T. 369–70—A.S.) A.S. said that S.S. told her that she did not want to stay either, but petitioner was in her bedroom, and S.S. was scared to go into her room to get her keys and purse. (T. 370—A.S.)

5 S.S. testified that she saw petitioner hit A.S. when S.S. was "laying on the floor and ... looked up."(T. 587—S.S.)

6 Prior to this testimony, there was a discussion outside the presence of the jury regarding the admissibility of such a statement. Defense counsel was concerned that mentioning a gang would be prejudicial to the defendant. (T. 389–94). Judge Brunetti gave a limiting instruction, which he read to counsel prior to reading it to the jury. (T. 397). The judge also mentioned that allowing this testimony would not be prejudicial to the defendant because the motive being proffered by this testimony was "entirely inconsistent with the proof up until this point as to the conduct of the person named Alfie in pursuing the witness and that [the assault] was the ultimate result of the rejection of [petitioner's] advances and had nothing to do whatsoever with any gang or retaliation so it actually ... creates fodder for the defense summation."(T. 398).

7 Judge Brunetti also issued separately paginated "Findings of Fact," (Dkt. No. 12 at CM/ECF pp. 364–70), but reproduced the entire document in his decision. (Dkt. No. 12 at CM/ECF pp. 414–17). As part of the Findings of Fact, Judge Brunetti invited further briefing on seven specific issues regarding petitioner's right to testify, including the effect of the court's finding that the testimony petitioner gave during the section 440.10 hearing would not have been the same testimony he would have given at trial. (*Id .* at CM/ECF pp. 418–Issue # 7).

8 At the section 440.10 hearing, petitioner testified that he and A.S. had consensual sex twice on September 23, 2005, once in S. S.'s apartment and once outside in the park. Petitioner speculated that A.S. accused him of rape because she found out that petitioner had another girlfriend who was pregnant with his child, and A.S. wanted to get back at him. (Hearing ("H") at 22–23).

9 Additionally, almost all the witnesses that petitioner states he would have called were related to petitioner. (H. at 24).

10 Prior to the AEDPA, the court was not required to defer to state court determinations on pure questions of law and mixed questions of law and fact. *Thompson v. Keohane,* 516 U.S. 99, 107–113 (1995). When presented with these questions, the court was empowered to conduct an independent review of the record. *Id.*

11 While the court notes that section 440.10(3)(b) provides only that a court "may" deny a motion to vacate where the grounds raised were determined on the merits in a prior motion, section 440.10 also provides that the trial court "must" deny a subsequent section 440.10 motion when the issue could have been, but was unjustifiably omitted from the on direct appeal. N.Y.Crim. Proc. Law § 440.10(2)(c).Section 440.10(2)(c) is considered a procedural default. *See Fernandez v. Artuz,* 402 F.3d 111, 115 n. 4 (2d Cir.2005) (identifying both section 440.10(2)(a) and (2)(c) as procedural defaults). Appeals from motions to vacate are discretionary. *See Nichols v. Brown,* No. 09 Civ. 6825, 2013 WL 1703577, at * 1 n. 2 (S.D.N.Y. April 19, 2013) (review of the denial of a section 440.10 motion is available only in the Appellate Division and only by leave of a judge). In this case, the appeal from petitioner's section 440.10 denial was consolidated with his direct appeal, and petitioner's counsel failed to raise the second ineffective counsel claim in either appeal. Thus, arguably, if petitioner went back to state court to attempt to exhaust the second ground for ineffective assistance of counsel, he would be met by a finding that he should have raised the issue when he was allowed to appeal the denial of the section 440 motion. In any event, the chances of Judge Brunetti deciding the issue again when he has already held an extensive hearing and made extensive findings of fact are exceedingly unlikely.

12 Petitioner has not raised ineffective assistance of appellate counsel, and this court is not specifically addressing the merits of any such claim. The court is merely citing to *Jones* for the proposition that counsel may justifiably focus on some, but not all issues that could possibly be raised on appeal. Although ineffective assistance of appellate counsel

would constitute "cause" for a procedural default, petitioner would have been required to exhaust that claim separately in state court. *Murray v. Carrier,* 477 U.S. 478, 488 (1986). In New York, a common law writ of error coram nobis, filed in the appellate court, is the proper vehicle for bringing a claim of ineffective assistance of appellate counsel. *People v. Bachert,* 69 N.Y.2d 593, 598, 516 N .Y.S.2d 623, 626 (N.Y.1987); *Turner v. Miller,* 124 F. App'x 682, 683–684 (2d Cir.2005).

13 Counsel kept her opening vague perhaps so that the jury would either disbelieve the stories entirely or determine that the victim consented to the encounter.

14 The Appellate Division's decision also stated that if petitioner told his attorney that he had sex with A.S. in the park, counsel would have made more of the fact that "vegetation" was found in the victim's underwear. 82 A.D.3d at 68.

15 A *falsus in uno* charge instructs the jury that if the jurors find that a witness has intentionally testified falsely as to any material fact, the juror may disregard that witness's entire testimony, or the juror may disregard so much of the testimony as he or she finds was untruthful, while accepting the part that the juror finds was truthful. *DiPalma v. State,* 90 A.D.3d 1659, 1660 (4th Dep't 2011) (citations omitted) (discussing the definition of *falsus in uno*).

16 The court would point out that even it if were considering the merits of petitioner's claim, the trial court did not err in failing to give the *falsus in uno* charge in response to the jury's question. The original instructions contained a specific statement that

> You may accept all of what a witness says, none of what a witness says or part of what a witness says. When I say you, I'm talking about you as an individual juror. You can believe all of what witness M said, two-thirds of what witness D said and none of what witness J said.

(T. 785). The jury question specifically addressed the determination of a witness's credibility and whether credibility could be established by the statement's consistency with the physical evidence. Judge Brunetti's response was appropriate for the question. Thus, the petitioner's claim would also fail on the merits.

17 The court notes that regardless of the lack of exhaustion, a claim of improper "bolstering" is akin to an erroneous evidentiary ruling and does not rise to the level of a cognizable federal claim. *Castaldi v. Poole,* No. 07–CV–1420, 2013 WL 789986, at *7 (E.D.N .Y. Mar. 1, 2013) (citations omitted)." 'The concept of 'bolstering' really has no place as an issue in criminal jurisprudence based on the United States Constitution. It is at most a New York State rule or policy derived from *People v. Trowbridge*... Violation of the *Trowbridge* rule, as is so with regard to many such state court rules, does not rise to a constitutional level.' " *Ayala v. Hernandez,* 712 F.Supp. 1069, 1074 (E.D.N.Y.1989) (omission in original) (quoting *Snow v. Reid,* 619 F.Supp. 579, 582 (S.D.N.Y.1985)). *See also Hodge v. Henderson,* 761 F.Supp. 993, 1008 (S.D.N.Y.1990), *aff'd,* 929 F .2d 61 (1991) (no cognizable federal issue in bolstering claim); *Campbell v. Poole,* 555 F.Supp.2d 345, 371 (W.D.N.Y.2008) (improper bolstering is not cognizable on federal habeas review). In this case, it was the victim who alluded to her own out-of-court identification of the petitioner. (T. 417). She originally testified that she never saw the face of her attacker, but recognized him by his other attributes as someone she knew as "Alfie." (T. 367, 377). She identified the petitioner in the courtroom and later testified that she found out that Alfie was Pierre Cosby. She called the police with this information. (T. 406–407, 416). The prosecutor then asked A.S. what happened, and she said "I identified him." (T. 417). Defense counsel objected. The trial court immediately sustained the objection and instructed the jury to disregard the answer, stating that "[i]t's not evidence of anything in this case." (T. 417). Judge Brunetti reserved on the defendant's motion for a mistrial, stating that he would research the issue and give curative instructions. (T. 427). The trial court likened the testimony to a "*Trowbridge* " violation, although *Trowbridge* did not deal with the victim testifying that she identified the defendant. *See People v. Trowbridge,* 305 N.Y. 471 (1953). The court ultimately found that as long as there was no reference to a photographic identification, which could tip the jury off to the fact that petitioner may have had a prior criminal record, there would be no prejudice to the defendant. The objectionable testimony was stricken from the record, and ultimately, the witness only referred in passing to an identification, without further elaboration. Finally, although petitioner argued on appeal that the victim's testimony was the only identification, there was DNA evidence that petitioner was the attacker. The court would point out that petitioner's new story is that he and the victim had consensual sex, so either way, the victim's brief outburst did not deprive petitioner of a fair trial.

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United States District Court,
N.D. New York.

Robert L. DAVIS, Petitioner,
v.
Mark BRADT, Superintendent, Respondent.

No. 9:12–CV–1843. | Feb. 11, 2014.

Attorneys and Law Firms

Robert L. Davis, pro se.

Leilani J. Rodriguez, AAG, for the Respondent.

DECISION and ORDER

THOMAS J. McAVOY, Senior District Judge.

I. INTRODUCTION

***1** This *pro se* petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 was referred to the Hon. Andrew T. Baxter, United States Magistrate Judge, for a Report and Recommendation ("R & R") pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). In his September 5, 2013 R & R, Magistrate Judge Baxter recommends that the petition be denied and dismissed, and that no certificate of appealability be issued. Dkt. # 20. Pending are Petitioner's timely objections to the R & R. Dkt. # 23.

II. STANDARD OF REVIEW

When objections to a magistrate judge's R & R are lodged, the district court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."28 U.S.C. § 636(b)(1)(C); *see also* *United States v. Male Juvenile,* 121 F.3d 34, 38 (2d Cir.1997) (the Court must make a *de novo* determination to the extent that a party makes specific objections to a magistrate's findings.)."[E]ven a *pro se* party's objections to a Report and Recommendation must be specific and clearly aimed at particular findings in the magistrate's proposal, such that no party be allowed a second bite at the apple by simply relitigating a prior argument."*Machicote v. Ercole,* 2011 WL 3809920, at *2 (S.D.N.Y. Aug. 25, 2011) (citations and interior quotations marks omitted). By the same reasoning, a party may not advance new theories that were not presented to the magistrate judge in an attempt to obtain this second bite at the apple. *See* *Calderon v. Wheeler,* 2009 WL 2252241, at *1 n. 1 (N.D.N.Y. July 28, 2009). General or conclusory objections, or objections which merely recite the same arguments presented to the magistrate judge, are reviewed for clear error. *Farid v. Bouey,* 554 F.Supp.2d 301, 306 n. 2 (N.D.N.Y.2008) (citing *Edwards v. Fischer,* 414 F.Supp.2d 342, 346–47 (S.D.N.Y.2006)).

After reviewing the report and recommendation, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions."28 U.S.C. § 636(b)(1)(C).

III. DISCUSSION

Having considered Petitioner's objections and reviewed the issues *de novo,* the Court determines to adopt Magistrate Judge Baxter's recommendations for the reasons stated in the September 5, 2013 R & R. Moreover, Petitioner has not pointed to any error in Magistrate Judge Baxter's analysis, and the Court finds that those portions of the R & R that Petitioner has chosen to reargue are not clearly erroneous.

IV. CONCLUSION

Therefore, the Court ACCEPTS and ADOPTS the recommendations made by Magistrate Judge Baxter in the September 5, 2013 R & R. For the reasons set forth therein, the petition is DENIED and DISMISSED.

In addition, the Court determines that the petition presents no question of substance for appellate review, and that Petitioner has failed to make a "substantial showing of the denial of a constitutional right."28 U.S.C. § 2253(c)(2); *see*FED. R.APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

***2** IT IS SO ORDERED.

REPORT–RECOMMENDATION

ANDREW T. BAXTER, United States Magistrate Judge.

This matter has been referred to me for Report and Recommendation, pursuant to 28 U.S.C. § 636(b) and Local

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Rules N.D.N .Y. 72.3(c), by the Honorable Thomas J. McAvoy, United States District Judge.

Presently before this court is a petition, seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. (Petition ("Pet.")) (Dkt. No. 1). Petitioner brings this action, challenging a judgment of conviction rendered on May 21, 2007, after a jury trial in the Onondaga County Court. Petitioner was convicted of two counts of Rape, First Degree; Kidnaping, Second Degree; Criminal Sexual Act, First Degree; Sexual Abuse, First Degree; and Robbery, Third Degree. Petitioner was sentenced as a second felony offender to consecutive prison terms of twenty five years for both counts of rape, the kidnaping, and the criminal sexual act; a seven year prison term for the sexual abuse; and an indeterminate term of three and one half to seven years for the robbery. The court also imposed five years of post-release supervision.

The Appellate Division, Fourth Department affirmed petitioner's conviction on September 30, 2011, and the New York Court of Appeals denied leave to appeal on December 15, 2011. *People v. Davis,* 87 A.D.2d 1332 (4th Dep't), *lv. denied,* 18 N.Y.3d 858 (2011).

Petitioner raises eight grounds for this court's review:

1. DNA evidence was obtained in violation of the 4th Amendment. (Pet. at CM/ECF p. 14).

2. The prosecutor committed misconduct before the Grand Jury. (*Id.*)

3. Petitioner's trial attorney was ineffective. (Pet. at CM/ECF p. 20).

4. "Hampering of deliberations" (*Id.*)

5. The court improperly admitted false expert testimony. (Pet. at CM/ECF p. 40).

6. The court improperly admitted the false testimony of a lay witness. (Pet. at CM/ECF p. 41).

7. The court improperly admitted evidence of unrelated "dismissed" charges. (Pet. at CM/ECF p. 46).

8. Two jurors were improperly removed from the case. (Pet. at CM/ECF p. 46).

Respondent has filed an answer in opposition to the petition, together with the pertinent state court records and a memorandum of law. (Dkt.Nos.10, 11). The state court records have been submitted under seal due to the nature of petitioner's crimes. (Dkt.Nos.8, 9). Petitioner has filed a traverse with exhibits. (Dkt. No. 19). For the following reasons, this court agrees with respondent and will recommend dismissal of the petition.

DISCUSSION

I. *Relevant Facts*

The petitioner's conviction in this case resulted from a rape and robbery that occurred on April 25–26, 2006 at the Dry Dock Grill in Syracuse, New York. The victim ("RC") worked the night shift as the bartender at the time of the incident. Her job included closing the bar at approximately 10:00 p.m. (RC—Trial Transcript ("T")[1] 22–23). On April 25, 2006, she arrived for work at 5:00 p.m. to work her normal evening shift. (RC—428). The cook left at 8:00 p.m., leaving RC with several regular customers in the bar. (RC—T.428–29). By 8:30 p.m., the only people in the bar were RC and a cab driver named Dan. (RC—T.430).

***3** A short time later, Jimmy Spencer ("Spencer"), an executive with Excellus Blue Cross Blue Shield came into the bar and ordered a beer from RC. (RC—T.432, Spencer—T.749). She served him the beer and went back to watching television. (RC—T.431). Spencer testified at trial that, while he was drinking his beer, petitioner came into the bar, showed RC some money and asked if he had enough to purchase a drink. When RC told petitioner that he did not have enough money, Spencer offered to buy him a drink. RC testified that she felt uncomfortable when the petitioner entered, and gave Spencer a "dirty look" when he offered to buy petitioner the drink, but poured petitioner a "Jack and coke." (RC—T.433–34). She testified that after pouring petitioner the drink, she walked away, trying to stay busy and finishing her paperwork in preparation for closing the bar. (*Id.*)

Dan left, and shortly thereafter, a blonde woman, Mary Jo Marcely ("Marcely") came into the bar to meet Spencer. (RC—T.434, Spencer—T.758–61). She and Spencer were co-workers, and had been in Rochester that day for a meeting. (Marcely—T.866). She arranged to meet Spencer at the Dry Dock to discuss some work matters. (Marcely—T.868, Spencer—T.758–59). RC testified that she went into the office to get her keys and her bag, and met her nephew at

the back door of the bar so that he could give her some change from a gift that he had purchased for RC's sister. (RC—T.436–37). When RC returned to the bar, she noticed that Spencer and Marcely had gone, leaving RC alone with petitioner. (RC—T.438).

RC testified that she just ignored the petitioner, thinking that he was just going to leave. She tried not to look at him and did not speak with him.(*Id.*) When RC came out from behind the bar to access the credit card machine, petitioner came up from behind her and put his arm around her neck. (RC—T.439–40). Petitioner was much taller and stronger than RC, and he pushed her toward the kitchen. She was shaking, and petitioner told her to stop shaking and calm down. (RC—T.440–41). Petitioner asked RC what was in the office. She told him that there was money in the cabinet, and that he could "take all the money." (RC—T.444). RC told him that the keys were at the bar. They obtained the keys, and petitioner ordered her to lock the front door. (RC—T.444–45).

Petitioner dragged RC back to the bar, took money out of a "Quick Draw" machine and from the cash register, stuffing the money into his pants pocket. He brought RC back into the office, where he ordered her to unlock the cabinet where the money was kept. (RC—T.447–48). Petitioner took more money out of the cabinet and put it in his pockets. (RC—T.449). RC testified that petitioner closed the office door and put his hand down her pants. She begged him to stop and offered to let him take her car. The petitioner told her that he could "make it easy or he could make it hard."(RC—T.450). RC did not struggle and allowed petitioner to pull down her pants. (*Id.*) Although he attempted to have sexual intercourse with her at that time, she testified that he was not erect and was only able to achieve slight penetration. (RC—T.452–54).

***4** RC testified that petitioner attempted to tie her hands with a cord, but eventually stopped. (RC—T.454–55). Petitioner asked about RC's car and told her that he was not going to hurt her, he was only going to take the car. (RC—T.456). RC gave him her keys, but he pushed her out the back door and toward the car. (RC—T.456–57). Before leaving the bar, petitioner grabbed a bottle of Bacardi rum. (RC—T.459). RC testified that when she got outside, she attempted to run away from petitioner, losing a shoe in the process. (RC—T.457). Petitioner caught up with her and put her in the car. Petitioner warned RC not to attempt to escape. RC testified that petitioner forced her head down as he drove out of the parking lot. (RC—T.457–58).

Ultimately, petitioner drove to a truck stop and pulled into a dark area. (RC—T.460–61). He began to drink the rum and ordered RC to remove her pants. (RC—T.461–62). He then performed oral sex on her and tried to have intercourse with her again. (RC—T.462–63). RC testified that he was not erect at first, but managed to achieve an erection and full penetration. She testified that petitioner also repeatedly put his fingers in her vagina and tried to kiss her, but RC turned her head. (RC—T.463–64).

After the assault was over, petitioner got dressed and drove to the north side of Syracuse, got out of the car, told RC not to go to the police, and walked away. (RC—T.464–65). RC got into the driver's seat and drove back to the bar. Once she was back in the bar, she called her father, her brother, the owner of the Dry Dock, and 911. [2] (RC—T.465–66). The police responded to the scene and found that a file cabinet was open, there was cash on the floor, some desk drawers were pulled out. In the bar area, a chair was knocked over, and on the bar, there was a glass with brown liquid in it. In the parking lot, Detective Patrick Boynton found a single shoe. The other shoe and a bottle of Bacardi were found in RC's car.

RC drove to the truck stop with Detective Boynton. (RC—T.471–72). She described the petitioner as a black male, who was around six feet tall, with a medium build and "bald shaven." (RC—T.472). RC was brought to University Hospital, where she was examined, and where swabs and samples were taken from her genitals, mouth, fingernails, and pubic hair. (RC—T.490–92, Galloway—T.808–809). Registered Sexual Assault Nurse Examiner ("SANE") Nurse Ann Galloway assembled a sexual offence evidence kit. Nurse Galloway did not observe any injury or trauma to RC, other than a small scrape on her face, but testified that this would not be unusual, notwithstanding a lack of consent. (Galloway—T.779–80, 816, 818–19). RC was then taken back to the police station where she gave a statement. (RC—T.493). A few days later RC showed a detective where the petitioner had released her after the attack. (RC—T.494).

Petitioner was ultimately identified as a suspect and arrested on May 1, 2006. He was taken to the police department and placed in an interview room. He was advised of, and waived, his *Miranda* [3] rights. At first, petitioner stated that he could not remember the events of the night of April 25 and 26, 2006 because he "blacked out," however, he did state that he was in the vicinity of the Dry Dock and had smoked heroin with some friends. As they continued to question him, the officers confronted him with a story that they had spoken to a third

party, who had spoken with petitioner's wife, the petitioner changed his story.[4] (Gilhooley—T.663–64).

***5** Petitioner then admitted being at the Dry Dock, where RC was bartending. He stated that two other customers were present, and one customer bought him a drink. However, petitioner also stated that this customer asked petitioner to obtain some cocaine and that he and RC gave petitioner money for drugs. (Gilhooley—T.667). Petitioner claimed that RC took the money out of the cash register. (*Id.*) Petitioner then stated that he used the patron's cellular telephone to call for the drug delivery. The drugs were allegedly delivered to the bar, and petitioner stated that they all snorted cocaine together. (Gilhooley—T.667–68).

Petitioner also stated that the two other patrons left, and that he and RC began kissing and that they ultimately had sexual intercourse on the bar. (Gilhooley—T.668). Petitioner alleged that he and RC took the bottle of alcohol from the bar and went outside where RC ran around and lost her shoe. (Gilhooley—T.669). They got into RC's car and drove around looking for more drugs. Petitioner denied forcing RC into the car and claimed that they drove to the truck stop, smoked a cigarette, drank some more alcohol, and had sex again. (Gilhooley—T.669–70). Petitioner stated that he had trouble maintaining an erection because of his consumption of drugs and alcohol. (Gilhooley—T.670). Petitioner then drove RC to an area that was a block away from petitioner's house. Petitioner claimed that RC threatened to call the police if petitioner did not pay her money, but petitioner just got out of the car and went home. (*Id.*)

At that point, the officers took a break from questioning. (Gilhooley—T.670–71). Although petitioner initially agreed to give a written statement, when he was provided with his *Miranda* rights in writing, he began to complain of chest pain and was taken to the hospital. (Gilhooley—T.672–79). He never gave a written statement. At trial, the detective who took the petitioner's oral statement, Detective Rory Gilhooley ("Gilhooley"), testified as to the contents of the statement. (Gilhooley—T.666–70).

On May 31, 2006, a detective collected a buccal swab from petitioner pursuant to a court order. A mixture of RC and petitioner's DNA was found on the swabs taken from RC's mouth and labia. (Hum[5] —T.975–78). Petitioner's DNA was also found on the straw that had been in the glass on the bar. (Hum—T.986–87). The DNA on the rim of the glass, however, did not match the petitioner's DNA. (Hum—T.988–89).

II. *Generally Applicable Law*

A. The AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that, when a state court has adjudicated the merits of a petitioner's claim, a federal court may grant an application for a writ of habeas corpus only if "the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *See also, e.g., Noble v. Kelly,* 246 F.3d 93, 98 (2d Cir.2001); *Brown v. Alexander,* 543 F.3d 94, 100 (2d Cir.2008).[6] This is a "difficult to meet," and "highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt." *Cullen v. Pinholster,* ––– U.S. ––––, 131 S.Ct. 1388, 1398 (2011) (citations omitted).

***6** Under section 2254(d)(1), a state-court decision is contrary to clearly established Supreme Court precedent if its "conclusion on a question of law is 'opposite' to that of the Supreme Court or if the state court decides a case differently than the Supreme Court's decision 'on a set of materially indistinguishable facts.' " *Id.* (quoting *Williams v. Taylor,* 529 U.S. 362, 413 (2000)). A state court decision involves an unreasonable application of clearly established Supreme Court precedent if it correctly identifies the governing legal principle, but unreasonably applies or unreasonably refuses to extend that principle to the facts of a particular case. *See Williams,* 529 U.S. at 413; *Ramdass v. Angelone,* 530 U.S. 156, 166 (2000).

Under the AEDPA, a state court's factual findings are presumed correct, unless that presumption is rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). If the state court failed to decide a claim "on the merits," the pre-AEDPA standard of review applies, and both questions of law and mixed questions of law and fact are reviewed *de novo. Washington v. Shriver,* 255 F.3d 45, 55 (2d Cir.2001).

B. Exhaustion

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, ... thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights."*Baldwin v. Reese,* 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry,* 513 U.S. 364, 365 (1995) (internal quotation and other citations omitted)); 28 U.S.C. § 2254(b)(1). The prisoner must "fairly present" his claim in each appropriate state court, including the highest court with powers of discretionary review, thereby alerting that court to the federal nature of the claim. *Id.;Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994).

"A habeas petitioner has a number of ways to fairly present a claim in state court without citing 'chapter and verse' of the Constitution, including '(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.' " *Hernandez v. Conway,* 485 F.Supp.2d 266, 273 (W.D.N.Y.2007) (quoting *Daye v. Attorney General,* 696 F.2d 186, 194 (2d Cir.1982)).

C. Procedural Bar

A federal judge may not issue a writ of habeas corpus if an adequate and independent state-law ground justifies the prisoner's detention, regardless of the federal claim. *See Wainwright v. Sykes,* 433 U.S. 72, 81–85 (1977). A federal habeas court generally will not consider a federal issue if the last state court decision to address the issue " 'rests on a state law ground that is independent of the federal question and adequate to support the judgment.' " *Garvey v. Duncan,* 485 F.3d 709, 713 (2d Cir.2007) (quoting *Lee v. Kemna,* 534 U.S. 362, 375 (2002)) (emphasis added). This rule applies whether the independent state law ground is substantive or procedural. *Id.*

***7** There are certain situations in which the state law ground will not be considered "adequate": (1) where failure to consider a prisoner's claims will result in a "fundamental miscarriage of justice," *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); (2) where the state procedural rule was not " 'firmly established and regularly followed,' " *Ford v. Georgia,* 498 U.S. 411, 423–24 (1991); *James v. Kentucky,* 466 U.S. 341, 348–349 (1984); and (3) where the prisoner had "cause" for not following the state procedural rule and was "prejudice[d]" by not having done so, *Wainwright v. Sykes,* 433 U.S. at 87. In *Garvey v. Duncan,* the Second Circuit stated that, in certain limited circumstances, even firmly established and regularly followed rules will not prevent federal habeas review if the application of that rule in a particular case would be considered "exorbitant." *Garvey v. Duncan,* 485 F.3d at 713–14 (quoting *Lee v. Kemna,* 534 U.S. at 376).

A state prisoner who has procedurally defaulted on a federal claim in state court may only obtain federal habeas review of that claim if he can show both cause for the default and actual prejudice resulting from the alleged violation of federal law, or if he can show that he is "actually innocent." *Clark v. Perez,* 510 F.3d 382, 393 (2d Cir.2008) (internal quotation and citations omitted). "Cause" exists if "the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule."*Murray v. Carrier,* 477 U.S. 478, 488 (1986). Prejudice exists if there is a "reasonable probability" that the result of the proceeding would have been different absent the alleged constitutional violation. *Stickler v.. Greene,* 527 U.S. 263, 289 (1999).

To demonstrate "actual innocence," a habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him, but for the alleged constitutional violation. *Murden v. Artuz,* 497 F.3d 178, 194 (2d Cir.2007), *cert. denied sub nom.Murden v. Ercole,* 552 U.S. 1150 (2008); *Schlup v.. Delo,* 513 U.S. 298, 327 (1995). "Actual innocence" requires factual innocence, not "legal" innocence. *Murden v. Artuz,* 497 F.3d at 194. A claim of actual innocence requires petitioner to put forth new, reliable evidence that was not presented at trial. *Cabezudo v. Fischer,* 05–CV–3168, 2009 WL 4723743, at *13 (E.D.N .Y. Dec. 1, 2009) (citing *Lucidore v. N.Y.S. Div. of Parole,* 209 F.3d 107, 114 (2d Cir.2000)); *Schlup v. Delo,* 513 U.S. at 316, 327–328.

III. ***DNA Evidence (Ground 1)***

A. Legal Standards

In *Stone v. Powell,* 428 U.S. 465 (1976), the Supreme Court held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a petitioner may not challenge an allegedly unconstitutional search and seizure in an application for federal habeas relief. *Id.* at 481–82;*see also Capellan v. Riley,* 975 F.2d 67, 70 (2d Cir.1992). The Second Circuit has determined that review of a Fourth Amendment claim in a habeas corpus application is proper only if: (1) the state has provided no corrective procedures at all to redress the alleged Fourth Amendment violations; or (2) the state has provided a corrective mechanism, but

the defendant was precluded from using that mechanism because of an unconscionable breakdown in that process. *See Capellan,* 975 F.2d at 70; *Gates v. Henderson,* 568 F.2d 830, 839–40 (2d Cir.1977).

***8** New York provides an approved mechanism for litigating Fourth Amendment claims. *See Capellan,* 975 F.2d at 70 (citing N.Y.Crim. Proc. § 710.10 et seq.); *Blake v. Martuscello,* No. 10–CV–2570, 2013 WL 3456958, at *5 (E.D.N.Y. July 8, 2013) (citing N .Y.Crim. Proc. Law § 710.10 and finding that the Second Circuit has explicitly approved New York's procedure for litigating Fourth Amendment claims) (citing *inter alia Capellan,* 975 F.2d at 70 n. 1) (other citations omitted)).

B. Application

Petitioner argues that the bucal swab of his mouth to obtain a DNA sample was taken in violation of the Fourth Amendment, that the court had no authority to order the sample taken, and that the incorrect "procedure" was used. (Pet. at CM/ECF p. 14). Petitioner never raised this claim in any state court. Without addressing the issues of exhaustion and procedural default, the court finds that petitioner's first claim should be dismissed based upon *Stone v. Powell.*

Petitioner's claim that somehow the DNA sample from his mouth was improperly taken and should have been suppressed is the type of Fourth Amendment claim to which *Stone v. Powell* applies. As stated above, New York State affords criminal defendants the opportunity to move to suppress evidence taken in violation of the Fourth Amendment. On May 18, 2006, the prosecutor made the application for the sample to the County Court Judge who originally presided over the petitioner's trial. (Trial Transcript ("T") at 2) (Dkt. No. 11–5). Defense counsel objected, and the court stated that "the case law is pretty well settled that it is a reasonable request and not particularly invasive, so I'm going to grant the order."(*Id.*)

Defense counsel did move to suppress statements made by petitioner, his identification, and "physical evidence" taken from petitioner. (Dkt. No. 11 at CM/ECF pp. 36, 40–41; Pet'r's Pretrial Motion). There was a lengthy suppression hearing, beginning on September 29, 2006. (T. at CM/ECF pp. 27–29, 54–108, 111–209). If there was a constitutional infirmity of some kind in taking the DNA sample, petitioner had plenty of time to challenge the procedure. Petitioner can not claim that there was an "unconscionable breakdown" in those procedures. The fact that petitioner did or did not avail himself of the opportunity to challenge the admission of the DNA does not change the result under *Stone v. Powell.*All that is required is that the petitioner have an "opportunity" to challenge the admission of the evidence. Thus, petitioner's first ground may be dismissed based upon *Stone v. Powell.*

IV. ***Prosecutorial Misconduct in the Grand Jury***

A. Exhaustion/Procedural Default

The petitioner's indictment included the incident that he challenges in this petition, together with another incident of similar conduct with a different victim, occurring on a different day. This other conduct was contained in Counts 7, 8, and 9 of the indictment. Petitioner claims that the prosecutor had the DNA reports for these other charges for eight months, but still put both cases before the same grand jury. Respondent argues that this claim is not exhausted because petitioner failed to raise it in constitutional terms in the Appellate Division. This court does not agree.

***9** In his brief to the Appellate Division, petitioner cited New York state law in support of his grand jury claim. However, he also stated that "[t]he error is one of constitutional dimension. Both the New York and United States Constitutions hold that no person shall be held to answer for a capital or otherwise infamous crime unless on indictment of a grand jury (N.Y. Const art I, § 6; US Const Amend V)." (Dkt. No. 11–4, Pet'r's Br. at 14–15). Petitioner's counsel also stated that "[o]ne has a *federal and constitutional right* to fundamentally fair Grand Jury proceedings, and the finding of actual prejudice by the lower court meant actual deprivation of that right."(*Id.*) (emphasis added). Petitioner included the identical claim in his application for leave to appeal to the New York Court of Appeals. (Dkt. No. 11–4 at CM/ECF pp. 133–34). Thus, to the extent possible, petitioner attempted to exhaust the grand jury claim.

Respondent based his argument on New York State law. The Appellate Division considered the petitioner's grand jury claim on the merits, finding that the prosecutor's conduct was consistent with state law, and noted that the trial judge severed the three counts and granted separate trials. The court also stated that, contrary to petitioner's argument, dismissal of the indictment was not warranted based on potential prejudice and concluded that "the circumstances of this case do not warrant the 'exceptional remedy of dismissal' " of the indictment." Although the Appellate Division based its decision on New York State law, petitioner did give the court

the “opportunity” to consider any federal claim that existed. Thus, petitioner exhausted his grand jury claim.

B. Non–Cognizable Claim

Even though petitioner exhausted his state court remedies, his grand jury claim may still be dismissed. As argued by respondent, the Fifth Amendment right to be tried for a felony only upon a Grand Jury indictment was not incorporated into the Due Process Clause of the Fourteenth Amendment, and it does not apply to the states. Because a state criminal defendant has no federal constitutional right to be charged by a grand jury, irregularities in grand jury proceedings, including the presentation of prejudicial evidence, are not cognizable in a federal habeas corpus petition. *Lopez v. Riley,* 865 F.2d 30, 32 (2d Cir.1989).*See Shapard v. Graham,* No. 10–CV–6700, 2012 WL 414117, at *2 (W.D.N.Y. Feb. 8, 2012) (claims of deficiencies in state grand jury proceedings are not cognizable in a federal habeas proceeding) (citing *inter alia Davis v. Mantello,* 42 F. App'x 488, 490–91 (2d Cir.2002)); *Klosin v. Conway,* 501 F.Supp.2d 429, 436–37 (W.D.N.Y.2007) (deficiencies in grand jury proceedings cured by petit jury conviction and not cognizable in federal habeas corpus proceeding) (citations omitted).

Petitioner claims that the prosecutor should not have presented evidence of both incidents to the same grand jury. Upon petitioner's counsel's motion, the trial court severed and granted separate trials. [7] Petitioner was convicted after a jury trial in this case. Therefore, petitioner's grand jury claim is not cognizable and may be dismissed.

V. *Ineffective Assistance of Counsel*

A. Exhaustion

***10** Petitioner claims that his trial attorney was ineffective for two reasons. (Dkt. No. 1 at CM/ECF p. 20). He states that his attorney “only made one objection on [sic] DNA order.”(*Id.*) He refers the court to “attach [ed]” pages 1–3 and a date of May 18, 2006. Petitioner appears to be complaining about the prosecutor's motion to the County Court Judge to take a bucal swab from petitioner. (Dkt. No. 1 at CM/ECF pp. 28–31). That is the only document attached to the petition, reflecting an appearance date of May 18, 2006.

The second basis for petitioner's ineffective assistance of counsel claim appears to be that his trial attorney failed to make a motion for a “lesser included offense.” (Dkt. No. 1 at 20). Petitioner refers the court to “page(s) 1014–1015.” (*See*Dkt. No. 1 at CM/ECF pp. 52–53—corresponding to pp. 1014–15 of the trial transcript). These pages reflect the motions made by petitioner's counsel at the end of the prosecution's case. Petitioner's counsel made a motion to dismiss the rape charges, and the court denied the motion stating that it was “denied as to all counts. And it's certainly sufficient to support any lesser included offenses.”(*Id.*)

Although it is not completely clear what conduct by counsel petitioner is trying to challenge, it is clear that he never raised an ineffective assistance of counsel claim in *any* New York State court prior to raising it in this petition. Therefore, his ineffective assistance claim is unexhausted.

B. Procedural Default

Although petitioner has failed to exhaust his state court remedies, he cannot return to state court to exhaust his claim. He has already filed a direct appeal. He cannot return to the Court of Appeals because New York permits only one application for direct review. *Oquendo v. Senkowski,* 452 F.Supp.2d 359, 368 (S.D.N.Y.2006) (citing *Spence v. Superintendent,* 219 F.3d 162, 169–70 (2d Cir.2000); *Grey v. Hoke,* 933 F.2d 117, 120 (2d Cir.1991)); N.Y. Rules of Court, Court of Appeals § 500.20. Petitioner would also be unsuccessful in moving to vacate his conviction pursuant to N.Y.Crim. Proc. Law § 440.10 because the claim would be dismissed due to petitioner's unjustifiable failure to raise the record-based claim on direct appeal. *Id.* § 440.10(2)(c). This procedural bar is independent and adequate, and is consistently applied. *See Clark v. Perez,* 510 F.3d at 393 (discussing § 440.10(2)(c)).

When petitioner has failed to exhaust his state court remedies, but return to state court is foreclosed, the claim is “deemed” exhausted, but is subject to a procedural default analysis. *Bossett v. Walker,* 41 F.3d 825 (2d Cir.1994) (citing *Grey v. Hoke,* 933 F.2d at 120–21). In order to overcome the procedural default, petitioner would have to show cause for his failure to raise this issue and prejudice resulting from the constitutional violation. Petitioner has not shown cause for his failure to challenge his trial counsel's effectiveness.

***11** Ineffective assistance of appellate counsel could establish cause for his failure to raise the ineffective trial counsel issue on direct appeal.*Murray v. Carrier,* 477 U.S. at 488. In the section of the form-petition which asks why petitioner did not raise his claims in state court, he writes “ineffective appeal [sic] counsel” and “ineffective trial counsel.” (Dkt. No. 1 at CM/ECF p. 20). He does

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not elaborate upon these two conclusory statements, and petitioner had new counsel on appeal. In any event, in order to establish that ineffective assistance of appellate counsel was "cause" for his failure to raise the ineffective trial counsel claim, petitioner would have had to exhaust the appellate counsel claim separately. *Id.* at 488–89.Petitioner did not do so in this case. Thus, he cannot establish cause for the procedural default. [8] Because petitioner has not established cause, the court need not address prejudice.

Finally, petitioner cannot show that he is actually innocent of the charges. There is no new evidence demonstrating that petitioner is "factually innocent" as required. Thus, petitioner cannot overcome the procedural default, and his ineffective assistance of trial counsel may be dismissed.

VI. *Grounds 4–8*

A. Exhaustion

Based upon the state court records filed by respondent, none of petitioner's remaining grounds were raised in any state court, rendering them all unexhausted. Petitioner has attached a document to his traverse that appears to be a "pro se supplemental brief" that was allegedly submitted to the Appellate Division. (Dkt. No. 19–2 at CM/ECF pp. 61–68). In this document, he raises some of the claims in grounds 4–8 above. He mentions problems with the "expert testimony" of Kathleen Hum [9] and argues that the court should have granted a mistrial based on some issues with the dismissal of jurors. [10] (*Id.* at CM/ECF p. 63–64).

The cover letter submitted with this pro se filing is from the Appellate Division, Fourth Department, dated May 23, 2011. (*Id.* at CM/ECF p. 59). The letter states that the court is returning petitioner's supplemental brief because it was not properly filed. (*Id.*) Petitioner failed to file sufficient copies, and failed to properly bind his submission. (*Id.*) The next document is a letter from petitioner, dated May 24, 2011, stating that all ten copies of his brief were mailed on May 20, 2011, but stated that only eight copies were mailed to the Appellate Division, another was mailed to the prosecutor, and the last copy was mailed to petitioner's appellate counsel.(*Id.* at CM/ECF p. 60). The letter is stamped "RECEIVED" May 26, 2011.(*Id.*) The pro se brief itself is stamped "FILED" on May 23, 2011. [11]

It is unclear whether the petitioner resubmitted the appropriate amount of copies, and it is therefore, unclear whether the Appellate Division considered petitioner's pro se supplemental brief because the lack of sufficient copies was only one of the two deficiencies listed in the Appellate Division's May 23, 2011 letter. In order to exhaust a claim, the document containing the argument must be fairly presented. *Daye, supra.*If the court rejected the brief and did not consider the contents, the issues raised therein were not "fairly presented." However, even assuming that the court considered the pro se brief, [12] petitioner raised only New York state evidentiary issues, cited no federal case law and no federal constitutional provisions. None of the methods of raising federal constitutional claims outlined in *Daye* were utilized in petitioner's papers. Additionally, to exhaust these claims, petitioner would have been required to raise the constitutional claims in his application to appeal to the New York Court of Appeals, and there is no indication that he did so. Thus, even if the court assumes that the document was considered by the Appellate Division, petitioner has still failed to exhaust grounds 4–8.

***12** Petitioner cannot return to state court to raise any of the claims because he will be procedurally barred from doing so. All of the claims are based upon evidence in the record, and if they were to be raised anywhere, they should have been raised on direct appeal.

B. Procedural Default

As stated above, petitioner has not shown cause for his failure to raise these claims on direct appeal. He has not exhausted a claim of ineffective appellate counsel, and such a claim would be unlikely to succeed in any event. Appellate counsel presented the claims that he believed were petitioner's strongest arguments on appeal as evidenced by the letters that he wrote to petitioner in response to petitioner's information and requests. There is no indication that counsel chose less meritorious claims in favor of those which would have succeeded. Any other choice is a matter of strategy. *See Harrington v. Richter,* ––– U.S. ––––, ––––, 131 S.Ct. 770, 790 (2011) ("Although courts may not indulge 'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect.' ") (internal citations omitted).

Petitioner does not claim that he has "new" evidence showing that he is "factually" innocent. Petitioner's defense to the charges was that the sexual acts in which he engaged with the victim were with her consent. Essentially, the jury believed the victim. Her testimony and the testimony of the bar patrons who were at the Dry Dock Grill shortly before the incident were consistent with each other and were not consistent with the petitioner's version of the events. The petitioner's DNA profile matched the sample that was found on the straw in the drink that was left on the bar, placing him at the bar that evening. (Hum—T.987). Additionally, petitioner's DNA profile matched the samples taken from the victim's mouth and labia. (Hum—T.970–86). The witness stated that the result was a mixture of the victim's and the defendant's DNA. (Hum—T.984).

Thus, petitioner's remaining claims may be dismissed.

WHEREFORE, based on the findings above, it is

RECOMMENDED, that the petition be **DENIED and DISMISSED,** and it is further

RECOMMENDED, that a certificate of appealability be **DENIED.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. These objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.****Roldan v.. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of HHS,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b) (1); Fed.R.Civ.P. 72.

All Citations

Slip Copy, 2014 WL 576174

Footnotes

1 The trial transcript has been filed as three "sealed" documents on the court's electronic filing system. The citations are to the transcript pages that appear at the upper right hand corner of the transcript and are the original page numbers.

2 A tape recording of the 911 call was played for the jury. (T. 468).

3 *Miranda v. Arizona,* 384 U.S. 436 (1966).

4 The court gave a curative instruction, explaining to the jury that law enforcement officers sometimes use deception techniques to get suspects to talk. (T. 663–64).

5 Kathleen Hum, a forensic scientist at the Onondaga County Center for Forensic Sciences, testified for the prosecution regarding the DNA samples taken from RC and from petitioner. (T. 899–1012).

6 Prior to the AEDPA, the court was not required to defer to state court determinations on pure questions of law and mixed questions of law and fact. *Thompson v. Keohane,* 516 U.S. 99, 107–113 (1995). When presented with these questions, the court was empowered to conduct an independent review of the record. *Id.*

7 Petitioner has submitted a transcript from an April 28, 2008 court appearance on the severed charges. (Dkt. No. 1 at CM/ECF pp. 60–64). Petitioner was represented by a different trial attorney. The prosecutor (the same as in the instant case) explained to the judge that the first attempt at trying the case resulted in a mistrial relating "to the jury [they] picked," and the victim was reluctant to testify. (*Id.* at 61). The prosecutor indicated that petitioner was already serving a 110 year sentence on this case and could not serve any more time if he were convicted again. (*Id.*) Because of this, the prosecutor let the victim make the choice not to testify, and petitioner's counsel moved for, and was granted dismissal of the action with prejudice. (*Id.* at 61–63). The prosecutor consented to the dismissal on the record. (*Id.* at 63). The court notes, however, that the dismissal had nothing to do with petitioner's innocence of the crime.

8 The court would also point out that his attorney's omission of an issue on appeal may have been an attempt to focus the court's attention on petitioner's strongest claims. Generally, such decisions are strategic and do not rise to the level of ineffectiveness. *See e.g. Jones v. Barnes,* 463 U.S. 745 (1983) (appellate counsel not ineffective for failing to raise every nonfrivolous issue requested by defendant). This proposition is supported by petitioner's own exhibits, which include three letters that appellate counsel wrote to petitioner during the pendency of his direct appeal. (Dkt. No. 1 at CM/ECF pp. 35–37). These letters respond to petitioner's submissions of "packets" of information and suggestions to counsel about arguments on appeal. In his letters, counsel attempts to explain to petitioner the reasons that counsel declined to raise certain arguments advanced by petitioner. Counsel's explanations are reasonable, and he clearly chose to raise what he believed were petitioner's strongest arguments. Counsel encouraged petitioner to file a pro se section 440.10

motion to vacate his conviction if he believed that other grounds needed to be raised. It appears that petitioner did not take counsel's advice.

9 The petition challenges the expert testimony of *Nurse Galloway,* not Kathleen Hum. (Pet. at CM/ECF p. 40). Thus, the expert testimony claim is still unexhausted.

10 In this supplemental brief, petitioner also raises facts and alleged claims based upon the dismissed counts of his indictment, arguing that somehow, a stray comment by Hum about a “bite mark” that was not present in this case prejudiced petitioner. The portion of Hum's testimony cited by petitioner would not have in any way indicated that there were additional counts in the indictment.

11 This stamp was likely the original stamp placed on the document prior to sending the document back to petitioner with the original cover letter of the same date.

12 There is no evidence that the court considered the brief. There is no mention of a pro se submission in the Appellate Division's order, and the order discusses only the claims raised by counsel. There is no mention of other claims, even to state that they were “summarily” rejected. *People v. Davis, supra.*

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2010 WL 4140715
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
W.D. New York.

Jeremy S. EDSALL, Petitioner,
v.
Luis R. MARSHALL, Superintendent of Sing Sing Correctional Facility, Respondent.

No. 08–CV–0673(MAT). | Oct. 21, 2010.

Attorneys and Law Firms

Jeremy S. Edsall, Romulus, NY, pro se.

Lisa Ellen Fleischmann, New York State Department of Law, New York, NY, for Respondent.

ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** *Pro se* petitioner Jeremy S. Edsall ("petitioner") has filed a timely petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction in Steuben County Court of Robbery in the First Degree (N.Y. Penal L. § 160.15(4)) and Tampering with Physical Evidence (N.Y. Penal L. § 215.40(2)), following a jury trial before Judge Joseph W. Latham. Petitioner was sentenced to a determinate term of imprisonment of twenty years on the robbery count, concurrent to one and one-half to three years on the evidencing tampering count.

II. Factual Background and Procedural History

A. The Prosecution's Case

On July 13, 2004, Leesa Kio ("Kio") was working the overnight shift at the Econolodge motel in Gang Mills, New York. T. 270. [1] Sometime around 6:00 or 6:30 a.m., Kio was in a rear office behind the front desk of the motel. Through a security monitor, she saw a man walk into the lobby and behind the front desk. T. 272–73. He was wearing an olive-colored ski mask with eye and mouth holes. Petitioner then entered the office, holding two blankets in his arms. He pulled one aside to display a black gun, and asked Kio for money. T. 275. As she handed him the money, Kio noticed that the man was not wearing any gloves. T. 277–78.

Petitioner addressed Kio by her first name, despite the fact that she was not wearing a name tag. Kio suspected the man might know her. T. 279, 302. Under his mask, Kio could see that petitioner had "big and buggy hazel" eyes, a fair complexion, and that his eyebrow had an orange or blonde tint. T. 279, 284. He was not very tall. T. 283. When petitioner gestured for her to keep quiet, she saw that he had a tattoo on his middle finger. T. 280–81. Kio later drew the tattoo's shape for police. T. 281–82, 300. She recalled that the tattoo was on his middle finger, below the knuckle, and had "a mushroom shape or a tooth shape."T. 281.

Investigator Eric Tyner ("Inv.Tyner") of the Steuben County Police Department was called to the Econolodge after the robbery occurred. T. 379–81. There, he interviewed Kio, and gave the media the description that Kio had provided to him, including the finger tattoo, T. 382–84. Outside the motel, the investigator saw tire tracks that curved into the parking lot and exited onto the street in the wrong direction. T 385. Those tracks were measured, as were tracks found in a grassy area in the parking lot. T. 387.

At trial, Kio testified that she did not know anyone by the name of Jeremy Edsall. She did, however, know his fiancee, Tracy Merrill ("Merrill"), as the two previously worked together at a Budget Inn. T. 290. Guest logs from the Econolodge indicated that Merrill had stayed at the motel two days in January, 2004 and once in December of 2003, despite that Merrill was on the motel's "do not rent" list since October, 2003. T. 318–20. Petitioner also stayed at the motel on August 15, 2003 and April 8, 2004. T. 316–18.

***2** Neither petitioner nor Merrill were employed, however petitioner was collecting disability payments. T. 329, 336. Both lived with petitioner's grandmother, who, in July of 2004, gave petitioner money and loaned him her 2002 Buick Century. T. 327, 329, 330, 334–35, 365–66.

Petitioner and Merrill, both users of crack cocaine, regularly purchased their drugs from Toney Jones ("Jones") three to four times per week. T. 336–37, 341, 360–61. A few days before the robbery, Jones sold cocaine to petitioner on credit. T. 362. When petitioner did not pay Jones $200, Jones

threatened to “whop” petitioner. T. 363. Two or three days later, on July 13, 2004, petitioner and his friend arrived at Jones' apartment between 8:00 and 8:30 a.m. T. 361–63. Petitioner handed Jones $130 or $140 in cash. Petitioner told Jones that he had robbed somebody and had about $300 or $400 with him. T. 363–64. The three men then went to Jones' basement, where petitioner purchased and smoked more crack cocaine. T. 364.

Shortly thereafter, the group drove in a brown Buick century to Savona, New York, where petitioner's friend had a trailer. Once they arrived at the trailer, the three men smoked crack, drank beer, and watched television. T. 366–67. A report came on the news regarding the Econolodge robbery. According to Jones, petitioner “looked over” at Jones and looked to the television, “indicat[ing] that that's the place he had robbed.”T. 366. Petitioner asked Jones not to mention the robbery to their friend. T. 367.

On July 14, 2004, petitioner's ex-wife learned of the robbery from the news and heard the description of the perpetrator's tattoo. T. 322–23. She immediately called Inv. Tyner to tell him that petitioner had skull-shaped tattoo on his finger. T. 324. That same day, the investigator saw petitioner in his grandmother's driveway in a Buick Century. The measurements of the tires on petitioner's grandmother's car were consistent with the tire tracks found in the motel parking lot. T. 388.

On July 15, 2004, petitioner and Merrill entered a tattoo shop run by Chris Heath (“Heath”) and asked Heath to cover petitioner's finger tattoo. T. 343–45. Although Heath had heard about the robbery, he nevertheless applied skin-tone ink over the tattoo on petitioner's finger. T. 354–57. Heath warned petitioner that the ink would not permanently cover the tattoo and the tattoo would essentially re-appear once the new tattooing had healed in a few days. T. 352, 357. Lee Keeney, an employee at the tattoo shop, watched Heath cover petitioner's tattoo. T. 354–57.

Petitioner was arrested on November 10, 2004, in the city of Hornell while attempting to purchase crack cocaine. T. 424. A crack pipe and $170 were recovered following a search of petitioner's person. T. 425. According to petitioner's online booking sheet, petitioner has hazel eyes and red hair, weighs about 145 pounds, has a light complexion and is 5′9″# or 5′10″ tall. T. 402, 410–11.

B. The Defense

***3** Jeffery Squires, an attorney, testified that he had represented petitioner in a worker's compensation proceeding. T. 442. Beginning in January, 2004, petitioner had received weekly payments of $75.38 from the Worker's Compensation Board. T. 442–43. Petitioner would receive that money until August 2, 2004, when he was due to receive a lump sum of $12,000. Petitioner became aware of the fact that he would receive the lump sum payment in May, 2004. T. 443–44.

Petitioner's grandmother testified that on July 5, 2004, she gave petitioner a check for $200, and another check on July 13, 2004, in the amount of $250. Since April, 2004, petitioner's grandmother had given petitioner approximately $11,920. T. 448–49.

Both Merrill and petitioner's grandmother testified that on July 13, 2004, around 7:00 a.m., petitioner was at home. T. 450. Although Merrill did not know where petitioner was between 5:30 and 7:00 a.m., she believed that they were both asleep in bed during that time. T. 464.

Merrill's friend, Michelle York, knew petitioner and Toney Jones. The defense sought to have her testify as to conversations she had with Jones, but the court would not permit her to testify further. T. 468–69.

C. Verdict and Sentence

The jury ultimately found petitioner guilty of first-degree robbery and evidence tampering. T. 627. On July 20, 2005, he was sentenced as a second felony offender to a term of imprisonment of twenty years for the robbery count, concurrent to an indeterminate term of one and a half to three years for the evidence tampering count. S. 13

D. Direct Appeal

Through counsel, petitioner appealed his conviction to the Appellate Division, Fourth Department, on the following grounds: (1) the trial court erred in admitting evidence of uncharged crimes; (2) prosecutorial misconduct; (3) legally insufficient evidence to support the conviction and the verdict was against the weight of the evidence; (4) ineffective assistance of trial counsel; (5) deprivation of a fair trial as a result of cumulative errors; and (6) the sentence was harsh and excessive. Respondent's Exhibits (“Ex.”) A. The Fourth Department unanimously affirmed the judgment of conviction. *People v. Edsall,* 37 A.D.3d 1100, 829 N.Y.S.2d

337 (4th Dept.2007), *lv. denied,*9 N.Y.3d 843, 840 N.Y.S.2d 769, 872 N.E.2d 882 (2007).

E. Post–Conviction Relief

On August 20, 2008, petitioner moved to vacate the judgment of conviction pursuant to N.Y.Crim. Proc. L. § 440.10 ("the 440 motion"), on the grounds that: (1) the prosecutor knew or should have known that a witness committed perjury; (2) ineffective assistance of trial counsel; and (3) petitioner was denied his right to present a defense. Ex. H. A hearing on petitioner's 440 motion followed on September 29, 2008, after which the county court denied petitioner's motion based on the procedural bars set forth in N.Y.Crim. Proc. L. § 440.10(2)(a) and (2)(c).*See* 440 Hr'g Mins. dated 9/29/2008 (Ex. M); Ex. K. Though petitioner attempted to seek leave to appeal that decision, the Appellate Division rejected petitioner's motion on December 1, 2008, for petitioner's failure to comply with the court filing requirements. Ex. N.

***4** The instant petition for habeas corpus followed, wherein petitioner seeks relief on the following grounds: (1) the trial court violated petitioner's right to present a defense; (2) the prosecutor failed to disclose information and knowingly used perjured testimony; (3) ineffective assistance of trial counsel; (4) the prosecutor improperly elicited evidence of petitioner's uncharged crimes; (5) ineffective assistance of appellate counsel; and (6) the evidence was legally insufficient to support his conviction. Petition ("Pet.") ¶ 13(a), (b)-(f) (Attach.).

For the reasons that follow, I find that petitioner is not entitled to the writ, and the petition is dismissed.

III. Discussion

A. General Principles Applicable to Federal Habeas Review

1. Standard of Review

To prevail under 28 U.S.C. § 2254, as amended in 1996, a petitioner seeking federal review of his conviction must demonstrate that the state court's adjudication of his federal constitutional claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established Supreme Court precedent, or resulted in a decision that was based on an unreasonable factual determination in light of the evidence presented in state court. *See*28 U.S.C. § 2254(d)(1), (2); *Williams v. Taylor,* 529 U.S. 362, 375–76, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

2. Exhaustion Requirement

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State...."28 U.S.C. § 2254(b)(1)(A); *see, e.g., O'Sullivan v. Boerckel,* 526 U.S. 838, 843–44, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *accord, e.g., Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994), *cert. denied,*514 U.S. 1054, 115 S.Ct. 1436, 131 L.Ed.2d 316 (1995)."The exhaustion requirement is not satisfied unless the federal claim has been 'fairly presented' to the state courts."*Daye v. Attorney General,* 696 F.2d 186, 191 (2d Cir.1982) (*en banc*), *cert. denied,*464 U.S. 1048, 104 S.Ct. 723, 79 L.Ed.2d 184 (1984).

3. Adequate and Independent State Ground Doctrine

It is a well-settled aspect of federal habeas jurisprudence that if "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred" absent (1) a showing of cause for the default and actual prejudice attributable thereto, or (2) a showing that failure to consider the claims will result in a "fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state ground will create procedural default sufficient to bar habeas review if the state ground first was an "independent" basis for the decision; this means that "the last state court rendering a judgment in the case clearly and expressly state[d] that its judgment rests on a state procedural bar ."In addition, the state procedural bar must be "adequate" to support the judgment-that is, it must be based on a rule that is " 'firmly established and regularly followed' by the state in question ."*Garcia v. Lewis,* 188 F.3d 71, 77 (2d Cir.1999) (quoting *Ford v. Georgia,* 498 U.S. 411, 423–24, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)).

***5** If a state court holding contains a plain statement that a claim is procedurally barred then the federal habeas court may not review it, even if the state court also rejected the claim on the merits in the alternative. *See Harris v. Reed,* 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) ("a state court need not fear reaching the merits of a federal claim in an alternative holding" so long as it explicitly invokes a state procedural rule as a separate basis for its decision).

B. Merits of the Petition

1. Right to Present a Defense

Petitioner first contends that he was denied his right to present a defense when the trial court precluded the testimony of an impeachment witness, Ernest Everly ("Everly") [2]. Pet. ¶ 13(a). Habeas review of this claim is precluded pursuant to the adequate and independent state ground doctrine. [3]

In denying petitioner's 440 motion, the county court rejected petitioner's "right to present a defense" claim because it was a matter that appeared in the record and could have been raised on appeal, but was not. *See*N.Y.Crim. Proc. L. § 440.10(2)(c) (mandating that the state court deny any 440.10 motion where the defendant unjustifiably failed to argue such constitutional violation on direct appeal despite a sufficient record); Ex. M at 3–4.

Section 440.10(2)(c) has been deemed an adequate and independent state procedural ground barring habeas review. *See Sweet v. Bennett,* 353 F.3d 135, 140–41 (2d Cir.2003) ("Thus we conclude that Sweet's appellate counsel unjustifiably failed to argue this ineffective assistance claim on direct appeal despite a sufficient record, and consequently waived the claim under § 440.10(2)(c). Accordingly, Sweet's claim is procedurally defaulted for the purposes of federal habeas review as well."); *see also Reyes v. Keane,* 118 F.3d 136, 139 (2d Cir.1997) (holding that where the trial record provided a sufficient basis for the ineffective assistance claim premised on trial counsel's failure to object to a jury charge, such a claim did not fall within any of the exceptions noted by the New York courts for claims that are appropriately raised in a collateral motion for *vacatur* rather than direct appellate review); *Aparicio v. Artuz,* 269 F.3d 78, 91 (2d Cir.2001) (holding that N.Y.Crim. Proc. L. § 440.10(2)(c) barred habeas review of a claim alleging ineffective assistance for failing to object on double jeopardy grounds because defendant unjustifiably failed to raise the ineffective assistance issue on direct appeal).

Because there is an adequate and independent finding by the state court that petitioner procedurally defaulted the claim in his 440 motion, petitioner must show in his habeas petition "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."*Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Petitioner does argue in a separate claim that his appellate counsel was at fault for failing to raise this particular claim on direct appeal, *see infra* at III.B.5, however, he cannot establish cause and prejudice because he has failed to exhaust an independent claim of ineffective assistance of appellate counsel by filing an application for writ of *error coram nobis* in the state court. *See Edwards v. Carpenter,* 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000). Further, petitioner has not attempted to make the showing of "actual innocence" required to qualify for the "fundamental miscarriage of justice" exception. *See Schlup v. Delo,* 513 U.S. 298, 314–16, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Accordingly, the instant claim is procedurally barred from federal habeas review.

2. Use of Perjured Testimony

***6** Petitioner next avers that Toney Jones testified under an undisclosed cooperation agreement and that the prosecutor permitted Jones' allegedly perjured testimony that no such agreement existed. Pet. ¶ 13(b). As with petitioner's first claim, he has not properly exhausted the instant claim because he failed to seek leave to appeal the denial of his 440 motion to the Appellate Division. This claim was also rejected by the 440 court on the basis of § 440 .10(2)(c). For the reasons stated above, *see* discussion at III.B.1, petitioner's due process claim is barred from habeas review by the state court's invocation of an adequate and independent state procedural rule.

Furthermore, petitioner does not allege establish cause and prejudice for his default. He cites no factor that inhibited his ability to assert the claim on direct appeal. *See Murray,* 477 U .S. at 492.Nor does he assert that he is "actually innocent" of the crimes for which he is convicted. *See Schlup,* 513 U.S. at 327. Accordingly, petitioner's second claim must be dismissed.

3. Ineffective Assistance of Trial Counsel

Petitioner contends that his trial counsel was constitutionally ineffective because he: (1) failed to adequately argue against the preclusion of Ernest Everly's testimony; (2) failed to object to the admission of the tire track evidence; and (3) failed to cross-examine Jones about his efforts to blackmail Tracy Merrill from prison about an affair she was having. Pet. ¶ 13(c). With respect to grounds (1) and (2) above, those claims are subject to the same procedural bar discussed earlier, *see supra* at III.B.1., because the county court rejected those contentions pursuant to an adequate and independent

state procedural rule. *See* Ex. M, K; N.Y.Crim. Proc. L. § 440.10(2)(c).

Ground (3), regarding counsel's deficient cross-examination of Jones, was rejected by the Appellate Division on the merits and is thus reviewable in this habeas proceeding. *See People v. Edsall* 37 A.D.3d 1100, 829 N.Y.S.2d 337 (4th Dept.2007).

To establish that he was deprived of his Sixth Amendment right to the effective assistance of trial counsel, a petitioner must show that (1) his attorney's performance was deficient, and that (2) this deficient performance prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficiency is measured by an objective standard of reasonableness, and prejudice is demonstrated by a showing of a "reasonable probability" that, but for counsel's unprofessional errors, the result of the trial would have been different. *Id.* at 694."A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding."*Id.* To succeed, a petitioner challenging counsel's representation must overcome a "strong presumption that [his attorney's] conduct falls within the wide range of reasonable professional assistance."*Id.* at 689.A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct,"*id.,* and may not second-guess defense counsel's strategy. *Id.* at 690.Here, petitioner has failed to demonstrate that his counsel's conduct was deficient within the meaning of *Strickland,* and that, but for the deficiency, the result of his trial would likely have been different.

***7** Decisions regarding " 'whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature.'"*Dunham v. Travis,* 313 F.3d 724, 732 (quoting *United States v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir.1987)). Accordingly, it is presumed that his attorney's conduct fell within the wide range of professional assistance unless petitioner can prove otherwise. *United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Petitioner complains that his attorney should have cross-examined Jones about his effort to blackmail Tracy Merrill. Specifically, petitioner contends that Jones threatened Merrill that he would tell petitioner that Merrill was having an affair if she did not put money in Jones' inmate account at the Steuben County Jail. [4] Pet. ¶ 13(c)(3).

His argument fails because he cannot show that his attorney's conduct was objectively unreasonable or that he was prejudiced by the absence of this testimony. Regardless of whether Jones was ultimately cross-examined on this specific subject, York's testimony on this point would not have been admissible. "[U]nder New York evidentiary law, a party may not introduce extrinsic evidence on a collateral matter offered for the purpose of impeachment."*Alexander v. Ercole,* No. 06 CV 3377(JG), 2007 WL 922419 at *6 (E.D.N.Y. March 27, 2007) (citing *People v. Alvino,* 71 N.Y.2d 233, 247–48, 525 N.Y.S.2d 7, 519 N.E.2d 808 (1987); *People v. Aska,* 91 N.Y.2d 979, 981, 674 N.Y.S.2d 271, 697 N.E.2d 172 (1998)). Testimony that Jones threatened Merrill was unrelated to petitioner's guilt or innocence, and would thus be considered collateral. *See Alexander,* 2007 WL 922419 at *20 ("Here, the state court reasonably could have concluded that the statements of the victim that minimized her jealousy toward [the impeaching witness] were collateral to the facts at issue, because [the witness] was not alleged to have been present at any time during the relevant conduct."); *see also Calderon v. Keane,* No. 97 Civ. 2116(RCC), 2003 WL 22097504, *3 (S.D.N.Y. Sept.9, 2003) ("The issue in each of these cases was whether he committed Attempted Murder in the First Degree and related charges. The testimony of the Petitioner's sister as to the conduct of Detective Capetta subsequent to the Petitioner's commission of the crimes is not probative to the issues presented in the case, nor does it indicate bias.... Therefore, the testimony was properly excluded.").

Moreover, petitioner cannot show that he suffered prejudice as a result of his attorney's alleged omission; Jones alleged blackmail of Merrill was unrelated to the motel robbery or to the trial testimony of Merrill or Jones and would not have had an impact on the outcome of petitioner's trial.

In sum, the Appellate Division's determination was neither contrary to, nor an unreasonable application of Supreme Court precedent.

4. Prosecutorial Misconduct

Petitioner contends, as he did on direct appeal, that the prosecutor was guilty of misconduct in presenting testimony that petitioner tried to purchase drugs four months after his arrest. Pet., ¶ 13(d). The Appellate Division rejected petitioner's prosecutorial misconduct claim on the merits. *Edsall,* 37 A.D.3d at 1101, 829 N.Y.S.2d 337.

***8** In order to obtain habeas relief based upon the misconduct of a prosecutor, "[i]t is not enough that the

prosecutor's remarks were undesirable or even universally condemned."*Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (internal quotation marks and citation omitted). Rather, a constitutional violation will be found only when the prosecutor's remarks " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' "*Gonzalez v. Sullivan,* 934 F.2d 419, 424 (2d Cir.1991) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). In deciding whether a defendant has suffered prejudice of due process proportions as a result of prosecutorial misconduct, courts have considered, (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; (3) and the certainty of conviction absent the misconduct. *See Floyd v. Meachum,* 907 F.2d 347, 355 (2d Cir.1990) (quoting *United States v. Modica,* 663 F.2d 1173, 1181 (2d Cir.1981) (per curiam)) (internal quotation marks omitted)); *accord United States v. Parker,* 903 F.2d 91, 98 (2d Cir.1990).

In *Blisset v. Lefevre,* 924 F.2d 434 (2d Cir.1991), the Second Circuit denied a habeas petition where a prosecutor's inappropriate remarks alluding to petitioner's prior criminal history did not carry a significant risk of inflaming or misleading the jury and did not cause petitioner substantial prejudice in view of the overwhelming evidence of his guilt. 924 F.2d at 440–441. Here, the trial court erroneously evidence that petitioner attempted to purchase drugs approximately four months after the robbery. [5] Assuming that the prosecutor's presentation of this evidence was improper, petitioner cannot establish that he would have been acquitted but for the misconduct. Other evidence that was properly admitted at trial established that petitioner was a regular crack c user, and the jury could have easily concluded that petitioner robbed the motel to satisfy an outstanding drug debt without considering his attempted drug purchase four months later. In light of the other, substantial evidence of petitioner's guilt, it cannot be said that the prosecutor's introduction of this evidence "so infected the trial with unfairness."*See Donnelly,* 416 U.S. at 643; *Blisset,* 924 F.2d at 440–441.

The Court therefore finds that the Appellate Division's decision concerning petitioner's prosecutorial misconduct claim did not involve an unreasonable application of clearly established Federal law; nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

5. Ineffective Assistance of Appellate Counsel

Petitioner argues, for the first time in the instant petition, that his appellate counsel was constitutionally deficient for failing to argue the following points on appeal: (1) the trial court erred in precluding the testimony of Ernest Everly; (2) trial counsel was ineffective for not adequately arguing the admissibility of Everly's testimony; and (3) trial counsel was ineffective for not objecting to the tire track evidence. Pet., ¶ 13(e).

***9** A habeas court may deny unexhausted claims on the merits despite petitioner's failure to exhaust his state court remedies pursuant to 28 U.S.C. § 2254(b)(2). The majority of district courts in this Circuit have followed a "patently frivolous" standard for denying unexhausted claims.*Colorio v. Hornbeck,* No. 05 CV 4984(NG) (VVP), 2009 WL 811588, at *3 (E.D.N.Y. Mar. 3, 2009) (citing *Brown v. State of New York,* 374 F.Supp.2d 314, 318 (W.D.N.Y.2005) (citing Naranjo v. Filion, No. 02–CIV–5449, 2003 WL 1900867, at *8 (S.D.N.Y. Apr.16, 2003) (collecting cases)) (footnote omitted)), while a minority of district courts have exercised § 2254(b)(2) discretionary review when "it is perfectly clear that the [petitioner] does not raise even a colorable federal claim[.]"*Hernandez v. Lord,* No. 00–CIV–2306, 2000 WL 1010975, at *4 n. 8 (S.D.N.Y. Jul. 21, 2000) (collecting and analyzing cases, internal quotation omitted). Another test that has been suggested in this Circuit is that unexhausted claims should be reviewed under a "heightened de novo standard." *King v. Cunningham,* 442 F.Supp .2d 171, 179 (S.D.N.Y.2006). Regardless of the standard employed, petitioner's claim fails on the merits.

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his attorney's representation was unreasonable under the "prevailing professional norms," and that there is a reasonable probability that, but for his attorney's errors, "the result of the proceeding would have been different."*Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A claim for ineffective assistance of appellate counsel is evaluated upon the same standard as is a claim of ineffective assistance of trial counsel. *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.1994) (citing *Claudio v. Scully,* 982 F.2d 798, 803 (2d Cir.1992)), *cert. denied,*508 U.S. 912, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993).

To establish ineffective assistance of appellate counsel for failure to raise specific issues, "it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to

advance every nonfrivolous that could be made. *Id.* Rather, counsel may winnow out weaker arguments on appeal and focus on one or two key issues that present "the most promising issue for review."*Jones v. Barnes,* 463 U.S. 745, 751–53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). A habeas petitioner must demonstrate that "counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."*Mayo,* 13 F.3d at 533.

An overall review of appellate counsel's work shows that petitioner received constitutionally effective representation under *Strickland.*Counsel raised a number of substantial arguments on appeal in a thorough, articulately drafted 47–page brief to the Appellate Division, which contained six points supported by state law and federal authority. Ex. A. In that brief, counsel cited 80 cases in support of the opening arguments, which were well-reasoned and intelligently written, containing full citations to the record. Counsel also filed a 22–page reply brief of equal quality, and sought leave to appeal the most salient issues to the New York Court of Appeals. Ex. D, F.

***10** Moreover, it is worth noting that counsel was partially successful on appeal. The Fourth Department agreed with counsel that the county court erred in admitting evidence of an uncharged crime unrelated to the charges in petitioner's indictment. *See Edsall,* 37 A.D.3d at 1100–01, 829 N.Y.S.2d 337. That the Appellate Division found the error to be harmless does not indicate any deficiency by appellate counsel, because the remaining evidence against petitioner was overwhelming. *Id.* at 1100–01, 829 N.Y.S.2d 337,*see infra* at III.B.6.

In light of the circumstances presented in the record, it cannot be said that appellate counsel's representation "fell below an objective standard of reasonableness,"*Strickland,* 466 U.S. at 688, therefore this claim is denied because it is wholly meritless.

6. Sufficiency of the Evidence

In petitioner's final claim for habeas relief, he challenges the sufficiency of the evidence to support his conviction of first-degree robbery and evidence tampering. Pet., ¶ 13(f). The Appellate Division rejected this claim on the merits. *Edsall,* 37 A.D.3d at 1101, 829 N.Y.S.2d 337.

A petitioner challenging the sufficiency of the evidence of his guilt in a habeas corpus proceeding "bears a very heavy burden." *Fama v. Comm'r of Corr. Services,* 235 F.3d 804, 813 (2d Cir.2000). Habeas corpus relief must be denied if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."*Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original). This sufficiency-of-evidence "inquiry does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit."*Herrera v. Collins,* 506 U.S. 390, 402, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

A federal court reviewing an insufficiency-of-the-evidence claim must look to state law to determine the elements of the crime. *Quartararo v. Hanslmaier,* 186 F.3d 91, 97 (2d Cir.1999) (citation omitted), *cert. denied,*528 U.S. 1170, 120 S.Ct. 1196, 145 L.Ed.2d 1100 (2000).

In New York, Robbery in the First Degree requires proof that a defendant forcibly stole property and, in the course of the commission of the crime or of immediate flight therefrom, displayed what appeared to be a "pistol, revolver ... or other firearm." N.Y. Penal L. § 160.15(4). A person is guilty of Tampering with Physical Evidence when, "[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration or destruction .... " N.Y. Penal L. § 215.40(2). "Physical evidence" is defined as "any article, object, document, record or other thing of physical substance which is or is about to be produced or used as evidence in an official proceeding." N.Y. Penal L. § 215.35(1).

***11** The evidence presented at trial can be summarized as follows: the motel clerk testified that someone with fair features and a slight build displayed a black gun and ordered her to give him money from the cash register. T. 275–78, 280–84. Her observations of his physical appearance matched petitioner's description on the online booking sheet, including a mushroom-shaped tattoo on his finger. T. 280–81. Petitioner's ex-wife reported to authorities that her ex-husband had a skull-shaped tattoo on his finger. T. 324. The tire tracks in the motel parking lot were consistent with the tires on petitioner's grandmother's car, which he often drove. T. 388. Petitioner also confessed to Toney Jones, to whom petitioner owed a drug debt. T. 363–66. His attempt to remove his finger tattoo after the robbery supports the conclusion that he was the same man with the middle-finger

tattoo who robbed the motel and sought to avoid the use of the tattoo as evidence against him. From this evidence, a rational trier of fact could easily find the elements of both first-degree robbery and evidence tampering. The evidence was thus legally sufficient to support the conviction.

Finally, petitioner's argument that Jones was not a credible witness has no place in a habeas court's legal sufficiency analysis, as matters of credibility are left to the jury. *See United States v. Reyes,* 157 F.3d 949, 955 (2d Cir.1998); *Huber v. Schriver,* 140 F.Supp.2d 265, 277 (E.D.N.Y.2001) ("[F]ederal habeas courts 'are not free to reassess the [fact-specific] credibility judgments by juries or to weigh conflicting testimony.... [A federal habeas court] must presume that the jury resolved any questions of credibility in favor of the prosecution.'") (quoting *Vera v. Hanslmaier,* 928 F.Supp. 278, 284 (S.D.N.Y.1996)).

For the foregoing reasons, the Appellate Division's rejection of petitioner's legal sufficiency claim was not contrary to, or an unreasonable application of *Jackson v. Virginia,* and habeas relief is denied on this ground.

IV. Conclusion

For the reasons stated above, Jeremy S. Edsall's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied, and the action is dismissed. Because petitioner has failed to make a "substantial showing of a denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the Court declines to issue a certificate of appealability. *See, e.g., Lucidore v. New York State Div. of Parole,* 209 F.3d 107, 111–113 (2d Cir.2000). The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal as a poor person. *Coppedge v. United States,* 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4140715

Footnotes

1 Citations to "T.__" refer to the trial transcript; citations to "S.__" refer to the sentencing transcript.

2 The defense sought to call Everly, who was incarcerated with Toney Jones, to testify about conversations he had in jail with Jones regarding Jones' forthcoming testimony at petitioner's trial. T. 433–436.

3 Petitioner raised this claim his 440 motion in state court. He did not, however, seek leave to appeal the county court's decision. Because the Appellate Division was not given the opportunity to review this claim, it is technically unexhausted. *See Pesina v. Johnson,* 913 F.2d 53 (2d Cir.1990) ("[f]ailure to seek leave to appeal the denial of a § 440.10 motion to the Appellate Division constitutes failure to exhaust the claims raised in that motion."). Notwithstanding petitioner's failure to exhaust, the claim is subject to a procedural default under the adequate and independent state ground doctrine.

4 Counsel had unsuccessfully sought to have Michelle York testify to these circumstances, but the trial court determined that counsel was first obligated to question Jones about the alleged threat. T. 470–74. When counsel sought to call Jones, the court precluded Jones' testimony on the ground that counsel could not call a witness for the sole purpose of cross-examining him. T. 471–72.

5 The Appellate Division found that the county court erred in admitting the evidence, "inasmuch as there was no evidence that defendant's drug use on that date was connected to the acts alleged in the indictment," but concluded that the error was harmless under the *Crimmins/Chapman* test.*Edsall,* 37 A.D.3d at 1100–01, 829 N.Y.S.2d 337 (citing *People v. Crimmins,* 36 N.Y.2d 230, 237, 367 N.Y.S.2d 213, 326 N.E.2d 787 (1975) (citing *Chapman v. California,* 386 U.S. 18, 22–24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))).

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United States District Court,
E.D. New York.

Ruben FERNANDEZ, Petitioner,
v.
M. SHEAHAN, Superintendent, Respondent.

No. 12–CV–2735 (WFK). | Signed Aug. 11, 2015.

Attorneys and Law Firms

Ruben Fernandez, Sonyea, NY, pro se.

Daniel Stephen Bresnahan, Kew Gardens, NY, John M. Castellano, Queens County District Attorney's Office, Kew Gardens, NY, for Respondent.

DECISION AND ORDER

WILLIAM F. KUNTZ, II, District Judge.

***1** Before the Court is a *pro se* petition for the writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 by Ruben Fernandez ("Petitioner"). On January 24, 2008, following a jury trial in the Supreme Court of Queens County, New York, Petitioner was convicted of one count of Robbery in the Second Degree, one count of Grand Larceny in the Fourth Degree, two counts of Unlawful Imprisonment in the First Degree, and one count of Endangering the Welfare of a Child. Petitioner seeks federal *habeas* relief on the following grounds: (1) the trial court denied Petitioner the right to a fair trial and to present a defense by refusing to admit expert testimony on factors affecting eyewitness identification; (2) Petitioner was denied his right to a fair trial by inappropriate comments by the prosecutor at trial; (3) Petitioner's statements to police should have been suppressed because he was not given *Miranda* warnings; (4) Petitioner was arrested without probable cause; and (5) Petitioner was denied his right to a fair trial because the prosecution presented false evidence to obtain Petitioner's conviction at trial. For the reasons stated below, Petitioner's *habeas* petition is hereby DENIED.

BACKGROUND

The Crimes and the Arrest

At approximately 5:30 P.M. on August 28, 2005, Reena Francis and her infant son, Devin Varghese, were in the backseat of her family's Nissan Maxima outside a dry-cleaning business at the intersection of 204th Street and Hillside Avenue in Queens, New York. Dkt. 10–2 ("Trial Transcript III") at 5–7, 10. [1] Ms. Francis's husband, Godley Varghese, was in the dry-cleaning business to drop off clothes. *Id.* at 7–8. At trial, Ms. Francis identified Petitioner, described himas wearing a white hat and a thick white hooded sweatshirt despite the 85–degree heat, and testified that he opened Ms. Francis's car door on the driver's side and got in. *Id* . at 9–11. Ms. Francis then informed Petitioner the car did not belong to him, began pushing Petitioner in an attempt to make him leave the car, and reached over Petitioner to honk the horn. *Id.* at 11–12. Petitioner began to back out of the parking lot, and Ms. Francis ceased her efforts to push him and honk the horn. *Id.* at 13. Mr. Varghese, upon noticing his car moving, exited the drycleaning business and began to yell that his wife was in the car. *Id.* at 138. Hector Colon, who was driving his black BMW nearby, stopped next to Mr. Varghese. *Id.* at 138, 174, 176–178. Mr. Varghese told Mr. Colon that Mr. Varghese's wife and son were in a car that had just been stolen by someone. *Id.* at 139, 178. Mr. Colon instructed Mr. Varghese to get in the car, and together they drove off in pursuit of Petitioner. *Id.* at 139, 178.

According to Ms. Francis, Petitioner drove "erratically," "fast," ran a red light, and at one point drove onto the curb. *Id.* at 13–14. Petitioner told Ms. Francis he would let her out and would not hurt the baby. *Id.* at 14. Ms. Francis asked him when, and became more frightened as Petitioner kept driving without letting her out. *Id.* She opened the car door and held Devin in her arms to be ready to jump; however, the car door shut because of how fast Petitioner was driving. *Id.* Ms. Francis also opened the car window and screamed for help. *Id.* at 14–15. Shortly after Ms. Francis opened the car door, Petitioner took a left turn at the intersection of 191st Street and Hillside Avenue and crashed into a parked minivan. *Id.* at 15. Both airbags deployed. *Id.* Ms. Francis and Devin were uninjured, and she and Petitioner both left the car. *Id.* at 15–16. Petitioner began to run north, whereupon Mr. Colon's vehicle pulled over and stopped. *Id.* at 16–17. Mr. Colon, who was then unknown to Ms. Francis, exited his vehicle and began to fight with Petitioner, while Mr. Varghese also exited and went to his own crashed car. *Id.* at 17, 146–147, Dkt. 10–3 ("Trial Transcript IV") at 1–3. Petitioner extricated himself from the fight and ran away. Trial Transcript III at 18, Trial Transcript IV at 8. According to Ms. Francis, at this point, Petitioner wore only a wife-beater or undershirt,

and no longer had his white hat. Trial Transcript III at 20. On cross-examination, Ms. Francis was unable to explain what had happened to the thick white hooded sweatshirt, but stated she believed it had come off during the fight, which she did not fully observe and which she said was one-sided in favor of Mr. Colon. *Id.* at 45–48. Mr. Colon also stated that Petitioner removed his original upper garment at some point after exiting the vehicle, and was wearing only a "tank top" when Petitioner ran away. Trial Transcript IV at 10.

***2** After Petitioner ran away, Ms. Francis spoke to ambulance personnel and police. Trial Transcript III at 20. Approximately ten minutes later, Ms. Francis was brought one block away from the crash site to "identify the suspect." *Id.* at 20–21. Petitioner was in handcuffs and surrounded by police, and Ms. Francis recognized him. *Id.* at 21. Ms. Francis estimated the time between Petitioner fleeing and her identification of Petitioner as less than ten minutes. *Id.* When Ms. Francis identified Petitioner, she was inside the police car, he was approximately 41 feet away from her, wearing a wife-beater, and the light conditions were bright and sunny. *Id.* at 21–22. Mr. Colon also identified the Petitioner when both men were inside different patrol cars. Trial Transcript IV at 11–13.

State Court Proceedings

A. Trial and Sentencing

Petitioner was charged, by Queens County Indictment Number 2789/2006, with two counts of Kidnapping in the Second Degree, one count of Robbery in the Second Degree, one count of Grand Larceny in the Fourth Degree, two counts of Unlawful Imprisonment in the First Degree, and one count of Endangering the Welfare of a Child. Dkt. 10 ("Trial Transcript I") at 83; Dkt. 8 ("Opposition") at 3.

On January 24, 2008, after a trial in the Supreme Court of Queens County before a jury and the Honorable Justice Richard L. Buchter, the jury found Petitioner not guilty of the two counts of Kidnapping in the Second Degree. Dkt. 10–5 ("Trial Transcript VI") at 130; Dkt. 10–6 ("Trial Transcript VII") at 7–8; Opposition at 3. The jury found Petitioner guilty of one count of Robbery in the Second Degree, one count of Grand Larceny in the Fourth Degree, two counts of Unlawful Imprisonment in the First Degree, and one count of Endangering the Welfare of a Child. Trial Transcript VII at 8–9; Opposition at 3.

On April 1, 2008, the trial court sentenced Petitioner to a determinate prison term of eight years for Robbery in the Second Degree, indeterminate prison terms of one to three years for each of the Grand Larceny in the Fourth Degree and Unlawful Imprisonment in the First Degree counts, and a determinate prison term of one year for Endangering the Welfare of a Child, all to be served concurrently. Dkt. 1 ("Petition") at 1; Opposition at 3.

B. Direct Appeal and § 440.10 Motion

Petitioner, represented by counsel, appealed his convictions before Second Department of the Appellate Division of the Supreme Court of New York State (the "Second Department") on the following grounds: (1) the trial court abused its discretion and deprived Petitioner of his due process rights to a fair trial and to present a defense by refusing to allow the defense to call an expert on eyewitness identification as a witness, even though the case relied solely on identification and there was "virtually no" corroborating evidence; and (2) the prosecutor's remarks and conduct deprived Petitioner of his due process right to a fair trial. Dkt. 11 ("Appellate Briefs") at 31–58; Opposition at 3–4. Petitioner also filed a separate *pro se* supplemental appellate brief, in which he claimed the following additional grounds for reversal: (1) failure to provide Petitioner with *Miranda* warnings upon his arrest; (2) improper show-up identification procedures performed through tinted car windows; (3) police failure to file investigative reports; (4) fatally defective indictment because the alleged arresting officer did not testify to the Grand Jury; (5) Hector Colon falsely testified to avoid prosecution for his illegal car chase; (6) no probable cause to arrest Petitioner because of contradictory descriptions of the carjacker that did not identify any facial features; (7) inconsistent and inconclusive testimony regarding the behavior and location of Sergeant Arenella, who communicated Ms. Francis's identification of Petitioner to other officers via a thumbs-up; (8) elicitation of hearsay testimony from officer at suppression hearing; and (9) improper unsworn testimony, vouching for witness, and subornation of perjury by prosecutor at trial. Dkt. 11–1 ("Supplemental and 440.10 Briefs") at 9–15; Opposition at 4–5.

***3** On November 3, 2010, the Second Department affirmed Petitioner's convictions. *People v. Fernandez,* 78 A.D.3d 726, 910 N.Y.S.2d 140 (2d Dep't 2010). The Second Department held the trial court properly exercised its discretion to exclude Petitioner's proposed expert witness on eyewitness identification. *Id.* at 141. The Second Department

acknowledged that, where the case hinges on the accuracy of an eyewitness and there is no corroborating evidence, the fact-finder may benefit from an expert's specialized knowledge. *Id.* However, the Second Department noted that in the instant case, there was corroborating evidence for the eyewitness testimony. *Id.* Specifically, "[Petitioner] was found shortly after the crime, in the vicinity of the crime, exiting the backyard of a home which he did not live in or own. He fled from the police, demonstrating consciousness of guilt, was identified independently by the complainant and an eyewitness, and made incriminatory statements."*Id.* The Second Department further found the prosecutor's conduct at trial either constituted harmless error, or else Petitioner's objections to such conduct were unpreserved for appellate review. *Id.* at 141–142. Additionally, the Second Department found Petitioner's motions to suppress identification evidence, Petitioner's statements to law enforcement officials, and physical evidence were properly denied. *Id.* at 142. Finally, the Second Department found that the remainder of Petitioner's contentions, set forth in Petitioner's *pro se* supplemental brief, were "unpreserved for appellate review or involve matter dehors the record."*Id.* Petitioner sought leave to appeal the Second Department's decision to the New York Court of Appeals, but was denied on March 28, 2011. *People v. Fernandez,* 16 N.Y.3d 830, 921 N.Y.S.2d 194, 946 N.E.2d 182 (2011).

On February 2, 2010, Petitioner filed a *pro se* motion before the trial court to vacate his convictions pursuant to New York Criminal Procedure Law § 440.10 (" § 440.10 Motion"). Supplemental and 440.10 Briefs at 21; Opposition at 7–8. The § 440.10 Motion reiterated the claims made in Petitioner's then-pending appeal, and added three additional arguments (1) Petitioner was improperly denied a competency hearing at trial, (2) the prosecution presented false evidence at trial, and (3) new evidence exonerated Petitioner. Supplemental and 440.10 Briefs at 23–32. On July 28, 2010, Justice Buchter denied the § 440.10 Motion. *Id.* at 105–109, 921 N.Y.S.2d 194, 946 N.E.2d 182. Justice Buchter found Petitioner's claim that the prosecution presented false evidence at trial was conclusory and unsupported, in contravention of New York Criminal Procedure Law § 440.30(1).*Id.* at 107, 921 N.Y.S.2d 194, 946 N.E.2d 182. Furthermore, Justice Buchter held that Petitioner's claim of being denied a competency hearing at trial (1) was procedurally barred under New York Criminal Procedure Law § 440.10(3)(b) because the matter could have been raised on the record, but was not, and (2) was only based on Petitioner's own allegations and therefore failed to comply with New York Criminal Procedure Law § 440.30(4)(d).*Id.* at 107–108, 921 N.Y.S.2d 194, 946 N.E.2d 182. Finally, Justice Buchter found that all of Petitioner's remaining claims —including Petitioner's claims of lack of probable cause, lack of *Miranda* warnings, improper identification procedures, police failure to file investigative reports, the conduct of Hector Colon, and the elicitation of hearsay testimony at the suppression hearing—concerned facts on the record and as such were subject to a mandatory procedural bar under New York Criminal Procedure Law § 440 .10(2)(b).*Id.* at 106–107. Petitioner did not seek leave to appeal Justice Buchter's denial of the § 440.10 Motion, and Petitioner's time to do so has expired.N.Y.Crim. Proc. Law § 460.10(4)(a).

The Instant *Habeas* Petition

***4** Petitioner now seeks *habeas* relief on the following grounds; (1) the trial court denied Petitioner the right to a fair trial and to present a defense by refusing to admit expert testimony on factors affecting eyewitness identification; (2) Petitioner was denied his right to a fair trial by inappropriate comments by the prosecutor at trial; (3) Petitioner's statements to police should have been suppressed because he was not given *Miranda* warnings; (4) Petitioner was arrested without probable cause; and (5) Petitioner was denied his right to a fair trial because the prosecution presented false evidence to obtain Petitioner's conviction at trial. Dkt. 1 ("Petition") at 6–15. The Court will consider each ground in turn.

DISCUSSION

I. *Habeas Corpus* Standard of Review

This Court's review of Petitioner's petition is governed by The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. The Court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."28 U.S.C. § 2254(a). To obtain relief, an individual in custody must demonstrate, *inter alia,* that he has: (1) exhausted his potential state remedies; (2) asserted his claims in his state appeals such that they are not procedurally barred from federal *habeas* review; and (3) satisfied the deferential standard of review set forth in AEDPA, if his appeals were decided on the merits. *See, e.g., Edwards v. Superintendent, Southport C.F.,* 991 F.Supp.2d 348, 365–467 (E.D.N.Y.2013) (Chen, J.); *Philbert v. Brown,*

11–CV–1805, 2012 WL 4849011, at *5 (E.D.N.Y. Oct.11, 2012) (Garaufis, J.).

"[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal."*Harrington v. Richter,* 562 U.S. 86, 102–103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (internal quotation marks and citation omitted). As the statute instructs:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The question is "not whether the state court was incorrect or erroneous in rejecting petitioner's claim, but whether it was objectively unreasonable in doing so."*Ryan v. Miller,* 303 F.3d 231, 245 (2d Cir.2002) (citing *Sellan v. Kuhlman,* 261 F.3d 303, 315 (2d Cir.2001)) (internal quotation marks, alterations, and emphases omitted). The petition may be granted only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents."*Harrington,* 562 U.S. at 102.

***5** Furthermore, a federal *habeas* court "will not review questions of federal law presented in a *habeas* petition when the state court's decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment."*Downs v. Lape,* 657 F.3d 97, 101–102 (2d Cir.2011) (citations and internal quotation marks omitted) (italics added).

II. Analysis

A. The Trial Court's Refusal to Admit Expert Testimony Did Not Deprive Petitioner of a Fair Trial.

Petitioner seeks *habeas* relief on the ground that the trial court denied his right to a fair trial when the trial court excluded Petitioner's proposed expert testimony on eyewitness identification. Petition at 6.

"[F]ederal *habeas corpus* relief does not lie for errors of state law."*Wilson v. Corcoran,* 562 U.S. 1, 131 S.Ct. 13, 16, 178 L.Ed.2d 276 (2010) (internal citations and quotation marks omitted) (italics added). Instead, a federal court may only grant *habeas* relief where a state court adjudication resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or based on an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)."The Supreme Court has never addressed the issue of whether a defendant has a constitutional right to present expert testimony on the subject of eyewitness identification."*Hearns v. Artus,* 08–CV–192, 2010 WL 2653380, at *11 (E.D.N.Y. June 23, 2010) (Garaufis, J.). Furthermore, "[e]videntiary rulings are typically within the province of state law, and are thus only cognizable under *habeas* review if they are of constitutional magnitude."*Smith v. Graham,* 10–CV–3450, 2012 WL 2428913, at *5 (S.D.N.Y. May 7, 2012) (Katz, Mag. J.) (citing *Perez v. Phillips,* 210 F. App'x 55, 56 (2d Cir.2006)) (internal quotation marks omitted).

To be of constitutional magnitude, an evidentiary ruling based on state law must erroneously exclude evidence that would create reasonable doubt which would not otherwise exist. *Perez,* 210 F. App'x at 56. A federal *habeas* court must apply a two-step analysis to determine whether a state court's evidentiary ruling based on state law is an error of constitutional magnitude: first, the federal court must determine whether the ruling erroneously applies state law, and second, the federal court must determine if the excluded evidence would have created reasonable doubt. *Id.* at 57. Additionally, Petitioner must show that the error was not harmless. *Id.*

Under New York law, the decision to admit expert evidence generally lies within the trial court's discretion. *People v. Young,* 7 N.Y.3d 40, 817 N.Y.S.2d 576, 850 N.E.2d 623, 626 (2006). However, a New York trial court must admit expert evidence on eyewitness testimony where the case turns solely on the accuracy of uncorroborated eyewitness testimony. *Smith,* 2012 WL 2428913 at *5 (citing *People v. Muhammad,* 17 N.Y.3d 532, 935 N.Y.S.2d 526, 959 N.E.2d 463 (2011) and *People v. LeGrand,* 170 Ohio App.3d 471, 867 N.E.2d 874 (2007)).

***6** In the instant case, as the Second Department noted, there was corroborating evidence for the eyewitness testimony. *Fernandez,* 78 A.D.3d 726, 910 N.Y.S.2d 140. "[Petitioner] was found shortly after the crime, in the vicinity of the crime, exiting the backyard of a home which he did not live in or own. He fled from the police, demonstrating consciousness of guilt, was identified independently by the complainant and an eyewitness, and made incriminatory statements."*Id.* As such, there was no erroneous application of state law. *See, e.g., Smith,* 2012 WL 2428913 at *5–6.

As to the second step of the analysis described in *Perez,* 210 F. App'x at 56, there is no reason to believe the exclusion of Petitioner's expert would have created a reasonable doubt that was not otherwise raised by Petitioner's trial counsel. According to Petitioner's counsel, the proposed expert would have testified as to the effect of stress on identification, and the "circumstances which contribute to misidentification," which are outside the expertise of the ordinary juror. Trial Transcript I at 67–78. However, Petitioner's trial counsel was able to make that argument without the help of an expert, inducing Ms. Francis to concede that she was extremely stressed during the car-jacking. Trial Transcript III at 101–102. Furthermore, Petitioner's trial counsel argued in summation that the eyewitness testimony was extremely uncertain due to terror and stress, Ms. Francis had no real opportunity to see Petitioner during the crime, and the situation was "ripe for misidentification." Dkt. 10–4 ("Trial Transcript V") at 161–172; Trial Transcript VI at 12–13. Furthermore, Justice Buchter instructed the jury to consider factors affecting the reliability of eyewitness identification. Trial Transcript VI at 103–105. As such, it is not clear that the exclusion of an expert created a reasonable doubt where the Petitioner's counsel was able to present the relevant information without the expert's help. *See, e.g., Sorenson v. Superintendent, Fishkill Corr. Facility,* 97–CV–3498, 1998 WL 474149 at *6 (E.D.N.Y. Aug.7, 1998) (Gershon, J.) (trial court did not abuse discretion in excluding testimony of expert on eyewitness identifications where defense had full opportunity to crossexamine the eyewitness and judge instructed jury on factors to take into account in evaluating reliability of eyewitness testimony).

Petitioner thus fails to show the exclusion of Petitioner's proposed expert was an error of constitutional magnitude. *Perez,* 210 F. App'x at 56. Accordingly, Petitioner's request for *habeas* relief based on the trial court's exclusion of Petitioner's expert is hereby DENIED.

B. Petitioner's Claims of Prosecutorial Misconduct are Meritless or Procedurally Barred.

Petitioner further requests *habeas* relief because the prosecutor's misconduct deprived Petitioner of a fair trial. Petition at 8. This alleged misconduct consisted of (1) "persistently mischaracterize[ing] and denigrat[ing] the defense theory of mistaken identification as falsely accusing the witness of lying," (2) asserting defense counsel made "silly" and "ridiculous" arguments, (3) suggesting Petitioner was a "girlfriend beater" and had "a penchant for violence," and (4) telling the jury the prosecution's case was a "royal flush." *Id* .

***7** The Second Department found defense counsel had preserved his objections to the prosecutor's comments that defense counsel was accusing witnesses of lying. *Fernandez,* 910 N.Y.S.2d at 141–142. However, the Second Department deemed those comments harmless error in light of the trial court's corrective measures, which included sustaining defense counsel's objections to the comments and instructing the jury to disregard such comments "completely." *Id* . at 142 (internal quotation marks omitted). The Second Department rejected Petitioner's other claims of prosecutorial misconduct as unpreserved for appellate review. *Id.* at 141–142. While the Second Department did not specifically name the statute it relied upon in rejecting Petitioner's claims as unpreserved, New York Criminal Procedure Law § 470.05(2) sets out the requirement for contemporaneous objections to preserve questions of law for appellate review. N.Y.Crim. Proc. Law § 470.05(2). For the reasons stated below, the Court finds Petitioner's preserved claim is meritless. Furthermore, the Court may not review Petitioner's unpreserved claims.

1. Petitioner's Preserved Claim is Meritless.

The Second Department decided Petitioner's preserved claim of prosecutorial misconduct on the merits. *Fernandez,* 910 N.Y.S.2d at 141–142. The Court therefore reviews these claims under the deferential standard of AEDPA. The Court may only grant relief upon this claim if it violates "clearly established Federal law" as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1)."The clearly established Federal law relevant here is [the Supreme Court's] decision in *Darden v. Wainwright...* which explained that a prosecutor's improper comments will be held to violate the Constitution only if they so infected the trial with unfairness as to make the resulting conviction a denial of due process."*Parker v. Matthews,* ––– U.S. ––––, ––––, 132 S.Ct. 2148, 2153, 183 L.Ed.2d 32 (2012) (citing *Darden v. Wainwright,* 477

U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)) (internal quotation marks omitted). The Court's task is not to grant *habeas* relief where a prosecutor's conduct may be "inappropriate, unethical, or even erroneous[,]"; rather, the Court may only grant *habeas* relief where the state courts unreasonably applied Supreme Court precedent in deciding the prosecutor's conduct did not so infect the trial with unfairness. *Jackson v. Conway,* 763 F.3d 115, 146–148 (2d Cir.2014) (discussing the *Darden* standard).

In its leading cases concerning improper prosecutorial comments, the Supreme Court has held that a prosecutor's improper statements that (1) he personally believed in the defendant's guilt, and (2) he believed the defendant went to trial because the defendant hoped to be convicted of a charge lesser than first-degree murder, did not result in a denial of due process where the trial judge issued a corrective instruction. *Donnelly v. DeChristoforoi* 416 U.S. 637, 94 S.Ct. 1868, 1870–1874, 40 L.Ed.2d 431 (1974). Similarly, the Supreme Court has also held that a prosecutor's improper comments regarding the negligence of the prison system, the necessity of the death penalty as the only guarantee against the defendant's future crimes, calling the defendant an "animal," and saying he wished to see the defendant's face "blown away by a shotgun" did not result in a denial of due process. *Darden,* 477 U.S. at 179–183. The *Darden* Court specifically noted the prosecutor "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent."*Id.* at 181–182.

***8** The Second Circuit, applying Supreme Court precedent, denied a *habeas* petition because "fairminded jurists could disagree" as to whether a state appellate court correctly decided that a prosecutor's improperly vouching for witness's credibility, improperly vouching for the defendant's guilt, and calling the defendant "twisted" and "sadistic" did not result in a denial of due process. *Jackson,* 763 F.3d at 149. The Second Circuit, like the Supreme Court in *Darden* and *DeChristoforo,* noted that the prosecutor did not misstate evidence and that the trial judge issued a corrective instruction. *Id.*

Accordingly, the Court cannot find that the Second Department violated or unreasonably applied "clearly established Federal law" as determined by the Supreme Court by ruling that the prosecutor's improper comments that defense counsel was accusing witnesses of lying. 28 U.S.C. § 2254(d)(1). The prosecutor's comments, while possibly implicating Petitioner's right to cross-examine witnesses against him, were no worse than the comments in *Jackson, DeChristoforo,* and *Darden.*The trial judge sustained defense counsel's objection to the comments and instructed the jury to ignore any comment to which an objection was sustained. Trial Transcript VI at 26, 93. Furthermore, the prosecutor did not misstate evidence. *See Darden,* 477 U.S. at 181–182. Fairminded jurists might apply Supreme Court precedent to find that the prosecutor's comments, while improper, did not result in a denial of due process. Therefore, Petitioner's request for *habeas* relief on this ground is hereby DENIED.

2. Petitioner's Unpreserved Claims are Procedurally Barred.

If a state court's disposition of federal claim "rests upon a state-law ground that is independent of the federal question and adequate to support the judgment," the Court will not review that claim. *Downs,* 657 F.3d at 101–102 (citations and internal quotation marks omitted). To be "adequate," a state law ground must be "firmly established and regularly followed by the state."*Richardson v. Greene,* 497 F.3d 212, 218 (2d Cir.2007) (internal citations and quotation marks omitted). A state law basis is sufficiently adequate if "the case law interpreting [the state law] ... displays consistent application in a context similar to [the instant case.]"*Id.* at 220 (citation omitted).

The Second Department found Petitioner's objections to most of the prosecutor's comments to be unpreserved for appellate review. *Fernandez,* 910 N.Y.S.2d at 141–142. While the Second Department did not name the particular law it relied on for this disposition, New York Criminal Procedure Law § 470.05(2) sets out the requirement for contemporaneous objections to preserve questions of law for appellate review. *See*N.Y.Crim. Proc. Law § 470.05(2).

New York Criminal Procedure Law § 470.05(2) is an adequate and independent state law ground. *Jones v. Bradt,* 13–CV–6260, 2015 WL 506485, at *12 (W.D.N.Y. Feb.6, 2015) (Telesca, J.) (finding N.Y.Crim. Proc. Law § 470.05(2) an independent and adequate state ground for the state court's rejection of appellant's claim of prosecutorial misconduct); *DeLee v. Graham,* 11–CV–653, 2013 WL 3049109, at *9 (N.D.N.Y. Jun.17, 2013) (D'Agostino, J.) (upholding state court's rejection of appellant's claim of prosecutorial misconduct as barred under N.Y.Crim. Proc. Law § 470.05(2)); *Blount v. Napoli,* 09–CV–4526, 2012 WL 4755364, at *14–15 (E.D.N.Y. Oct.5, 2012) (Matsumoto, J.) (state court's dismissal of appellant's claim of prosecutorial misconduct under N.Y.Crim. Proc. Law § 470.05(2)) is both

"independent" of federal law and "adequate"). As such, there were independent and adequate state law grounds for the Second Department's rejection of Petitioner's claims of prosecutorial misconduct.

***9** A federal *habeas* petitioner may seek review of his federal claims notwithstanding the existence of independent and adequate state law grounds for the state courts' decision in three circumstances. First, he may do so if he is actually innocent of the crime for which he has been convicted. *Dunham v. Travis,* 313 F.3d 724, 730 (2d Cir.2002). Second, he may also do so if the state law, while generally adequate, has been applied exorbitantly. *Lee v. Kemma,* 534 U.S. 362, 376, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002). Third, if the independent and adequate state law ground is a procedural default in state court, then the petitioner may circumvent the bar to *habeas* review by showing (1) cause for his procedural default, and (2) prejudice. *Blount,* 2012 WL 4755364 at *13. Here, Petitioner does not argue he is actually innocent, nor does he allege any exorbitant application of New York Criminal Procedure Law § 470.05, nor does he claim cause or prejudice. Accordingly, the Court will not review Petitioner's claims that were disposed of in state court on independent and adequate state grounds. Therefore, Petitioner's request for *habeas* relief on the ground of prosecutorial misconduct is procedurally barred and is hereby DENIED.

C. Petitioner's *Miranda* Claim is Meritless.

"The Fifth Amendment bars the use of statements elicited as a product of custodial interrogation."*United States v. Shteyman,* 10–CR–347, 2011 WL 2006291, at * 13 (E.D.N.Y. May 23, 2011) (Johnson, J.) (citing *Miranda v. Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Petitioner request *habeas* relief on the ground that he was not given warnings pursuant to *Miranda* upon his arrest, and therefore his post-arrest statements should have been suppressed. Petition at 10–11. The Second Department rejected this claim on the merits, citing *People v. Schreiber,* 250 A.D.2d 786, 673 N.Y.S.2d 444 (2d Dep't 1998).*Fernandez,* 910 N.Y.S.2d at 142; *see also Schreiber,* 250 A.D.2d 786, 673 N.Y.S.2d 444 (finding defendant's statements, made in the absence of *Miranda* warnings, were "spontaneous" and "voluntary" and "not the product of police interrogation" despite detective arresting defendant, introducing himself, and advising defendant of charges against him). The Court reviews this claim under the deferential standard of AEDPA. *See* section I *supra.*

Police Officer Kevin Stewart conceded he did not give Petitioner a *Miranda* warning upon his arrest. Trial Transcript I at 22. Petitioner was placed in a lodging cell after his arrest; while Officer Stewart was "gathering his paperwork," Petitioner began crying and declared "This is not me" and "This is not what I do."*Id.* at 16. Officer Stewart said nothing to Petitioner prior to Petitioner's statement. *Id.* at 22. Petitioner objects to the admission of this statement at trial. Petition at 10–11.

On this record, the Court cannot find the Second Department's decision that Petitioner's statement was not the product of police interrogation to be "contrary to, or an unreasonable application of, clearly established Federal law" as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).*See, e.g., United States v. Carr,* 63 F.Supp.3d 226, 238–239 (E.D.N.Y.2014) (Brodie, J.) (applying *Miranda* and its progeny to find defendant's post-arrest statement of "You got me" voluntary, and not the product of interrogation, where evidence suggested defendant was asked no questions); *Shteyman,* 2011 WL 2206291 at *19–20 (applying *Miranda* and its progeny to find statements from arrested defendant voluntary, and not the product of interrogation, where officers asked defendant no questions, and there was no evidence defendant was of belowaverage intelligence or otherwise particularly vulnerable). Accordingly, Petitioner's request for *habeas* relief on this ground is DENIED.

D. Petitioner's Probable Cause Claim is Meritless.

***10** Petitioner requests *habeas* relief on the ground that there was no probable cause for his arrest. Petition at 10–11. This claim is grounded in the Fourth Amendment and is subject to the standard articulated in *Stone v. Powell,* 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), which states that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a [petitioner] may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."Here, Petitioner's claim was fully litigated on the merits, dismissed by the Second Department, and rejected for consideration by the New York Court of Appeals. *Fernandez,* 16 N.Y.3d 830, 921 N.Y.S.2d 194, 946 N.E.2d 182; *Fernandez,* 78 A.D.3d 726, 910 N.Y.S.2d 140;.

There are two exceptions to the *Stone v. Powell* rule: (1) where the state provides no corrective process at all for Fourth Amendment violations, or (2) where the defendant was precluded from using a corrective process because there was an "unconscionable breakdown in the [State's]

process."*Capellan v. Riley,* 975 F.2d 67, 70 (2d Cir.1992) (citing *Gates v. Henderson,* 568 F.2d 830, 840 (2d Cir.1977)); *see also McPhail v. Warden, Attica Corr. Facility,* 707 F.2d 67, 70 (2d Cir.1983). New York State's corrective process for evidence obtained through without probable cause, as set out in Article 710 of the New York Criminal Procedure Law, has been found facially adequate by federal courts. *See, e.g ., Holmes v. Scully,* 706 F.Supp. 195, 201 (E.D.N.Y.1989) (Glasser, J.) (noting that petitioner's only method of raising his Fourth Amendment claim before the federal court would be via the second *Stone v. Powell* exception).

Here, Petitioner experienced no "unconscionable breakdown" in state process, but simply failed to make a motion to suppress based on lack of probable cause. Petitioner moved to suppress based on lack of *Miranda* warnings and suggestive identification, but not based on lack of probable cause for Petitioner's arrest. Trial Transcript I at 43, 54–56 (wherein the suppression court acknowledged that "this is not a *Dunaway* hearing," [2] and heard Petitioner's argument for suppression based on suggestive identification and an involuntary statement). Petitioner's failure to make a motion to suppress based on lack of probable cause does not constitute an unconscionable breakdown. *See, e.g., Lopez v. Lee,* 11–CV–2706, 2011 WL 6068119, at *9 (E.D.N.Y. Dec.7, 2011) (Gleeson, J.) (finding a petitioner's failure to comply with New York's procedural requirements in requesting a suppression hearing is not an unconscionable breakdown of state process). Accordingly, *Stone* bars the Court from reviewing Petitioner's claim for *habeas* relief based on an arrest without probable cause. Petitioner's claim is hereby DENIED.

E. Petitioner's Claim that Prosecutor Presented False and Misleading Evidence is Procedurally Barred.

***11** Petitioner claims the prosecutor violated his right to a fair trial by presenting false and misleading evidence. Petition at 13. Petitioner did not raise this claim in his direct appeal. Appellate Briefs at 5–58; Supplemental and 440.10 Briefs at 8–30. Petitioner did raise this claim in his § 440.10 motion, but did not appeal the lower court's denial of that motion. Accordingly, Petitioner did not exhaust his state remedies as required by AEDPA. 28 U.S.C. § 2254(b)(1)(A); *Ortiz v. Heath,* 10–CV–1492, 2011 WL 1331509 at *18 (E.D.N.Y. Apr.6, 2011) (Matsumoto, J.) (New York petitioner's claim was unexhausted where he failed to failed to raise it on direct appeal). Furthermore, Petitioner now cannot exhaust his state remedies. He has used the one direct appeal he is entitled to under New York law. *See, e.g., N.Y. ex. rel. Turner ex. rel. Connors v. Dist. Attorney of N.Y. Cnty.,* 12–CV–3355, 2015 WL 4199135, at *11 (S.D.N.Y. July 10, 2015) (Swain, J.) (adopting report and recommendation by Magistrate Judge Freeman). Furthermore, the time for Petitioner to seek leave to appeal to an intermediate appellate court from the denial of his § 440.10 motion has expired. *See*N.Y.Crim. Proc. Law § 460.10(4)(a). Since Petitioner's state remedies are unexhausted and time-barred, the Court must treat them as if they were disposed of on an independent and adequate state ground. *Turner,* 2015 WL 4199135 at *11. Petitioner has not alleged cause and prejudice, exorbitant application, or actual innocence. *See* section II.B.2 *supra.*Accordingly, the Court cannot review Petitioner's unexhausted and time-barred claim that the prosecutor introduced false and misleading evidence at trial, and it is hereby DENIED.

CONCLUSION

Petitioner's application for a writ of habeas corpus is DENIED in its entirety. A certificate of appealability shall not issue. *See*28 U.S.C. § 2253(c). The Clerk of the Court is directed to serve notice of entry of this Order on all parties and to close the case.

SO ORDERED.

All Citations

Slip Copy, 2015 WL 4771958

Footnotes

1. All page numbers for transcripts of the state court pre-trial and trial proceedings refer to the pages of the PDF document filed on ECF, and not the numbering used by the court reporter.
2. A *Dunaway* hearing is used "to determine whether a statement or other intangible evidence obtained from a person arrested without probable cause should be suppressed at a subsequent trial."*Montgomery v. Wood,* 727 F.Supp.2d 171, 185–186 (W.D.N.Y.2010); *see Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Jones v. LaValley,* 11–CV–6178, 2014 WL 1377589, at *22 & n. 45 (S.D.N.Y. Apr.3, 2014) (Peck, Mag. J.).

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United States District Court,
N.D. New York.

Harry C. FLEEGLE, Petitioner,
v.
James CONWAY, Superintendent,
Attica Correctional Facility, Respondent.

Civil Action No. 9:08–CV–0771
(TJM/DEP). | Aug. 5, 2010.

Attorneys and Law Firms

Harry C. Fleegle, Attica, NY, pro se.

Hon. Andrew M. Cuomo, Office of Attorney General, State of New York, Alyson J. Gill, Esq., Ashlyn H. Dannelly, Esq., Assistant Attorneys General, New York, NY, for Respondent.

REPORT AND RECOMMENDATION

DAVID E. PEEBLES, United States Magistrate Judge.

***1** Petitioner Harry C. Fleegle, a New York State prison inmate as a result of a 2003 conviction for rape and sexual abuse, has commenced this proceeding seeking federal habeas intervention pursuant to 28 U .S.C. § 2254. Although reciting in considerable detail the eleven arguments raised in the state appellate courts in support of an appeal of his conviction, in both his initial petition and a subsequently filed amended pleading, Fleegle appears to assert only a single ground for habeas intervention, arguing that he was denied effective assistance of counsel prior to and during his trial.

Two earlier orders issued in this matter signaled the court's view that based upon the relevant chronology outlined, Fleegle's claims could be time-barred. Since the issuance of those orders respondent has answered the petition, as amended, seeking its dismissal as untimely.

Having carefully reviewed the record and determined that Fleegle's petition was not filed within the prescribed time period and that there is no basis for tolling, equitable or otherwise, of any portion of the time between the date on which his conviction became final and the filing of his petition to avoid the effect of the applicable one-year statute of limitations, I recommend that the petition be dismissed.

I. *BACKGROUND*

Petitioner's conviction results from a series of four incidents occurring between August of 1995 and December of 1997 at his home in Ogdensburg, New York, where he resided at the time with his girlfriend and her son and fourteen year old daughter, C.V.[1] It is alleged that on those occasions petitioner placed his hands on C.V.'s breasts and forced her to have sexual intercourse with him while the two of them were home alone.

The incidents giving rise to petitioner's conviction were not reported to law enforcement officials until March, 2000. Petitioner was subsequently arrested in August of 2000, and was indicted by a St. Lawrence County Grand Jury and charged with thirty-one counts each of first degree sexual abuse, first degree rape, third degree rape, and sodomy in the first and third degrees. Following dismissal of various of those counts petitioner was tried on the remaining charges, resulting in a jury verdict convicting him of six counts of sexual abuse in the first degree, six counts of first degree rape, six counts of rape in the third degree, and five counts each of first and third degree sodomy. The resulting conviction was reversed on appeal by the New York State Supreme Court Appellate Division, Third Department, however, based upon a series of perceived trial court errors and a finding that petitioner had received ineffective assistance of counsel at trial, and the matter was remanded for a new trial. *People v. Fleegle,* 295 A.D.2d 760, 745 N.Y.S.2d 224 (3d Dep't 2002).

Following the remand the trial court dismissed the remaining twenty-eight counts of the indictment, with leave to present the case to a new grand jury. Petitioner was subsequently re-indicted by a St. Lawrence County Grand Jury on November 19, 2002 and charged with six counts of first degree sexual abuse, four counts each of first and third degree rape, and one count each of first and third degree sodomy.

***2** A second trial was held in connection with the new charges, commencing on July 8, 2003, with County Court Judge Eugene L. Nicandri presiding. At the conclusion of that second trial petitioner was again convicted and found guilty of four counts of first degree rape, four counts of rape in the third degree, and five counts of first degree sexual abuse, and was subsequently sentenced on August 4, 2003 principally to

an indeterminate term of imprisonment of between twenty-six and one-half and fifty-seven years.

Petitioner appealed from that second judgment of conviction, with the assistance of counsel. In his appeal Feegle advanced eleven separate grounds for reversal, arguing that 1) he was denied the right to trial before a fair and impartial jury, based upon two distinct events occurring during the course of the trial; 2) his right to a fair trial was further denied based upon the trial judge's failure to recuse himself following the reversal of his earlier conviction; 3) his retrial for certain of the crimes charged represented a double jeopardy; 4) the prosecution committed misconduct during the course of the trial; 5) certain of the charges set forth in the indictment against the petitioner were duplicitous; 6) the court's ruling regarding the use of prior bad acts was improper; 7) the trial court failed to appropriately charge lesser included offenses; 8) the evidence adduced at trial was insufficient to support a portion of the jury's verdict; 9) various of the counts of the indictment should have been dismissed as inclusory concurrent counts; 10) the petitioner was denied effective assistance of counsel; and 11) the sentence imposed was unduly harsh and excessive.

On July 14, 2005, the Appellate Division issued a decision in which, with the exception of reversal in connection with one count of sexual abuse in the first degree, the court unanimously affirmed petitioner's conviction, as modified.*People v. Fleegle,* 20 A.D .3d 684, 798 N.Y.S.2d 244 (3d Dep't 2005). In that decision, the Third Department held first that the jury fairness issue was not properly preserved and opted not to address the claim in the interest of justice. 20 A.D.3d at 685, 798 N.Y.S.2d at 226. Turning to the argument regarding recusal, the appellate court concluded that the trial judge's decision not to recuse himself did not represent an abuse of discretion. *Id.* at 686, at 227.

The court next addressed petitioner's double jeopardy argument, concluding that one of the counts was premised upon different conduct than asserted in the original indictment and a corresponding bill of particulars; as a result, the court reversed the conviction as to that count, which charged sexual abuse in the first degree based upon a December 15, 1997 incident. The court otherwise found, however, that no double jeopardy violation had occurred. *Id.* Next, the court rejected defendant's argument that certain of the counts were duplicitous, concluding that each count charged a separate, discrete offense pertaining to a definitive time frame. *Id.* The court also summarily rejected petitioner's argument regarding inclusory concurrent counts.

***3** The last substantive issue addressed by the appeals court concerned the sufficiency of evidence at trial, the court concluding that the evidence adduced, which "included, among other things, the detailed testimony of the victim regarding the acts perpetrated upon her by defendant ... [and] the testimony of both the victim and her brother [which] established the abusive behavior and threatening atmosphere created by and employed by defendant", amply sufficed to support the jury's verdict. *Fleegle,* 20 A.D.3d at 687, 798 N.Y.S.2d at 228. The Appellate Division closed by noting that petitioner's "remaining contentions have been considered and found unpersuasive."*Id.* Leave to appeal the Appellate Division's decision to the New York Court of Appeals was denied on September 2, 2005, *People v. Fleegle,* 5 N.Y.3d 828, 804 N.Y.S.2d 42 (2005) (Table), and petitioner's application for a writ of *certiorari* was denied by the United States Supreme Court on May 22, 2006.*Fleegle v. New York,* 547 U.S. 1152, 126 S.Ct. 2297 (2006).

II. *PROCEDURAL HISTORY*

Fleegle's petition, which is dated March 1, 2008, was filed on June 23, 2008 in the Western District of New York. Dkt. No. 1. Appropriately named as the respondent in Fleegle's petition is the superintendent of the correctional facility in which he is currently being held.

Following a transfer of the matter to this court, on August 18, 2008 Senior District Judge Thomas J. McAvoy issued an order identifying a potential timeliness issue, based upon the chronology laid out in the petition, and dismissing the petition as facially untimely, with leave to amend. Dkt. No. 6. In that order, the court specifically directed petitioner to include reference in his amended petition to any state court post-conviction motions filed to challenge his conviction and sentence, and to provide information concerning any such proceedings. *Id.*

Fleegle filed an amended petition with the court on September 11, 2008.Dkt. No. 7. Like the original, Feegle's amended petition contains a single claim, alleging that he received ineffective assistance of counsel at trial, and additionally asserting that he is actually innocent of the various crimes for which he was convicted. *Id.* While the text of the amended petition fails to make reference to the filing of any state court post-conviction motions, attached to the amended petition are excerpts of what appear to be papers prepared in support of a

motion to vacate his judgment of conviction under New York Criminal Procedure Law § 440.10. *See id.,* Attachment.

After reviewing Fleegle's amended petition, by order dated December 2, 2008, I directed respondent to submit an answer, limited to addressing the issue of timeliness, including any potential grounds for tolling, and specifically directed that the respondent refrain from producing the relevant state court records until directed to do so. Dkt. No. 8. A text order was subsequently entered on April 13, 2010 instructing respondent's counsel to retrieve and forward those state court records, which have now been received by the court. Dkt. Nos. 20, 21.

***4** The threshold procedural issue of the timeliness of Fleegle's petition, which is now ripe for determination, is now before me for the issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3. *See*Fed.R.Civ.P. 72(b).

III. *DISCUSSION*

A. *Statute of Limitations*

In 1996 Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1214 (1996), bringing about sweeping reform of the prison inmate litigation landscape. The measures introduced by the AEDPA included significant new restrictions on the power of the federal courts to grant habeas relief to state court prisoners under 28 U.S.C. § 2254. One such restriction resulted from creation of a one-year limitation period for filing such habeas petitions. 28 U.S.C. § 2244(d)(1); *Cook v. New York State Div. of Parole,* 321 F.3d 274, 279–80 (2d Cir.2003). The AEDPA statute of limitations provision was enacted to "reduce[ ] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review."*Duncan v. Walker,* 533 U.S. 167, 179, 121 S.Ct. 2120, 2128 (2001).

The provision establishing the one-year limitation offers specific guidance regarding measurement of the prescribed period, providing that it

> shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

For purposes of the AEDPA statute of limitations, petitioner's judgment of conviction became final on May 22, 2006 upon denial of his petition for a writ of *certiorari.*28 U.S.C. § 2244(d)(1) (A); *see Williams v. Artuz,* 237 F.3d 147, 150–51 (2d Cir.2001). Absent a finding of a cognizable basis for tolling the governing statute of limitations, Fleegle therefore had only one year from that date, or until May 22, 2007, to file a timely habeas petition. Giving the petitioner the benefit of the prison mailbox rule, *Tracy v. Freshwater,* No. 5:01–CV–0500, 2008 WL 850594, at *1 (N.D.N.Y. Mar. 28, 2008) (McCurn, S.J.) (*citing Houston v. Lack,* 487 U.S. 266, 276, 108 S.Ct. 2379, 2385 (1988)), for the purposes of the statute of limitations calculus, the earliest filing date he could claim is March 1, 2008, the date of his petition.[2] Even with the benefit of that date, Fleegle's petition is untimely unless all or a portion of the intervening period may properly be excluded.

B. *Tolling For Pendency Of State Court Post–Conviction Proceedings*

***5** Under the AEDPA the one-year governing limitation period is tolled during the pendency of a properly filed application for state post-conviction or other collateral review.[3] 28 U.S.C. § 2244(d)(2); *see Rhines v. Weber,* 544 U.S. 269, 274, 125 S.Ct. 1528, 1533 (2005). This tolling provision

> balances the interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision

> limits the harm to the interest in finality by according tolling effect only to "properly filed application[s] for State post-conviction or other collateral review."
> *Duncan v. Walker,* 533 U.S. 167, 179–80, 121 S.Ct. 2120, 2128 (2001).

The record is equivocal as to petitioner's efforts to file his section 440.10 motion. Annexed to Fleegle's amended petition, although somewhat disorganized and seemingly incomplete, are papers related to such a motion, including excerpts from an affidavit of the petitioner purporting to support such an application, as well as a signed but undated and unsworn signature page. *See* Amended Petition (Dkt. No. 7), Attachment. Included as an exhibit to petitioner's reply memorandum is a notarized letter from Evelyn I. Fleegle, the petitioner's wife, in which she avers that she mailed two copies of petitioner's section 440.10 motion on May 1, 2007 to the St. Lawrence County District Attorney and the St. Lawrence County Court. Reply Memorandum (Dkt. No. 15) Exh. 1. In that letter, Ms. Fleegle also notes having telephoned both the St. Lawrence County Court and the District Attorney on several occasions and having been told on those occasions that the documents were never received.

In a declaration submitted by respondent's counsel, Ashlyn Dannelly, Esq., in response to Fleegle's petition; counsel states that she has contacted both the trial court and the St. Lawrence County District Attorney's office, and that neither has any record of Fleegle having filed a section 440.10 motion to vacate his judgment of conviction. Dannelly Decl. (Dkt. No. 13–1) ¶¶ 2–3.

In order to entitle a petitioner to the benefit of the section 2244(d)(2) tolling provision, his or her application for state-post conviction relief for collateral review must have been properly filed. 28 U.S.C. § 2244(d)(2); *Artuz v. Bennett,* 531 U.S. 4, 8, 121 S.Ct. 361, 363 (2000); *see also Hurley v. Moore,* 233 F.3d 1295, 1297–98 (11th Cir.2000)."An application is 'filed,' as that term is commonly understood, when it is delivered to and accepted by, the appropriate court officer for placement into the official record."*Artuz,* 531 U.S. at 8, 121 S.Ct. at 363 (citations omitted). In *Artuz,* the Supreme Court went on to note that a "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings."*Artuz,* 531 U.S. at 8, 121 S.Ct. at 364.

***6** There is no evidence now before the court to suggest that the petitioner's section 440.10 motion was in compliance with all applicable requirements of state law, or that it was actually accepted for filing. The motion is not dated or notarized, and does not purport to represent a complete set of documents, as required by applicable provisions of New York law. [4]

The burden of establishing entitlement to the benefit of a basis for tolling of the limitations period rests squarely with the petitioner. *Bolarwinwa v. Williams,* 593 F.3d 226, 231 (2d Cir.2010). In this instance, there is no evidence now before the court to establish that a motion to vacate petitioner's judgment of conviction pursuant to section 440.10 was ever filed with the trial court. Accordingly, petitioner is not entitled to the benefit of the tolling provision set forth in section 2244(d)(2).*Goedeke v. McBride,* 437 F.Supp.2d 590, 595–96 (S.D.W.Va.2006) (submission of a partially completed state habeas petition to the trial judge which was not docketed does not constitute a "properly filed" state court proceeding within the meaning of section 2244(d)(2)); *Harvey v. People of the City of New York,* 435 F.Supp.2d 175, 178–79 (E.D.N.Y.2006) (petitioner's unsubstantiated claim of having filed a post-conviction motion not appearing on the official state court records was not properly filed and hence did not serve to toll the limitations period under section 2244(d)(2)).

C. *Equitable Tolling*

To overcome the apparent untimeliness of his petition, Fleegle could ostensibly attempt to invoke equitable tolling. Equitable tolling, however, applies "only in the 'rare and exceptional circumstance[ ].' " *Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000) (quoting *Turner v. Johnson,* 177 F.3d 390, 391–92 (5th Cir.1999)) (alteration in original); *see also Doe v. Menefee,* 391 F.3d 147, 159 (2d Cir.2004) (citing *Smith*); *Corrigan v. Barbery,* 371 F.Supp.2d 325, 330 (W.D.N.Y.2005) (citing *Smith*); *Austin v. Duncan,* 2005 WL 2030742, at *3 (N.D.N.Y.2005) (citing *Smith*). When applied in habeas corpus settings, it has been held that equitable tolling of the AEDPA's statute of limitations is only available when "extraordinary circumstances" prevent a prisoner from filing a timely habeas petition. *Pace v. DiGuglielmo,* 544 U.S. 408, 418, 125 S.Ct. 1807, 1814 (2005) (citation omitted); *see also Warren v. Garvin,* 219 F.3d 111, 113 (2d Cir.2000) (quoting *Smith,* 208 F.3d at 17); *Menefee,* 391 F.3d at 154; *Spaulding v. Cunningham,* No. 04–CV–2965, 2005 WL 1890398, at *3 (E.D.N.Y. Aug. 4, 2005); *Agramonte v. Walsh,* 00CV892, 2002 WL 1364086, at *1 (E.D.N.Y. June 20, 2002). "To merit application of equitable tolling, the petitioner must demonstrate that he acted with reasonable diligence during the period he wishes to have tolled, but

that despite his efforts, extraordinary circumstances beyond his control prevented successful filing during that time." *Smaldone v. Senkowski,* 273 F.3d 133, 138 (2d Cir.2001) (internal quotation and citation omitted), *cert. denied,*535 U.S. 1017, 122 S.Ct. 606 (2002); *see also Warren,* 219 F.3d at 113 (citing *Smith*); *West v. Hamill,* No. 04–CV–2393, 2005 WL 1861735, at *1 (E.D.N.Y. Aug. 1, 2005) (citing *Smith*)

***7** This is not a case in which unfair and unusual circumstances warranting invocation of the equitable tolling doctrine are presented. Fleegle nowhere alleges that he was precluded from filing a timely petition based upon actions or circumstances beyond his control. I therefore recommend against a finding of equitable tolling in this instance.

D. ***Actual Innocence***

Another potentially available exception to the one-year statute of limitations involves a claim of actual innocence. The Second Circuit has not yet staked out a formal position regarding whether the United States Constitution requires that an "actual innocence" exception be engrafted into the AEDPA's statute of limitations. *See Whitley v. Senkowski,* 317 F.3d 223, 225 (2d Cir.2003); *Warren v. Artus,* Nos. 9:05 CV 1032, 2007 WL 1017112, at *9 (N.D.N.Y. Mar. 30, 2007 ((Kahn, D.J. & Peebles, M.J.). That court has nonetheless directed that district courts consider the claim of actual innocence before dismissing a habeas petition as untimely. *Id.; see also Menefee,* 391 F.3d at 161. A showing of actual innocence requires more than merely arguing that the jury's finding of guilt is against the weight of the evidence; to establish actual innocence, a petitioner must present "new reliable evidence that was not presented at trial and show that it is more likely than not that no reasonable juror would have found him [or her] guilty beyond a reasonable doubt.*Whitley,* 317 F.3d at 225;*see also Medina v. McGinnis,* No. 04 Civ 26, 2004 WL 2088578 at *27 (S.D.N.Y. Sept. 20, 2004).

Among the submissions filed with the court by Fleegle in support of his petition is an affidavit from an individual identified as Kindra Purser, in which she asserts that in the summer of 2003 E.V., the victim's brother, stated that the victim had "made up the stories about petitioner [having sexually abused her]". See Amended Petition (Dkt. No. 7 p. 11), Attachment. As presented, that statement constitutes double hearsay, and it is unlikely that the trial court would have permitted Ms. Purser, who was not a witness at trial, to testify concerning the matters stated in her affidavit. While it is arguable that the statement made by the victim could constitute a declaration against interest, given that it plainly contradicts sworn testimony given during the course of the trial, there does not appear to be any hearsay exception that would apply to the statement made by the victim's brother to the affiant and permit the affiant to testify regarding it at trial.

This notwithstanding, in light of the proffered affidavit and the claim that the victim's testimony was perjured, I have reviewed the record in this case with an eye toward determining the strength of the prosecution's case against the petitioner and whether, armed with this information, a reasonable juror could probably reach a verdict of guilty. *Menefee,* 391 F.3d at 163. As the Appellate Division noted, the evidence at trial included detailed testimony of the victim regarding the acts giving rise to petitioner's conviction, as well as testimony from both the victim and her brother describing the abusive behavior and threatening atmosphere existing within the household with Fleegle present.

***8** During her testimony the victim described in detail the events occurring on August 14, 1995, when the petitioner forcibly engaged in sex with her, and told her that he was a Vietnam veteran and could kill anybody with his two hands. TT 343–46, 362. The victim also described in detail the incidents occurring on December 20, 1996 when petitioner, at the time fifty-four years old, engaged in forcible sexual contact with the fifteen year old victim. TT 288, 355–62, 389. Petitioner similarly described the events of December 15, 1997, involving another incident of forcible sexual contact and the petitioner confiding in the victim that he would kill her and her brother if she ever told anybody, *see* TT 358–62, and of December 22, 1997, involving another rape. TT 360–62.

In addition to testifying in detail regarding these incidents, the victim was able to provide additional facts permitting at least a certain degree of corroboration. During her testimony, the victim described the petitioner's penis as being circumcised, and stated that he has a mole in his lower private area, one which cannot be seen when he has his pants on. TT 354. These facts were confirmed through the testimony of petitioner's wife, who also testified that she had never discussed petitioner's private anatomy with the victim. TT 394–95. The victim also testified that during the course of the incident on December 22, 1997 the petitioner was wearing a pinkish colored spiked ring around his penis, while having sexual intercourse with her. TT 361. Once again the petitioner's ownership and use of such a ring was corroborated by the petitioner's wife, who indicated that Fleegle had purchased the ring at a sex shop. TT 395.

In the face of this evidence, and notwithstanding the affidavit submitted in support of his petition, I find that Fleegle has failed to establish a credible claim of actual innocence. I therefore recommend against a finding that all or a portion of intervening period between the date his conviction became final and the filing of his petition in this matter be tolled on this basis.

E. *Certificate of Appealability*

In order for a state prisoner to appeal a final order denying habeas relief, he or she must receive a certificate of appealability ("COA").28 U.S.C. § 2253(c)(1)(A); *see also*Fed. R.App. P. 22(b) ("unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)", an appeal may not be taken from the denial of a habeas petitioner under section 2254). A COA may only issue "if the applicant has made a substantial showing of the denial of a constitutional right."28 U.S.C. § 2253(c)(2).

In a case such as this, where dismissal of a petition is based on a procedural ground, a petitioner is eligible for a COA upon a showing "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."*Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 1604 (2000); *see also Bethea,* 293 F.3d, 577–78. As can be seen, this standard is comprised of two prongs, one of which is directed on the constitutional claims set forth in the petition, while the other focuses upon the basis for the court's procedural holding. *Slack,* 529 U.S. at 484–85, 120 S.Ct. at 1604.

***9** The court is unable to address the strength of petitioner's ineffective assistance argument, based largely upon the fact that Fleegle's petition does provide meaningful illumination regarding that ground. *See* Amended Petition (Dkt. No. 7) ¶ 153. The ineffective assistance of counsel argument raised to the Appellate Division, however, provides some potential insight into the potential claim. None of the actions of counsel cited in support of that claim appear to be sufficiently egregious to meet the prevailing standard under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In any event, I am convinced that reasonable jurists could not disagree over the application of the one-year statute of limitations and the resulting finding that Fleegle's petition is time-barred. Accordingly, I recommend against the issuance of a certificate of appealability in this case.

IV. *SUMMARY AND RECOMMENDATION*

The petition in this matter was filed significantly beyond expiration of the one-year governing statute of limitations under the AEDPA. Having concluded that there is no basis to find tolling of any of the period between when petitioner's conviction became final and the filing of his petition, it is therefore hereby respectfully

RECOMMENDED that the petition in this matter is DISMISSED as untimely; and it is further

RECOMMENDED, based upon my finding that Fleegle has not made a "substantial showing of the denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c)(2), that a certificate of appealability not issue with respect to any of the claims set forth in his petition.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(d), 72; *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993).

It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4365659

Footnotes

1 Under New York law, "[t]he identity of any victim of a sex offense ... shall be confidential. No ... court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection."N.Y. Civ. Rights Law § 50–b. In light of this provision, and in order to insure her privacy, the victim in this case will be referred to herein as "C.W.".*See Lucidore v. New York State Div. of Parole,* 209 F.3d 107, 109 n. 4 (2d Cir.), *cert. denied,*531 U.S. 873, 121 S.Ct. 175 (2000).

2 Copies of all unreported decisions cited in this document have been appended for the convenience of the *pro se* plaintiff. Editor's Note: Attachments of Westlaw case copies deleted for online display.

3 It should be noted that this savings provision only operates to toll the statute of limitations during the pendency of a properly filed state court proceeding; it does not require resetting of the one-year clock or confer a new one-year limitation period upon conclusion of a state court collateral review proceeding qualifying under that provision. *See* *Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000); *see also* *Bethea v. Girdich,* 293 F.3d 577, 578 (2d Cir.2002).

4 New York Criminal Procedure Law § 440.10 provides that "anytime after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the [following] ground[s] ..."N.Y.Crim. Proc. Law § 440.10(1). Such a motion must be supported by sworn allegations of fact. *People v. Oliveri,* 29 A.D.3d 330, 331, 814 N.Y.S.2d 435, 437 (1st Dep't 2006); *see also* *People v. Wagner,* 9 Misc.3d 131(A), 808 N.Y.S.2d 920 (Table) (N.Y. Sup.Ct.App. Term 2005).

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United States District Court,
S.D. New York.

George HAYES, Petitioner,
v.
Wiliam E. LEE, Respondent.

No. 10 Civ. 5134(PGG)(RLE). | July 30, 2013.

Attorneys and Law Firms

George Hayes, Stormiville, NY, pro se.

Ashlyn Dannelly and Thomas B. Litsky, Assistant Attorneys General, New York, NY, for Respondent.

ORDER

PAUL G. GARDEPHE, District Judge.

***1** George Hayes, a New York state prisoner incarcerated at Green Haven Correctional Facility, has filed a *pro se* petition for a writ of habeas corpus. On July 16, 2010, this Court referred the petition to Magistrate Judge Ronald L. Ellis for a Report and Recommendation ("R & R"). (Dkt. No. 3) On July 27, 2010, Hayes filed an Amended Petition. (Dkt. No. 5) On April 8, 2011, Judge Ellis issued an R & R recommending that this Court deny the petition in its entirety. (Dkt. No. 16) Hayes has filed objections to the R & R. (Dkt. No. 20) For the reasons stated below, this Court will adopt the R & R and will deny Hayes's Amended Petition.

BACKGROUND

On July 10, 2007, Hayes was convicted by a jury in Supreme Court of the State of New York, New York County, of criminal possession of a weapon in the third degree, criminal possession of a controlled substance in the fourth degree, and criminal use of drug paraphernalia in the second degree. (R & R at 1)

Hayes's convictions arose from the execution of a search warrant at 201 Linden Boulevard, Apartment 22D, in Brooklyn, on August 17, 2006. (R & R at 2 (citing Trial Tr. at 33–34)) The police officers executing the search warrant used a hydraulic ram to take down the door of the apartment. (Trial Tr. at 36) When the police entered, Patrick McGuilkin ran into a bedroom, and Rasean Williams threw a plastic bag containing cocaine out of the living room window. (R & R at 2 (citing Trial Tr. at 37, 39); Trial Tr. at 38–39, 233) Several officers followed McGuilkin into the bedroom, where he threw himself onto the bed and appeared to reach for something under the mattress. (R & R at 2; Trial Tr. at 231–32) Officers found a fully-loaded, chrome-plated, semi-automatic 9 mm. Norinco-brand handgun under the mattress in the bedroom. (R & R at 2 (citing Trial Tr. at 196); *see also* Trial Tr. at 89–90)

When the police entered the bedroom, they found Hayes standing by a window. (Trial Tr. at 39) Detectives searched Hayes and found cocaine in his pocket; he was holding tinfoil wrappers used to package drugs. (R & R at 2; Trial Tr. at 39, 43, 196) In the bedroom, police also found three large black trash bags that contained clear, zip-lock plastic bags used to package drugs, a number of photographs showing Hayes in the apartment, and a bank statement addressed to Hayes at a post office box. (R & R at 2 (citing Trial Tr. at 45–55)) One of the photographs the police recovered from the trash bags in the bedroom showed Hayes sitting in that bedroom, on the bed, holding what appeared to be the same handgun found under the mattress (the "Photograph"). (Trial Tr. at 46–48, 92–94)

I. *PRETRIAL PROCEEDINGS AND TRIAL*

Before trial, defense counsel moved to exclude the Photograph as unfairly prejudicial, arguing that there was no proof as to when it was taken, and that because the Photograph "was taken on an unknown date, one cannot infer [that] my client even knew the gun was still in the apartment."Defense counsel also mentioned, in passing, that he didn't "think [the People] could prove that it is the same gun."(June 4, 2007 Pre–Trial Tr. 6–10; June 5, 2007 Pretrial Tr, at 14–15) The trial judge ruled that the Photograph was admissible, commenting that "It appears to be the apartment. It appears to be the gun. It is and appears to be the defendant."(June 5, 2007 Pre–Trail Tr. at 20) Defense counsel then asked the trial judge whether there were any limitations on the use of the Photograph:

> ***2** Mr. Delbaum: I have a question with respect to having admitted the allowing—the admission of the photograph. The question is, are there any restrictions, should it be, if—

The Court; What kind of restrictions are you talking about?

Mr. Delbaum: Well, you know the issue here is knowledge, access, dominion and control.

Does that picture basically indicate any time my client-my argument that is-it is basically, if they want to show my client ate pizza last Monday, did he eat pizza this Monday.

The Court: You could argue anything you want.

Mr. Delbaum: Is that picture admissible for all purposes, any purpose the People want?

The Court: It is him in the apartment.

(June 5, 2007 Pre–Trial Tr. at 20–21)

The decision to admit the Photograph prompted an outburst from Hayes, which led the trial judge to remove Hayes from the courtroom for the balance of the trial. (R & R at 3 (citing June 5, 2007 Pre–Trial Tr. at 21–27, 55))

At trial, the Photograph was admitted through Detective Selwyn Fonrose, who had discovered the photographs in one of the trash bags while searching the bedroom. (Trial Tr. at 44–48) Detective Desmond Stokes, a firearms expert, testified that the handgun Hayes was holding in the Photograph was the same type of semi-automatic pistol that was recovered in the bedroom, and that it was also the same color. (Trial Tr. at 82–86, 92–94) Det. Stokes conceded, however, that he could not determine whether it was "the exact same gun," because that could only be determined by a serial number comparison, and the serial number of the handgun shown in the Photograph was not legible. (Trial Tr. at 93–94).

In connection with the use of photographs generally, the trial judge instructed the jury that

> ... the fact that I'm admitting a photograph doesn't mean you have to do anything with it other than in the jury room put it aside and say, that's nice to know. You can make an evaluation and decide the photograph has some connection or probative value with respect to all the probative issues you are asked to figure out, use it. If it does not make sense, don't use it.

(Trial Tr. at 51)

In summation, defense counsel conceded that the gun Hayes was holding in the Photograph was—if not the same gun —"a gun that appears to be very much like [the gun that was recovered under the mattress].... Certainly, the same kind of gun."(Trial Tr. at 256) Counsel argued, however, that the People had not proven that Hayes had dominion and control over the gun, or that he even knew that it was under the mattress when the search warrant was executed, noting that it was Patrick McGuilkin who had reached for the gun and therefore it was under his control. (Trial Tr. at 257–58; *see also* Trial Tr. at 263–64 ("even if the gun he held in that picture is the same gun, they did not prove that he knew it was under the bed") With respect to the Photograph, defense counsel argued that Hayes had been "stoned" and may "not [have] even [been] aware that somebody put this gun in his hand."(Trial Tr. at 256)

***3** In response to defense counsel's argument that McGuilkin had dominion and control over the gun, the prosecutor argued—over defense counsel's objection—that "there is no picture of Patrick McGuilkin holding the gun. We only have a picture of George Hayes holding the gun. He's the only person who knew about the gun in that room," (Trial Tr. at 276) The prosecutor also ridiculed defense counsel's argument that someone had slipped the gun into Hayes's hand and then snapped the Photograph:

> Now, does it look like he was set up here? Do you think someone slipped that gun into his hand [and] then snapped a quick picture? Look at how comfortable he is in this picture holding that gun. Look how comfortable he is in the surroundings in all of the pictures. He's comfortable in the apartment. He knew the gun was there, and he obviously had dominion and control over the gun. You could see it.

(Trial Tr. at 276)

The jury found Hayes guilty on all counts. (R & R at 4 (citing Trial Tr. at 318–19))

II. *POST–TRIAL PROCEEDINGS*

Defense counsel moved to set aside the verdict, arguing that the Photograph portrayed a "prior bad act," and should only have been received for a limited purpose. (R & R at 4 (citing Litsky Decl., Ex. N)) The trial judge denied the motion. (R & R at 4 (citing Sentencing Tr. at 2)) Hayes then moved *pro se* for a reconstruction hearing, claiming that the transcript of the pretrial proceedings did not accurately reflect the trial judge's ruling admitting the Photograph for all purposes. (R & R at 4 (citing Litsky Decl., Ex. O)) Hayes submitted an affidavit from trial counsel, who claimed that when he asked the judge, "Is that picture admissible for all purposes, any purpose the People want?", the trial judge replied, "For all purposes." (R & R at 4 (citing Litsky Decl., Ex. 0)) The court denied Hayes's motion, finding that there was no reason to question the accuracy of the transcript. (R & R at 4 (citing Litsky Decl., Ex. P))

Hayes then appealed his conviction to the Appellate Division, First Department. (R & R at 4) On appeal, Hayes argued, *inter alia,* that the evidence was insufficient, that the verdict was against the weight of the evidence, and that trial counsel had been constitutionally ineffective in not requesting a different limiting instruction concerning the use of the Photograph. The Appellate Division rejected these arguments and affirmed Hayes's conviction:

> Defendant's motion for a trial order of dismissal was insufficiently specific to preserve his present challenge to the legal insufficiency of the evidence supporting his weapon possession conviction (*see People v. Hawkins,* 11 N.Y.3d 484, 492 (2008)), and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v. Danielson,* 9 N.Y.3d 342, 348–349 (2007)). Evidence including, among other things, an incriminating photograph supported the conclusion that defendant was a member of a drug-selling operation conducted out of an apartment, and that he and the other participants jointly possessed a pistol in connection with their drug enterprise (*see People v. Tirado,* 38 N.Y.2d 955 (1976)).
>
> ***4** Defendant's claim that his trial counsel rendered ineffective assistance by failing to request certain limiting instructions regarding the jury's use of the photograph depicting defendant holding a pistol is unreviewable on direct appeal because it involves matters outside the record concerning counsel's strategy (*see People v. Rivera.* 71 N.Y.2d 705, 709 (1988); *People v. Love.* 57 N.Y.2d 998 (1982)). In particular, counsel may have had a strategic reason for accepting the limiting instruction the court actually delivered, which was arguably quite favorable to defendant, and refraining from asking for a different instruction. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v. Benevento,* 91 N.Y.2d 708, 713–714 (1998); *see also Strickland v. Washington,* 466 U.S. 668 (1984)). Defendant has not shown that his counsel's acceptance of the court's instruction was unreasonable, or that it caused him any prejudice or deprived him of a fair trial.

People v. Hayes, 61 A.D.3d 432, 432–33 (1st Dept.2009). Leave to appeal was denied on August 12, 2009. *People v. Hayes,* 13 N.Y.3d 744 (2009).

III. *THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION*

Hayes's habeas petition presents five grounds for relief:

1. the transcript of pretrial proceedings is inaccurate;

2. the trial court failed to properly balance the probative value and prejudicial effect of the Photograph;

3. the trial court did not give an appropriate limiting instruction to the jury concerning use of the Photograph as prior bad act evidence;

4. the Photograph was not properly authenticated, and its admission permitted the jury to speculate that the handgun shown in the Photograph was the handgun recovered in the bedroom-speculation that the prosecutor argued in summation; and

5. the Appellate Division erred in affirming Hayes's conviction, because the verdict on the weapons charge was legally insufficient and against the weight of the evidence.

(Am.Pet.(Dkt. No. 5) at 5–6)

With respect to the insufficiency claim, Judge Ellis found that habeas review was precluded, because the state court decision rejecting Hayes's appeal relied on independent and adequate state grounds. (R & R at 7–8) The Appellate Division determined that "Defendant's motion for a trial order

of dismissal was insufficiently specific to preserve his present challenge to the legal insufficiency of the evidence supporting his weapon possession conviction." *Hayes,* 61 A.D.3d at 432. Under these circumstances, Judge Ellis concluded that Hayes's insufficiency claim was procedurally barred. (R & R at 8) Judge Ellis nonetheless went on to consider Hayes's claim on the merits, concluding that there was substantial evidence—including the photographs introduced in evidence and Hayes's possession of drug paraphernalia similar to that recovered in the apartment—indicating that Hayes was part of a drug distribution ring that operated out of the apartment, and that he had joint dominion and control over the handgun found under the mattress. (R & R at 11–12)

***5** As to the inaccurate transcript claim, Judge Ellis concluded that Hayes was given an opportunity to resettle the record, and that he had not offered sufficient evidence to overcome the presumption that the transcript is correct. Judge Ellis also noted that Hayes had not shown prejudice resulting from the omission of the statement that he claimed was missing from the transcript. (R & R at 9)

Judge Ellis also rejected all of Hayes's claims concerning the admission of the Photograph, concluding that the Photograph was more probative than prejudicial, that the limiting instruction was appropriate, and that the Photograph was properly authenticated, given that an authenticating witness is not required to identify with certainty each object shown in a photograph received in evidence. (R & R at 10–11)

IV. *HAYES'S OBJECTIONS TO THE REPORT AND RECOMMENDATION*

In his objections to the R & R, Hayes continues to argue that the Photograph was improperly admitted, because no witness testified that the handgun shown in the Photograph is the same handgun recovered under the mattress. (Pet.Obj. (Dkt. No. 20) at 2–7) Hayes further contends that the prosecutor should not have been permitted to argue in summation that the handgun in the Photograph is the same handgun that was recovered. (*Id.* at 8–9, 11) Hayes also argues that the admission of the Photograph permitted the jury to convict him on prior bad act evidence, and that the trial court's jury instructions concerning the Photograph were inadequate. (*Id.* at 8–11)

DISCUSSION

I. *STANDARD OF REVIEW*

In evaluating a magistrate judge's R & R, a district court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b) (1). Where, as here, objections have been made to the Magistrate Judge's recommendations, "[the district court judge] shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *Razo v. Astrue,* No. 04 Civ. 1348(PAC)(DF), 2008 WL 2971670, at *3 (S.D.N.Y. July 31, 2008) (citing *Pizarro v. Bartlett.* 776 F.Supp. 815, 817 (S.D.N.Y.1991)). However, "the phrase *de novo determination* in section 636(b)(1), as opposed to de *novo hearing,* was selected by Congress 'to permit whatever reliance a district judge, in the exercise of sound judicial discretion, cho[oses] to place on a magistrate's proposed findings and recommendations.' " *Grassia v.. Scully,* 892 F.2d 16, 19 (2d Cir.1989) (quoting *United States v.. Raddatz,* 447 U.S. 667, 676 (1980) (emphasis in original)).

Although this Court reviews Hayes's objections to the R & R *de novo,* the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), requires a district court to give deference to state court decisions on the merits. *Harrington v. Richter,* 131 S.Ct. 770, 785 (2011) (noting that "[a] state court must be granted a deference and latitude that are not in operation when the case involves [direct] review [of a criminal conviction]").

***6** Section 2254(d) provides that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court has emphasized that, under " § 2254(d) (1), 'an *unreasonable* application of federal law is different

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from an *incorrect* application of federal law.' " *Harrington,* 131 S .Ct. at 785 (quoting *Williams v. Taylor,* 529 U.S. 362, 410 (2000)) (emphasis in *Williams*). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 786 (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)); *see also id.* at 786–87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.")

Because the arguments that Hayes presents now are the same arguments he made to the Appellate Division in his pro se supplemental brief (*see* Litsky Decl., Ex. B), and because the Appellate Division "considered and rejected [Hayes's] *pro se* claims,"*Hayes,* 61 A.D.3d at 433, the state court's determination of these issues was on the merits, and is entitled to deference.

II. *AUTHENTICATION AND ADMISSION OF THE PHOTOGRAPH*

Hayes argues that the Photograph was not properly authenticated under New York law, because the handgun in the Photograph was "not established to be one and the same to the contraband charged."(Pet. Obj. at 3, 8)

The Supreme Court has "stated many times that 'federal habeas corpus relief does not lie for errors of state law.' " *Swarthout v. Cooke,* 131 S.Ct. 859, 861 (2011) (*per curiam*) (quoting *Estelle v. McGuire,* 502 U.S. 62, 67 (1991)). An erroneous evidentiary ruling will only warrant habeas relief if it rises to the level of a constitutional violation that deprived the defendant of a " 'fundamentally fair trial.' " *Rosario v. Kuhlman,* 839 F .2d 918, 924–25 (2d Cir.1988) (emphasis omitted) (quoting *Taylor v.. Curry,* 708 F.2d 886, 891 (2d Cir.1983)).

In reviewing a state court's evidentiary ruling in the context of a habeas petition, "[t]he first step ... is to determine whether the state court decision violated a state evidentiary rule, because the proper application of a presumptively constitutional state evidentiary rule would not be unconstitutional."*Green v. Herbert,* No. 01 Civ. 11881(SHS), 2002 WL 1587133, at *12 (S.D.N.Y. July 18, 2002), "Second, the petitioner must [prove] that the state evidentiary error violated an identifiable constitutional right."*Id.*

***7** Here, the Photograph was admitted through Det. Fonrose, who found it in the bedroom in which Hayes was arrested. (Trial Tr. at 46–48) Judge Ellis concluded that "Detective Fonrose's testimony that the photograph was recovered from the apartment and that it appeared to show Hayes in the bedroom was sufficient for authentication purposes ."(R & R at 11 (citing *Cochrane v. McGinnis,* 50 Fed. App'x 478 (2d Cir.2002)) Hayes objects to that determination, arguing that the evidence at trial was insufficient to authenticate the Photograph, because the detectives could not say that the handgun depicted in the Photograph was the same handgun that was recovered from the apartment. (Pet. Obj. at 7–8 (citing *People v. Brown,* 216 A.D.2d 737, 738 (3d Dept.1995))

Brown, relied on by Petitioner, is distinguishable. In *Brown,* the defendant was charged with criminal possession of weapons after four guns were found under the mattress in his bedroom. *Brown,* 216 A.D.2d at 737. At trial, Brown argued that the guns belonged to his brother, who had access to his apartment. *Id.* To demonstrate Brown's knowing possession of the weapons, the People introduced a photograph recovered in Brown's bedroom, which "depict[ed] an individual, purportedly defendant, holding a handgun ."*Id.* Defense counsel objected to the photograph, arguing that there was no proof that the gun depicted in the photograph was one of the handguns recovered in the apartment. *Id.* In particular, no witness had testified that the gun in the photograph appeared to be the handgun that had been recovered in the apartment. Instead, "[the photograph] appears to have been admitted based upon the prosecutor's assertion that she looked at the photo and concluded that the weapon depicted therein appeared to her to be the kind of weapon found under the mattress."*Id.* at 738 n. 1.

The Appellate Division noted that "[p]hotographs are authenticated by testimony of a person familiar with the object portrayed therein that it is a correct representation of such object, in this case one of the handguns found in defendant's bedroom."*Id.* at 738.The Court held that since no witness had offered such testimony, "the jury was left to speculate as to whether the gun depicted in the exhibit was one of the guns found under the mattress."*Id.* After finding that the error was not harmless, the court reversed and remanded the case for a new trial. *Id.*

Here, Det. Funrose testified as to his recovery of the Photograph in the bedroom where Hayes was arrested, and Det. Stokes, the firearms expert, testified that the handgun held by Hayes in the Photograph appeared to be the same type of semi-automatic pistol that was recovered under the mattress. Det. Stokes also testified that the handgun in the photograph was the same distinctive color as the handgun found under the mattress. (Trial Tr. at 92–94; *see also* Trial Tr. at 220–21 (testimony of Sgt. Butler that the recovered firearm appeared to be the handgun shown in the Photograph)) Det. Stokes admitted that he could not be certain that it was the "exact same gun," because that would require a comparison of serial numbers, and the serial number of the handgun shown in the photograph could not be seen. (Trial Tr. at 93) In sum, unlike in *Brown,* there was witness testimony addressing the similarity between the handgun recovered and the handgun in the Photograph. [1]

***8** In any event, given the distinctive appearance of the chrome-plated 9 mm. semiautomatic handgun, and the circumstances under which it and the Photograph were recovered, it is far from clear that the trial court erred as a matter of federal law in admitting the Photograph. Under federal law, given the circumstances here, the Photograph would have been admissible in connection with the drug charges against Hayes, because guns are tools of the narcotics trade. *See United States v. Muniz,* 60 F.3d 65, 71 (2d Cir.1995) ("[T]here are innumerable precedents of this court approving the admission of guns in narcotics cases as tools of the trade."); *United States v. Vegas,* 27 F.3d 773, 778 (2d Cir.1994) ("[T]his Court has repeatedly approved the admission of firearms as evidence of narcotics conspiracies, because drug dealers commonly keep firearms on their premises as tools of the trade."(internal quotation marks omitted)). Moreover, the Second Circuit has explicitly upheld a conviction under 18 U.S.C. § 924(c)—which makes it illegal to use or carry a firearm in connection with a drug trafficking crime—where the defendant's ownership of a firearm was confirmed by "a photograph of [the defendant] holding a gun identical to the one found under the sofa."*United States v. Taylor,* 18 F.3d 55, 58 (2d Cir.1994).

Even if the Photograph was improperly authenticated under New York law, this Court cannot grant habeas relief on that basis alone. *See Swarthout,* 131 S.Ct. at 861 ("We have stated many times that federal habeas corpus relief does not lie for errors of state law.") (internal quotations omitted). Habeas relief for an evidentiary error is appropriate only where a violation of a constitutional dimensions has taken place. *Taylor,* 708 F.2d at 890–91 ("Erroneous evidentiary rulings do not automatically rise to the level of constitutional error sufficient to warrant issuance of a writ of habeas corpus. Rather, the writ would issue *only* where petitioner can show that the error deprived her of a *fundamentally fair* trial.") (emphasis in original)."Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,' have we imposed a constraint tied to the Due Process Clause."*Perry v. New Hampshire,* 132 S.Ct. 716, 723 (2012) (quoting *Dowling v. United States,* 493 U.S. 342, 352 (1990) (internal quotation marks omitted)).

The Supreme Court has never held that admission of evidence not adequately authenticated under state law is sufficient, in itself, to demonstrate a due process violation. Moreover, Hayes characterizes the trial court's error here as the improper admission of evidence of uncharged crimes or prior bad acts. (*See* Pet. Obj. at 8–11) Courts have consistently held that a state court's erroneous admission of prior bad act evidence does not provide a basis for habeas relief. *See Mercedes v. McGuire,* No. 08 Civ. 299(JFB), 2010 WL 1936227 at *8 (E.D.N.Y. May 12, 2010) ("The Supreme Court has never held that a criminal defendant's due process rights are violated by the introduction of prior bad acts or uncharged crimes."); *Parker v. Wouahter,* No. 09 Civ. 3843(GEL), 2009 WL 1616000, at *2 (S.D.N.Y. June 9, 2009) ("Here, petitioner cites no Supreme Court case, and the Court is aware of none, holding that the admission of evidence of uncharged crimes violates the Due Process Clause of the Fourteenth Amendment."); *Jones v. Conway,* 442 F.Supp.2d 113, 131 (S.D.N.Y.2006) ("Given that the Supreme Court has not held that the use of uncharged crimes would violate the Due Process Clause, the Appellate Division's rejection of this claim is hardly either contrary to or an unreasonable application of clearly established Supreme Court law."); *see also Tingling v. Donelli,* No. 07 Civ. 1833(RMB)(DF), 2008 WL 4724567, at *9 (S.D.N .Y. Oct. 24, 2008) ("Not only would Petitioner's claim fail if analyzed under the ... precedent cited above, but, under AEDPA, it would also fail ... as the Supreme Court has not directly held that due process is violated by the introduction at trial of evidence of a defendant's uncharged crimes.").

***9** Finally, given that (1) Hayes was in the bedroom where the gun was found; (2) Hayes's bank statement and personal photographs were found in the bedroom; (3) other photographs showed Hayes in the apartment; (4) Hayes possessed cocaine, and police observed a co-defendant throw cocaine out the window when the police entered the

apartment; and (5) Hayes possessed drug paraphernalia of the same nature as the drug paraphernalia found in the bedroom, a rational jury could have concluded—even absent the Photograph—that Hayes was a member of a cocaine distribution ring operating out of the apartment, and that he had at least constructive possession of the gun found in the bedroom. "[I]n light of the other strong evidence of [Hayes's] guilt, ... [he] has not shown that the admitted evidence removed a reasonable doubt that otherwise would have existed,"*Tingling.* 2008 WL 4724567, at *9. [2]

In sum, even if the trial court's admission of the Photograph violated New York law concerning authentication, Hayes has not demonstrated that he suffered a due process violation that would entitle him to habeas relief.

III. *JURY INSTRUCTIONS*

Hayes argues that the trial judge's limiting instructions concerning the Photograph were inadequate. (Pet. Obj. at 11) In order to grant habeas relief based on a state court's erroneous jury instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."*Cupp v. Naughten,* 414 U.S. 141, 146(1973).

Here, the trial judge instructed the jury that the probative value of the photographs was entirely up to the jury, and that the jury should feel free to disregard any photograph that was not probative of the issues in the case, (Trial Tr. at 51) There is nothing objectionable in this instruction. Hayes sought no specific alternative or supplemental instruction at trial, and he has not identified in this proceeding precisely what instruction the trial judge should have given.

As to the weapon possession count, the dispute about the probative value of the Photograph was clear, and there is no reasonable possibility of jury confusion on this subject. Det. Stokes acknowledged both the need for a serial number comparison before a determination could be made that it was "the exact same gun," and the fact that no such comparison was possible, because the serial number of the handgun shown in the Photograph was not visible. (Trial Tr. at 93–94) The jury had access to the firearm that was seized and to the Photograph, and the jurors could draw their own conclusion as to whether the People had demonstrated that the gun shown in the Photograph was the gun seized at the time of Hayes's arrest.

In sum, Hayes has not demonstrated that the trial court's jury instructions were insufficient, that an additional limiting instruction was necessary, or that the failure to give such an instruction deprived him of due process.

IV. *PROSECUTOR'S SUMMATION*

***10** Hayes objects to the prosecutor's statement in summation that "one picture in particular that's eye catching in this case is George Hayes, in the bedroom, the same bedroom, the same bed, the same person, the same gun."(Pet. Obj. at 9; *see* Trial Tr. at 270) The Supreme Court has recognized that prosecutorial misconduct on cross-examination and in summation can constitute a due process violation when it "infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."*Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); *see also United States v. Elias,* 285 F.3d 183, 190 (2d Cir.2002) ("Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute 'egregious misconduct,' ") (citations omitted).

Here, the trial judge overruled defense counsel's objection to the prosecutor's statement, commenting that "[the prosecutor] can certainly argue it's the same gun. The jury will figure it out."(Trial Tr. at 270) The judge made clear moments later that the jury was free to accept or reject any of the lawyers' arguments in summation: "You heard the summations a few minutes ago. It is the lawyer's view of what is in the book of the trial.... If you think something was not based on the record, is illogical, not helpful, don't use it."(Trial Tr. at 282–83)

For the reasons discussed above, a rational jury could have inferred that the handgun Hayes was holding in the Photograph was in fact the handgun that the police recovered in the bedroom. Accordingly, the prosecutor's argument in summation does not constitute "egregious misconduct" that deprived Hayes of due process. *Elias,* 285 F.3d at 190.

V. *TRANSCRIPT ACCURACY*

In his Amended Petition, Hayes argues that the transcript of the trial is inaccurate because it does not reflect that the trial judge ruled that the Photograph was admissible "for all purposes." (Am. Pet. at 5) He argues that this error denied him of his right to appeal. Because Hayes does not include this argument in his objections to the R & R, the Court will review this portion of Judge Ellis's R & R for clear error. *See Gilmore v. Comm'r of Soc. Sec.,* No, 09 Civ. 6241(RMB)(FM), 2011

WL 611826, at *1 (S.D.N.Y. Feb. 18, 2011) (" 'The district judge evaluating a magistrate judge's recommendation may adopt those portions of the recommendation, without further review, where no specific objection is made, as long as they are not clearly erroneous.' ") (quoting *Chimarev v. TD Waterhouse Investor Servs., Inc.,* 280 F.Supp.2d 208, 212 (S.D.N.Y.2003)).

Where the petitioner in a federal habeas proceeding

> contends that the record was inadequate to permit a constitutionally fair appeal, [the court] should consider the extent of the State's fault in failing to preserve the record, the extent of any prejudice suffered by the petitioner, and whether the state provided the petitioner with an opportunity to reconstruct what was lost.

***11** *Van Stuyvesant v. Conway,* 03 CIV. 3856(LAK), 2007 WL 2584775, at *37 (S.D.N.Y. Sept 7, 2007).

Here, there is no clear error in Judge Ellis's findings that Hayes was given a fair opportunity to resettle the record, has not demonstrated any error in the transcript, and-in any event-has not shown any prejudice resulting from the omission of the statement he claims is missing from the record. (R & R at 9)

In his written decision rejecting the reconstruction motion, the trial judge noted that

> [t]he accuracy of the transcript cannot be questioned merely because defense counsel's memory of the ruling is different than the transcribed records. Attorneys, witnesses, and the court often misremember what was said in court, and disputes about what was said are resolved by examining ... the transcript or asking the reporter to read the stenographic notes.

(Litsky Decl., Ex P at 4) In response to Hayes's motion for reconstruction of the record, the trial judge "examined the transcript and [found] no reason to question the accuracy of the transcript."(*Id.*) The court noted that "[t]he significant disparity between what defense counsel alleges he heard this court say and the transcribed ruling rules out any possibility that the reporter misheard a word or phrase when this court announced the ruling."(*Id.* at 5)

Hayes has not demonstrated that the trial transcript is inaccurate, much less that any such inaccuracy justifies habeas relief.

CONCLUSION

For the reasons stated above, this Court adopts the findings and conclusions set forth in Judge Ellis's R & R. Hayes's petition for a writ of habeas corpus (Dkt. No. 5) is DENIED. The Clerk of the Court is directed to mail a copy of this Order to George Hayes (*pro se*), No. 07–A–4821, Green Haven Correctional Facility, P.O. Box 4000, Stormville, N.Y. 12582, and to close this case.

SO ORDERED.

REPORT AND RECOMMENDATION

RONALD L. ELLIS, United States Magistrate Judge.

To the HONORABLE PAUL G. GARDEPHE, U.S.D.J.:

I. INTRODUCTION

Pro se Petitioner George Hayes, a New York state prisoner at Green Haven Correctional Facility, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 26, 2010, Hayes filed his initial Petition with the *Pro Se* Office in this District, and filed an Amended Petition ("the Petition") on July 27, 2010.

On July 10, 2007, Hayes was convicted of one count of criminal possession of a weapon in the third degree, one count of criminal possession of a controlled substance in the fourth degree, and one count of criminally using drug paraphernalia in the second degree. He was sentenced, as a mandatory persistent felony offender, to concurrent prison terms of fifteen years to life on the weapons charge, three and one-half years on the drug possession charge, and one year on the paraphernalia charge. Hayes contends that his incarceration for the weapons charge violates the United States Constitution in that: 1) the transcript of pretrial proceedings that was provided to the parties is inaccurate, thus depriving him

of his right to appeal; 2) the trial court failed to properly balance the prejudicial nature of photographic evidence against its probative value; 3) the trial court failed to provide a proper limiting instruction to the jury regarding photographic evidence; 4) photographic evidence was improperly admitted without authentication; and 5) the verdict on the weapons charge was legally insufficient and against the weight of the evidence. For the reasons set forth below, I recommend that the Petition be **DENIED.**

II. BACKGROUND

A. Factual Background

1. The Arrest

***12** On August 17, 2006, members of the NYPD's Brooklyn South Narcotics command executed a search warrant at 201 Linden Boulevard, Apartment 22D. (Tr. at 33–34.) Upon entering the apartment, the officers saw one man running to the left of the apartment, while another threw a plastic bag out of the living room window. (Tr. at 37.) Several officers followed the running man, later identified as Patrick McGuilkin, into a bedroom, where another man, later identified as Hayes, was standing by the window. (Tr. at 39.) Hayes was searched and found to have cocaine in his pocket and tinfoil wrappers used to package drugs in his hand. (Tr. at 43, 196 .) The package thrown from the living room window was also found to contain cocaine. (Tr. at 112).

Upon running into the bedroom, McGuilkin had thrown himself down on the bed and appeared to be reaching for something under the mattress before being secured by the police. (Tr, at 232.) In searching the bedroom, the officers found three large garbage bags that contained clear sandwich bags used to package drugs, a number of photographs showing Hayes in the apartment, and a bank statement addressed to Hayes at a P.O. Box. (Tr. at 45–55.) A search under the mattress of the bed revealed a chrome semi-automatic handgun. (Tr. at 196.) One of the recovered photographs showed Hayes sitting on the bed holding what appeared to be the same handgun. (Tr. at 92–94.)

2. The Pretrial Proceedings and Trial

Before the trial began, Hayes's attorney moved to have the photograph of Hayes holding the gun excluded from the evidence as overly prejudicial. (Tr. at 15.) When the trial judge ruled that the photograph was admissible, Hayes's attorney asked whether there would be any restrictions to its admission, suggesting that the photograph should not be used to show a propensity towards gun ownership. (Tr. at 19–21.) The transcript shows that Hayes's attorney asked, "Is that picture admissible for all purposes, any purpose the People want?" and that the trial judge replied, "It is him in the apartment."(Tr. at 21.) The judge's decision to admit the photograph prompted an outburst from Hayes on the unfairness of the proceedings, eventually causing him to be removed from the courtroom for the entire trial. (Tr. at 21–27, 55.)

At trial, the prosecution presented the testimony of several of the officers who executed the search warrant, a ballistics expert who had tested the gun, and the forensic analysts who had tested the drugs. The picture of Hayes holding the gun was admitted upon the authentication of Detective Selwyn Fonrose, who had discovered the photographs while searching the apartment. (Tr. at 47.) Upon admitting the photograph, the trial judge instructed the jury:

> "And the fact that I'm admitting a photograph doesn't mean you have to do anything with it other than in the jury room put it aside and say, that's nice to know. You can make an evaluation and decide the photograph has some connection or probative value with respect to all the probative issues you are asked to figure out, use it. If it does not make sense, don't use it."

***13** (Tr. at 51.) Detective Desmond Stokes, the ballistics expert, testified that the gun in the photograph appeared to be the same type of gun as the one recovered from the apartment, but that he could not say for certain that they were the same gun because the serial number of the gun in the photograph was not legible. (Tr. at 93–94.) In his summation, and over the defense attorney's objections, the prosecutor argued that the gun in the photograph was the same as the one recovered from the apartment. (Tr. at 275–76.) Hayes's attorney emphasized that it had not been established that Hayes was a resident of the apartment (tr. at 252–54), and that McGuilkin had been the one reaching for the gun. (Tr. at 258–59.) The jury found Hayes guilty on all counts. (Tr. at 318–19.)

B. Procedural Background

Soon after the verdict was announced, Hayes, represented by his trial counsel, moved to set aside the verdict on the

ground that admitting the photograph of him with the gun for all purposes violated New York law safeguards against conviction by propensity. (Decl. in Opp'n to Pet. (' "Decl. in Opp'n"), Ex. N.) At the sentencing hearing, the trial judge denied Hayes's motion. (Sentencing Tr. at 2.) Hayes then moved *pro se* for a reconstruction hearing, claiming that the transcript of pretrial proceedings did not accurately reflect the trial judge's ruling admitting the photograph for all purposes. (Decl. in Opp'n, Ex. O.) He submitted an affidavit in support of his motion from his trial attorney, who claimed that when he asked the judge, "Is that picture admissible for all purposes, any purpose the People want?" the judge replied, "For all purposes." § *Id.*)On September 2, 2008, the trial judge denied Hayes's motion, construing it as a motion to resettle the record. (Decl. in Opp'n, Ex. P.) The court found that there was no reason to question the accuracy of the transcript, and no need to consult with the court reporter. § *Id.*)

Represented by counsel, Hayes then filed an appeal of his conviction with the Appellate Division, First Department. He argued that: 1) the evidence was legally insufficient and the verdict was against the weight of the evidence; 2) trial counsel was ineffective because he failed to request a limiting instruction regarding the photograph of Hayes with the gun; and 3) Hayes's sentence was excessive. (Decl. in Opp'n, Ex. A.) Hayes also filed a *pro se* supplemental brief, arguing: 1) that he was unfairly prejudiced by the trial court's admission of the photograph of him with the gun; and 2) that the lack of an adequate record denied him the right to appellate review. (Decl. in Opp'n, Ex. B.) The Appellate Division affirmed Hayes's conviction and sentence on April 7, 2009. *People v. Hayes,* 61 A.D.3d 432 (1st Dep't 2009). Hayes filed *apro se* motion for reargument, or, in the alternative, for leave to appeal, (Decl, in Opp'n, Ex. F.) That motion was denied on October 13, 2009, (Decl. in Opp'n, Ex. I.) Represented by counsel, Hayes filed for leave to appeal to the Court of Appeals. (Decl. in Opp'n, Ex, J.) He also filed *apro se* letter supplementing his application. (Decl. in Opp'n, Ex. K.) Leave to appeal was denied on August 12, 2009. *People v. Hayes,* 13 N.Y.3d 744 (2009).

***14** Hayes next filed a *pro se* § 440.10 motion, attacking his conviction as being procured by fraud because the trial transcript was incorrect. (Decl. in Opp'n, Ex. Q.) The trial court denied this motion on July 16, 2010 (Decl. in Opp'n, Ex. S), and Hayes has not yet sought leave to appeal. (*See* Resp't's Mem. of Law in Opp'n to Am. Pet. ("Mem. in Opp'n") at 15 n. 4.)

III. DISCUSSION

A. Threshold Issues

1. Timeliness

A petitioner must file an application for a writ of habeas corpus within one year of his conviction becoming final. *See*28 U.S.C. § 2244(d)(1). A conviction becomes final " 'when [the] time to seek direct review in the United States Supreme Court by writ of certiorari expire[s],' " that is, ninety days after the final determination by the state court. *Williams v. Artuz,* 237 F.3d 147, 150 (2d Cir.2001) (quoting *Ross v. Artuz,* 150 F.3d 97, 98 (2d Cir.1998)). The statute of limitations is tolled while state court relief is pending. 28 U.S.C. § 2244(d)(2); *Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000). The tolling period runs from when the post-conviction motion is filed until leave to appeal is denied. *See Rodriguez v. Portuondo,* 2003 WL 22966293 at *1–2 (S.D.N.Y. Dec. 15, 2003); *see also Carey v. Saffold,* 536 U.S. 214, 216 (2002); *Bennett v. Artuz,* 199 F.3d 116, 119 (2d Cir.1999.)

Hayes's conviction became final on November 10, 2009, ninety days after his leave to appeal to the Court of Appeals was denied. The statute of limitations was tolled while Hayes's § 440.10 motion was pending in state court. As his Petition was filed on July 27, 2010, while the tolling period was still running, it is timely.

2. Exhaustion

Pursuant to 28 U.S.C. § 2254(b), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), courts may not grant a petition for habeas corpus unless the petitioner has exhausted all state judicial remedies. *See* 28 § 2254(b)(1)(A); *Picard v. Connor,* 404 U.S. 270, 275 (1971); *Dorsey v. Kelly,* 112 F.3d 50, 52 (2d Cir.1997). In order to satisfy substantive exhaustion, a petitioner's claim before the state courts must have been federal or constitutional in nature. Although not an exacting standard, a petitioner must inform state courts of "both the factual and legal premises of the claim [he] asserts in federal court."*Jones v. Vacco,* 126 F.3d 408, 413 (2d Cir.1997) (quoting *Daye v. Attorney Gen. of New York,* 696 F.2d 186, 191 (2d Cir.1982) (*en banc)*).

> [T]he ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and

> verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

***15** *Daye,* 696 F.2d at 194. Procedurally, the petitioner must utilize all avenues of appellate review within the state court system before proceeding to federal court. *See Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994). He must raise each federal claim at each level of the state court system, "present [ing] the substance of his federal claims 'to the highest court of the pertinent state,' " *Id.*(quoting *Pesina v. Johnson,* 913 F.2d 53, 54 (2d Cir.1990)). Even where a respondent does not challenge petitioner's claims on exhaustion grounds, the court has an independent obligation to ensure that this requirement has been met, unless expressly waived by the State. *See*28 U.S.C. § 2254(b)(3). Hayes raised all of the claims that he presents now during his direct appeals process, so that they were presented to the highest state court. He raised all of his claims in constitutional terms, so that they are both procedurally and substantively exhausted.

3. Procedural Bar

A claim is precluded from habeas review if; (1) the state court declines to address petitioner's federal claim because petitioner failed to meet a state procedural requirement, and (2) the state court decision rested on independent and adequate state grounds. *Coleman v. Thompson,* 501 U.S. 722 (1991); *Jones v. Vacco,* 126 F.3d 408, 414 (2d Cir.1997) (*citing Ellman v, Davis,* 42 F.3d 144, 147 (2d Cir.1994)). A state law ground is "adequate" if "the state's insistence on compliance with its procedural rule serves a legitimate state interest."*Wainwright v. Sykes,* 433 U.S. 72, 83, n. 8 (1977) (quoting *Hen ry v. Mississippi,* 379 U.S. 443, 447 (1965)). Further, the adequacy of a procedural rule rests on whether such rule is firmly established and regularly followed in the specific circumstances presented in the case. *Cotto v. Herbert,* 331 F.3d 217, 240 (2d Cir.2003). A petitioner can overcome this procedural bar if he can show cause for the default and actual prejudice, or "demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice."*Coleman,* 501 U.S. at 750 (internal citations and quotations omitted).

In his direct appeal, Hayes argued that the evidence supporting his conviction was legally insufficient. The Appellate Division, First Department, ruled that his "motion for a trial order of dismissal was insufficiently specific to preserve his present challenge to the legal insufficiency of the evidence supporting his weapon possession conviction."*Hayes,* 61 A.D.3d at 432. Under New York law, for an issue to be considered on appeal, it must have been challenged by a contemporaneous objection at the trial level. N.Y.C.P.L. § 470.05(2). The United States Supreme Court has ruled that a "contemporaneous objection" rule presents an independent and adequate state ground, barring direct review of claims in federal habeas petitions. *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977) (citing *Hen ry v. Mississippi,* 379 U.S. 443 (1965)). As a result, Hayes's claim that the evidence convicting him was legally insufficient is procedurally barred and should be **DENIED.**

B. Merit s of Hayes's Claims

1. Standard of Review

***16** AEDPA constrains a federal habeas court's ability to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. The Act limits issuance of the writ to circumstances in which the state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."28 U.S.C. § 2254(d)(1); *see Williams v. Taylor,* 529 U.S. 362, 412 (2000). A state court decision is contrary to federal law if the state court applies "a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts."*Williams,* 529 U.S. at 413. Furthermore, in cases where the state court decision rests on a factual determination, the federal court must find that the "decision ... was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."28 U.S.C. § 2254(d)(2).

2. Hayes's Claim That the Transcript is Inaccurate

Hayes argues that the transcript of his trial is inaccurate because it does not reflect that the trial court ruled that the photograph of him holding the gun was admissible "for all

purposes." He claims that this error denied him his right to an appeal.

"[O]nce a State offers to criminal defendants the opportunity to appeal their cases, it must provide a trial transcript to an indigent defendant if the transcript is necessary to a decision on the merits of the appeal."*Ake v. Oklahoma,* 470 U.S. 68, 76 (1985) (citing *Griffin v. Illinois,* 351 U.S. 12 (1956)). There is, however, no federal or constitutional right to an absolutely accurate transcript. *See, e.g., Burrell v. Swartz,* 558 F.Supp. 91, 92 (S.D.N.Y.1983); *see also Benjamin v. Greiner,* 296 F.Supp.2d 321, 333 (E.D.N.Y.2003) (the right to a trial transcript includes the right to a reasonably accurate transcript). When a federal habeas petitioner claims that an inaccurate transcript denied him the right to an appeal, the reviewing court considers, "the extent of the State's fault in failing to preserve the record, the extent of any prejudice suffered by the petitioner, and whether the state provided the petitioner with an opportunity to reconstruct what was lost."*Van Stuyvestant v. Conway,* No. 03–CV–3856 (LAK) (DCF), 2007 WL 2584775 at *37 (S.D.N.Y. Sept. 7, 2007). The petitioner must also "overcome the 'presumption of regularity that attaches' to state trial transcripts."*Id.* at *37 n. 34 (quoting *Bankhead v. LaVallee,* 430 F.Supp. 156, 159 n. 4 (E.D.N .Y.1977)).

Here, the state provided Hayes with an opportunity to resettle the record, and Hayes has not shown any prejudice resulting from the omission of the statement that he claims is missing from the record. He also has not offered sufficient evidence of error to overcome the presumption of the transcript's regularity. As a result, Hayes's claim that inaccuracies in the transcript denied him his right to an appeal should be **DENIED.**

3. Hayes's Claim That the Trial Court Improperly Admitted a Prejudicial Photograph

***17** Hayes claims that the trial court failed to properly balance the prejudicial nature of the photograph of him holding the gun against its probative value, and that this failure denied him due process of the law. Generally, evidentiary questions are considered to be state law matters that are not cognizable of federal review. *See Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991). In order to rise to the level of a constitutional violation, an evidentiary error must be so "material to the presentation of the defense so as to deprive the defendant of fundamental fairness."*Rosario v. Kuhlman,* 839 F.2d 918, 924 (1988). The trial court found that, according to state law, the probative value of the photograph, which provided strong evidence that Hayes might know of and have control of a gun in the bedroom at question, outweighed any potential prejudicial effect. Hayes has not demonstrated that this finding was unreasonable, and his claim on this ground should be **DENIED.**

4. Hayes's Claim That the Trial Court Failed to Give a Proper Limiting Instruction

Hayes argues that his due process rights were violated because the trial court failed to give the jury an appropriate limiting instruction as to the proper uses of the photograph showing him holding a gun in the apartment. Upon admitting the photograph, the trial judge instructed the jurors that they were to determine whether it had any probative value, and if not they were not to use it. (Tr. at 52.) As the photograph was admitted for all purposes, this instruction was not unreasonable, and his claim on this ground should be **DENIED.**

5. Hayes's Claim That the Photograph was not Properly Aut hen ticated

Hayes claims that the photograph of him holding the gun was not properly authenticated, because no witness was able to testify with certainty that the gun in the photograph was the same as the gun that was the subject of the charge against him. Due process does not require that an authenticating witness be able to identify with certainty each object in a photograph offered in evidence; Detective Fonrose's testimony that the photograph was recovered from the apartment and that it appeared to show Hayes in the bedroom was sufficient for authentication purposes. *See, e.g., Cochrane v. McGinnis,* 50 Fed. App'x 478 (2d Cir.2002) (affirming denial of writ of habeas corpus where government introduced photographs at trial that were found in petitioner's apartment). Accordingly, Hayes's claim that the photograph was not properly authenticated should be **DENIED.**

6. Hayes's Weight of the Evidence and Legal Sufficiency Claims

Hayes claims that the verdict of guilty on the weapons charge is against the weight of the evidence. A weight of the evidence claim, however, is a purely state law claim, and is not cognizable of federal habeas corpus review. *See, e.g., Mitchell v. Artus,* No, 07 Civ. 4688(LTS)(AJP), 2008 WL 2262606 at *17 (S.D.N.Y. June 2, 2008) (collecting cases).

***18** Hayes also asserts that the verdict was legally insufficient, a related but separate claim that is reviewable in federal habeas corpus proceedings. *See Garbez v. Greiner,* 01 Civ. 9865(LAK) (GWG), 2002 WL 1760960 at *8 (S.D.N.Y. July 30, 2002) (citing *People v. Bleakley,* 69 N.Y.2d 490, 515 N. Y.S, 2d 761 (1987)). Even if this claim were not procedurally barred, however, Hayes has not shown that the verdict against him was legally insufficient. In order to determine whether a verdict was legally sufficient, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."*Jackson,* 443 U.S. at 319. The evidence presented in the case, which included all of the photographs of Hayes in the apartment and Hayes's possession of drug paraphernalia of a similar nature to the rest of the drug paraphernalia recovered in the apartment, could have led a rational jury to conclude that Hayes was part of a drug distribution ring that operated out of the apartment and jointly exercised dominion and control over the gun. Accordingly, Hayes's weight of the evidence/legal insufficiency claim should be **DENIED.**

IV. CONCLUSION

For the reasons set forth above, I recommend that Hayes's Petition for a writ of habeas corpus be **DENIED.**Pursuant to Rule 72, Federal Rules of Civil Procedure, the parties shall have fourteen (14) days after being served with a copy of the recommended disposition to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable Paul G. Gardephe, 500 Pearl Street, Room 920, and to the chambers of the undersigned, 500 Pearl Street, Room 1970. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Thomas v. Arn,* 474 U.S. 140, 150 (1985); *Small v. Sec'y of Health and Human Servs.,* 892 F.2d 15, 16 (2d Cir.1989) (*per curiam*); 28 U.S.C. § 636(b)(1) West Supp.1995); FED. R. CIV. P. 72, 6(a), 6(d).

All Citations

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Footnotes

1 Hayes has never disputed that the gun recovered appeared to be identical to the gun shown in the Photograph. *See, e.g.,* Litsky Decl., Ex. N (Mot. to Set Aside Verdict) at 3) ("the gun [in the Photograph] appeared to be similar, if not identical, to the gun attributed to [Hayes] on the day of his arrest").

2 For these same reasons, this Court agrees with Judge Ellis's rejection of Hayes's claim that his conviction was against the weight of the evidence and was legally insufficient.

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United States District Court,
N.D. New York.

Miguel A. JARAMILLO, Petitioner,
v.
Dale ARTUS, Superintendent, Attica Correctional Facility,[1] Respondent.

No. 9:12–cv–01657–JKS. | Signed July 2, 2014.

Attorneys and Law Firms

Miguel A. Jaramillo, Attica, NY, pro se.

Alyson J. Gill, Office of Attorney General, New York, NY, for Respondent.

ORDER [Re: Motion at Docket No. 12] and MEMORANDUM DECISION

JAMES K. SINGLETON, JR., Senior District Judge.

***1** Miguel A. Jaramillo, a New York state prisoner proceeding *pro se,* filed a Petition for a Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. Jaramillo is currently in the custody of the New York State Department of Corrections and Community Supervision and is incarcerated at Attica Correctional Facility. Respondent has answered, and Jaramillo has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

On October 18, 2009, Lloyd Little was working as a bouncer at Tico's Bar in Watertown, New York. Prior to the bar closing, Little encountered Jaramillo and his girlfriend arguing outside the bar. When Little attempted to intervene, Jaramillo stabbed him in the abdomen with a knife. A grand jury charged Jaramillo with first-degree assault, second-degree reckless endangerment, first-degree perjury, and two counts of fourth-degree criminal possession of a weapon.

Jaramillo was arraigned on June 3, 2010, and entered a not guilty plea to each count of the indictment. At arraignment, Jaramillo requested the assignment of new counsel, claiming that his representation by the Public Defender's Office was ineffective because counsel had waived his speedy trial rights without his consent. The trial court denied the request, stating:

> [F]rom my observation there has been no ineffective assistance of counsel. Now, whether or not they waive certain hearings, that may be to your advantage to do that. So as far as I'm concerned, they have done nothing against your interest so far. In fact, it is just the opposite. We have had one, two, three, four, five, six, seven, eight conferences before this was presented to the Grand Jury. Now, whether or not they came back to you with information that you didn't want to hear, that's a whole different issue.
>
> But as far as ineffective assistance of counsel, no, I see none of that, and they will be appointed to represent you.

Through counsel, Jaramillo moved to dismiss the indictment, claiming that the grand jury proceedings were defective because he was shackled during his testimony before that tribunal. He alternatively sought reduction of the indictment on the grounds that the evidence presented to the grand jury was not legally sufficient to prove serious injury and that there was insufficient evidence that Jaramillo intended to use the weapon unlawfully against another. He further moved to suppress eyewitness identification, statements, and physical evidence as tainted by unlawful police conduct. The trial court found that no defect occurred at grand jury and that the evidence was legally sufficient to establish serious physical injury.

The court held a suppression hearing on the remainder of the motion on September 29, 2010. Prior to the commencement of the hearing, Jaramillo again requested a new attorney. He stated that he had filed a civil suit against the Public Defender's Officer which created a conflict such that the court should assign him a new attorney. The court stated that there were no grounds to remove the Public Defender's Office from their representation of Jaramillo and expressed its belief that Jaramillo's actions were "a deliberate action on [Jaramillo's] part to delay these proceedings."

***2** At the hearing, Detective James Romano from the Watertown Police Department testified that, in the early morning hours of October 18, 2009, he was called into work for a reported stabbing at Tico's Bar. He stated that he developed a suspect through witnesses who also informed him that the suspect might be in possession of a shotgun. When Detective Romano and another police officer arrived at Jaramillo's residence, Jaramillo allowed them to enter the apartment. When Jaramillo entered the living room to

obtain identification, the officers followed him and observed a shotgun and a bullet proof vest lying in plain view. Another police office took the shotgun and vest into possession. Jaramillo denied any wrongdoing and, although he at times stated that he did not have to go with the police officers because they did not have a warrant, he ultimately agreed to accompany the officers to the station for an interview. At the station, Detective Romano read Jaramillo his *Miranda* [2] rights, and Jaramillo gave a signed, written statement about his involvement in the stabbing. After giving his written statement, Jaramillo stated that the victim had grabbed him and that his actions were made in self-defense. Jaramillo then stated that he no longer wanted to speak to the officer.

A status conference was held on January 7, 2011. The conference was held in chambers because a jury on an unrelated case was deliberating in the courtroom. At the conference, Jaramillo requested to represent himself, and the court engaged in a lengthy colloquy with Jaramillo before the following discussion occurred:

THE COURT: All right. Well, Mr. Jaramillo, I am going to allow you to represent yourself. I don't know that that is a very wise decision for you, but my role here isn't to decide whether you are wise or unwise, Mr. Jaramillo. You do have a Sixth Amendment right to represent yourself. I can tell you that everyone that has done that in this Court for the last 11 years has been convicted of something.

[JARAMILLO:] I understand that, Your Honor.

THE COURT: All right. So you know, the odds aren't with you, Mr. Jaramillo; but that's not for me to decide.

[JARAMILLO:] Yeah, I can tell.

THE COURT: But it is not a wise thing, but I think you have enough intelligence and you are able to do that.

The court granted Jaramillo's motion to represent himself but appointed Jaramillo's previously-assigned attorney to serve as shadow counsel during trial. At the conference, Jaramillo also moved to reduce the indictment on the ground that the evidence presented to the grand jury was not legally sufficient to prove serious injury.

On January 18, 2011, the court held an additional conference where it handed down its written decision on the suppression motion. The court found the police testimony credible and concluded that the officers were entitled to seize the shotgun because it posed "a legitimate safety concern" and that Jaramillo consented to the seizure of the vest. The court also declined to suppress Jaramillo's statement to the police. The court did, however, grant Jaramillo's motion to dismiss count 4 of the indictment, finding that there was not legally sufficient evidence before the grand jury to sustain that count.

***3** Jaramillo proceeded to jury trial on January 24, 2011. During trial, the court held at least three conferences in chambers with both parties present. At the first of these in-chambers proceedings, the court ruled that the prosecution would be allowed to introduce evidence that Jaramillo had possessed the shotgun and vest as well as other witness testimony of Jaramillo's prior bad acts. Upon conclusion of trial, the jury found Jaramillo guilty of first-degree assault, fourth-degree criminal possession of a weapon, and first-degree perjury. After hearing statements from Jaramillo and the prosecution as well as reviewing the pre-sentence report, the court sentenced Jaramillo to an imprisonment term of 14 years plus 5 years of post-release supervision on the assault conviction, a concurrent 1–year sentence on the criminal possession of a weapon conviction, and a consecutive term of 1# to 4 years on the perjury conviction. The court also imposed restitution and a mandatory surcharge.

Through counsel, Jaramillo appealed his conviction, arguing that: 1) the evidence was legally insufficient to sustain his assault conviction and the verdict was against the weight of the evidence; 2) the trial court committed "cumulative error" by refusing to assign new counsel, denying his motion to suppress evidence and admitting the evidence at trial, holding proceedings in chambers, failing to give a curative instruction during the prosecution's summation, and denying his motion to dismiss the grand jury proceeding; and 3) the sentence imposed was erroneous as well as harsh and excessive. Jaramillo also submitted a *pro se* supplemental brief, arguing that: 1) the trial court failed to dismiss the indictment and failed to disclose to the Appellate Division and his appellate counsel Jaramillo's motion to dismiss the indictment; 2) trial counsel was ineffective for waiving Jaramillo's rights to a speedy trial and to testify at the grand jury; 3) the trial court should have dismissed the indictment due to the prosecutor's knowing and willful use of perjured testimony in obtaining it; and 4) the trial erroneously refused to suppress evidence seized from his home and statements he made to law enforcement. The Appellate Division affirmed his conviction in its entirety in a reasoned opinion. *See People v. Jaramillo,* 97 A.D.3d 1146, 947 N.Y.S.2d 876, 878

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(N.Y.App.Div.2012). Appellate counsel then sought leave to appeal the denial of the claims brought in the main appellate brief. Jaramillo also sought leave, raising the claims he addressed in his *pro se* supplemental brief. The Court of Appeals summarily denied both requests on September 27, 2012.

Jaramillo timely filed a Petition for a Writ of Habeas Corpus to this Court on November 2, 2012. Jaramillo subsequently moved for discovery and requested that this Court investigate the authenticity of documents indicating that Jaramillo's counsel waived his right to a speedy trial on Jaramillo's behalf.

II. GROUNDS RAISED

***4** In his *pro se* Petition before this Court, Jaramillo raises the following claims: 1) the trial court committed cumulative errors, including a) abusing its discretion when it denied Jaramillo's repeated requests for new counsel, b) allowing the admission of prior bad acts evidence, c) holding proceedings in chambers rather than open court, d) denying his motion to dismiss the indictment even though he was required to testify before the grand jury in shackles, and e) failing to issue curative instructions after the prosecution inaccurately stated its burden during summation; 2) the trial court failed to disclose to the Appellate Division and appellate counsel for appellate review Jaramillo's motion to dismiss the indictment and failed to dismiss the indictment on speedy trial grounds; 3) trial counsel was ineffective for waiving his right to a speedy trial and to testify before the grand jury; 4) the trial court failed to dismiss the indictment after it was obtained through the prosecutor's knowing use of perjury; and 5) the trial court failed to suppress evidence obtained without a warrant and statements made by Jaramillo in violation of his right against self-incrimination.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), this Court cannot grant relief unless the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor,* 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke,* ––– U.S. ––––, ––––, 131 S.Ct. 859, 863, 178 L.Ed.2d 732 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied). It is a fundamental precept of dual federalism that the states possess primary authority for defining and enforcing the criminal law. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (a federal habeas court cannot reexamine a state court's interpretation and application of state law); *Walton v. Arizona,* 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Under the AEDPA, the state court's findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller–El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

***5** In applying these standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *Ylst v. Nunnemaker,* 501 U.S. 797, 804, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Jones v. Stinson,* 229 F.3d 112, 118 (2d Cir.2000). Where there is no reasoned decision of the state court addressing the ground or grounds raised on the merits and no independent state grounds exist for not addressing those grounds, this Court must decide the issues de novo on the record before it. *See Dolphy v. Mantello,* 552 F.3d 236, 239–40 (2d Cir.2009) (citing *Spears v. Greiner,* 459 F.3d 200, 203 (2d Cir.2006)); *cf. Wiggins v. Smith,* 539 U.S. 510, 530–31, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (applying a de novo standard to a federal claim not reached by the state court). In so doing, the Court presumes that the state court decided the claim on the merits and the decision rested on federal grounds. *See Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Coleman v. Thompson,* 501 U.S. 722, 740, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *see also Jimenez v. Walker,* 458 F.3d 130, 140 (2d Cir.2006) (explaining the *Harris–Coleman* interplay); *Fama v. Comm'r*

of Corr. Servs., 235 F.3d 804, 810–11 (2d Cir.2000) (same). This Court gives the presumed decision of the state court the same AEDPA deference that it would give a reasoned decision of the state court. *Harrington v. Richter,* ––– U.S. ––––, –––– – ––––, 131 S.Ct. 770, 784–85, 178 L.Ed.2d 624 (2011) (rejecting the argument that a summary disposition was not entitled to § 2254(d) deference); *Jimenez,* 458 F.3d at 145–46.

IV. DISCUSSION

A. Exhaustion

Respondent correctly contends that two of Jaramillo's claims are unexhausted. This Court may not consider claims that have not been fairly presented to the state courts. 28 U.S.C. § 2254(b)(1); *see Baldwin v. Reese,* 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (citing cases). Exhaustion of state remedies requires the petition to fairly present federal claims to the state courts in order to give the state the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. *Duncan v. Henry,* 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). A petitioner must alert the state courts to the fact that he is asserting a federal claim in order to fairly present the legal basis of the claim. *Id.* at 365–66.An issue is exhausted when the substance of the federal claim is clearly raised and decided in the state court proceedings, irrespective of the label used. *Jackson v. Edwards,* 404 F.3d 612, 619 (2d Cir.2005). As Respondent notes, Jaramillo raised his admission of prior bad acts and failure to give curative instructions arguments (both part of claim 1) solely on the basis of state law.

These unexhausted claims are procedurally barred. Because Jaramillo's claims are based on the record, they could have been raised in his direct appeal but were not; consequently, Jaramillo cannot bring a motion to vacate as to these claims. N.Y. CRIM. PROC. LAW § 440.10(2)(c) ("[T]he court must deny a motion to vacate a judgment when[,][a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal ...."). Moreover, Jaramillo cannot now raise these claims on direct appeal because he has already filed the direct appeal and leave application to which he is entitled. *See Grey v. Hoke,* 933 F.2d 117, 120–21 (2d Cir.1991).

***6** "[W]hen a 'petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred,' the federal habeas court should consider the claim to be procedurally defaulted."*Clark v. Perez,* 510 F.3d 382, 390 (2d Cir.2008); *see also Grey,* 933 F.2d at 121. A habeas petitioner may only avoid dismissal of his procedurally defaulted claims if he can demonstrate "cause for the default and prejudice from the asserted error,"*House v. Bell,* 547 U.S. 518, 536, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), or a "fundamental miscarriage of justice," *Murray v. Carrier,* 477 U.S. 478, 495–96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). A miscarriage of justice is satisfied by a showing of actual innocence. *See Schlup v. Delo,* 513 U.S. 298, 326–27, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Jaramillo does not claim that cause exists for his procedural default nor does he assert actual innocence. Because Jaramillo may not now return to state court to exhaust these claims, the claims may be deemed exhausted but procedurally defaulted from habeas review. *See Ramirez v. Att'y Gen.,* 280 F.3d 87, 94 (2d Cir.2001).

Despite Jaramillo's failure to exhaust these claims, this Court nonetheless may deny those claims on the merits and with prejudice. *See*28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). This is particularly true where the grounds raised are meritless. *See Rhines v. Weber,* 544 U.S. 269, 277, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). Accordingly, this Court declines to dismiss the unexhausted claims solely on exhaustion grounds and will instead reach the merits of the claims as discussed below.

B. Merits

1. Alleged Errors Relating to the Indictment (Claims 1D, 2, and 4)

Jaramillo contends that the trial court should have dismissed the indictment because the grand jury proceedings were defective as Jaramillo was required to testify before the grand jury in shackles (claim 1D), the prosecutor knowingly used perjury (claim 4), and his right to a speedy trial was violated (part of claim 2). He additionally contends that the trial court failed to disclose to the Appellate Division and appellate counsel for appellate review his motion to dismiss the indictment on speedy trial grounds (remainder of claim

2). The Appellate Division summarily rejected these claims on direct appeal.*Jaramillo,* 947 N.Y.S.2d at 878.

a. Defective Grand Jury Proceedings Due to Shackles and Alleged Perjury

Jaramillo's claims that the indictment should have been dismissed because it was obtained as a result of defective state grand jury proceedings are not cognizable on federal habeas review. For federal constitutional purposes, a jury conviction transforms any defect in the grand jury's charging decision into harmless error because the trial conviction establishes probable cause to indict and also proof of guilt beyond a reasonable doubt. *See, e.g., United States v. Mechanik,* 475 U.S. 66, 67, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) ("[T]he petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted. Therefore, the convictions must stand despite the [grand jury] rule violation.").

***7** In *Lopez v. Riley,* the Second Circuit relied on *Mechanik* in holding that "[i]f federal grand jury rights are not cognizable on direct appeal where rendered harmless by a petit jury, similar claims concerning a state grand jury proceeding are *a fortiori* foreclosed in a collateral attack brought in a federal court."*Lopez v. Riley,* 865 F.2d 30, 32 (2d Cir.1989); *see also Davis v. Mantello,* 42 F. App'x 488, 490–91 (2d Cir.2002) [3] ("Claims of deficiencies in state grand jury proceedings are not cognizable in a habeas corpus proceeding in federal court."(citing cases)); *May v. Warden,* 07 Civ. 2176, 2010 WL 1904327, at *3 (S.D.N.Y. May 10, 2010) (dismissing habeas claim that prosecutor knowingly presented false evidence to grand jury). Jaramillo therefore is not entitled to relief on his defective grand jury proceedings claims.

b. Speedy Trial

Construing his *pro se* Petition liberally, *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam), the Court may discern that Jaramillo's claim attacking the indictment on speedy trial grounds additionally raises a constitutional claim that Jaramillo was denied his right to a speedy trial. To the extent that Jaramillo raises speedy trial violations based on New York criminal procedural law, a state statutory protection, however, his claims are not cognizable on federal habeas review. *See, e.g., Bermudez v. Conway,* No. 09–CV–1515, 2012 WL 3779211, at *9 (E.D.N.Y. Aug. 30, 2012); *Hodges v. Bezio,* No. 09–CV–3402, 2012 WL 607659, at *4 (E .D.N.Y. Feb. 24, 2012); *Rodriguez v. Superintendent, Collins Corr. Facility,* 549 F.Supp.2d 226, 236–37 (N.D.N.Y.2008). Accordingly, any New York Criminal Procedure Law ("CPL") § 30.30 speedy trial claim is not a basis for relief in this Court.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial."U.S. CONST. amend VI. This right is enforced against the states through the Due Process Clause of the Fourteenth Amendment. *Klopfer v. N. Carolina,* 386 U.S. 213, 222–23, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). The right to a speedy trial functions "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."*Barker v. Wingo,* 407 U.S. 514, 532, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). As the Supreme Court made clear in *Barker:*

> [T]he right to a speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial.

Id. at 521;*see also Vermont v. Brillon,* 556 U.S. 81, 89, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009) (the right to a speedy trial is "amorphous," "slippery," and "necessarily relative"); *United States v. Ghailani,* 733 F.3d 29, 41 (2d Cir.2013).

***8** The Supreme Court has established a multi-factor balancing test to aid courts in assessing whether a speedy trial violation has occurred: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) prejudice to the defendant.*Barker,* 407 U.S. at 530. The list is not exhaustive, and no single factor is dispositive. *Id.* Accordingly, "reasonable minds may disagree in close cases on whether the balance of factors tips in favor of recognizing a violation of the Speedy Trial Clause."*United States v. Ray,* 578 F.3d 184, 191 (2d Cir.2009); *see also Barker,* 407 U.S. at 521 ("It is, for example, impossible to determine with precision when the right has been denied.").

In this case, Jaramillo was arrested on October 18, 2009, and the trial commenced on January 24, 2011—a period of approximately fifteen months. Jaramillo has therefore demonstrated that the delay is "presumptively prejudicial." *See United States v. Vassell,* 970 F.2d 1162, 1164 (2d Cir.1992) (suggesting that there is a general consensus that a delay of eight months is presumptively prejudicial); *see also Doggett v. United States,* 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (a delay that "approaches one year" is presumptively prejudicial). Nonetheless, Jaramillo's claim fails in light of the application of the four *Barker* factors.

First, with respect to the length of the delay, a fifteen-month delay is shorter than the delays in other cases in which the Second Circuit has found no Sixth Amendment violation. *See United States v. Vasquez,* 918 F.2d 329, 338 (2d Cir.1990) (twenty-six month delay did not violate right to speedy trial); *United States v. McGrath,* 622 F.2d 36, 41 (2d Cir.1980). Second, at least part of the delay was necessary in order to allow his newly-assigned counsel to prepare for the grand jury and to conduct plea negotiations which—despite Jaramillo's contentions—was ultimately for his benefit. Upon Jaramillo's request, counsel withdrew the waiver of speedy trial time and requested that Jaramillo be permitted to testify at the grand jury. Furthermore, while Jaramillo has reasserted his right to a speedy trial, he has not claimed that the delay in the commencement of his trial caused him to suffer any prejudice or prevented him from presenting a full defense. Accordingly, Jaramillo cannot prevail on his speedy trial claim.

c. Failure to Disclose

In support of his claim that the trial court failed to disclose to the Appellate Division and appellate counsel his motion to dismiss the indictment on speedy trial grounds, Jaramillo "requests judicial notice be taken by this Court that the trial court did not provide [his] motion to dismiss indictment pursuant to CPL §§ 30.30(1)(A) and 210.20(1)(G), and its decision and order to the New York State Appellate Division, Fourth Judicial Department, or his appellate attorney so it is part of the record on appeal to the appellate division in this manner."Federal Rule of Evidence 201(b) entitles this Court to take judicial notice of facts "not subject to reasonable dispute." FED.R.EVID. 201(b); *see Oneida Indian Nation v. New York,* 691 F.2d 1070, 1086 (2d Cir.1982) ("When there is no dispute as to the authenticity of ... materials and judicial notice is limited to law, legislative facts, or factual matters that are incontrovertible, such notice is admissible.").

***9** Judicial notice is not appropriate here because there is no support in the record that the motion and decision were not provided to the Appellate Division and thus Jaramillo's assertion is far from incontrovertible. In support of his claim, Jaramillo cites to a document entitled "Appellate Attorney's List of Documents Filed by the Trial Court" that was apparently included in an appendix to his supplemental brief on direct appeal, but he did not file that document before this Court, and it is therefore not part of the record. Jaramillo is therefore not entitled to relief on his unsupported claim. *See In re Vey,* 520 U.S. 303, 303–04, 117 S.Ct. 1294, 137 L.Ed.2d 510 (1997) (per curiam) (unsupported, conclusory statements insufficient to support allegations on habeas review). Indeed, the record before this Court includes the appendix on appeal, prepared jointly by the prosecution and Jaramillo's appellate counsel, which appears to show that the Appellate Division and his appellate counsel received both Jaramillo's suppression motion and the trial court's order denying it.

Moreover, even if Jaramillo were able to show that the Appellate Court did not have his motion and the lower court's order in the record before it, Jaramillo cannot show that he was prejudiced by such omission because Jaramillo was able to fully raise in his *pro se* supplemental brief on direct appeal the arguments he made in his trial court motion. The court's summary denial of his claim, *see Jaramillo,* 947 N.Y.S.2d at 878 ("We have considered the contentions raised by [Jaramillo] in his pro se supplemental brief and conclude that none warrants modification or reversal of the judgment."), does not indicate that it lacked briefing or was otherwise prevented from conducting effective appellate review.

2. Ineffective Assistance of Counsel and Denial of New Counsel (Claims 1A and 3)

Jaramillo additionally claims that he received the ineffective assistance of counsel because his attorney waived without Jaramillo's consent his right to a speedy trial and his right to testify in the grand jury. He likewise argues that the court erred in not appointing new counsel.

a. Ineffective Assistance of Counsel—Waiver of Speedy Trial Rights

To demonstrate ineffective assistance of counsel under *Strickland v. Washington,* a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. 466 U.S. 668, 687, 104

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S.Ct. 2052, 80 L.Ed.2d 674 (1984). A deficient performance is one in which "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."*Id.* The Supreme Court has explained that, if there is a reasonable probability that the outcome might have been different as a result of a legal error, the defendant has established prejudice and is entitled to relief. *Lafler v. Cooper,* ––– U.S. ––––, –––– – ––––, 132 S.Ct. 1376, 1385–86, 182 L.Ed.2d 398 (2012); *Glover v. United States,* 531 U.S. 198, 203–04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001); *Williams,* 529 U.S. at 393–95. Thus, Jaramillo must show that his trial counsel's representation was not within the range of competence demanded of attorneys in criminal cases, and that there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. *See Hill v. Lockhart,* 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). An ineffective assistance of counsel claim should be denied if the petitioner fails to make a sufficient showing under either of the *Strickland* prongs. *See Strickland,* 466 U.S. at 697 (courts may consider either prong of the test first and need not address both prongs if the defendant fails on one).

***10** New York's test for ineffective assistance of counsel under the state constitution differs slightly from the federal *Strickland* standard. "The first prong of the New York test is the same as the federal test; a defendant must show that his attorney's performance fell below an objective standard of reasonableness."*Rosario v. Ercole,* 601 F.3d 118, 124 (2d Cir.2010) (citing *People v. Turner,* 5 N.Y.3d 476, 806 N.Y.S.2d 154, 840 N.E.2d 123 (N.Y.2005)). The difference is in the second prong. Under the New York test, the court need not find that counsel's inadequate efforts resulted in a reasonable probability that, but for counsel's error, the outcome would have been different. "Instead, the 'question is whether the attorney's conduct constituted egregious and prejudicial error such that defendant did not receive a fair trial." *Id.* at 124 (quoting *People v. Benevento,* 91 N.Y.2d 708, 674 N.Y.S.2d 629, 697 N.E.2d 584, 588 (N.Y.1998)). "Thus, under New York law the focus of the inquiry is ultimately whether the error affected the 'fairness of the process as a whole." *Id.* (quoting *Benevento,* 674 N.Y.S.2d 629, 697 N.E.2d at 588). "The efficacy of the attorney's efforts is assessed by looking at the totality of the circumstances and the law at the time of the case and asking whether there was 'meaningful representation.' " *Id.* (quoting *People v. Baldi,* 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400, 405 (N.Y.1981)).

The New York Court of Appeals views the New York constitutional standard as being somewhat more favorable to defendants than the federal *Strickland* standard. *Turner,* 806 N.Y.S.2d 154, 840 N.E.2d at 126. "To meet the New York standard, a defendant need not demonstrate that the outcome of the case would have been different but for counsel's errors; a defendant need only demonstrate that he was deprived of a fair trial overall."*Rosario,* 601 F.3d at 124 (citing *People v. Caban,* 5 N.Y.3d 143, 800 N.Y.S.2d 70, 833 N.E.2d 213, 222 (N.Y.2005)). The Second Circuit has recognized that the New York "meaningful representation" standard is not contrary to the federal *Strickland* standard. *Id.* at 124, 126.The Second Circuit has likewise instructed that federal courts should, like the New York courts, view the New York standard as being more favorable or generous to defendants than the federal standard.*Id.* at 125.

Jaramillo's claim must fail, however, even under the more lenient New York standard. The United States Supreme Court has long established that "[w]hat suffices for waiver depends on the nature of the right at issue."*New York v. Hill,* 528 U.S. 110, 114, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000)."[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."*United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)."Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial."*Taylor v. Illinois,* 484 U.S. 400, 417–18, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

***11** An attorney, acting without direct consent from his client, can waive his client's speedy trial right because "[s]cheduling matters are plainly among those [rights] for which agreement by counsel generally controls."*Gonzalez v. United States,* 553 U.S. 242, 249, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (quoting *Hill,* 528 U.S. at 115). Therefore, counsel's waiver of Jaramillo's rights to a speedy trial, even if counsel was acting without Jaramillo's consent or knowledge, does not alone rise to the level of deficient performance. As a practical necessity, attorneys must have control of trial management matters for "[t]he adversary process could not function effectively if every tactical decision required client approval."*Id.* (quoting *Taylor,* 484 U.S. at 418). Counsel's speedy trial waiver without Jaramillo's knowledge thus was not an unreasonable course of action by counsel who,

after Jaramillo's retained attorney was allowed to withdraw, undertook Jaramillo's representation on March 15, 2010—just three days before the grand jury proceedings were scheduled to begin.

As the Appellate Division has recognized, however, the waiver of a defendant's speedy trial rights may amount to deficient representation if counsel waives a meritorious claim of a violation of a petitioner's speedy trial rights. *See People v. Garcia,* 33 A.D.3d 1050, 822 N.Y.S.2d 322, 324 (N.Y.App.Div.2006) (stating that while "[d]efense counsel may waive a defendant's unripe speedy trial rights ... [a] single error of failing to raise a meritorious speedy trial claim is sufficiently egregious to amount to ineffective assistance of counsel"). In this case, Jaramillo was arrested on October 18, 2009. New York's speedy trial statute requires that the prosecution announce their readiness for trial within six months of the commencement of the action. N.Y. CRIM. PROC. LAW § 30.30(1)(a). The prosecution therefore had six months, or until April 18, 2010, to announce readiness for trial. On March 16, 2010, Jaramillo's counsel executed the speedy trial waiver. He subsequently revoked the waiver in writing on May 7, 2010. The matter was presented to the grand jury on May 10, 2010, and the prosecution announced readiness on June 3, 2010. Approximately five months elapsed between Jaramillo's arrest and the speedy trial waiver. The prosecution announced their readiness within a month from the revocation of the waiver, prior to the expiration of the six-month period. Therefore, Jaramillo's speedy trial rights were not violated, and Jaramillo's counsel did not waive a meritorious speedy trial claim when he waived Jaramillo's unripe speedy trial rights. Because the underlying claim is meritless, Jaramillo cannot assert an ineffective representation claim on this ground as counsel did not waive a meritorious claim to dismiss based upon a speedy trial violation. *See United States v. Arena,* 180 F.3d 380, 396 (2d Cir.1999), *overruled on other grounds by Scheidler v. National Org. for Women, Inc.,* 537 U.S. 393, 403 n. 8, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003).

b. Ineffective Assistance of Counsel—Waiver of Right to Testify

***12** Because there is no constitutional right to testify before a grand jury, Jaramillo's claim that his counsel impermissibly waived his state right to testify before a grand jury is not cognizable on federal habeas review. *See Burwell v. Superintendent of Fishkill Corr. Facility,* No. 06 Civ. 787, 2008 WL 2704319, at *8 (S.D.N.Y. July 10, 2008) ("[T]here is no federal constitutional right to testify before the grand jury. In fact, there is no federal right to a grand jury in state criminal prosecutions."); *Affser v. Murray,* No. 04 CV 2715, 2008 WL 2909367, at *7 (E.D.N.Y. July 28, 2008) ("[C]ounsel's alleged failure to secure petitioner's presence before the grand jury does not constitute ineffective assistance" (collecting cases)). As the Second Circuit explained:

> We also reject the petitioner's argument that his claim should be interpreted as a claim for ineffective assistance of counsel based on his attorney's failure to secure his right to testify before the grand jury .... A defendant's right to testify before the grand jury is not a constitutional right; rather, it is a statutorily created right. N.Y. CRIM. PROC. LAW § 190.50(5). New York courts have consistently held that counsel's failure to ensure that the defendant testifies before the grand jury does not amount to ineffective assistance of counsel.

Davis, 42 F. App'x at 491 n. 1 (citing federal and state case law).

Furthermore, Jaramillo cannot show that he was prejudiced by his counsel's alleged waiver of his right to testify. The record indicates that Jaramillo did in fact testify before the grand jury. This is further evidenced by Jaramillo's claim in his Petition before this Court that the trial court erred in dismissing the indictment based on defective grand jury proceedings because he was forced to testify while in shackles, as discussed *supra.*It therefore appears that, if counsel initially waived Jaramillo's right to testify, he later revoked the waiver. Likewise, Jaramillo cannot demonstrate prejudice because he was later convicted at trial. *See Murry v. Greene,* No. 06–cv–0322, 2009 WL 3165637, at *8 n. 9 (N.D.N.Y. Sept.29, 2009) ("Petitioner maintains that if he could have testified before the grand jury, he could have explained the facts of the case and refuted the finding that he committed a crime. However, any error in grand jury proceedings is cured by the subsequent conviction on the charge by the petit jury."(citing *Velez v. New York,* 941 F.Supp. 300, 316 (E.D.N.Y.1996))).

c. Denial of Request for New Counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."U.S. CONST. amend VI. The Supreme Court has, however, "recognized that the right to choose one's own counsel is not absolute."*United States v. Jones,* 381 F.3d 114, 119 (2d Cir.2004)."The Sixth Amendment guarantees a criminal defendant an effective advocate, not necessarily the advocate of his or her choosing."*Id.*"Because the right to counsel of one's choice is not absolute, a trial court may require a defendant to proceed to trial with counsel not of defendant's choosing; although it may not compel defendant to proceed with incompetent counsel."*United States v. Schmidt,* 105 F.3d 82, 89 (2d Cir.1997).

***13** It is not sufficient for a defendant simply to request new counsel."[A] defendant seeking substitution of assigned counsel must ... afford the court with legitimate reasons for the lack of confidence."*McKee v. Harris,* 649 F.2d 927, 932 (2d Cir.1981). The Supreme Court has, however, "reject[ed] the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel."*Morris v. Slappy,* 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). Rather, "[i]n order to warrant a substitution of counsel during trial, the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict."*McKee,* 649 F.2d at 931 (citation omitted). In determining whether a trial court abused its discretion in denying a motion for substitute counsel, the Second Circuit looks to the timeliness of defendant's motion, the adequacy of the court's inquiry into the defendant's complaints, and whether the conflict "resulted in [a] total lack of communication preventing an adequate defense."*United States v. Simeonov,* 252 F.3d 238, 241 (2d Cir.2001).

Because, as discussed above, Jaramillo's counsel did not render ineffective assistance when he waived Jaramillo's rights to a speedy trial and to testify before the grand jury, he necessarily cannot show that the trial court abused its discretion by not substituting counsel for those reasons. Moreover, Jaramillo cannot show that the trial court abused its discretion by refusing to substitute counsel after Jaramillo filed a civil lawsuit against the Public Defender's Office. As the appellate court concluded, substitution of counsel was not warranted "based on [Jaramillo's] apparent attempt to create a conflict of interest by commencing an action in federal court against the Public Defender."*Jaramillo,* 947 N.Y.S.2d at 878. The Second Circuit squarely has held that a petitioner cannot manufacture a conflict of interest " 'merely by expressing dissatisfaction with [the] attorney's performance.' " *United States v. John Doe No. 1,* 272 F.3d 116, 126 (2d Cir.2001) (quoting *United States v. Moree,* 220 F.3d 65, 71 (2d Cir.2000) (" '[A]n actual conflict of interest' does not necessarily arise every time that an attorney responds to allegations of incompetent representation or contradicts his client in open court." (citation omitted))).

Jaramillo nonetheless contends that there was a complete breakdown of communication warranting the substitution of counsel. In addressing this claim, the Court must consider "whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense" and "whether the defendant substantially and unjustifiably contributed to the breakdown in communication."*John Doe No. 1,* 272 F.3d at 122–23 (citation and internal quotation marks omitted). While Jaramillo complains that his counsel failed to meet with him, the record indicates that Jaramillo exacerbated that problem by refusing to meet with his counsel on multiple occasions. Accordingly, to the extent that Jaramillo argues that the breakdown in communication chilled his ability to consult with his attorney, that belief is not a reasonable one and does not present a valid claim that his right to the effective assistance of counsel was violated. *Cf., e.g., id.* at 123–24 (finding no abuse of discretion in failure to substitute new counsel where distrust of current counsel allegedly prevented an adequate defense but the defendant's distrust was unreasonable and was the unjustifiable cause of any breakdown in communication); *United States v. Roston,* 986 F.2d 1287, 1292–93 (9th Cir.1993) (same); *Thomas v. Wainwright,* 767 F.2d 738, 740–43 (11th Cir.1985) (no constitutionally ineffective assistance of counsel where habeas petitioner unreasonably refused to communicate with his attorney).

***14** Jaramillo has not demonstrated a potential, an actual, or a *per se* conflict of interest on the part of counsel and has failed to show either that counsel's representation of him in connection with the pre-trial proceedings or as shadow counsel during the trial fell below an objective standard of reasonableness or that he suffered prejudice as a result. Accordingly, Jaramillo is not entitled to relief on either his ineffective assistance of counsel or substitution of counsel claims.

d. Self–Representation

The Court also discerns that the Petition raises a potential claim that the trial court erred in granting Jaramillo's motion to represent himself after it denied his motion to substitute counsel. The Sixth Amendment "right to assistance of counsel implicitly embodies a correlative right to dispense with a lawyer's help."*Faretta v. California,* 422 U.S. 806, 814, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (citation and internal quotation marks omitted)."When an accused manages his own defense, he relinquishes, as purely a factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits."*Id.* at 835 (citation and internal quotation marks omitted)."Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."*Id.* (citation and internal quotation marks omitted). There is no "formula or script to be read to a defendant who states that he elects to proceed without counsel."*Iowa v. Tovar,* 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). Rather, the determination of whether a defendant has knowingly and intelligently waived his rights to counsel depends on "a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."*Id.* In addition, the court must specifically warn a defendant electing to proceed *pro se* "of the hazards ahead." *Id.* at 88–89.

Prior to granting Jaramillo's motion, the trial court surmised that Jaramillo had a high school education and had completed some college credits. Jaramillo likewise indicated that he had prior experience in the California court system and that he had no physical or mental limitations. Jaramillo further indicated that he understood what was expected of him and that he would be expected to abide by the same rules that governed attorney conduct. He repeatedly stated that he wanted to exercise his Sixth Amendment right to represent himself. Under these circumstances, Jaramillo's waiver of his right to counsel was knowing, voluntary and intelligent and the trial court did not unconstitutionally permit him to defend himself at trial. *Cf. Faretta,* 422 U.S. at 835 (trial court deprived defendant of his constitutional right to defend himself where defendant clearly and unequivocally declared that he wanted to represent himself, was literate, competent, and understanding). Moreover, the court mitigated any problems Jaramillo might encounter by appointing counsel to assist him as needed. Jaramillo therefore cannot prevail on any claim that the trial court erred in allowing him to represent himself.

3. Erroneous Admission and Failure to Suppress (Claim 1B and 5)

***15** Jaramillo additionally contends that the trial court made a number of evidentiary errors.

a. Admission of Prior Bad Acts

Jaramillo first contends that the "trial court erred in admitting prior bad acts at trial without a showing of relevance and without properly balancing its potential for prejudice."Jaramillo does not in his Petition or the memorandum of law accompanying it point to any prior bad acts. Rather, he states in his Petition that "[t]he evidence included a shotgun and a military issue vest that was seized by police from his home without his consent and without a warrant."The substance of this claim is therefore identical to his claim that the trial court erred in failing to suppress the tangible evidence obtained without a warrant which is discussed below. [4]

b. Failure to Suppress Tangible Evidence

Jaramillo's claim that the trial court should have suppressed the shotgun and vest as obtained by illegal means is precluded by the Supreme Court's decision in *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Under *Stone,*"where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim," federal habeas corpus relief will not lie for a claim that evidence recovered through an illegal search or seizure was introduced at trial. *Id.* at 482.The Second Circuit has made clear that all *Stone* requires is that the State provide a petitioner the opportunity to litigate his Fourth Amendment claim. *See McPhail v. Warden, Attica Corr. Facility,* 707 F.2d 67, 69–70 (2d Cir.1983).

In order to receive habeas review of his Fourth Amendment claim, a petitioner must demonstrate either that the State failed to provide any "corrective procedures" by which Fourth Amendment claims could be litigated, or that the State had such procedures in place but that the petitioner was unable to avail himself of those procedures "because of an unconscionable breakdown in the underlying process."*Capellan v. Riley,* 975 F.2d 67, 70 (2d Cir.1992). A "mere disagreement with the outcome of a state court ruling is not the equivalent of an unconscionable breakdown in the

state's corrective process," and thus is insufficient to give this Court authority to review Fourth Amendment claims. *Id.* at 72.That New York has in place such procedures is well-settled, *see id.* at 70 & n. 1, and Jaramillo has not asserted the existence of an unconscionable breakdown of that process in this case. Jaramillo therefore cannot prevail on this claim on a Fourth Amendment theory either.

c. Failure to Suppress Statements to Law Enforcement

Jaramillo likewise contends that the trial court should have suppressed statements he made to law enforcement at his home before he was subsequently read his *Miranda* rights at the police station. The Supreme Court has held that an individual subjected to custodial interrogation by law enforcement personnel "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."*Miranda,* 384 U.S. at 479. A custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."*Id.* at 444.

***16** At the suppression hearing, Detective Romano testified that Jaramillo allowed the officers to enter his apartment, was not constrained in any way when he answered their questions, and voluntarily accompanied them to the police station. Jaramillo nonetheless describes in his Petition the following confrontation:

> On October 18, 2009, three police officers arrived at [Jaramillo's] home, asked him questions about the incident he was convicted of while he was standing in the door to his kitchen without giving *Miranda* warnings and then, barged into his home, detained him so he was not free to leave, searched and seized items that were not in plain view without a warrant, questioned [him] again while in his living room and being detained without giving him *Miranda* warnings while there was no exigent circumstances or probable cause for the police to do these things without first obtaining a warrant and they did not obtain [his] consent to enter or search his home.

But his assertions are nothing more than an attack on the testimony of the police officers. Jaramillo misperceives the role of a federal court in a federal habeas proceeding attacking a state-court conviction. This Court is precluded from either re-weighing the evidence or assessing the credibility of witnesses. This Court's role is simply to determine whether there is any evidence, if accepted as credible by the trier of fact, sufficient to sustain the finding of fact. *See Schlup,* 513 U.S. at 330. In the absence of clear and convincing evidence to the contrary, this Court is bound by the factual findings of the state court which concluded that Jaramillo allowed the police to enter his residence such that his statements given to police at his home were not the product of custodial interrogation and offered his later oral and written statements, which were the subject of custodial interrogation, only after being advised of his rights to remain silent and to have the assistance of an attorney. 28 U.S.C. § 2254(e)(1); *Miller–El,* 537 U.S. at 340. Jaramillo is therefore not entitled to relief on this claim.

4. In–Chamber Proceedings (Claim 1C)

Jaramillo additionally claims that "[o]n at least four occasions the trial court elected to hold proceedings in its chambers without the showing of necessity which violated [his] right to a public trial."

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."U.S. CONST., amend. VI. The "public trial" clause was made applicable to state prosecutions by *In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948), and therefore the Sixth Amendment entitles a defendant in a state criminal proceeding to a public trial, *see id.; accord, e.g., Presley v. Georgia,* 558 U.S. 209, 214–15, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam); *Waller v. Georgia,* 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (a courtroom cannot be closed to the public unless "the party seeking to close the hearing ... advance[s] an overriding interest that is likely to be prejudiced, the closure ... [is] no broader than necessary to protect that interest, the trial court ... consider [s] reasonable alternatives to closing the proceeding, and it ... make[s] findings adequate to support the closure"); *Gibbons v. Savage,* 555 F.3d 112, 115 (2d Cir.2009).

***17** However, Jaramillo cannot prevail on this claim because he failed to object to the court's holding proceedings

in closed chambers. "Where a defendant, with knowledge of the closure of the courtroom, fails to object, that defendant waives his right to a public trial."*Bennefield v. Kirkpatrick,* 741 F.Supp.2d 447, 457 (W.D.N.Y.2010) (quoting *United States v. Hitt,* 473 F.3d 146, 155 (5th Cir.2006) (footnote omitted)); *see also Levine v. United States,* 362 U.S. 610, 618–19, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960); *Singer v. United States,* 380 U.S. 24, 35, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965) (noting that a defendant can waive the right to a public trial). In *Levine,* the Supreme Court explained:

> The continuing exclusion of the public in this case is not to deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding, thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it. This was not a case of the kind of secrecy that deprived petitioner of effective legal assistance and rendered irrelevant his failure to insist upon the claim he now makes. Counsel was present throughout, and it is not claimed that he was not fully aware of the exclusion of the general public. The proceedings properly began out of the public's presence and one stage of them flowed naturally into the next. There was no obvious point at which, in light of the presence of counsel, it can be said that the onus was imperatively upon the trial judge to interrupt the course of proceedings upon his own motion and establish a conventional public trial. We cannot view petitioner's untenable general objection to the nature of the proceedings by invoking Rule 42(b) as constituting appropriate notice of an objection to the exclusion of the general public in the circumstances of this proceeding under Rule 42(a).

362 U.S. at 619.

Under *Levine,* Jaramillo's failure to lodge a timely objection to conducting proceedings in chambers effected a waiver of any right he may have had to conducting them in open court. *See Bennefield,* 741 F.Supp. at 458 (citing *United States v. Guzman,* 271 F. App'x 442, 444 (5th Cir.2008) ("However, Guzman failed to object to the closure of the courtroom and therefore waived any right he may have had to an open sentencing hearing.")).

Even if Jaramillo had timely objected to the proceedings, he cannot demonstrate that habeas relief is warranted on this claim "because the record is devoid of 'any suggestion that new open proceedings would likely produce a substantial change in the parties' positions[.]' " *Id.* at 459 (quoting *Hunt v. Tucker,* 875 F.Supp. 1487, 1530 (N.D.Ala.1995)). The trial transcript indicates that the court held a number of brief conferences regarding ministerial or scheduling matters in its chambers, apparently while the jury was already convened in the courtroom, prior to each day of trial. It appears that the length of these conferences was at most twenty minutes. As the appellate court concluded, "[t]he record establishes that the proceedings at issue were distinct from trial proceedings that must be conducted in public." *Jaramillo,* 947 N.Y.S.2d at 878. Accordingly, Jaramillo cannot show that he was wrongly deprived of his right to an open trial, and habeas relief is not warranted on this claim.

5. Failure to Offer Curative Instructions (Claim 1E)

***18** Jaramillo finally asserts that "[t]he trial court failed to intervene with a curative instruction when, during summation, the prosecutor shifted the burden of proof onto [Jaramillo] to prove reasonable doubt which violated his right to a fair and impartial trial."The appellate court denied this claim after finding that Jaramillo's failure to object at trial forfeited his claim on direct appeal. *Jaramillo,* 947 N.Y.S.2d at 878.

As an initial matter, "an adequate and independent finding of procedural default will bar federal habeas review of the federal claim."*Harris,* 489 U.S. at 262. In finding this claim unpreserved for appellate review, the Appellate Division relied upon New York's contemporaneous objection rule, CPL § 470.05(2), which has long been considered an "adequate and independent ground" that bars federal habeas review. *See Whitley v. Ercole,* 642 F.3d 278, 292 (2d Cir.2011). New York's rule requires that an alleged error be "brought to the attention of the trial court at a time and in a way that [gives it] the opportunity to remedy the problem and thereby avert reversible error."*People v. Luperon,* 85 N.Y.2d 71, 623 N.Y.S.2d 735, 647 N.E.2d 1243, 1246–47 (N.Y.1995). As Jaramillo never objected before the

trial court to its failure to issue a curative instruction, the Appellate Division properly applied New York's adequate and independent contemporaneous objection rule.

In any event, Jaramillo's claim is without merit. To successfully raise a claim cognizable on habeas review based on a prosecutor's comments at trial, a petitioner must demonstrate that the prosecutor's comments " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). Under this standard, only "egregious" prosecutorial misconduct can give rise to a constitutional claim. *See Miranda v. Bennett,* 322 F.3d 171, 180 (2d Cir.2003) (quoting *Donnelly,* 416 U.S. at 647–48). A prosecutor's comments in summation constitute "grounds for reversal only when the remarks caused 'actual prejudice." *Dunn v. Sears,* 561 F.Supp.2d 444, 455 (S.D.N.Y.2008) (citing *Tankleff v. Senkowski,* 135 F.3d 235, 252 (2d Cir.1998)). "In determining whether the prosecutor's comments cause[d] prejudice, [a] court considers three factors: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the improper statements." *Id.* at 457 (quoting *United States v. Thomas,* 377 F.3d 232, 245 (2d Cir.2004)).

Jaramillo's claim falls far short of meeting these standards. During closing argument, the prosecutor asked the jury to review all of the evidence presented by the prosecution and defense and then stated, "I submit to you that if you do that, you will come to the undenial conclusion that there is only one reasonable alternative here, that [Jaramillo's] story does not amount to reasonable doubt, and that [he] is guilty of each and every charge contained in the Indictment."Jaramillo cannot show that this comment warrants habeas relief, particularly given that the court thereafter admonished the jury that:

> ***19** The defendant is not required to prove that he is not guilty. In fact, the defendant is not required to prove or disprove anything. To the contrary, the People have the burden of proving the defendant guilty beyond a reasonable doubt. That means before you can find the defendant guilty of a crime, the People must prove beyond a reasonable doubt every element of the crime, including that the defendant is the person who committed the crime.

Moreover, the prosecutor's statement during summation does not rise to the level of egregious conduct required for habeas relief. It is improper as a matter of both state and federal law for a prosecutor to impugn defense counsel's integrity, denigrate or ridicule the defense theory, or make *ad hominem* attacks on defense counsel. *See, e.g., United States v. Biasucci,* 786 F.2d 504, 513–14 & n. 9 (2d Cir.1986) (characterizing as "clearly ... inappropriate" the prosecutor's "needless and unwarranted *ad hominem* attacks against defense counsel[,] ... [f]or instance, the prosecutor addressed defense counsel at one point as 'you sleaze,' at another as 'you hypocritical son-,' as being 'so unlearned in the law,' and on several occasions the prosecutor objected to questions by the defense as 'nonsense" ' (internal citations to the record omitted)); *People v. LaPorte,* 306 A.D.2d 93, 762 N.Y.S.2d 55, 57–58 (N.Y.App.Div.2003) (reversing conviction where prosecutor's remarks during summation were not fair response to defense counsel's summation and thus denied defendant a fair trial because evidence against defendant was not overwhelming, prosecutor impugned defense counsel's integrity, ridiculed the defense theory as "mumbo jumbo," and "warned the jurors ... several times that defense counsel was manipulating them and trying to prevent them from using their common sense") (citation omitted). But as the Second Circuit has noted, "a prosecutor is not precluded from vigorous advocacy, or the use of colorful adjectives, in summation." *United States v. Jaswal,* 47 F.3d 539, 544 (2d Cir.1995) (citation and internal brackets omitted). In this case, the Appellate Division's decision denying this claim was neither unreasonable nor contrary to federal law because the prosecutor's comment on summation was not improper and thus does not amount to a constitutional infirmity. Rather, the statement constituted a fair response to defense counsel's summation, in which he challenged the veracity of the prosecution's witnesses and the strength of its case. *See Knight v. Walsh,* 524 F.Supp.2d 255, 287 (W.D.N.Y.2007). Jaramillo therefore fails to show that the prosecution committed misconduct in any respect.

C. Request for Discovery

At Docket No. 12, Jaramillo requests discovery and an expansion of the record as to the authenticity of certain documents relating to his speedy trial waiver. Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts mandates that "[a] judge may, for

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good cause authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery."Rule 6(b) requires that "[a] party requesting discovery must provide reasons for the request."Rule 7(a) provides that, "[i]f the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition."

***20** In support of his discovery request, Jaramillo avers that certain documents filed in Respondent's appendix are "forged instruments." Docket No. 12 at 2. The documents to which Jaramillo refers are a letter and an affidavit from his counsel which were originally included in the parties' joint appendix submitted on direct appeal and submitted by Respondent in this matter. As an initial matter, there is no indication that the documents, which are signed by counsel, are inauthentic. In response to Jaramillo's motion, Respondent filed two affidavits affirming that the documents were not altered prior to their submission in this case. Docket Nos. 14–1, 15.It appears that Jaramillo's challenge to the documents is not to their authenticity but rather to the veracity of the statements within. Jaramillo suggests that the documents, which indicate that counsel waived his client's speedy trial rights, reflect that he did so with Jaramillo's consent. This is untrue. The letters clearly indicate that counsel executed the waiver by signing his own name. As previously discussed, an attorney, acting without indication of a particular consent from his client, can waive his client's speedy trial right, as "[s]cheduling matters are plainly among those [rights] for which agreement by counsel generally controls."*Gonzalez,* 553 U.S. at 249.

In any event, because, as discussed above, Jaramillo is not entitled to relief on his speedy trial claim, further discovery on this issue is unwarranted. Furthermore, because this Court has considered and rejected Jaramillo's claims as without merit, the Court further dismisses the Petition thus rendering it inappropriate to expand the record under Rule 7.

V. CONCLUSION

Jaramillo is not entitled to relief on any ground raised in his Petition.

IT IS THEREFORE ORDERED THAT the Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus is **DENIED.**

IT IS FURTHER ORDERED THAT the Request for Discovery at Docket No. 12 is **DENIED.**

IT IS FURTHER ORDERED THAT the Court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c); *Banks v. Dretke,* 540 U.S. 668, 705, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" (quoting *Miller–El,* 537 U.S. at 327)). Any further request for a Certificate of Appealability must be addressed to the Court of Appeals. *See*FED. R.APP. P. 22(b); 2D CIR. R. 22.1.

The Clerk of the Court is to enter judgment accordingly.

All Citations

Slip Copy, 2014 WL 2986926

Footnotes

1 Dale Artus is substituted for Mark L. Bradt as Superintendent, Attica Correctional Facility. FED. R. CIV. P. 25(d).

2 *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3 Cited for persuasive value pursuant to Second Circuit Rule 32.1 .1.

4 In any event, Jaramillo cannot prevail on a claim challenging the trial court's admission of prior bad acts even assuming that Jaramillo has correctly identified the claim as such because the appellate court's denial cannot be said to be contrary to or an unreasonable application of clearly established Supreme Court authority. *See, e.g., Mercedes v. McGuire,* No. 08–CV–299, 2010 WL 1936227, at *8 (E.D.N.Y. May 12, 2010) (Appellate Division's rejection of petitioner's claim that the use of uncharged crimes violated his due process rights was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent because "the Supreme Court has never held that a criminal defendant's due process rights are violated by the introduction of prior bad acts or uncharged crimes"); *Allaway v. McGinnis,* 301 F.Supp.2d 297, 300 (S.D.N.Y.2004) (the Supreme Court has yet to clearly establish "when the admission of evidence of prior crimes under state evidentiary laws can constitute a federal due process violation").

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United States District Court,
S.D. New York.

Joey LOPEZ, Respondent.
v.
SUPERINTENDENT OF FIVE POINTS CORRECTIONAL FACILITY, Respondent.

No. 14–CV–4615 (RJS)(JLC).
| Signed March 23, 2015.

REPORT AND RECOMMENDATION

JAMES L. COTT, United States Magistrate Judge.

***1 To the Honorable Richard J. Sullivan, United States District Judge:**

Pro se Petitioner Joey Lopez seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his November 24, 2009 judgment of conviction in New York Supreme Court, New York County. A jury convicted Lopez of two counts each of burglary in the first degree and robbery in the second degree and one count each of attempted assault in the first degree, assault in the second degree, and attempted assault in the second degree. The trial court found Lopez to be a predicate felony offender and sentenced him to an aggregate prison term of 15 years followed by five years of supervised release. In his petition, Lopez contends that his seconddegree robbery and first-degree burglary convictions were against the weight of the evidence and that there was insufficient evidence to support them.

Lopez also seeks discovery pursuant to Rule 6(a) of the Federal Rules Governing Section 2254 Proceedings. (Dkt. No. 20). Specifically, Lopez requests that Respondent produce a tape recording of a certain 911 call and a complete transcript of the victim's grand jury testimony.

For the reasons set forth below, I recommend that both Lopez's motion for discovery and his habeas corpus petition be denied.

I. *BACKGROUND*

The following facts are drawn from the record of proceedings before the state trial court. In view of Lopez's conviction, the evidence presented at trial is summarized in the light most favorable to the verdict. *See Garbutt v. Conway,* 668 F.3d 79, 80 (2d Cir.2012) (citation omitted). On October 18, 2008, Lopez assaulted Ery Martinez on 204 th Street and Post Avenue in Manhattan, took his cell phone, and pursued him into an apartment building to continue beating him with a gun. (Trial Transcript ("Tr.") 34, 48–51, 60–62 (Dkt. No. 10)).[1] The beating was meted out as punishment after Martinez had lost marijuana worth approximately $100, which he was supposed to sell for Lopez. (Tr. 37, 48, 194). As a result of the beating, Martinez sustained multiple facial fractures, cerebral soft tissue swelling, and a broken nose, injuries consistent with blunt force trauma, and for which he was hospitalized for two and a half days. (Tr. 74, 226–30).

On November 17, 2008, a grand jury returned an indictment charging Lopez with two counts each of robbery in the first degree, robbery in the second degree, and burglary in the first degree. Lopez was also charged with attempted assault in the first degree, assault in the second degree, and attempted assault in the second degree. Lopez's co-defendant, Jose Collado, was jointly charged with robbery in the second degree and burglary in the first degree and separately charged with criminal possession of a weapon in the third degree.

On October 21, 2009, Lopez and Collado proceeded to a jury trial before the Honorable Lewis Bart Stone of New York State Supreme Court, New York County. During the trial, Justice Stone dismissed the first-degree robbery counts against Lopez and the third-degree weapons possession count against Collado. The jury subsequently convicted Lopez of all charges and acquitted Collado of all charges. Lopez is currently serving his sentence at Five Points Correctional Facility in Romulus, New York.

A. *Lopez's Trial*

1. The Prosecution's Case

***2** The prosecution's case consisted of the testimony of the victim, Martinez (Tr. 30–78); Christopher Hidalgo, a witness to the incident with ties to both Lopez and Martinez (Tr. 173–219, 265–92); Jessica Yaroshynski, a custodian of records manager at the New York City Department of Corrections ("NYC DOC"), who maintained the NYC DOC recording of an incriminating telephone call between Lopez and Hidalgo (Tr. 105–24); Dr. Gautam Mirchandani, the neuroradiologist who analyzed the radiology films of Martinez's injuries taken

while he was being treated at Columbia Presbyterian Medical Center (Tr. 219–30); and Detective Thomas Taughran, the officer who arrested Lopez and Collado (Tr. 232–37). In addition, the prosecution offered into evidence, *inter alia,* the NYC DOC audiotape recording of the conversation between Lopez and Hidalgo and the radiology films depicting Martinez's injuries. *See* People's Exs. 1, 8; (Tr. 121–22, 223–24).

The testimony of the witnesses recounted the following story:

a. Martinez's Testimony

In October 2008, 19–year–old Ery Martinez was living with his girlfriend, Felicia Philbert, in a rented room in Hidalgo's apartment at 83 Post Avenue. (Tr. 52–54, 135–36, 164). Martinez, who never finished high school, had immigrated to the United States from the Dominican Republic in 2007 on a travel visa. (Tr. 32, 84). Martinez's visa had expired at the end of 2008, so that by the time of trial, he was no longer a legal resident. (Tr. 84–85, 238–39). Martinez testified that the prosecutor had told him he would help him avoid deportation (Tr. 240). Martinez was also receiving monetary assistance from the District Attorney's office to help pay for his living expenses because he had been homeless for a period of time following the incident giving rise to the charges against Lopez. (Tr. 32–33, 138, 256–57).

On the morning of October 18, 2008, Martinez began his shift as a marijuana dealer covering the one-block territory of 204 th Street and Post Avenue. (Tr. 33–36). Upon exiting 83 Post Avenue, Martinez received $100 worth of marijuana from Kevin ("Kev"), who served as his immediate supervisor and "lookout." (Tr. 37–38, 87–88). Both Martinez and Kev reported to Lopez. (Tr. 34–37, 47, 88). As was his custom, Martinez placed the marijuana he received from Kev inside the wheel well of a parked car. (Tr. 38, 90). Kev then left to buy a pair of sneakers, leaving Martinez alone to look out for police, potential thieves, and customers. (Tr. 38, 90–91). At one point, Martinez walked down the block to talk to a cousin who lived in a nearby building. (Tr. 38, 91). Martinez suddenly noticed that the car in which he had hidden the drugs was no longer there. (*Id.*). He ran around the block looking for either the car or the marijuana without success. (Tr. 39, 91).

Once Kev returned and learned what had happened, he called Lopez. (Tr. 39, 91–94, 24849). Lopez summoned Kev to meet him while Martinez remained at his post. (Tr. 39.92–96, 249–50). After a few minutes, Lopez arrived, accompanied by a group of men that included Kev and Collado. (Tr. 40, 97). Martinez stood with his back to the wall of 83 Post Avenue while Lopez and his associates surrounded him. (Tr. 47–48, 97, 142–43). Lopez threatened that he would make Martinez "look worse than the other person [who ...] beat [him] up before," referring to a beating that Martinez had received from another drug dealer approximately a week earlier after he had accused Martinez of stealing drugs. (Tr. 42–45, 129–31, 259). Martinez began to explain that Kev, who was supposed to "back" him, had left, and Martinez "could not take care of everything and watch what was going on" because he was there alone. (Tr. 41, 4648, 261).

***3** While Martinez attempted to account for the loss of the drugs, Lopez suddenly punched Martinez below his left eye, and he fell back against the wall. (Tr. 48–49). Lopez, who was taller and heavier than Martinez, repeatedly punched Martinez in the face and head, causing Martinez to become dizzy. (Tr. 48–50, 82). Martinez did not fight back because the other men, including Collado, threatened that if he did, they would beat him up as well. (Tr. 49–50, 80). At one point during the beating, Lopez took the cell phone Martinez had in his pocket. (Tr. 50–51, 143). Martinez testified that he had recently purchased the cell phone at a Radio Shack on 207 th Street for $43. (Tr. 51, 94).

When Lopez eventually stopped hitting Martinez, he told Collado to go and retrieve a gun. (Tr. 54). Martinez managed to extract his keys from his pocket, opened the front door to 83 Post Avenue, and entered the vestibule as the door closed behind him. (Tr. 51, 54–55, 14345). Martinez could hear Lopez outside the building threatening to kill him and his girlfriend and to "take all the money that was upstairs in the apartment" once he got the gun. (Tr. 163). Philbert came downstairs to be with Martinez after he entered the vestibule. (Tr. 56–57). Martinez gave her his keys and told her to leave because Lopez had threatened to kill them both. (*Id.*). Philbert went back upstairs and Martinez slumped down in the vestibule between the inner and outer doors to the building, crying from pain and fear. (Tr. 56–58, 163). He was bleeding, his eye and ear were swollen, his face and lips were cut, and he had a broken and bleeding molar. (Tr. 82–83, 60–61, 163).

From where he sat, Martinez could see through the partially transparent outer door of the building, and he observed Collado hand Lopez a .45 caliber gun. (Tr. 59, 62, 147–48). Lopez ordered Hidalgo, who was "hanging out with [Lopez] at that moment," to open the door to the building. (Tr. 59–60, 271–73). According to Martinez, Lopez pointed a gun to Hidalgo's head and threatened to shoot him unless he opened

the door. (Tr. 59–60, 160–64). Hidalgo complied. (*Id.*). Lopez and his entourage entered the vestibule where Martinez was sitting. (Tr. 60, 164). Martinez was too frightened to move. (Tr. 165, 355 [stipulation]). Lopez struck Martinez repeatedly with the gun. (Tr. 60–62, 168). Then Lopez, while pointing a gun at Martinez's head and threatening to kill him, demanded that Hidalgo open the second door leading into the interior hallway. (Tr. 62, 166). Once inside, Lopez and the other men began to march Martinez up the stairs toward Hidalgo's fourth floor apartment. (Tr. 63, 166). Martinez begged Lopez to stop as he repeatedly struck Martinez with the gun. (Tr. 64, 170). At the second floor, a woman opened her door, saw the group of men, and quickly shut it again. (Tr. 64–66). Lopez continued to beat Martinez until Hidalgo intervened and asked Lopez to stop because Martinez was severely hurt. (Tr. 66). Lopez obliged, telling Martinez, "You see, you saved yourself." (Tr. 67). As he descended the stairs, Lopez again threatened Martinez that he would kill him. (*Id.*).

***4** After Lopez and his crew left, Hidalgo took Martinez upstairs to clean off all the blood. (Tr. 67–68). When Martinez said that he would call the police, Hidalgo told him that if he did, he would have to move out of Hidalgo's apartment immediately. (Tr. 67). Despite Hidalgo's warning, Philbert called the police. (Tr. 69, 139). After the police arrived, Martinez explained what had happened, identified the perpetrators by name, and pointed out the window to a group of men on the street who were part of Lopez's crew, though neither he nor Collado were in sight. (Tr. 69–70, 139–41).

Martinez was then taken to the hospital in an ambulance. (Tr. 71). At the hospital, the neuroradiologist, Dr. Mirchandani, reviewed Martinez's radiology results and determined that Martinez's injuries were consistent with blunt force trauma. (Tr. 228). His left sinus had multiple fractures and was filled with blood, his nose was broken, and he had lacerations and severe swelling near his eyeball. (Tr. 224–30). Martinez received stitches on his face, forehead, and ear, and was released from the hospital after two-and-a-half days. (Tr. 74). Thereafter, he went to live with his aunt in the Bronx. (Tr. 33). Subsequently, Martinez was homeless for a period of time until he received monetary assistance from the District Attorney's office to rent an apartment. (Tr. 32–33, 138, 257). At the time of trial, Martinez still suffered from his injuries: his molar bled, he was missing a tooth, and he grew upset whenever he thought about the incident. (Tr. 77, 165).

b. Hidalgo's Testimony

Hidalgo also testified for the prosecution, though his testimony diverged from Martinez's in certain key respects that favored the defense. [2] Hidalgo had known Lopez for about 15 years since they met as children living on the same block, and the two men were close. (Tr. 185–86). They considered themselves brothers-in-law because Hidalgo was having a child with the sister of the mother of Lopez's child. (Tr. 185–86, 267). At first, Hidalgo claimed that he did not know what Lopez did for a living, but eventually admitted that he believed Lopez sold drugs. (Tr. 186, 285–86).

On the morning of October 18, 2008, Lopez's birthday, Hidalgo had gone to Lopez's apartment to get ready for his birthday party. (Tr. 189–90). Hidalgo was present when Lopez received a phone call that visibly upset him, and accompanied Lopez to the street where a man, whom Hidalgo said he did not know, approached Lopez to speak with him. (Tr. 191–95). Hidalgo then walked away toward his own building, because he tried to stay away from "stuff ... about the block, anything that has to do with fighting or anything."(Tr. 195). Hidalgo testified that he witnessed the assault, but claimed that both Lopez and Martinez exchanged blows, and Martinez hurt Lopez's left arm, which was in a cast. (Tr. 198–200, 268–69).

Hidalgo adamantly denied seeing Lopez with a gun that day, though he conceded that he opened the door to his building because he was afraid that Lopez would hit him. (Tr. 215–16, 271–72, 290). Hidalgo also denied that Lopez took Martinez's cell phone because he knew "as a fact" that Martinez had no cell phone. (Tr. 276–78). Hidalgo explained that he knew this because he had asked Martinez for his phone number in order to purchase marijuana from him and Martinez never provided one. (Tr. 277–79). Later in his testimony, however, Hidalgo admitted that he did not actually know whether or not Martinez had a cell phone and "maybe there was a phone." (Tr. 279).

c. Other Evidence

***5** Detective Taughran testified that he arrested Lopez on November 10, 2008. (Tr. 233–37). On January 20, 2009, corrections authorities recorded a telephone conversation between Lopez and Hidalgo pursuant to NYC DOC standard procedures. (Tr. 118–19, 213–14). The recording of the conversation was admitted into evidence and played before the jury. (Tr. 121–22, 124). During the call, Hidalgo agreed to talk with Lopez's lawyer because he wanted to help Lopez. (Tr. 214–15, 286). Lopez told Hidalgo "to make sure" to say

that Martinez "never owned a phone." *See* People's Ex. 1; Brief for Respondent ("Resp.Brief') at 13.[3] Lopez pointed out that if they could demonstrate that Martinez never had a phone, the prosecution would have "to knock" the robbery charges. *Id.*

Lopez further instructed Hidalgo to say that Martinez had swung at Lopez first, and that Lopez "had a cast on for a broken hand."People's Ex. 1; Resp. Brief at 13–14. Additionally, Lopez advised Hidalgo that "if worse c[a]me to worse" Hidalgo should say that the "toy" had belonged to Collado and that Lopez "never hit [Martinez] with the shit."(Tr. 265, 275). When asked at trial about the meanings of "toy" and "shit," Hidalgo, though initially equivocal, later acknowledged that both terms referred to a gun. (Tr. 266, 279, 282–83). Hidalgo further admitted at trial that "[i]f it came down to it," he was willing to lie for Lopez. (Tr. 275).

2. The Defense Case and Motion for Dismissal

Lopez presented no evidence at trial. (Tr. 323). At the end of the prosecution's case, Lopez moved for dismissal on all counts "on the grounds that the People have failed to establish a prima facie case."(Tr. 349). Lopez did not specify the deficiencies in the prosecution's case, relying solely on the record. (*Id.*). The court denied the motion as to all counts. (*Id.*).

3. Verdict and Sentencing

On October 27, 2009, the jury convicted Lopez on all counts while acquitting Collado on all counts. (Tr. 485–86). On November 24, 2009, Justice Stone sentenced Lopez *in absentia* as a predicate felon based on his 2002 conviction for criminal possession of a weapon in the third degree. (Sentencing Transcript ("S.") 6–7).[4] The court accepted the prosecutor's sentencing recommendations, which amounted to an aggregate prison term of 15 years. (S.7–8, 10–11).[5] The court observed that trial testimony had demonstrated the incident was an act "of a drug dealing king pin[ ] ... keeping his minions in line by terror."(*Id.*). The court initially sentenced Lopez to three years of post-release supervision; however, because the mandatory minimum for first-degree attempted assault and second-degree assault was five years of post-release supervision, the court resentenced Lopez to the five-year mandatory minimum term on September 16, 2010. (Resentencing Transcript 3, 7–8).

B. *Post–Conviction Proceedings*

1. Lopez's Direct Appeal

***6** Lopez, represented by counsel, filed a direct appeal of his conviction to the New York State Supreme Court, Appellate Division, First Department in December 2012. Brief for Defendant–Appellant ("Appellant's Brief"). Lopez raised two grounds for appeal:

> Appellant's second-degree robbery and first-degree burglary convictions must be set aside as against the weight of the evidence where the people did not establish that: a) a cell phone had been taken from the complainant; or b) assuming that a cell phone had been taken, that it had been taken with larcenous intent and not simply as an afterthought; and c) appellant's entry into [83 Post Avenue] was unlawful. U.S. Const., amend. XIV; N.Y. Const., art. I, § 6; C.P.L. § 470.15(5).
>
> Appellant's 15 year prison term is unduly harsh and excessive and should be reduced in the interest of justice.

Appellant's Brief at 26, 39. On May 16, 2013, the Appellate Division unanimously affirmed Lopez's conviction. *People v. Lopez,* 106 A.D.3d 533, 964 N.Y.S.2d 539 (1st Dep't 2013). The court rejected Lopez's argument that his robbery and burglary convictions were against the weight of the evidence. It concluded that there was "no basis for disturbing the jury's credibility determinations," finding that "[t]he evidence established that [Lopez] stole the victim's cell phone, that he did so by force rather than as an afterthought following an assault, and that he unlawfully entered the victim's apartment building by threatening an occupant."*Lopez,* 106 A.D.3d at 534. With respect to Lopez's second claim, the court perceived "no basis for reducing [Lopez's] sentence."*Lopez,* 106 A.D.3d at 534.

Lopez then sought leave for further review in the New York Court of Appeals of "all issues raised" in his brief to the Appellate Division, but on January 6, 2014, the Court of Appeals denied Lopez's application. *People v. Lopez,* 22 N.Y.3d 1089, 981 N.Y.S.2d 674 (2014).

2. The Instant Petition

On June 5, 2014, Lopez, proceeding *pro se,* filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, arguing that his convictions for first-degree burglary and second-degree robbery were both against the weight of the evidence and unsupported by legally sufficient evidence.

Petition for Writ of Habeas Corpus ("Pet.") (Dkt. No. 1). The petition was subsequently referred to the undersigned for a report and recommendation. Order of Reference (Dkt. No. 6). Respondent, the Superintendent of Five Points Correctional Facility, where Lopez is currently incarcerated, opposed the petition in papers filed on September 24, 2014. Answer; Resp. Mem. of Law in Opp'n to Pet. ("Resp.Mem.") (Dkt. No. 9). Lopez filed a Traverse on January 13, 2015. Traverse (Dkt. No. 21).

Lopez asserts two claims in his petition. First, just as he argued on direct appeal, Lopez contends that his robbery and burglary convictions were against the weight of the evidence. Pet. at 5–14. As to the robbery counts, Lopez argues that the prosecution failed to prove the existence of the cell phone that he allegedly stole from Martinez. Pet. at 7. As to the burglary counts, Lopez argues that the prosecution failed to establish that he entered 83 Post Avenue with the intent to commit a crime, or alternatively, even if it did, the prosecution failed to prove that he entered the building unlawfully. Pet. at 11–13. Second, Lopez challenges his robbery and burglary convictions on the grounds that there was legally insufficient evidence to sustain them, relying on the same factual arguments in support of his claim that these convictions were against the weight of the evidence. Pet. at 5–14.

II. *DISCUSSION*

A. *Lopez's Request for Discovery*

***7** On January 13, 2015, the Court received a motion from Lopez seeking discovery pursuant to Rule 6(a) of the Federal Rules Governing Section 2254 Proceedings. Petitioner's Discovery Motion ("Pet.'r's Mot.") (Dkt. No. 20). Lopez requests that Respondent produce:

(1) a tape of a 911 call made by Martinez's girlfriend, Felicia Philbert, after the crime took place; and (2) a complete transcript of Martinez's grand jury testimony. [6] Respondent opposed Lopez's motion by letter filed on January 20, 2015. (Dkt. No. 24).

1. Legal Standard for Discovery in Habeas Cases

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course."*Bracv v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Rather, Rule 6(a) of the Rules Governing Section 2254 Proceedings provides that a "judge may, for good cause, authorize a party to conduct discovery ..."28 U.S.C. § 2254, Rule 6(a). Good cause requires more than "[g]eneralized statements regarding the possible existence of discoverable material."*Pizzuti v. United States,* 809 F.Supp.2d 164, 176 (S.D.N.Y.2011) (citations omitted); *see also Gonzalez v. United States,* No. 12–CV–5226 (JSR)(JLC), 2013 WL 2350434, at *3 (S.D.N.Y. May 23, 2013), *reconsideration denied in part,*2013 WL 4453361 (S.D.N.Y. July 9, 2013); *Edwards v. Superintendent. Southport C.F.,* 991 F.Supp.2d 348, 364 (E.D.N.Y.2013) (citations omitted). Moreover, "Rule 6 does not license a petitioner to engage in a 'fishing expedition' by seeking documents 'merely to determine whether the requested items contain any grounds that might support his petition, and not because the documents actually advance his claims of error.' " *Gonzalez,* 2013 WL 2350434, at *3 (quoting *Pizzuti,* 809 F.Supp.2d at 176); *see also, e.g., Ruine v. Walsh,* No. 00–CV–3798 (RWS), 2005 WL 1668855, at *6 (S.D.N.Y. July 14, 2005) (quoting *Charles v. Artuz,* 21 F.Supp.2d 168, 169 (E.D.N.Y.1998). "A petitioner can meet his burden of showing 'good cause' for discovery only when 'specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief.' " *Gonzalez,* 2013 WL 2350434, at *3 (quoting *Bracy,* 520 U.S. at 908–09); *see also, e.g., Drake v. Portuondo,* 321 F.3d 338, 346 (2d Cir.2003); *Edwards.* 991 F.Supp. at 364 (citation omitted).

2. Lopez Cannot Demonstrate Good Cause for His Discovery Requests

a. The Recording of the 911 Call

Lopez requests that Respondent produce the recording of the 911 phone call Philbert made to the police after Lopez left 83 Post Avenue and Martinez and Hidalgo returned to Hidalgo's apartment. On May 29, 2014, Lopez made a Freedom of Information Law ("FOIL") request for the recording from the New York City Police Department, and his request was denied as was his subsequent appeal of the denial. *See* Pet.'r's Mot., Ex. A (Letter dated June 10, 2014, denying FOIL request) and Ex. B (Letter dated July 11, 2014, denying appeal of FOIL request denial). Lopez's FOIL request was denied on the grounds that disclosure of the information may endanger someone's safety or "constitute an unwarranted invasion of privacy."*See id.*In his discovery request, Lopez contends that the call would reveal that Philbert, who allegedly witnessed the entire incident, did not mention that a robbery occurred, which would bolster his claim that there was insufficient

evidence to sustain the second-degree robbery convictions. Pet.'r's Mot. ¶¶ 8–9.

***8** The Court concludes, however, that Lopez has not shown good cause for compelling the production of the 911 recording because his request is based entirely on speculation and relates to evidence that was neither admitted at trial nor crucial to impeach Martinez's testimony regarding the robbery. As Respondent observes, Lopez has not stated how he would have personal knowledge of the call, and specifically whether Philbert ever uttered the word "robbery." Respondent's Letter Opposing Petitioner's Discovery Motion ("Resp'f s Opp'n") at 2. Moreover, Philbert did not testify at trial, and there was no 911 call admitted into evidence. *Id.* At trial, Martinez testified that Philbert said she would call the police and that she had "watched everything from upstairs," (Tr. 55, 69), but defense counsel's objection to this testimony was sustained. Further, even if Philbert had been an eyewitness to the assault occurring outside 83 Post Avenue, she might not have seen the robbery, because Lopez "simply reached into [Martinez's] pocket and removed a cell phone," which was a minor event during the course of the assault on Martinez. Resp't's Opp'n at 2. Therefore, the production of the tape, assuming it still exists, could not lead to habeas relief.

b. The Transcript of Grand Jury Testimony

Lopez also seeks a complete transcript of Martinez's grand jury minutes. He currently has six pages of the transcript comprising an excerpt of Martinez's testimony, which he contends is rife with inconsistencies with his trial testimony, and thus "goes to the heart of the credibility of the victim."Pet.'r's Mot. ¶¶ 12–14, 16, 18. Lopez asserts that if he had the complete grand jury testimony, he would be able to ascertain "what else ... this victim (who was an illegal immigrant) told the Grand Jury so he would not be deported,"*id.* ¶ 19, which potentially might reveal additional discrepancies with Martinez's trial testimony, and thus "were necessary for cross examination purposes."*Id.* 12. Lopez notes a number of specific inconsistencies between Martinez's grand jury and trial testimony, including: the characterization of Lopez's entourage ("black guys" vs. "Dominican guys"); the legality of Martinez's line of work (*"illegal" vs. "legal"*); and what time of day Martinez began selling marijuana on October 18, 2008, the date of the incident ("9:00 a.m. vs. 11:00 a.m.").*Id* . ¶ 16.

These contentions do not demonstrate any grounds for habeas relief. Lopez's trial counsel had the opportunity to use, and did in fact use, Martinez's grand jury testimony to impeach him at trial. (*See* Tr. 246–47). Moreover, there is nothing in the record to demonstrate that Lopez's counsel did not have all of the grand jury testimony to which he was entitled, namely, the testimony of the witnesses who testified at trial. When evidence, such as that sought here by Lopez, is neither new nor was unavailable at the time of trial, courts routinely deny a habeas petitioner's motion to obtain discovery. *See, e.q., Gonzalez v. Bennett,* No. 00–CV–8401 (VM), 2001 WL 1537553, at *5 (S.D.N.Y. Nov.30, 2001) (denying petitioner's discovery motion seeking transcripts of witnesses' plea allocutions and various documents where trial counsel could have obtained transcripts and requested documents were already introduced into evidence at trial). In sum, Lopez has failed to demonstrate good cause for seeking a copy of Martinez's complete grand jury testimony (or any other witness's grand jury testimony, to the extent he is seeking it as well).

***9** For these reasons, Lopez's discovery motion should be denied.

B. ***Legal Standards for Habeas Corpus Relief Under Section 2254***

1. The Exhaustion Doctrine

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief unless the petitioner has first exhausted his claims in state court. *See*28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-(A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.); *id.* § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."); *O'Sullivan v. Boerckel,* 526 U.S. 838, 842, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) ("[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."). The exhaustion requirement is grounded in principles of comity and federalism. *O'Sullivan,* 526 U.S. at 844 ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first

opportunity to review this claim and provide any necessary relief.") (citations omitted).

Exhaustion "requires that the prisoner 'fairly present' his constitutional claim to the state courts, which he accomplishes 'by presenting the essential factual and legal premises of his federal constitutional claim to the highest state court capable of reviewing it.' " *Jackson v. Conway,* 763 F.3d 115, 133 (2d Cir.2014) (quoting *Rosa v. McCray,* 396 F.3d 210, 217 (2d Cir.2005)). "While 'a state prisoner is not required to cite chapter and verse of the Constitution in order to satisfy this requirement,' he must tender his claim 'in terms that are likely to alert the state courts to the claim's federal nature.' " *Jackson,* 763 F.3d at 133 (quoting *Carvajal v. Artus,* 633 F.3d 95, 104 (2d Cir.2011)). A petitioner may sufficiently alert the state court to the nature of his constitutional claim by citing to a specific constitutional provision. *Ramirez v. Attorney Gen. of New York,* 280 F.3d 87, 94–95 (2d Cir.2001). However, a petitioner may not merely "make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Gray v. Netherland,* 518 U.S. 152, 163, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (holding that a general appeal to a "broad federal due process right" was insufficient to meet the exhaustion requirement without a "more particular analysis" of the specific claim based on the relevant constitutional case law); *see also Smith v. Duncan,* 411 F.3d 340, 349 (2d Cir.2005) ("The greatest difficulty arises when in the state court the petitioner has described his claim in very broad terms, such as denial of a 'fair trial.' ") (quoting *Dave v. Attorney Gen. of State of New York,* 696 F.2d 186, 192 (2d Cir.1982)).

***10** A petitioner may also fairly present his claim to a state court by: "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, [or] (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation."*Carvaial,* 633 F.3d at 104 (quoting *Dave,* 696 F.2d at 194). In this analysis, the critical question is whether the legal doctrines asserted in the state and federal courts are substantially the same, such that the state courts would have been on notice of the constitutional nature of the claim, even if it was argued primarily on state law grounds. *Smith,* 411 F.3d at 349–50; *Dave,* 696 F.2d at 192. A federal claim is not fairly presented for purposes of habeas exhaustion when the state-law claim raised in state court is "no more than somewhat similar" to a claim for relief grounded in federal law. *Smith,* 411 F.3d at 350 (quoting *Duncan v. Henry,* 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam)) (internal quotation marks omitted).

2. Procedural Bar to Claims Deemed Exhausted

Under the doctrine of procedural default, a federal court will not review the merits of claims that a state court declined to hear because the prisoner failed to abide by a state procedural rule. *See, e.g., Martinez v. Ryan,* ––– U.S. ––––, ––––, 132 S.Ct. 1309, 1316, 182 L.Ed.2d 272 (2012) (citing Coleman, 501 U.S. at 747–48). When a state prisoner has failed to raise a particular claim to the state court and would be precluded from raising it now because of a state procedural rule, the claim is deemed to be procedurally defaulted. *Coleman,* 501 U.S. at 732. The claim meets the technical requirements for exhaustion because there are no state remedies any longer "available" to the prisoner. *Id.* (citing 28 U.S.C. § 2254(b)) (additional citations omitted). However, a federal court may not reach the claim's merits "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice."*Id.* at 750; *see also Murray v. Carrier,* 477 U.S. 478, 492, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Smith,* 411 F.3d at 347; *Ramirez,* 280 F.3d 87, 94 (2d Cir.2001).

To demonstrate cause for the procedural default, the petitioner ordinarily must point to some external impediment preventing his appellate counsel from constructing or raising the claim, and "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default ... on appeal ..."*Murray,* 477 U.S. at 492. A fundamental miscarriage of justice is "an extraordinary case where a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Id.* at 496." '[A]ctual innocence' means factual innocence, not mere legal insufficiency."*Dunham v. Travis,* 313 F.3d 724, 730 (2d Cir.2002) (quoting *Bousley v. United States,* 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (other internal quotation marks omitted); *see also Sawyer v. Whitley,* 505 U.S. 333, 339, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

3. AEDPA's Deferential Standard of Review

***11** When a petitioner raises a claim that was "adjudicated on the merits in State court proceedings," habeas relief may be granted only where the state court's decision was "contrary

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to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or ... was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."28 U.S.C. § 2254(d)(1)-(2); *see also Parker v. Matthews,* —— U.S. ——, ——, 132 S.Ct. 2148, 2151, 183 L.Ed.2d 32 (2012). Federal habeas corpus relief is available only for a violation of the Constitution or federal law; it "does not lie for errors of state law."*Swarthout v. Cooke,* 562 U.S. 216, 131 S.Ct. 859, 861, 178 L.Ed.2d 732 (2011) (internal quotation marks omitted); *see also, e.g., Mannix v. Phillips,* 619 F.3d 187, 199 (2d Cir.2010) (["[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") (internal quotation marks and citation omitted).

In reviewing a petitioner's claims, a federal habeas court presumes that the state court's determinations of fact were correct, placing on the petitioner the burden of "rebutting the presumption of correctness by clear and convincing evidence."28 U.S.C. § 2254(e)(1); *see also Schriro v. Landrigan,* 550 U.S. 465, 473–74, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). In order for a state court to make an "unreasonable determination of the facts," it must be shown that "reasonable minds could not disagree that the [state] court misapprehended or misstated material aspects of the record in making its finding."*Cardoza v. Rock,* 731 F.3d 169, 178 (2d Cir.2013) (citing *Wiggins v. Smith,* 539 U.S. 510, 528, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). A factual determination is not unreasonable simply because " 'the federal habeas court would have reached a different conclusion in the first instance.' " *Burt v. Titlow,* ——U.S. ——, ——, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013) (quoting *Wood v. Allen,* 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)).

Habeas corpus review by a federal court is a "guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal."*Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011) (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring)) (internal quotation marks omitted). AEDPA thus "imposes a highly deferential standard for evaluating state-court rulings and demands that statecourt decisions be given the benefit of the doubt."*Jones v. Murphy,* 694 F.3d 225, 234 (2d Cir.2012) (quoting *Hardy v. Cross,* —— U.S. ——, ——, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011)) (internal quotation marks omitted).

4. Petitioner's *Pro Se* Status

Lopez bears the burden to establish, by a preponderance of evidence, that his constitutional rights have been violated. *Hawkins v. Costello,* 460 F.3d 238, 246 (2d Cir.2006); *see also Bonner v. Ercole,* 409 F. App'x 437, 438 (2d Cir.2010). However, because he is proceeding *pro se,* Lopez's submissions are held to "less stringent standards than formal pleadings drafted by lawyers."*Ahlers v. Rabinowitz,* 684 F.3d 53, 60 (2d Cir.2012) (quoting *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)). The Court will liberally construe the petition and interpret it "to raise the strongest arguments that [it] suggest[s]."*See, e.g., Kirkland v. Cablevision Sys.,* 760 F.3d 223, 224 (2d Cir.2014) (quoting *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994)).*Pro se* status, however, "does not exempt a party from compliance with relevant rules of procedural and substantive law."*Traguth v. Zuck,* 710 F.2d 90, 95 (2d Cir.1983) (internal quotations omitted).

C. *Analysis of Lopez's Habeas Claims*

***12** Respondent acknowledges that Lopez's petition is timely, having been filed less than one year after the date his conviction became final. Resp. Mem. at 9. Respondent argues, however, that Lopez may not obtain habeas relief on the two claims he advances because: (1) Lopez's weight of the evidence claim, though exhausted, is not cognizable on habeas review; and (2) Lopez has not exhausted his insufficiency of the evidence claim, having never raised it in state court; or, alternatively, (3) even if the sufficiency claim is deemed exhausted, it fails on the merits. *Id.* at 2. Each of these arguments will be considered in turn.

1. Lopez's Weight of the Evidence Claim Is Not Cognizable on Habeas Review

Lopez contends that his burglary and robbery convictions were against the weight of the evidence because certain elements of each crime were established only through Martinez's testimony, which lacked credibility and was contradicted in key respects by Flidalgo's testimony. Pet. at 5, 7–13. As a preliminary matter, Respondent concedes that Lopez has exhausted state court remedies as to his claims that his first-degree burglary and second-degree robbery convictions are against the weight of the evidence. Resp. Mem. at 10. Nevertheless, Respondent correctly argues that the Court cannot reach the merits of Lopez's weight of the evidence claim because it is grounded exclusively in state

law. *Id.* at 12–13. Indeed, in his Traverse, Lopez does not contest this conclusion.

It is well-established that a weight of the evidence claim is exclusively a matter of state law and therefore presents no federal question reviewable by a federal habeas court. *See, e.g., McKinnon v. Superintendent, Great Meadow Corr. Facility,* 422 F. App'x 69, 75 (2d Cir.2011) ("[T]he argument that a verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus."); *Wilkerson v. Stallone,* No. 13–CV–3817 (GHW) (GWG), 2014 WL 4629671, at *21 (S.D .N.Y. Sept. 17, 2014) (petitioner's weight of the evidence claim not cognizable on habeas review), *report and recommendation adopted,*2015 WL 678581 (S.D.N.Y. Feb.17, 2015); *Howie v. Phillips,* No. 03–CV–9757 (RWS), 2004 WL 2073276, at *3 (S.D.N.Y. Sept.17, 2004) ("Unlike New York State appellate courts, the federal courts may not independently weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony.") (internal quotation marks and citation omitted).

Lopez's specific arguments attacking Martinez's credibility are likewise unreviewable. *See* Pet. at 9–10. Credibility determinations are the exclusive province of the jury and are beyond the scope of habeas review. *See, e.g., Maldonado v. Scully,* 86 F.3d 32, 35 (2d Cir.1996) ("[A]ssessments of the weight of the evidence or the credibility of witnesses are for the jury and not grounds for reversal on appeal."); *Alexis v. Griffin,* No. 11CV–5010 (DLC)(FM), 2014 WL 3545583, at *20 (S.D.N.Y. July 18, 2014) (habeas court must defer to jury's assessments regarding weight of the evidence and credibility) (quoting *Frazier v. New York,* 187 F.Supp.2d 102, 109 (S.D.N.Y.2002)), *report and recommendation adopted,*2014 WL 5324320 (S.D.N.Y. Oct.20, 2014). Accordingly, Lopez's arguments regarding the weight of the evidence and the credibility of the prosecution's witnesses fail to articulate a basis for habeas relief.

2. Lopez Did Not Adequately Exhaust his Insufficiency of the Evidence Claim

***13** Lopez's second contention is that the evidence presented at trial was legally insufficient to establish his guilt of second-degree robbery and first-degree burglary. Specifically, Lopez asserts that Martinez's unreliable and uncorroborated testimony, which Hidalgo contested, was insufficient to prove: (1) the existence of the cellphone Lopez allegedly stole; (2) that Lopez entered 83 Post Avenue with the intent to commit a crime; or, in the alternative, (3) that Lopez entered 83 Post Avenue unlawfully (by brandishing a gun and coercing Hidalgo to open the entrance door to the building). Pet. at 5–13. Respondent contends that Lopez failed to adequately exhaust this claim because he did not raise it in state court, and, therefore, the claim is procedurally defaulted. Resp. Mem. at 13. Respondent argues further that because the claim is procedurally defaulted and because Lopez has shown neither cause for nor prejudice from the failure to raise the claim, nor that he is actually innocent, it is not reviewable. *Id.* In his Traverse, Lopez responds to Respondent's argument by claiming that he exhausted his insufficiency of the evidence claim simply by raising a state-law weight of the evidence claim on direct appeal even if, as Lopez admits, he never challenged the evidence's legal sufficiency specifically. Traverse at 7–9. For the following reasons, I agree with Respondent. [7]

a. Lopez Did Not Fairly Present his Sufficiency Claim to the State Courts

Lopez's brief to the Appellate Division only argued that his convictions for seconddegree robbery and first-degree burglary were against the weight of the evidence, not that the evidence was legally insufficient. *See* Appellant's Brief at 26. In support of his claim, Lopez exclusively cited New York State legal authority regarding the reversal of jury verdicts that are against the weight of the evidence. In fact, Lopez essentially conceded that the evidence was legally sufficient to establish guilt, arguing that reversal was warranted "even if the evidence is legally sufficient from a technical standpoint," and "even if all elements and necessary findings are supported by some credible evidence."Appellant's Brief at 28; *see also* Resp. Brief at 16 ("On appeal, defendant does not ... dispute that the jury's verdict for all of the charges was supported by legally sufficient evidence."). [8] Having disclaimed any challenge to the sufficiency of the evidence in his state court appeals, Lopez cannot now raise the argument for the first time in federal court. *See, e.g., Galdamez v. Keane,* 394 F.3d 68, 73–74 (2d Cir.2005) ("A petitioner may not evade exhaustion's strictures by defaulting his or her federal claims in state court.") (citing Coleman, 501 U.S. at 732).

An analysis of his specific contentions on direct appeal demonstrates that Lopez sought reversal of his robbery and burglary convictions solely on weight of the evidence grounds and not based on the evidence's legal insufficiency. The thrust of Lopez's claim was that the jury improperly weighed the testimonial evidence and made the wrong credibility determinations about the prosecution's chief

witnesses, Martinez and Hidalgo. Conceding that Martinez's testimony regarding the existence of the cell phone and Lopez's forceful entry into 83 Post Avenue would meet a legal sufficiency threshold, see Appellant's Brief at 26, 28, Lopez nevertheless argued that the Appellate Division should reweigh the evidence because Martinez's uncorroborated testimony "was neither credible nor reliable," while Hidalgo, whose testimony contradicted Martinez's, "was the more credible witness." *Id.* at 26, 31, 36.

***14** In advancing these arguments, Lopez "did not invoke 'pertinent federal cases employing constitutional analysis,' nor did he seek support for his contention from 'state cases employing constitutional analysis in like fact situations.' " *Carvaial,* 633 F.3d at 107 (quoting *Dave,* 696 F.2d at 194); *see also* *Baldwin v. Reese,* 541 U.S. 27, 33, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004); *Duncan,* 513 U.S. at 366. Lopez's only allusion to federal law is three string citations to the Fourteenth Amendment, *see* Appellant's Brief at 3, 26, 27, which is, at best, a vague appeal to a broad constitutional guarantee that fails to identify a specific constitutional error. Gray, 518 U.S. at 163 (petitioner may not merely "make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court"); *Brown v. Conway,* No. 08–CV–1780 (MKB), 2012 WL 2872150, at *3 (E.D.N.Y. July 11, 2012) (same).

Therefore, as Lopez correctly observes, the key inquiry is whether his weight of the evidence claim under New York law can, standing alone, serve as a proxy for presenting a constitutional sufficiency claim to the state court. *See* Pet. Reply at 7 ("[T]he exhaustion question [asks] whether the claim had been fairly presented to the state courts, not whether [petitioner] had attached the correct label.") (quoting *Duncan,* 513 U.S. at 372) (Stevens, J., dissenting)); *Smith,* 411 F.3d at 349. The short answer is that it cannot. These two claims are, in the words of *Duncan,* "no more than somewhat similar" rather than "virtually identical," as would be required for the former claim to fairly present the latter. 513 U.S. at 366 (holding that petitioner's claim concerning evidentiary error under state law was not sufficiently similar to federal due process claim in order for that claim to be exhausted)."In developing and refining the 'fairly presented' standard, the Supreme Court has concentrated on the degree of similarity between the claims that a petitioner presented to the state and federal courts."*Smith,* 411 F.3d at 349 (quoting *Jackson v. Edwards,* 404 F.3d 612, 619 (2d Cir.2005)) (other internal quotation marks omitted) (petitioner failed to exhaust constitutional claim where "the state and federal issues are not so similar that the constitutional claim was fairly presented to the state court").

An argument that the jury's verdict is against the weight of the evidence is grounded in New York Criminal Procedure Law ("CPL") § 470.15(5), which permits the intermediate appellate court to reverse or modify a conviction when it determines on independent review of the facts that the verdict "was, in whole or in part, against the weight of the evidence."Unlike a claim challenging the sufficiency of the evidence, which may be based upon both state and federal due process principles, a weight of the evidence claim is a pure state-law claim that involves a different standard of review. *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 (1987). As the *Bleakley* court explained:

> ***15** Although the two standards of intermediate appellate review-legal sufficiency and weight of evidence-are related, each requires a discrete analysis. For a court to conclude ... that a jury verdict is supported by sufficient evidence, the court must determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial ... and as a matter of law satisfy the proof and burden requirements for every element of the crime charged. If that is satisfied, then the verdict will be upheld by the intermediate appellate court on that review basis.
>
> To determine whether a verdict is supported by the weight of the evidence, however, the appellate court's dispositive analysis is not limited to that legal test. Even if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further. If based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony ... If it appears that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict.

Id.; see also *Parker v. Ercole,* 666 F.3d 830, 833 (2d Cir.2012) ("Under New York law, a weight of the evidence claim requires more exacting review than an insufficiency claim, because it entails a weighing of the evidence and an assessment of the credibility of the State's witnesses.") (citing *Bleakley,* 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672); *Douglas v. Portuondo,* 232 F.Supp.2d

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106, 116 (S.D.N.Y.2002) (sufficiency of the evidence claim cognizable under federal due process principles whereas New York weight of the evidence claim has no corollary in federal law).

The difference in standards is more than semantic; it can be outcome-dispositive. *See, e.g., People v. Zephyrin,* 52 A.D.3d 543, 544, 860 N.Y.S.2d 149 (2d Dep't 2008) (finding complainant's testimony legally sufficient evidence to establish defendant's guilt but reversing conviction as against the weight of the evidence because testimony lacked credibility and was contradicted by testimony of police officers at scene of incident); *People v. Roman,* 217 A.D.2d 431, 431, 629 N.Y.S.2d 744 (1st Dep't 1995) ("[W]e do not reverse based on the legal insufficiency of the evidence adduced at trial to establish his guilt of the crime of criminal possession of stolen property.... Rather, we reverse because we find merit in appellant's contention that the verdict should be set aside because it was against the weight of the evidence (CPL 470.15[5]).").

The Appellate Division construed Lopez's brief to raise only the claim that his robbery and burglary convictions were against the weight of the evidence under New York law and rejected his appeal on those grounds without any mention of the evidence's sufficiency. New York state courts "ha[ve] no duty to 'look for a needle in a paper haystack' " nor construe a federal claim in a brief that explicitly disclaims reliance on one. *Smith,* 411 F.3d at 345 (quoting *Galdamez v. Keane,* 394 F.3d 68, 74 (2d Cir.2005)). Moreover, as discussed *supra,* had the court deemed Lopez to raise a sufficiency claim, it would have found it to be unpreserved because Lopez's counsel did not properly specify the deficiencies in the evidence at trial as is required under C.P.L. § 470.05(2).

***16** Accordingly, because Lopez did not fairly present his constitutional insufficiency of the evidence claim to the state courts, it is not exhausted for purposes of AEDPA.

The Court is aware that some federal courts have reached the opposite conclusion: that presenting a weight of the evidence claim without more also raises an insufficiency of the evidence claim for purposes of habeas exhaustion. Lopez cited to some of these decisions in his Traverse. *See* Traverse at 8–9, citing *Liberia v. Kelly,* 839 F.2d 77, 80 n. 1 (2d Cir.1988) (finding respondent's exhaustion argument "frivolous" on similar facts because "New York courts, when reviewing the evidence in support of a criminal conviction, have consistently adhered to a standard that is virtually identical to the standard set forth in *Jackson v. Virginia"*) and *Wilson v. Heath,* 938 F.Supp.2d 278, 290 (N.D.N.Y.2013) (addressing merits of sufficiency claim in abundance of caution because "the Second Circuit [in *Liberta*] has suggested that a petitioner who raises a state law weight of the evidence claim on direct appeal has exhausted a constitutional sufficiency of the evidence claim for federal habeas purposes"); *see also, e.g., Williams v. Lavalley,* No. 9:12–CV–01141–JKS, 2014 WL 1572890, at *1 (N.D.N.Y. Apr.17, 2014) (same); *Martin v. Brown,* No. 08–CV–0316 (JFB), 2010 WL 1740432, at *7–8 (E.D.N.Y. Apr.29, 2010) (same); *Davis v. Senkowski,* No. 97–CV–2328 (JG), 1998 WL 812653, at *6 n. 3 (E.D.N.Y. Aug.6, 1998) ("Federal courts appear to use these terms ['weight of the evidence' and 'sufficiency of the evidence'] interchangeably. New York courts, when reviewing the weight or sufficiency of the evidence in support of a criminal conviction, adhere to a standard that is virtually identical to the one given in *Jackson,* 443 U.S. at 319.").

However, notwithstanding the footnote in *Liberia,* more recent cases that have analyzed the nature of "weight" and "sufficiency" claims in greater detail have come to the same conclusion as this Court: a weight claim cannot stand in for a constitutional sufficiency claim when considering whether a habeas petitioner has exhausted state court remedies because the two claims are no more than somewhat similar. *See, e.g., Martin v. Brown,* No. 08–CV–0316 (JFB), 2010 WL 1740432, at *7–8 n. 4 (E.D.N.Y. Apr.29, 2010); *Thomas v. Fischer,* No. 05–CV–3010 (DLC), 2007 WL 1988273, at *2–4 (S.D.N.Y. July 6, 2007); *Peralta v. Bintz,* No. 00–CV–8935 (HB)(GWG), 2001 WL 800071, at *5 (S.D.N.Y. July 16, 2001), *report and recommendation adopted,*2001 U.S. Dist. LEXIS 25963 (S.D.N.Y. Nov. 30, 2001).

Furthermore, the Second Circuit has not reaffirmed the identity of weight and sufficiency claims since its *Liberia* footnote. But to the extent the law remains unclear on this point and in an abundance of caution, this Court will address the merits of Lopez's sufficiency claim below. [9]

3. The State Court's Finding That There Was Sufficient Evidence to Establish Lopez's Guilt of Second–Degree Robbery and First–Degree Burglary Was Not Objectively Unreasonable

***17** Assuming the Court construes Lopez's sufficiency claim as exhausted and not procedurally barred, it nonetheless provides no avenue for habeas relief. As an initial matter,

to the extent the Appellate Division decided that Lopez's robbery and burglary convictions were not against the weight of the evidence, it necessarily decided that there was sufficient evidence to support the verdict. *See Parker,* 666 F.3d at 833; *Bleakley,* 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 (Appellate Division must first find that "all the elements and necessary findings are supported by some credible evidence" before reexamining the credibility of witnesses and relative weight of conflicting testimony and inferences that may be drawn from it); *People v. Romero,* 7 N.Y.3d 633, 643, 826 N.Y.S.2d 163, 859 N.E.2d 902 (2006) (same).

The Due Process Clause of the Fourteenth Amendment requires that a criminal conviction be based on "proof beyond a reasonable doubt of every fact necessary to constitute the crime [with] which [the defendant] is charged."*Einaugler v. Supreme Court of the State of New York,* 109 F.3d 836, 839 (2d Cir.1997) (quoting *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). A habeas petitioner challenging the sufficiency of the evidence to support a state-court conviction "bears a very heavy burden," *Ponnapula v. Spitzer,* 297 F.3d 172, 179 (2d Cir.2002) (citation omitted), because the AEDPA establishes a "twice-deferential" standard of review.*Santone v. Fischer,* 689 F.3d 138, 148 (2d Cir.2012) (quoting *Parker v. Matthews,* ––– U.S. ––––, ––––, 132 S.Ct. 2148, 2152, 183 L.Ed.2d 32 (2012) (per curiam)). First, a state court must uphold a jury's guilty verdict so long as "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."*Jackson.* 443 U.S. at 318–19 (emphasis in original); *see also, e.g., Santone,* 689 F.3d at 148; *United States v. Rosa,* 11 F.3d 315, 337 (2d Cir.1993) (citing cases). Thereafter, a federal court in a habeas proceeding may not overturn the "state-court decision rejecting a sufficiency challenge ... unless the 'decision was objectively unreasonable.' " *Matthews,* 132 S.Ct. at 2152 (quoting *Cavazos v. Smith,* ––– U.S. ––––, ––––, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) (per curiam)) (other internal quotation marks omitted).

The evidence in the record must be reviewed as a whole, and "guilt beyond a reasonable doubt may be established entirely by circumstantial evidence."*Maldonado,* 86 F.3d at 35. It is well-established that credibility determinations are to be made by the jury and are not reviewable by a federal habeas court. *See, e .g., Matthews,* 132 S.Ct. at 2152; *Maldonado,* 86 F.3d at 35; *Coble.*2013 WL 5323733, at *13. Thus, where there are conflicts in testimony, the court defers "to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence."*United States v. Best,* 219 F.3d 192, 200 (2d Cir.2000) (quoting *United States v. Morrison,* 153 F.3d 34, 49 (2d Cir.1998)) (internal quotation marks omitted); *see also, e.g., Schlup v. Delo,* 513 U.S. 298, 330, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) ("The *Jackson* standard ... looks to whether there is sufficient evidence which, *if credited,* could support the conviction.") (emphasis added); *Santone,* 689 F.3d at 148 (*"Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors draw reasonable inferences from basic facts to ultimate facts[.]") (quoting *Coleman v. Johnson,* ––– U.S. ––––, ––––, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012) (per curiam)).

***18** Under *Jackson,*"federal courts must look to state law for the substantive elements of the criminal offense."*Johnson,* 132 S.Ct. at 2064 (quoting *Jackson,* 443 U.S. at 324, n. 16). To establish Lopez's guilt of robbery in the second degree, the prosecution had to prove that Lopez, with the aid of another person actually present, forcibly stole Martinez's cell phone.N.Y. Penal Law § 160.10(1). Lopez contends that the prosecution failed to prove that Martinez owned a cell phone because it offered no physical evidence of ownership, such as a store receipt or phone company record, Pet. at 8, 10, and the only evidence it did offer-Martinez's testimony-lacked credibility, given Martinez's background as an illegal immigrant and drug dealer, and his motive to provide favorable testimony to the prosecution. Pet. at 9–10. Moreover, Lopez argues that Martinez's testimony was contradicted by Hidalgo, who testified at one point that Martinez did not own a cell phone and that "a cell phone was never involved" in the incident. *Id.*

Despite Lopez's arguments, the Appellate Division's finding that Lopez "stole Martinez's cell phone ... by force rather than as an afterthought following an assault,"106 A.D.3d at 534, has ample support in the record. Martinez testified that he had purchased the cell phone from Radio Shack for $43, and that during the assault outside his building, Lopez took the cell phone from his pocket. (Tr. 50–51). Although Lopez objects that there was no direct evidence of Martinez's ownership of the cell phone, Pet. at 8, a conviction may be based on testimonial or circumstantial evidence alone. *See, e.g., Dixon v. Miller,* 293 F.3d 74, 81 (2d Cir.2002); *Maldonado,* 86 F.3d at 35; *Bossett v. Walker,* 41 F.3d 825, 830 (2d Cir.1994). Lopez argues that Martinez's testimony cannot not be trusted

because he "had plenty of reason[s] to frame" Lopez, and "other evidence ... existed to support that Martinez did not possess a cell phone," namely, Hidalgo's testimony. Pet. at 8–10; (Tr. 276). Hidalgo, in any event, later admitted that he did not know with certainty whether Martinez owned a phone. (Tr. 279). Additionally, the prosecution presented evidence of a phone call recorded by the NYC DOC in which Lopez coached Hidalgo to assert that Martinez never had a phone so that Lopez could avoid a robbery conviction. *See* People's Ex. 1; Resp. Brief at 13.

Considering the evidence as a whole and crediting all inferences in the prosecution's favor, *Jackson,* 443 U.S. at 318–19; *Maldonado,* 86 F.3d at 35, a rational jury could have believed Martinez's testimony instead of Hidalgo's contrary claim that Martinez did not own a cell phone. The Court must defer to the jury's resolution of conflicting testimony and its determinations as to whose testimony was more credible. *United States v. Miller,* 626 F.3d 682, 691 (2d Cir.2010); *Best,* 219 F.3d at 200. Lopez does not contest the prosecution's proof of any other element of the crime. Therefore, Lopez has not demonstrated that the state court's finding that there was sufficient evidence to establish his guilt of second-degree robbery was objectively unreasonable.*Matthews,* 132 S.Ct. at 2152; *Santone.* 689 F.3d at 14.

***19** Next, with respect to Lopez's convictions of two counts of burglary in the first degree, the prosecution had to establish that Lopez knowingly entered or unlawfully remained in 83 Post Avenue (the "dwelling") with the intent to commit a crime therein, and that, when effecting entry or while in the dwelling, he caused physical injury to Martinez, who was not a participant in the crime. N.Y. Penal Law § 140.30.

Lopez's claim that the prosecution failed to prove that he entered 83 Post Avenue with the "intent to commit a crime," Pet. at 12–13, is contradicted by substantial evidence. Lopez is not challenging his assault-related convictions here nor did he do so in his direct appeal; therefore, Lopez admits that he physically assaulted Martinez both on the street in front of 83 Post Avenue and inside the building. At trial, Martinez testified that he entered the building to escape the severe beating that Lopez was inflicting on him at the time. (Tr. 51, 54–55, 143–45). Martinez testified that, from inside the building, he heard Lopez threaten to kill him and his girlfriend once he got the gun and to "take all the money that was upstairs in the apartment."(Tr. 54–55, 57, 163). Lopez then ordered Hidalgo to let him into the building and violently beat and pistol-whipped Martinez until Hidalgo intervened. (Tr. 66–67, 164–66).

Martinez's testimony alone is sufficient to support Lopez's convictions.*United States v. Danzey,* 594 F.2d 905, 916 (2d Cir.1979) ("[T]he testimony of a single, uncorroborated eyewitness is generally sufficient to support a conviction."); *Quintana v. Lee,* No. 12–CV–3204 (PGG)(FM), 2014 WL 6749207, at *6 (S.D.N.Y. Nov. 18, 2014), *report and recommendation* (same); *Coble,*2013 WL 5323733, at *12 (same)."Intent can be inferred from the circumstances of the forcible entry and from testimony that, immediately after entering, [Lopez] assaulted [Martinez]."*Serrata v. Fischer,* No. 13–CV–2632 (LGS), 2013 WL 5708599, at *10 (S.D.N.Y. Oct.21, 2013) (citing *People v. Sterina,* 108 A.D.3d 1088, 1090, 968 N.Y.S.2d 296 (4th Dep't 2013)). Based on Martinez's testimony, the jury could and did rationally infer that Lopez intended to commit assault once inside the building, and it was not objectively unreasonable for the Appellate Division to refrain from disturbing the jury's factual findings.

In the alternative, Lopez argues that the prosecution failed to establish that he entered the building "unlawfully." Pet. at 12. "A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so."N.Y. Penal Law § 140.00. Lopez argues that he "merely told Hidalgo to open the door" and that Hidalgo denied on several occasions that Lopez ever threatened him with a gun. Pet. at 12–13. Martinez, on the other hand, testified that Lopez pointed a gun to Hidalgo's head and threatened to shoot him if he did not open the door. (Tr. 5960, 160–64). Even Hidalgo testified that he opened the door because he was afraid that Lopez would hit him. (Tr. 271–72, 290–91). Furthermore, although Hidalgo denied seeing Lopez with a gun that day, he admitted that during the phone conversation recorded by NYC DOC, Lopez instructed Hidalgo to say that the gun, referred to as a "toy," belonged to Collado and that Lopez never hit Martinez with it. (Tr. 266, 279, 282–83).

***20** Thus, not only did the prosecution offer Martinez's testimony, which would be sufficient in and of itself, but also additional corroborating evidence to prove that Lopez did not have permission to enter 83 Post Avenue but did so through coercion and force. This evidence is more than sufficient to prove the "unlawful entry" element of first-degree burglary. *See, e.g., Faison v. McKinney,* No. 07–CV–8561 (JGK), 2009 WL 4729931, at *5 (S.D.N.Y. Dec.10, 2009) (eyewitness testimony that petitioner forcefully entered

apartment to assault occupant sufficient to support first-degree burglary conviction notwithstanding petitioner's claim that he was invited into the apartment); *Serrata,* 2013 WL 5708599, at *7–8 (same). And to the extent Lopez is relying on conflicts between Martinez's and Hidalgo's testimony, the Court again notes that it must defer to the jury's resolution of conflicting evidence and its credibility determinations. The record thus contains sufficient evidence to support the jury's verdict of guilt as to the first-degree robbery counts and the state court's decision upholding the verdict was not objectively unreasonable.

Accordingly, Lopez's insufficiency of the evidence claim as to both his second-degree robbery and first-degree burglary convictions should be denied on the merits as well.

III. *CONCLUSION*

For the foregoing reasons, I recommend that Lopez's motion for discovery and his petition for a writ of habeas corpus be denied.

PROCEDURE FOR FILING OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also*Fed.R.Civ.P. 6. Such objections, and any responses to such objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Richard J. Sullivan, and to the chambers of the undersigned, United States Courthouse, 500 Pearl Street, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Sullivan. **FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.***See* *Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.,* 596 F.3d 84, 92 (2d Cir.2010); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72.

All Citations

Slip Copy, 2015 WL 1300030

Footnotes

1 The transcript of the proceedings in Lopez's criminal case, running from jury selection through sentencing, is docketed on ECF as Document number 10. The transcript is divided into four separately paginated subparts representing each proceeding. All citations to the trial proceedings are designated as "Tr."

2 Hidalgo initially invoked the Fifth Amendment in response to questions from the prosecutor, but testified once he was granted immunity from future proceedings arising out of his testimony in this case. (Tr. 173–74, 178–80).

3 Lopez's and the District Attorney's briefs to the Appellate Division comprise part of the State Court Record, which was filed with Respondent's Opposition to the Petition. The State Court Record additionally contains: the order of the Appellate Division affirming Lopez's convictions; Lopez's application seeking leave to appeal to the Court of Appeals; the District Attorney's opposition to his application; and the Court of Appeals' certificate denying leave. (Dkt. No. 11).

4 Lopez did not appear in court on the day of his sentencing and he was also absent for all but the first day of trial, despite the judge's issuance of a warrant for his arrest. (Tr. 413; S. 2–3).

5 Specifically, the court sentenced Lopez to: (1) four determinate prison terms of 15 years to be followed by five years of post-release supervision on the burglary and robbery counts; (2) two determinate prison terms of five years followed by five years of post-release supervision on the attempted first—and second-degree assault counts; and (3) an indeterminate prison term of two to four years on the second-degree assault count, with all sentences to run concurrently.

6 In his motion, Lopez state that he seeks the "missing grand jury transcripts as testified to by the victim," Pet.'r's Mot. at 3, but in his conclusion says that he requests "the full and complete grand jury transcripts."*Id.* at 14.

7 Had Lopez presented an insufficiency of the evidence claim to the Appellate Division, it would have found the argument unpreserved. In his Traverse, Lopez asserts that he preserved this claim "nunc pro tunc" by asking the Appellate Division to reweigh the evidence because "that step is performed ... irrespective of whether defendant preserved the sufficiency claim at trial."Traverse at 8 (citing *People v. Danielson,* 9 N.Y.3d 342, 348–49, 849 N.Y.S.2d 480, 880 N.E.2d 1 (2007)). Lopez misunderstands the preservation standards under New York law. It is true that the Appellate Division may exercise its unique authority to hear a weight of the evidence claim irrespective of whether a sufficiency claim was properly

preserved at trial. *See Danielson,* 9 N.Y.3d at 348–49, 849 N.Y.S.2d 480, 880 N.E.2d 1. However, any potential sufficiency claim here is barred from review because Lopez has not complied with New York's procedural rules. Although Lopez's trial counsel moved for dismissal at the end of the prosecution's case "on the grounds that the People have failed to establish a prima facie case," Tr. 348–49, under New York law, a motion to dismiss that does not specify how the proof is insufficient to sustain the charge fails to preserve that issue of law for appeal. *See King v. Artus,* 259 F. App'x 346, 347 (2d Cir.2008) (summary order) ("In New York State, a defendant may not raise, for the first time on appeal, arguments concerning the legal sufficiency of the prosecution's evidence that were not raised with specificity in the trial court.") (citing C.P.L. § 470.05(2)) (additional citations omitted); *People v. Gray,* 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919 (1995) ("[E]ven where a motion to dismiss for insufficient evidence was made, the preservation requirement compels that the argument be 'specifically directed' at the alleged error.") (citation omitted).

8 Page 28 of Lopez's brief to the Appellate Division was inadvertently omitted from the State Court Record. Respondent's counsel subsequently located the missing page and supplemented the record. (Dkt. No. 13).

9 Because the Court concludes that Lopez's sufficiency claim was not fairly presented to the state courts, it is deemed exhausted but procedurally defaulted. New York procedural rules prevent Lopez from bringing a sufficiency claim that he could have presented on direct appeal but did not. *See*N.Y. Ct. Rules § 500.10(a); N.Y.Crim. Proc. Law §§ 440.10(2)(c), 460.15; *Ramirez,* 280 F.3d at 89; *Bryan v. Lee,* No. 09–CV–9276 (ER), 2013 WL 5586312, at *7 (S.D.N.Y. Oct.9, 2013). As Lopez has made no attempt to show cause for, or prejudice from, the failure to present this claim to the New York State courts, or that failure to consider the claim will result in a fundamental miscarriage of justice, his claim should be dismissed without reaching its merits for this reason as well. *See, e.g., Coleman,* 503 U.S. at 750.

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573 Fed.Appx. 22
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
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.
United States Court of Appeals,
Second Circuit.

Joseph McCRAY, Petitioner–Appellant,
v.
State of NEW YORK, Department of Parole, Respondent–Appellee.

No. 13–1137–pr. | July 17, 2014.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Attorneys and Law Firms

Sally Wasserman, New York, NY, for Petitioner–Appellant.

Camille O'Hara Gillespie (Leonard Joblove, Ann Bordley, on the brief), Assistant District Attorneys, for Kenneth P. Thompson, District Attorney, Kings County, Brooklyn, NY, for Respondent–Appellee.

PRESENT: BARRINGTON D. PARKER, DEBRA ANN LIVINGSTON and CHRISTOPHER F. DRONEY, Circuit Judges.

SUMMARY ORDER

Petitioner–Appellant Joseph McCray appeals from a judgment of the United States District Court for the Eastern District of New York (Dearie, *J.*), entered February 21, 2013. The district court denied McCray's petition for habeas corpus, which was premised on a claim of ineffective assistance of trial counsel. McCray contends that his lawyer should have moved to dismiss the indictment in McCray's underlying state criminal case due to the allegedly improper size of the grand jury that issued the indictment. In that case, McCray was convicted after a jury trial of grand larceny, criminal possession of a forged instrument, falsifying business records, offering a false instrument for filing, criminal mischief, and criminal trespass, and was sentenced in October 2006 to four to twelve years' imprisonment on the top count, with lesser sentences on the other counts to run concurrently. His conviction was affirmed by the Appellate Division, and leave to appeal to the Court of Appeals was denied. McCray's motion under New York Criminal Procedure Law § 440.10 was also denied by the state court, and the Appellate Division denied leave to appeal the decision. McCray was released from state prison in November 2009 and discharged from parole in November 2011. We assume ***23** the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal. [1]

I.

The federal habeas corpus statute generally requires a petitioner for a writ of habeas corpus to show that he has “exhausted the remedies available in the courts of the State” in order for the writ to be granted. 28 U.S.C. § 2254(b)(1)(A). “Exhaustion of state remedies requires that a petitioner fairly present federal claims to the state courts in order to give the state the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.” *Carvajal v. Artus,* 633 F.3d 95, 104 (2d Cir.2011) (quoting *Duncan v. Henry,* 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam)) (brackets and internal quotation marks omitted). Even if a claim was not exhausted, however, the habeas statute permits a petition to “be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(2); *see also Abuzaid v. Mattox,* 726 F.3d 311, 321–22 & n. 8 (2d Cir.2013).

Like the district court, we are inclined to think that McCray has exhausted his state remedies on his claim of ineffectiveness due to his counsel's failure to object to the allegedly oversized grand jury: he attempted to present this claim in his *pro se* motion under New York Criminal

Procedure Law § 440.10. But we need not decide this question because, in any event, McCray's petition was properly denied on the merits. *See* 28 U.S.C. § 2254(b)(2).

II.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both (1) that counsel's performance was "deficient" as measured by an "objective standard of reasonableness," and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On the first prong, "[a] court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011) (internal quotation marks omitted). With respect to the second element, "a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (internal quotation marks omitted). "[A] petitioner cannot show prejudice if the claim or objection that an attorney failed to pursue lacks merit." *Harrington v. United States,* 689 F.3d 124, 130 (2d Cir.2012) (citations omitted).

We conclude that McCray's claim fails on the second prong because he cannot show that prejudice resulted from any error that his counsel may have committed ***24** by failing to object to a grand jury composed of more members than are permitted under New York state law. The Supreme Court has never held that state criminal defendants enjoy a federal constitutional right to an indictment. *See Alexander v. Louisiana,* 405 U.S. 625, 633, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). The right to indictment in a New York state court prosecution stems from the state constitution, and the particulars of New York grand jury practice are laid out in state law. *See* N.Y. Const. art. I, § 6; N.Y.Crim. Proc. Law art. 190. Given the evidence at McCray's trial and his subsequent conviction by a petit jury, there is not a reasonable probability that the result of the proceeding would have been different had his attorney objected to the allegedly oversized grand jury. *See People v. Wiggins,* 89 N.Y.2d 872, 653 N.Y.S.2d 91, 675 N.E.2d 845, 845–46 (1996) (stating that the court would not "elevate the kind of representational lapse" that may have precluded a criminal defendant from testifying in his grand jury proceeding "to an automatic delayed reversal device," given that he had been convicted by jury verdict); *see also United States v. Mechanik,* 475 U.S. 66, 70, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) (holding that "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt" where a petit jury had convicted the defendants beyond a reasonable doubt). Accordingly, McCray cannot show prejudice under *Strickland,* and thus his petition for habeas corpus must be denied.

We have considered all of McCray's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED.**

All Citations

573 Fed.Appx. 22

Footnotes

1 As a preliminary matter, we note that McCray has been released from prison and is also no longer serving a term of parole. However, he nonetheless meets the statutory requirement that he was "in custody" at the time of the filing of his petition, 28 U.S.C. § 2254(a), because he was then on state parole, *see Maleng v. Cook,* 490 U.S. 488, 490–91, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (citing *Jones v. Cunningham,* 371 U.S. 236, 242, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963)). Moreover, because McCray challenges his conviction, his petition is not mooted by his release from custody and parole supervision. *See Wilson v. Mazzuca,* 570 F.3d 490, 493 n. 1 (2d Cir.2009) (citing *Sibron v. New York,* 392 U.S. 40, 57, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)).

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United States District Court,
N.D. New York.

Tad McKINNEY, Petitioner,
v.
John W. BURGE, Superintendent,
Auburn C.F., Respondent.

Civil Case No. 9:04–CV–1150
(GTS/DEP). | March 10, 2009.

West KeySummary

1 **Burglary**

Applying New York law, sufficient evidence existed to convict defendant of second degree burglary. Defendant admitted to police investigators that he committed the burglaries. Defendant gave stolen items to an individual to sell. Additionally, defendant was identified as an individual who cashed victim's traveler's check. Defendant argued that only circumstantial evidence linked him to the burglary. However, the circumstantial evidence combined with his confession was sufficient. McKinney's Penal Law § 140.25(2).

Cases that cite this headnote

Attorneys and Law Firms

Tad McKinney, Malone, NY, pro se.

Hon. Andrew M. Cuomo, Attorney General for the State of New York, Michelle E. Maerov, Esq., Assistant Attorney General, of Counsel, New York, NY, for Respondent.

DECISION and ORDER

GLENN T. SUDDABY, District Judge.

***1** Tad McKinney ("Petitioner") brought this Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. No. 1.) By Report–Recommendation dated January 29, 2008, the Honorable David E. Peebles, United States Magistrate Judge, recommended that the Petition be denied and dismissed, and that a certificate of appealability not issue. (Dkt. No. 24 [Rep.-Rec.].) Petitioner timely filed Objections to the Report–Recommendation after being given leave for an extension on May 30, 2008. (Dkt. No. 29 [Obj. to Rep.-Rec.].) For the reasons set forth below, the Court accepts and adopts the Report–Recommendation, and dismisses Petitioner's Petition.

I. STANDARD OF REVIEW

When specific objections are made to a magistrate judge's report-recommendation, the Court makes a "de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."*See*28 U.S.C. § 636(b)(1)(C). [1] When only general objections are made to a magistrate judge's report-recommendation (or the objecting party merely repeats the allegations of his pleading), the Court reviews for clear error or manifest injustice. *See Brown v. Peters,* 95–CV–1641, 1997 WL 599355, at *2–3 (N.D.N.Y. Sept.22, 1997) (Pooler, J.) [collecting cases], *aff'd without opinion,*175 F.3d 1007 (2d Cir.1999). [2] Similarly, when a party makes no objection to a portion of a report-recommendation, the Court reviews that portion for clear error or manifest injustice. *See Batista v. Walker,* 94–CV–2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995) (Sotomayor, J.) [citations omitted]; Fed.R.Civ.P. 72(b), Advisory Committee Notes: 1983 Addition [citations omitted]. After conducting the appropriate review, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."28 U.S.C. § 636(b)(1)(C).

II. BACKGROUND

For the sake of brevity, the Court will not repeat the factual background of Petitioner's conviction in 2001 for burglary, grand larceny and petit larceny, and his subsequent state court appeals, but will simply refer the parties to the relevant portions of Magistrate Judge Peebles's Report–Recommendation, which accurately recite that factual background. (Dkt. No. 24, at 2–16 [Rep.-Rec.].)

In his Petition, Petitioner asserts six claims in support of his request for habeas relief: (1) his statement to police officials was coerced; (2) the prosecution improperly withheld

exculpatory material from him; (3) the evidence adduced at trial was legally insufficient to support his convictions; (4) his trial counsel was ineffective; (5) his appellate counsel was ineffective; and (6) the sentence imposed was excessive and constituted cruel and unusual punishment. (Dkt. No. 1, at 3 [Addendum 3 to Petition]; *see also*Dkt. No. 18, at 6–19 [Pages "2" to "15" of Traverse].)

In his Report–Recommendation, Magistrate Judge Peebles' recommends that the Court deny each of these six claims. (Dkt. No. 24, at 21–100 [Rep.-Rec.].)

***2** In his Objections to Magistrate Judge Peebles' Report–Recommendation, Petitioner raises specific objections to only the first five of Magistrate Judge Peebles' six recommendations. (*See*Dkt. No. 29, Part 1, at 1–36 [Obj. to Rep.-Rec.].) Petitioner makes no objection (or only a general objection) to Magistrate Judge Peebles' sixth recommendation (i.e., that the Court deny Petitioner's claim that his sentence is cruel and unusual, in violation of the Eighth Amendment). (*Compare*Dkt. No. 24, at 94–100 [Rep.-Rec.] *with*Dkt. No. 29, Part 1, at 35–36 [Obj. to Rep.-Rec.].)

III. ANALYSIS

The Court's analysis begins with recognition of the fact that, because Petitioner makes no objection (or only a general objection) to Magistrate Judge Peebles' sixth recommendation (i.e., that the Court deny Petitioner's claim that his sentence is cruel and unusual, in violation of the Eighth Amendment), the Court reviews that sixth recommendation for clear error or manifest injustice. After carefully reviewing all of the papers in this action, the Court concludes that Magistrate Judge Peebles' sixth recommendation is not subject to attack for plain error or manifest injustice. (*See*Dkt. No. 24, at 94–100 [Rep.-Rec.].) As a result, the Court adopts Magistrate Judge Peebles' recommendation that the Court deny Petitioner's claim that his sentence is cruel and unusual, in violation of the Eighth Amendment. The Court notes that this recommendation would survive even a de novo review.

Turning to the five recommendations of Magistrate Judge Peebles to which Petitioner does make a specific objection, the Court reviews those recommendations de novo. After carefully reviewing all of the papers in this action, including Magistrate Judge Peebles' Report–Recommendation and Plaintiffs' Objections thereto, the Court can find no error in these five recommendations of Magistrate Judge Peebles. (*See*Dkt. No. 24, at 21–94 [Rep.-Rec.].) Magistrate Judge Peebles employed the proper legal standards, accurately recited the facts, and correctly applied the law to those facts. (*Id.*) The Court finds that only eight of Petitioner's arguments are worthy of further discussion in this Decision and Order.

Liberally construed, these eight arguments are as follows: (1) that the Report–Recommendation improperly failed to consider Petitioner's Traverse; (2) that the state courts and Magistrate Judge Peebles failed to consider the "totality of the circumstances" surrounding Petitioner's discussion with police investigators; (3) that the state courts and Magistrate Judge Peebles improperly characterized, or failed to recognize, the exculpatory evidence that was withheld from Petitioner; (4) that the jury charge on circumstantial evidence was improper; (5) that there are facts which the state courts and Magistrate Judge Peebles failed to realize, and which support a finding that the evidence presented at trial was legally insufficient to convict Petitioner; (6) that Magistrate Judge Peebles wrongfully relied on certain case law in recommending that Petitioner's ineffective assistance of counsel claim be dismissed; (7) that Petitioner's claims regarding the ineffective assistance of trial counsel were properly exhausted; and (8) that Petitioner's claims regarding the ineffective assistance of appellate counsel were properly exhausted. (*See*Dkt. No. 29, Part 1, at 7–11, 15–27, 30, 32–33 [Obj. to Rep.-Rec.].)

A. Petitioner's Argument that the Report–Recommendation Improperly Failed to Consider His Traverse

***3** Petitioner argues that the Report–Recommendation improperly failed to consider his Traverse. (Dkt. No. 29, Part 1, at 7 [Obj. to Rep.-Rec.].) Magistrate Judge Peebles expressly cited Petitioner's Traverse in his Report–Recommendation. (*See, e.g.,*Dkt. No. 24, at 17, 22, 32, 36, 38, 44.)In addition, after reviewing the record, the Court finds that Petitioner's Traverse offered only one argument that Magistrate Judge Peebles could be said to have not exhaustively considered: that the prosecution had failed to turn over to Petitioner exculpatory evidence in the form of a police report about Ted Johnson. (Dkt. No. 18, at 13–16 [attaching pages "9" to "12" of Traverse].)[3] Of course, Magistrate Judge Peebles could not have reached the merits of this argument because Petitioner failed to provide Magistrate Judge Peebles with a copy of the police report. (Dkt. No. 24, at 41, 42–43 [Report–Recommendation].) In any event, the Court discusses—and rejects—this argument in Part III.C. of this Decision and Order.

For these reasons, the Court rejects Petitioner's argument that the Report–Recommendation improperly failed to consider his Traverse.

B. Petitioner's Argument that the State Courts and Magistrate Judge Peebles Failed to Consider the "Totality of the Circumstances" Surrounding Petitioner's Discussion with Police Investigators

Petitioner argues that the state courts and Magistrate Judge Peebles failed to consider the "totality of the circumstances" surrounding Petitioner's discussion with the police investigators. (Dkt. No. 29, Part 1, at 9 [Obj. to Rep.-Rec.].) More specifically, Petitioner argues that his constitutional rights were violated because (1) he was coerced into speaking with the police, (2) he asked to have an attorney present but was ignored, and (3) his speech was not voluntary because he had just been released from a "psych clinic." (*Id.* at 8–9.)

Magistrate Judge Peebles thoroughly addressed the "totality of the circumstances" in reaching his lengthy conclusion that Petitioner's constitutional rights were not violated with regard to his oral statements to law enforcement officials. (Dkt. No. 24, at 21–37 [Rep.-Rec.].) The Court will only add one point.

Detective McBlane read Petitioner his *Miranda* rights from a *Miranda* rights waiver form, and asked after each right whether Petitioner understood those rights, to which Petitioner responded in the affirmative. (Dkt. No. 24, at 26–27 [Rep.-Rec.].) Petitioner then read and signed the waiver form at approximately 6:00 p.m. and agreed to speak with investigators without an attorney. (*Id.* at 27.)Petitioner argues that he requested an attorney "during [Detective] McBlane's portion of the interrogation and was ignored the whole nite [sic]." (*See*Dkt. No. 29, Part 1, at 11 [Obj. to Rep.-Rec.].) However, Petitioner offers no evidence supporting this argument. [4] Moreover, Petitioner continued to speak with investigators for the next eight to nine hours despite their alleged refusal to comply with his request for an attorney.

***4** For these reasons, the Court rejects Petitioner's argument that the state courts and Magistrate Judge Peebles failed to consider the "totality of the circumstances" surrounding Petitioner's discussion with the police investigators.

C. Petitioner's Argument that the State Courts and Magistrate Judge Peebles Improperly Characterized, or Failed to Recognize, the Exculpatory Evidence that Was Withheld from Petitioner

Petitioner argues that the state courts and Magistrate Judge Peebles improperly characterized, or failed to recognize, two pieces of exculpatory evidence that the prosecution failed to turn over, in violation of its requirement under *Brady:* (1) reports on the forgery investigation/reports related to the facts surrounding the travelers checks that first led police to Mark Perry; and (2) a police report about, and the sworn statement of, Ted Johnson, which (allegedly) show that Johnson was a suspect in the burglary. (Dkt. No. 29, Part 1, at 13–18 [Obj. to Rep.-Rec.].)

With regard to the former evidence, the Court finds that this evidence was in fact thoroughly (and correctly) addressed by Magistrate Judge Peebles in his Report–Recommendation. (*See*Dkt. No. 24, at 37–43 [Rep.-Rec.].) With regard to the latter evidence, Magistrate Judge Peebles could not have considered it because Petitioner failed to provide him with either a copy of Johnson's sworn statement or a copy of the police report. (Dkt. No. 24, at 43 [Report–Recommendation].)

Although Petitioner still has not provided a copy of the Ted Johnson police report (which Petitioner speculates must exist based on the sworn statements made by Johnson), Petitioner has now—for the first time—provided a copy of Johnson's sworn statement made on June 20, 2000. (Dkt. No. 29, Part 1, at 38–40.) As an initial matter, the Court finds that Petitioner has no right to present this evidence during his Objection to Magistrate Judge Peebles' Report–Recommendation, because he has offered no compelling justification for not offering the evidence to Magistrate Judge Peebles in the first instance. *See, supra,* note 1 of this Decision and Order. [5] Under the circumstances, the Court declines to exercise its discretion to review the evidence. The Court would add only two points.

First, the Court is uncertain how Johnson's sworn statement—which regards events leading up to the towing of a car driven by Johnson on June 14, 2000, near the location of 222 Moore Avenue, at around the time that the residence was burglarized—is even material to Petitioner's conviction. [6] Petitioner was not convicted of any crimes that occurred on June 14, 2000, or of any crimes that were related to the burglary of the residence at 222 Moore Avenue; rather, the last crime that Petitioner was convicted of committing occurred on June 7, 2000. (*See*Dkt. No. 24, at 7 [Rep.-Rec.].)

Second, Petitioner offers only speculation about what the June 14, 2000, police report says. (Dkt. No. 29, Part 1, at 15–16 [Opp. to Rep.-Rec.].) Moreover, to the extent that the police report exists and details the towing of the car that Johnson was driving and places Johnson near 222 Moore Avenue at around the time the residence was burglarized, that police report would be cumulative of Johnson's sworn statement.

***5** For these reasons, the Court rejects Petitioner's argument that the state courts and Magistrate Judge Peebles improperly characterized, or failed to recognize, exculpatory evidence that the prosecution failed to turn over, in violation of its requirement under *Brady.*

D. Petitioner's Argument that the Jury Charge on Circumstantial Evidence Was Improper

Petitioner argues that the jury charge on circumstantial evidence was highly prejudicial, impairing his right to a fair trial, because it was too lengthy and confusing. (Dkt. No. 29, Part 1, at 32–33 [Obj. to Rep.-Rec.].) Specifically, Petitioner appears to argue either (1) that a circumstantial evidence charge was inapplicable because the prosecution's case rested on a combination of direct and circumstantial evidence, or (2) that, because a circumstantial evidence charge was given to the jury, it was improper to allow the introduction of any direct evidence of guilt, such as Detective Stonecypher's report. (*Id.* at 2.) [7]

Assuming for the sake of argument that Petitioner has sufficiently presented this argument to Magistrate Judge Peebles for review, the Court rejects this argument for three reasons. First, challenges to jury instructions that rely on a violation of state law are generally not cognizable on habeas review.*Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Ponnapula v. Spitzer,* 297 F.3d 172, 182 (2d Cir.2002) (non-constitutional claims not cognizable in federal habeas corpus proceedings). Only constitutional challenges are actionable, and there was no constitutional violation in this case. Stated another way, the trial court's decision to give the circumstantial evidence jury charge (which defense counsel requested) did not result in a violation of Petitioner's federal constitutional rights. Moreover, the Court notes that, even if it were to find that the instruction was improper under state law (which the Court does not find), Defendant has not shown that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."*Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973).

Second, to the extent that Petitioner argues that the circumstantial evidence charge to the jury should not have been given because the prosecution's case relied on both direct and circumstantial evidence, the Court rejects that argument. Even assuming (for the sake of argument) that some of the evidence used to convict Petitioner could qualify as "direct evidence" as opposed to "circumstantial evidence," Petitioner would not have been harmed by such a charge for two reasons: (1) the charge still demanded that Petitioner's guilt be proven beyond a reasonable doubt; and (2) indeed, the charge drew the attention of the jury to the more rigorous standard that it would have to apply in order to convict Petitioner. [8]

Third, and finally, to the extent Petitioner argues that the introduction of any direct evidence of guilt (such as Stonecypher's report) should have been precluded because of the charge, the Court also rejects that argument. Such evidence should have been precluded only if that evidence was obtained in violation of Petitioner's *Miranda* rights. [9] The Court notes that a confession as to the commission of one crime is not direct evidence of the commission of a related crime, but instead may be extrinsic evidence of a common scheme or plan. [10] The Court notes also that, here, a *Ventimiglia* hearing was held to determine the admissibility of evidence against Petitioner of uncharged crimes; and, during that hearing, Petitioner's counsel objected to the introduction of Stonecypher's report. (*See* Trial Tr. at 8–10, 12, 16–19.) The result of the hearing, as evidenced by the testimony of Detective Stonecypher, was that Stonecypher's testimony regarding Petitioner's admissions to having committed prior burglaries was limited to only those burglaries that were "inextricably interwoven" with the burglaries that Petitioner was charged with committing. (*See* Trial Tr. at 523–31.)

***6** For these reasons, the Court rejects Petitioner's argument that the jury charge on circumstantial evidence was improper.

E. Petitioner's Argument that There Are Facts Which the State Courts and Magistrate Judge Peebles Failed to Realize, and Which Support a Finding that the Evidence Presented at Trial Was Legally Insufficient to Convict Petitioner

Petitioner argues that there are facts which the state courts and Magistrate Judge Peebles failed to realize, and which support a finding that the evidence presented at trial was

legally insufficient to convict Petitioner. (Dkt. No. 29, Part 1, at 18–24 [Obj. to Rep.-Rec.].) Again, Magistrate Judge Peebles thoroughly addressed this claim in his Report–Recommendation. (Dkt. No. 24, Part 1, at 43–53 [Rep.-Rec.].) The Court notes that "[a]n inquiry into whether there was sufficient evidence adduced at trial to support a conviction 'does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit.' " *Moss v. Phillips,* 03–CV–1496, 2008 WL 2080553, at *5 (N.D.N.Y. May 15, 2008) (Kahn, J.) (citing *Herrera v. Collins,* 506 U.S. 390, 402 [1993]). "A habeas petitioner claiming that there was insufficient evidence supporting the conviction is entitled to relief under 28 U.S.C. § 2254 only if it is found 'that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.' " *Moss,* 2008 WL 2080553, at *5 (citing *Jackson v. Virginia,* 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) [other citation omitted]. "The reviewing court is required to consider the evidence in the light most favorable to the prosecution, and draw all inferences in its favor." *Id.* (citing *Jackson,* 443 U.S. at 319).

For these reasons, the Court rejects Petitioner's argument that there are facts which the state courts and Magistrate Judge Peebles failed to realize, and which support a finding that the evidence presented at trial was legally insufficient to convict Petitioner.

F. Petitioner's Argument that Magistrate Judge Peebles Wrongfully Relied on Certain Case Law in Recommending that Petitioner's Ineffective Assistance of Counsel Claim Be Dismissed

Petitioner argues that Magistrate Judge Peebles improperly relied on certain case law in rendering his recommendation that Petitioner's ineffective assistance of counsel claim be dismissed. (Dkt. No. 29, Part 1, at 30–32 [Obj. to Rep.-Rec.].) Specifically, Petitioner argues (1) that the Report–Recommendation should not have relied on *Pena v. Fischer,* 00–CV–5984, 2003 WL 1990331, at *10 (S.D.N.Y. Apr.30, 2003), when addressing the *Ventimiglia* issue, because the case was not decided until 2003, and Petitioner went to trial in June 2001, and (2) "all of the cases cited in the Report [Recommendation] on p[age] 78[and] p[age] 79 do not deal with ineffective assistance [of counsel]."(*Id.*)

***7** On pages 71 and 72 of his Report–Recommendation, Magistrate Judge Peebles cites *Pena* for the proposition that, "[w]hen evidence of uncharged crimes is part of the history of the charged crime, it is admissible."*Pena v. Fischer,* 00–CV–5984, 2003 WL 1990331, at *10 (S.D.N.Y. Apr.30, 2003). Although Petitioner is correct that the *Pena* decision occurred after Petitioner's conviction, in reciting the above-referenced point of law, *Pena* expressly relies on a Second Circuit case decided in 1986—*United States v. Brennan,* 798 F.2d 581, 589 (2d Cir.1986).

Furthermore, on pages 78 and 79 of his Report–Recommendation, Magistrate Judge Peebles cites three cases to support his recommendation that Petitioner's trial counsel was not ineffective due to his failure to timely request a missing witness charge. (Dkt. No. 24, at 78–79 [Rep.-Rec.].) First, the Court notes that this portion of Magistrate Judge Peebles's recommendation is an alternative explanation for dismissing Petitioner's ineffective assistance claim against trial counsel. (*Id.* at 75–79.)Second, as Magistrate Judge Peebles notes, proving ineffective assistance of counsel requires that Petitioner demonstrate a "reasonable probability" that, but for counsel's deficiency, the result would have been different. (*Id.* at 66 [citing *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)].) Magistrate Judge Peebles cites the three cases to explain that whatever error may have resulted from trial counsel's failure to timely request a missing witness charge did not create a "reasonable probability" that the result would have been different because trial counsel was still able to emphasize the absence of the witness during summation.

For these reasons, the Court rejects Petitioner's argument that Magistrate Judge Peebles improperly relied on certain case law in rendering his recommendation that Petitioner's ineffective assistance of counsel claim be dismissed.

G. Petitioner's Argument that His Claims Regarding the Ineffective Assistance of Trial Counsel Were Properly Exhausted

Petitioner argues that all of his claims regarding the ineffective assistance of trial counsel were properly exhausted, because "none of the issues that Pet [itioner] raised on appeal, or in his habeas petition, involved allegations not contained in the record."(Dkt. No. 29, Part 1, at 24 [Obj. to Rep.-Rec.].) Petitioner further argues that he did not file a 440.10 motion because he "never sought to rely on any issue that was not preserved on the record."(*Id.*)

The Court does not agree with Petitioner that he properly exhausted all claims that he now seeks to assert regarding ineffective assistance of trial counsel for the same reasons

offered by Magistrate Judge Peebles. (Dkt. No. 24, at 53–64 [Rep.-Rec.].) Simply stated, twelve of the challenges that Petitioner asserts are not challenges that assert the availability of new evidence, but instead are challenges based upon facts that appear on the face of the record. [11] Nonetheless, on direct appeal, Petitioner made only a general claim that his trial counsel was ineffective, which claim was (he argued) supported by the record. (*See Pro Se* Supp. Br. at I.) [12]

***8** For the reasons that Magistrate Judge Peebles found Petitioner's challenges unexhausted, the Court finds Petitioner's challenges unexhausted. (Dkt. No. 24, at 56–59 [Rep.-Rec.].) As noted by Magistrate Judge Peebles, because Petitioner can no longer raise these claims in a second direct appeal, the claims are "deemed exhausted." (Dkt. No. 24, at 58–59 [Rep.-Rec.].) Deemed exhausted, the Court concludes that the ineffective assistance arguments are also procedurally barred, for the reasons indicated by Magistrate Judge Peebles in his Report–Recommendation. (Dkt. No. 24, at 59–64 [Rep.-Rec.].) In addition, for the reasons indicated by Magistrate Judge Peebles in his Report–Recommendation, Petitioner has not demonstrated cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. (*Id.*) However, for the reasons indicated in Part III.F. of this Decision and Order, and in Magistrate Judge Peebles's Report–Recommendation, the Court finds that Petitioner's unexhausted claims are "plainly meritless."

For these reasons, the Court rejects Petitioner's argument that his claims regarding the ineffective assistance of trial counsel were properly exhausted.

H. Petitioner's Argument that His Claims Regarding the Ineffective Assistance of Appellate Counsel Were Properly Exhausted

Petitioner argues that all of the claims regarding the ineffective assistance of appellate counsel have been exhausted, contrary to Magistrate Judge Peebles's findings. (Dkt. No. 29, Part 1, at 35 [Obj. to Rep.-Rec.].) To the extent that Magistrate Judge Peebles found Petitioner's claims to be unexhausted due to Petitioner's failure to initiate a state *coram nobis* proceeding, without addressing this finding, Petitioner argues that he exhausted his claims because he raised some of his specific challenges to appellate counsel's effectiveness in the state courts through letter correspondence with the Appellate Division. (*Id.*)

"[A] claim that appellate counsel was ineffective is not pleaded as a ground for habeas relief, and is unexhausted [when Petitioner does] not raise this claim in a state *coram nobis* petition."*Horton v. Ercole,* 557 F.Supp.2d 308, 327 (N.D.N.Y.2008) (Sharpe, J.) [citations omitted]; *Garcia v. Scully,* 907 F.Supp. 700, 706–07 (S.D.N.Y.1995) (noting that "[t]he only procedure in New York [for presenting a claim of appellate counsel ineffectiveness] is an application for a writ of error *coram nobis* to the Appellate Division department that affirmed the conviction.") [citations omitted].

Because Petitioner failed to initiate a state *coram nobis* proceeding, the Court finds that the claims identified by Magistrate Judge Peebles as unexhausted are unexhausted. Moreover, the Court agrees with Magistrate Judge Peebles that these unexhausted claims are "plainly meritless," for the reasons stated in his Report–Recommendation. (Dkt. No. 24, at 90–94 [Rep.-Rec.].)

For these reasons, the Court rejects Petitioner's argument that his claims regarding the ineffective assistance of appellate counsel were properly exhausted.

***9 ACCORDINGLY,** it is

ORDERED that Magistrate Judge Peebles's Report–Recommendation (Dkt. No. 24) is ***ACCEPTED*** and ***ADOPTED*** in its entirety; and it is further

ORDERED that Petitioner's Petition (Dkt. No. 1) is ***DISMISSED*** in its entirety; and it is further

ORDERED that a Certificate of Appealability will not be issued.

REPORT AND RECOMMENDATION

DAVID E. PEEBLES, United States Magistrate Judge.

Pro Se petitioner Tad McKinney, a New York State prison inmate as a result of a 2001 conviction for burglary, grand larceny and petit larceny, has commenced this proceeding seeking federal habeas intervention on his behalf, pursuant to 28 U.S.C. § 2254. In his habeas petition, McKinney raises several grounds most, though not all, of which were previously raised by him in the state courts and rejected, arguing, *inter alia,* that the trial court improperly denied his application to suppress certain statements by him to

law enforcement, the prosecution failed to provide him with exculpatory material in violation of his rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and he was denied effective representation by his trial and appellate counsel. Having reviewed McKinney's petition, which the respondent has opposed, in light of the deferential standard owed to the findings of the state courts with respect to his claims, I recommend that the petition be denied.

I. *BACKGROUND*

Petitioner's conviction stems from his participation in a string of burglaries that took place in the Syracuse University vicinity between April and June of 2000. During that time period, petitioner lived with his wife in Apartment 1004 at 80 Presidential Plaza, in the City of Syracuse. Transcript of Trial (June 4, 5, 6, 7, 2001) ("Trial Tr.") at 521, 616–17.

Following petitioner's confession to law enforcement investigators to having committed the burglaries and the recovery of some of the stolen property from individuals who had received the recovered items from the petitioner, McKinney was indicted by an Onondaga County grand jury and charged with second degree burglary (four counts), third degree burglary, fourth degree grand larceny (four counts) and petit larceny (three counts). Prior to the scheduled commencement of trial on those charges, a *Huntley/Wade* [1] hearing was held on March 23 and 26, 2001 by the assigned trial judge, Onondaga County Court Judge Anthony F. Aloi. Following that hearing, Judge Aloi denied petitioner's motion to suppress photographic identifications made by two witnesses, Mark Perry and Teddy Johnson, finding that the photographic arrays at issue were displayed to them in a non-suggestive manner. *See* Transcript of Hearing (Mar. 23, 2001) ("Mar. 23 Hrg. Tr."), at 27–33. In a decision and order dated March 30, 2001, Judge Aloi also denied petitioner's motions to suppress his statements to police investigators. *See*Dkt. No. 10, Exh. 3b ("Opinion").

***10** A separate hearing was held on June 1, 2001 to determine the validity of consent given by petitioner's wife, Elizabeth McKinney, authorizing a search of the couple's apartment. As a result of that hearing Judge Aloi determined that Mrs. McKinney's consent was freely and voluntarily given, and accordingly declined to suppress the fruits of that search. [2] *See* Transcript of Consent Hearing, at 39.

A jury trial was conducted by Judge Aloi, beginning on June 4, 2001, to address the charges lodged against the petitioner. The evidence adduced during the trial established that the first of the five burglaries with which petitioner was charged took place at 133 Circle Road, a residence occupied by Donald DeSalvia and his family. *See* Trial Tr. at 410–11, 583–84. On April 21, 2000, at approximately 12:30 a.m., Mark DeSalvia arrived at the family's home, and did not notice anything unusual. Trial Tr. at 410–11. The next morning, Mark and Donald DeSalvia noticed that the front door to the porch was open, the garage door was open, and there was bread and baloney left out on the counter. Trial Tr. at 411, 583. A VCR, a set of earphones, a compact disc ("CD") player, a computer bag with a laptop and programs, $800 cash, $900 in American Express travelers checks, a bag with a digital camera, sneakers, and a jacket were all determined by the DeSalvias to be missing. Trial Tr. at 411, 583–84. Donald DeSalvia identified a trial exhibit as one of the stolen traveler's checks, bearing his name. Trial Tr. at 584–85. Mark DeSalvia's 1978 Ford Bronco, valued at between one and two thousand dollars, was also discovered to be missing from the driveway of the residence. Trial Tr. at 411–13. The stolen vehicle was located the next day in the 900 block of South Townsend Street in Syracuse. Trial Tr. at 438–39. No one, including petitioner, had permission to enter the house or to take any of the missing items. Trial Tr. at 412, 584–85.

The second and third subject burglaries took place on May 23, 2000, the first of those occurring at a home located at 543 Cumberland Avenue, in Syracuse. Trial Tr. At 428–30. At 2:00 a.m. on that date Barbara Curran, who lived alone at the residence, awoke with leg cramps and went downstairs to retrieve some aspirin. *Id.* During the process, she discovered that the lights were on, the cellar door was open, and the shades were pulled. *Id.* The victim's purse, two cell phones, a walkman and a camera were ultimately determined to be missing. *Id.* The next day, outside of her home Curran discovered a beer bottle that matched the brand kept in her refrigerator; the victim subsequently turned the bottle over to investigating officers. Trial Tr. at 433–34. No one, including petitioner, had permission to enter Curran's home or to take the missing items. Trial Tr. at 434. At trial, Curran identified a trial exhibit as one of the cell phones taken from her home. Trial Tr. at 433–34.

The second May 23, 2000 burglary took place at 1011 Westcott Street, at the home of Barry and Eleanor Lentz. Trial Tr. at 510–11. At approximately 4:30 a.m., Eleanor Lentz awoke to discover that the dining room window and refrigerator doors were open; the back door was also found to be ajar, and the screen door had been propped open

with a bucket. Trial Tr. at 511. The Lentz's family cat was found coming in and out of the open window. *Id.* Upon investigation, it was determined that the children's two backpacks and Eleanor Lentz's briefcase were missing, along with money from Barry Lentz's wallet, and twenty-three CDs. Trial Tr. at 512–15. One of the missing backpacks was later discovered in a neighbor's yard. Trial Tr. at 515. Lentz identified a trial exhibit as his wife's briefcase. *Id.* at 513.No one had permission to enter the home or take the missing items. Trial Tr. at 514.

***11** The fourth burglary in issue took place on May 31, 2000 at the home of Michael Grygus, located at 856 Maryland Avenue in Syracuse. When Grygus awoke, he discovered strawberries out on the kitchen counter, and that the window and back door were open. Trial Tr. at 457–58. The victim also found that his CD player, wallet, camcorder, calculator, the drive to his laptop computer, and several bottles of beer were all missing. Trial Tr. at 458–59. In his backyard, Grygus found a bag containing CDs and work papers. *Id.* at 459.At trial, Grygus identified a trial exhibit as his calculator and the drive to his laptop computer. *Id.* at 460.No one had permission to enter Grygus's home or take the missing items. *Id.* at 459.

The last burglary took place on June 7, 2000 at 732 Ostrum Avenue, a two-story building owned by Syracuse University and used by the college's Psychology Department. Trial Tr. at 498–99. Some of the rooms located within the building give the appearance of being a day care center, with children's drawings hung on the walls and dolls available for children to play with. *Id.* at 499–500.On the morning following the burglary, Carlos Panahon, a graduate psychology student, arrived at the dwelling for a morning appointment and discovered computer equipment on the floor, and that doorknob on the door leading from the kitchen to the main hallway was broken. *Id.* at 500, 502.Panahon noticed that other computer equipment and a camcorder were missing, along with a radio and a locked metal box containing between $500 and $1,000. Trial Tr. at 501–502.

Teddy Johnson, one of the witnesses at trial, testified that he and the petitioner began using drugs together in 2000, and that McKinney would occasionally knock on his door and give him things to sell. Trial Tr. at 478–79. When that occurred, McKinney told Johnson he had obtained the items from the University area. Trial Tr. at 479–80. On one occasion in May of 2000, Johnson helped petitioner cash a traveler's check, stolen from 133 Circle Avenue, at the M & M market at 140 Oakwood Avenue in the City of Syracuse. Trial Tr. at 420–21, 480–82. Marwazi Azzam, the owner of that business, confirmed that Johnson and another man came into his store at or about that time, and that he cashed a $100 traveler's check for the man because Johnson, a regular customer, had vouched for his companion. Trial Tr. at 420–22. When Azzam was notified by the bank that the check was stolen, he contacted law enforcement officials, gave them a copy of the check, and provided them with Johnson's name. Trial Tr. at 421. Trial Tr. at 423. Azzam identified the check earlier confirmed by Donald DeSalvia as having been stolen from his home on April 21, 2000 as the check he cashed for Johnson and his companion. Trial Tr. at 423.

Johnson also testified to once witnessing the petitioner break open a strong box and remove envelopes containing money from inside. Trial Tr. at 482. Petitioner told Johnson he obtained the box from a daycare center. *Id.* at 482, 492–93.Johnson sold the box, along with two bracelets and a ring, to petitioner's wife. Trial Tr. at 495–96, 616–17. At trial, Panahon identified the lockbox as that which had been taken from 732 Ostrum Avenue. *Id.* at 503.Michael Douglas, who is affiliated with the Department of Psychology at Syracuse University, also identified the box and provided police with the key. Trial Tr. at 641–42, 647, 652–54.

***12** On June 20, 2000, Syracuse City Police Detective Edward MacBlane transported the petitioner to the department's Criminal Investigations Division (CID) offices where he administered petitioner his *Miranda* rights and petitioner signed a *Miranda* rights waiver form.[3] Trial Tr. at 519–20, 646–47, 657. At that time, police officials were investigating between fifteen and fifty residential burglaries in the University area. Trial Tr. at 646–47. Upon initial questioning, petitioner denied any involvement in those burglaries. *Id.* at 658.Detective MacBlane turned the interview of petitioner over to Detectives Steven Stonecypher and Mark Abraham at approximately 7:00 p.m. Trial Tr. at 519–20. For the first hour of the ensuing interview session, petitioner talked about himself and his background, and advised Stonecypher that he wanted to assist law enforcement by writing a book and by talking to police academy students about how he executed burglaries in order to educate them and to prevent future crimes. Trial Tr. at 553–54, 560.

Stonecypher asked the petitioner about the University-area burglaries, which he termed "incidents." Trial Tr. at 519. Petitioner responded, "[l]et's not call them incidents, and let's call them what they are. They are burglaries."*Id.* at 519–20.Petitioner told Stonecypher that he lived at Presidential

Plaza, and that when he wanted to commit burglaries, he chose a neighborhood close to home. He explained that he would go into the University area and look for houses that had open windows and doors, which McKinney stated that he would use to access the homes. *Id.* at 539–40.If the windows had screens, McKinney stated that he would cut them and lift them out so that he could climb in through the window. *Id.* at 540.Once inside, petitioner said that he would wait a few minutes to be certain no one was home or awakened by his intrusion, and would then prop open outside doors to make an easy exit for himself when he was finished with the burglary. *Id.* at 540, 559.

Petitioner told Stonecypher that at one of the burglaries, a motion light came on and startled him, causing him to stand and watch a cat climb into the open window. Trial Tr. at 552. Petitioner explained that while inside the houses, he would eat and drink because "a man needed fuel." Trial Tr. at 552. McKinney stated that some of the property which he took from the homes was sold by him at Presidential Plaza. *Id.* at 553.Petitioner admitted having taken a VCR during the course of one of the burglaries. *Id.*

Up until that point in the interrogation, petitioner did not list specific addresses of the homes which he burglarized, nor did he detail the items taken or the food eaten during the course of those crimes. Trial Tr. at 559–61, 564–68. Petitioner spoke to his mother during the interview and, based on her advice, told Stonecypher that he would provide him with specific information, including the locations of the burglaries, after he rested. Trial Tr. at 553–54. The interview ceased, and at approximately 6:00 a.m., Stonecypher took petitioner to be booked on a parole warrant, and did not speak with him after that. Trial Tr. at 554.

***13** On June 30, 2000, Detective Eric Carr went to Hans Klint's apartment at Presidential Plaza as part of the burglary investigation. Trial Tr. at 610–11. With Klint's permission, Carr recovered two calculators, coins, a blue carry bag, a camera, and a disc drive for a computer. *Id.* at 613–14.Petitioner's identification was found inside the blue bag, later confirmed to be that which was taken from the Lentz residence. *Id.* at 614.Detective Carr also recovered a VCR from Rosa Smith, who told Carr she bought it from petitioner for $20.00. Trial Tr. at 617.

On June 27, 2000, Detective Carr spoke to Julio Diaz, who also lived at Presidential Plaza, and recovered a cell phone. A check of the serial number on the phone confirmed that it belonged to Barbara Curran's son, and was one of the phones taken from Curran home during the May 23, 2000 burglary. Trial Tr. at 433–34, 644–47. Michael Grygas identified one of the calculators and the computer drive as those taken from his home during the May 31, 2000 burglary. Trial Tr. at 460–61, 649–50. Eleanor Lentz identified the blue bag as one taken from her home. Trial Tr. at 642.

Petitioner's wife, Elizabeth McKinney, and his niece, Sarah Lethbridge, testified for petitioner during his trial. Elizabeth McKinney testified that on June 20, 2000, she permitted police to enter the apartment which she shared with her husband because she was afraid that if she did not cooperate she would be arrested. Trial Tr. at 673–75. Mrs. McKinney testified that she was asked to provide the investigating agents with two bracelets, a blue ring and a metal box all of which were believed to be stolen. *Id.* at 674.Petitioner's wife did not believe the items were stolen because she bought them from Teddy Johnson two days earlier for $10.00. *Id.* at 675–76.Mrs. McKinney told police that Johnson and Hans Klint regularly picked through garbage, and that Johnson said he retrieved the box from the trash. *Id.* at 678–79.Petitioner's wife claimed that between April and June of 2000, petitioner left the house "maybe twice." *Id.* at 693.On three occasions, Mrs. McKinney remembered that petitioner went to the nearby gas station, and claimed that on April 23, May 21, and June 5, 2000, petitioner was home babysitting his niece, Sarah Lethbridge. *Id.* at 693–96; 702–704.

During her testimony McKinney's niece, Sara Lethbridge, recalled spending every Tuesday and Friday night between April and June, 2000 with petitioner and his wife at their home. Trial Tr. at 702–08. She testified that she saw petitioner at home each time she stayed there, that she slept on the couch, and that while there she was never awakened by petitioner entering or exiting the apartment. *Id.*

At the close of his trial, petitioner was convicted of four counts of second degree burglary, two counts of fourth degree grand larceny, and three counts of petit larceny. Trial Tr. at 876. The jury acquitted petitioner of charges in connection with the 732 Ostrum Avenue burglary, and a fourth degree grand larceny count relating to the theft of Mark DeSalvia's 1978 Ford Bronco. *Id.* Based upon the jury's verdict, petitioner was sentenced on July 12, 2001 as a persistent violent felony offender principally to an aggregate indeterminate term of incarceration of between twenty years and life. *See* Transcript of Sentencing (7/2/01) ("Sent.Tr.") at 40–42.

II. *PROCEDURAL HISTORY*

A. *State Court Proceedings*

***14** Petitioner appealed his conviction to the New York State Supreme Court, Appellate Division, Fourth Department. In a brief filed in connection with that appeal by his appellate counsel, petitioner argued that 1) his statement should have been suppressed; 2) the evidence was legally insufficient to support his conviction, which was against the weight of the evidence; 3) the trial court erred when it permitted petitioner to represent himself at sentencing; 4) the trial court erred when it denied petitioner's motion for a mistrial; 5) the sentence imposed was excessive, and in violation of the Eighth Amendment. *See*Dkt. No. 10, Exh. 3c; Brief in Support of Appeal ("App.Br.") at 26–62. In a supplemental brief filed by the petitioner, *pro se,* McKinney raised several additional grounds for reversal, asserting that 1) the trial court erred when it failed to issue a missing witness jury instruction; 2) petitioner's motion to sever the offenses joined in the indictment returned against him should have been granted; 3) the trial court's *Sandoval* ruling was prejudicial;[4] 4) the prosecution failed to provide him with exculpatory evidence in its possession; and 5) he did not receive effective trial or appellate counsel. *See*Dkt. No. 10, Exh. 3c, Pro Se Supplemental Brief ("Pro Se Supp. Br.").

On February 7, 2003, the Fourth Department vacated the sentences imposed on the two grand larceny convictions but otherwise unanimously affirmed petitioner's conviction, remitting the case to Onondaga County Court for re-sentencing on the grand larceny counts. *People v. McKinney,* 302 A.D.2d 993, 755 N.Y.S.2d 541 (4th Dep't.2003).[5] Leave to appeal that court's decision to the New York State Court of Appeals was subsequently denied on July 7, 2003. *People v. McKinney,* 100 N.Y.2d 584, 764 N.Y.S.2d 395, 796 N.E.2d 487 (2003).

B. *Proceedings in this Court*

Petitioner commenced this proceeding on October 7, 2004. Dkt. No. 1. Appropriately named as the respondent in McKinney's petition is John W. Burge, the superintendent of the prison facility in which he was housed at the time of filing. *Id.* In support of his quest for habeas relief, petitioner argues that 1) his statement to police officials were coerced; 2) the prosecution improperly withheld exculpatory material from him; 3) the evidence adduced at trial was legally insufficient to support his convictions; 4) his trial and appellate counsel were ineffective; and 5) the sentence imposed was excessive and constituted cruel and unusual punishment. *Id., see also*Dkt No. 18.

On March 17, 2005, the Office of the Attorney General for the State of New York, acting on respondent's behalf, filed a response to McKinney's petition, accompanied by a legal memorandum and various of the relevant state court records and transcripts. Dkt. Nos. 10 & 11. Petitioner subsequently filed a reply memorandum, or "Traverse", on August 31, 2005. Dkt. No. 18.The matter, which is now ripe for determination, has been referred to me for the issuance of a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c).*See also*Fed.R.Civ.P. 72(b).

III. *DISCUSSION*

A. *Standard of Review*

***15** Enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1214 (1996), brought about significant new limitations on the power of a federal court to grant habeas relief to a state court prisoner under 28 U.S.C. § 2254. Under the AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct [and t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."28 U.S.C. § 2254(e) (1); *see also Boyette v. Lefevre,* 246 F.3d 76, 88 (2d Cir.2001) (quoting § 2254(e)(1)) (internal quotes omitted). Significantly, a federal court may not grant habeas relief to a state prisoner on a claim

> that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see also Thibodeau v. Portuondo,* 486 F.3d 61, 65 (2d Cir.2007); *Noble v. Kelly,* 246 F.3d 93, 98 (2d Cir.), *cert. denied,*534 U.S. 886, 122 S.Ct. 197, 151 L.Ed.2d 139 (2001); *Boyette,* 246 F.3d at 88. When applying this test, the Second Circuit has noted that

> [u]nder AEDPA, we ask three questions to determine whether a federal court may grant habeas relief: (1) Was the principle of Supreme Court case law relied upon in the habeas petition "clearly established" when the state court ruled? (2) If so, was the state court's decision "contrary to" that established Supreme Court precedent? (3) If not, did the state court's decision constitute an "unreasonable application" of that principle?

Williams v. Artuz, 237 F.3d 147, 152 (2d Cir.2001), *cert. denied*534 U.S. 924, 122 S.Ct. 279, 151 L.Ed.2d 205, 151 L.Ed. 205 (2001) (citing *Williams v. Taylor,* 529 U.S. 362, 412–13, 1120 S.Ct. 1495, 1523, ––L.Ed.2d ––, –– – –– (2000) and *Francis S. v. Stone,* 221 F.3d 100, 108–09 (2d Cir.2000) (citing *Williams*)).

Because the AEDPA's restriction on federal habeas power was premised in no small part upon the duty of state courts to uphold the Constitution and faithfully apply federal laws, the AEDPA's exacting review standards apply only to federal claims which have been actually adjudicated on the merits in the state court. *Washington v. Schriver,* 255 F.3d 45, 52–55 (2d Cir.2001). Specifically, as the Second Circuit explained in *Sellan v. Kuhlman,*"[f]or the purposes of AEDPA deference, a state court 'adjudicate[s]' a state prisoner's federal claim on the merits when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment."261 F.3d 303, 312 (2001); *see Jimenez v. Walker,* 458 F.3d 130, 140 (2d Cir.2006) (citing *Sellan*),*cert. denied sub nom., Jimenez v. Graham,* 549 U.S. 1133, 127 S.Ct. 976, 166 L.Ed.2d 740 (2007). Significantly, the Second Circuit further held that when a state court adjudicates a claim on the merits, "a federal habeas court must defer in the manner prescribed by § 28 U.S.C. 2254(d)(1) to the state court's decision on the federal claim—*even if the state court does not explicitly refer to either the federal claim or to relevant federal case law."Sellan,* 261 F.3d at 312 (emphasis added). [6] , [7]

***16** When a state court's decision is found to be decided "on the merits," that decision is "contrary to" established Supreme Court precedent if it applies a rule that contradicts Supreme Court precedent, or decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams,* 529 U.S. at 405–06, 120 S.Ct. at 1519–20. Moreover, a federal court engaged in habeas review must also determine not whether the state court's determination was merely incorrect or erroneous, but instead whether it was " 'objectively unreasonable.' " *Sellan,* 261 F.3d at 315 (quoting *Williams,* 529 U.S. at 409, 120 S.Ct. at 1521 (O'Connor, J.)). The Second Circuit has noted that this inquiry admits of "[s]ome increment of incorrectness beyond error", though "the increment need not be great [.]" *Francis S.,* 221 F.3d at 111.

If a state court does not adjudicate a petitioner's federal claim "on the merits," the federal court must instead apply the pre-AEDPA standard of "de novo review to the state court's disposition of the federal claim. *See Cotto v. Herbert,* 331 F.3d 217, 230 (2d Cir.2003) (citing *Aparicio v. Artuz,* 269 F.3d 78, 93 (2d Cir.2001)).

B. ***Ground One: The Voluntariness of Petitioner's Statements***

Petitioner first claims that his oral statements to law enforcement officials should have been suppressed as products of improper coercion. Specifically, petitioner alleges that 1) the length of the interview during which those statements were made was, in itself, coercive; 2) in obtaining his confession to the claims under investigation the detectives questioning him used trickery; 3) he had very little sleep and a long history of mental illness, both of which conditions were unduly exploited by those questioning him; 4) he was under the influence of cocaine ingested by him while in the police interview room, after finding it hidden in a chair; and 5) investigating officers threatened to arrest his wife if he refused to cooperate. Dkt. No. 1, Addendum 3, Ground One; Dkt. No. 18 at 3–7.Respondent counters by arguing that this claim is without merit. Dkt. No. 11, at 17–20.

Petitioner raised this claim in support of his direct appeal. App. Br. at 26–34, Pro Se Supp. Br. at 18–21. The Fourth Department rejected the argument, finding that although the suppression hearing testimony confirmed that petitioner suffered from depression and had stayed overnight at a psychiatric clinic on the night before he was interrogated, it also reflected that he appeared to be "fine" at the time of the interrogation and "freely engaged in a conversation with [questioning investigators]."*McKinney,* 302 A.D.2d at 993, 755 N.Y.S.2d 541. The appellate court further found that petitioner understood his *Miranda* warnings and "knowingly and intelligently waived his rights."*Id.* Since the state court

considered but rejected this claim on the merits, those findings are entitled to AEDPA deference.

1. ***Clearly Established Supreme Court Precedent***

***17** On habeas review, the determination of whether a statement was voluntarily presents a legal question that requires independent federal analysis "based on the totality of the circumstances surrounding the confession."*Nelson v. Walker,* 121 F.3d 828, 833 (2d Cir.1997).*See Arizona v. Fulminante,* 499 U.S. 279, 282–89, 111 S.Ct. 1246, 1251–53, 113 L.Ed.2d 302 (1991); *U.S. v. Tudoran,* 476 F.Supp.2d 205, 215 (N.D.N.Y.2007) (Sharpe, J.). That review includes an examination into whether the petitioner's waiver of his or her *Miranda* rights was valid. The inquiry into the circumstances surrounding the confession, including the length and circumstances of the interrogation and a defendant's prior experience with the legal system, is "purely factual, and the state court's answer to it is afforded a presumption of correctness" under 28 U.S.C. § 2254(e)(1).*Holland v. Donnelly,* 216 F. Supp .2d 227, 231 (S.D.N.Y.2002), *aff'd*324 F.3d 99 (2d Cir.), *cert. denied*540 U.S. 834, 124 S.Ct. 86, 157 L.Ed.2d 63 (2003).*See Thompson v. Keohane,* 516 U.S. 99, 111–12, 116 S.Ct. 457, 465, 133 L.Ed.2d 383 (1995); *Miller v. Fenton,* 474 U.S. 104, 116–17, 106 S.Ct. 445, 453, 88 L.Ed.2d 405 (1985); *Tankleff v. Senkowski,* 135 F.3d 235, 243 (2d Cir.1998); *Dallio v. Spitzer,* 170 F.Supp.2d 327, 338 (E.D.N.Y.2001), *aff'd*343 F.3d 553 (2d. Cir.2003), *cert. denied*541 U.S. 961, 124 S.Ct. 1713, 158 L.Ed.2d 402 (2004).

In determining whether a confession was voluntary, courts should consider 1) the characteristics of the accused, including their background and experience, education and level of intelligence; 2) the conditions of interrogation, including the location and length of detection; and 3) the conduct of law enforcement officials, including whether there was physical mistreatment, whether the suspect was deprived of food and water, and whether the suspect was subjected to prolonged restraint in handcuffs or psychologically coercive techniques such as promises of leniency. *Green v. Scully,* 850 F.2d 894, 901–02 (2d Cir.1988), *cert. denied*488 U.S. 945, 109 S.Ct. 374, 102 L.Ed.2d 363 (1988) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973) and *Mincey v. Arizona,* 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978)); *Tudoran,* 476 F.Supp.2d at 215. Among these factors, no one is dispositive. *Green,* 850 F.2d at 900; *Tudoran,* 476 F.Supp.2d at 215; *Huntley v. Superintendent,* No. 00–CV–191, 2007 WL 319846, at *11 (N.D.N.Y. Jan. 30, 2007 (Hurd, J). State courts frequently must resolve conflicts in the testimony of law enforcement officials and defendants when determining whether a statement was voluntary. In these circumstances, "the law is clear that state-court findings on such matters are conclusive on the habeas court if fairly supported in the record."*Tibbs v. Greiner,* 01–Civ–4319, 2003 WL 1878075 at *9 (S.D.N.Y.2003). A petitioner bears the burden of overcoming this presumption of correctness by showing, by clear and convincing evidence, that the state court was wrong. *Id.;Whitaker v. Meachum,* 123 F.3d 714, 716 (2d Cir.1997).

II. ***Contrary to, Or an Unreasonable Application of, Clearly Established Supreme Court Precedent***

***18** During its *Huntley* hearing, the trial court heard the testimony of Detectives Edward MacBlane and Steven Stonecypher; Dr. Marilyn S. Ward; Arthur Dougherty, petitioner's parole officer, and the petitioner. Following the hearing the court issued a thirteen page written decision, dated March 30, 2001, denying petitioner's motion to suppress his statement. Opinion at 1–13. In its decision the trial court made certain factual determinations, finding that 1) petitioner's parole officer, Arthur Dougherty, had required petitioner to receive psychiatric care as a condition of parole (*See* Transcript of Hearing, March 26, 2001 ("Mar. 26 Hrg. Tr.") at 20–22); 2) Dr. Ward diagnosed the petitioner as suffering from a depression disorder and prescribed medications, but was unaware of whether petitioner was taking them on June 20, 2000 *id.* at 19–20, 255 N.Y.S.2d 838, 204 N.E.2d 179); 3) Dougherty learned that members of the Syracuse Police Department had been conducting a burglary investigation, and were attempting to locate the petitioner (*Id.* at 23–25, 255 N.Y.S.2d 838, 204 N.E.2d 179); 4) on June 19, 2000, at approximately 6:30 p.m., Dougherty found the petitioner outside a grocery store holding a can of beer (Mar. 26 Hrg. Tr. at 24); 5) petitioner appeared very volatile and angry, and threatened suicide (*Id.* at 24–26, 255 N.Y.S.2d 838, 204 N.E.2d 179); 6) Dougherty took petitioner to CPEP, an outreach psychiatric clinic operated at a local hospital (*Id.* at 25–27, 255 N.Y.S.2d 838, 204 N.E.2d 179); 7) Dougherty stayed with petitioner until 2:00 a .m., when he was admitted into the hospital (*Id.*);8) Dougherty filed a violation of parole against petitioner (*Id.* at 27–28, 255 N.Y.S.2d 838, 204 N.E.2d 179); 9) petitioner was released to Dougherty at approximately 3:00 p.m. on June 20, 2000, after Dr. Frye, a psychiatrist at CPEP, determined that McKinney was no longer a threat to himself (Mar. 26 Hrg. Tr. at 28–30, 78–80); 10) Dougherty then transported the petitioner back to his

office, where he called police investigators (*Id.* at 29–30, 255 N.Y.S.2d 838, 204 N.E.2d 179); 11) at that point, petitioner was calm and unemotional (*Id.*);12) at approximately 5:00 p.m., Detective MacBlane met with petitioner at the parole office, and took him to CID (Mar. 23 Hrg. Tr. at 38–40; Mar. 26 Hrg. Tr. at 30; 13) MacBlane was advised petitioner had been at CPEP, but he appeared to act normally during the interview (Mar. 23 Hrg. Tr. at 45); 14) MacBlane read petitioner his rights from a *Miranda* rights waiver form and asked after each right whether petitioner understood, to which petitioner responded in the affirmative (*Id.* at 39–43); 15) petitioner read and signed the waiver form at approximately 6:00 p.m., and agreed to speak to police investigators without an attorney present (Mar. 23 Hrg. Tr. at 38–41); 16) petitioner did not request an attorney, and did not ask to speak to anyone other than police during his interview with MacBlane (*id.* at 52); 17) Detective Stonecypher began interviewing the petitioner at approximately 7:00 p.m., after being advised by MacBlane that petitioner had waived his *Miranda* rights (*id.* at 43, 54–56); 18) Stonecypher knew petitioner from past investigations, and told McKinney he needed to speak to him regarding recent incidents (Mar. 23 Hrg. Tr. at 56; Mar. 26 Hrg. Tr. at 57–58); 19) petitioner talked about himself and his family, and blamed outside influences for his problems (Mar. 23 Hrg. Tr. at 56–60); 20) petitioner admitted involvement in the burglaries under investigation, and began to describe how he committed them (*id.*);21) at approximately 3:00 a.m. on the following morning, petitioner spoke with his mother (Mar. 23 Hrg. Tr. at 69–71; Mar. 26 Hrg. Tr. at 68–70); (22) when petitioner told Stonecypher he wanted to rest, the interview ceased, and petitioner was taken to be booked on the parole warrant at approximately 8:00 a.m. on June 21, 2000 (Mar. 23 Hrg. Tr. at 70–72; 92–94); and 23) during his interview with Stonecypher, petitioner did not ask for a lawyer (*Id.* at 73). Opinion, at 1–6.

***19** In his decision, Judge Aloi also summarized petitioner's hearing testimony, noting petitioner's testimony to the effect that 1) he was born in 1961; 2) he had his general equivalency diploma ("GED"); 3) he had been arrested in the past, and was familiar with his constitutional rights; 4) police officers threatened to arrest his wife for possession of stolen property if he did not provide a statement; 5) although petitioner's signature appeared in the *Miranda* waiver form, he had no recollection of signing it; 6) he asked for an attorney seven times during the police interview; 7) he was initially denied the use of a bathroom; 8) he denied involvement in the burglaries; 9) he was tired, but questioning detectives would not let him sleep; 10) in an effort to stay awake, petitioner ingested cocaine he discovered hidden inside an interview room chair; 11) he talked with his mother, who advised him not to speak to police officers unless they could assure him of a "deal", and 12) petitioner promised to cooperate if police would let him sleep. Opinion, at 6–8; Mar. 26 Hrg. Tr. at 31–77. Based upon his assessment, Judge Aloi rejected petitioner's testimony, finding portions of it to be incredible. Opinion, at 6–8.

Considering the evidence adduced, the trial court found that 1) petitioner was "attempting to maintain a facade of innocence by appearing to cooperate with police" (Opinion, at 6); 2) during the interview from 5:30 p.m. on June 20, 2000 until 8:00 a.m. on June 21, 2000, petitioner was "offered drinks, cigarettes and bathroom breaks" and was not "threatened or tricked into providing police with the various statements ... nor did he ask for an attorney during the interview" (Opinion, at 8–9; Mar. 23 Hrg. Tr. at 73–75, 83–85; Mar. 26 Hrg. Tr. at 61, 65, 72); and 3) that petitioner "did not appear to be intoxicated or under the influence of drugs and acted in a normal manner during the interviews and did not ask that the interview be stopped."(Opinion, at 9; Mar. 23 Hrg. Tr. at 45–52, 74–75, 85, 87–88). Petitioner has not come forward with evidence to refute the hearing court's factual findings, which accordingly are presumed to be correct. *Whitaker,* 123 F.3d at 716.

In reviewing the entire record, I find no basis to support a finding that petitioner was unable to make a knowing and intelligent waiver of his constitutional rights. The totality of the circumstances, including petitioner's age, intelligence, past experience with the criminal justice system, and the circumstances surrounding the interview and the conduct of the police, fully supports the finding that petitioner's statements were voluntary, and made of his own free will. Specifically, petitioner's background and experience do not indicate that he would be susceptible to coercion. At the time he was interviewed, petitioner was thirty-nine years old, and had his GED. Mar. 26 Hrg. Tr. at 31–32. Petitioner had familiarity with the criminal justice system by virtue of his numerous convictions, including two prior convictions for burglary. *Id.* at 71, Sent. Tr. at 39. Petitioner and Stonecypher had prior dealings in connection with other investigations. Mar. 23 Hrg. Tr. at 56; Mar. 26 Hrg. Tr. at 57–58. Petitioner admitted that he knew and understood his rights. Mar. 26 Hrg. Tr. at 72.

***20** Upon petitioner's arrival at the police headquarters, Detective MacBlane read him his constitutionally-mandated

warnings from a *Miranda* waiver form, one by one, and asked petitioner if he understood each right as it was read to him; in response petitioner indicated he understood each of his rights. Mar. 23 Hrg. Tr. at 38–42. Petitioner read the form and signed it, agreeing to speak with questioning officers. *Id.* at 40–41.McKinney's willingness to speak freely to Detectives MacBlane and Stonecypher regarding his background and upbringing, his past criminal history, his substance abuse problems, and his method of committing the burglaries, as well as his offer to assist law enforcement in preventing burglaries, including his offer to write a book on the subject, all provide indicia that petitioner's statements were purely voluntary. *Id.* at 49–52, 55–63.Additionally, petitioner's past encounters with law enforcement, and, indeed, with Detective Stonecypher, suggest petitioner was aware of his constitutional rights.

During the interview by detectives, petitioner was not handcuffed, was not threatened with physical harm by the detectives, was given bathroom breaks, drinks and cigarettes, and was permitted to speak with his mother. *Id.* at 68–77, 71–74, 84–86; Mar. 26 Hrg. Tr. at 54–56, 60, 65, 68–69, 72. There were frequent breaks during the interrogation, ranging from five to ten minutes in length, during which detectives spoke to each other and evaluated the interview. Mar. 23 Hrg. Tr. at 83–84. Petitioner never asked for a lawyer, or to stop the interrogation until the early morning hours after speaking to his mother, at which time the interview ceased. *Id.* at 70–72, 92–93.This evidence suggests that petitioner was not threatened with force, nor was he subjected to coercive measures at any time while in police custody.

Despite the state court's findings and these compelling indicators supporting the finding that petitioner's statement was not coerced, petitioner now claims that the state court's finding that his statement was voluntarily made was contrary to clearly established federal law. Dkt. No. 1 at Addendum 3; Dkt. No. 18, at 2–7.Petitioner now contends, as he did at the suppression hearing and on appeal, that he suffered from depression, and that when questioning him police officials exploited his mental illness. While the hearing court acknowledged that petitioner suffered from depression at the relevant times, it concluded that it was only one of many factors to be considered in arriving at its decision. Opinion, at 11. The Appellate Division affirmed the trial court's finding that petitioner's statements were voluntary, concluding that while the record established that petitioner suffered from depression and had stayed overnight at a psychiatric clinic the night before the interrogation, he seemed "fine" during the interview, did not become upset during questioning by investigating officers, and freely engaged in conversation with police. *McKinney,* 302 A.D.2d at 993, 755 N.Y.S.2d 541.

***21** The suppression hearing testimony supports these findings. Mar. 23 Hrg. Tr. at 23–30, 45–46, 48; Mar. 26 Hrg. Tr. at 78–80. Both Detective MacBlane and Arthur Dougherty testified, for example, that despite the fact that petitioner spent the night before the interview in a psychiatric hospital, he appeared to be "fine" and cooperative before the interview began. Mar. 23 Hrg. Tr. at 45–46, 48; Mar. 26 Hrg. Tr. at 29–30. Petitioner was released to Dougherty's custody, despite his threat of suicide, after Dr. David Frye determined that petitioner was no longer a threat to himself. Mar. 26 Hrg. Tr. at 28, 78–80. In light of all the relevant circumstances, petitioner's depressive disorder did not prevent him from making a knowing and intelligent waiver of his rights. The state court's rejection of this portion of petitioner's claim was therefore neither contrary to nor an unreasonable application of clearly established federal law. *See, e.g. U.S. v. Male Juvenile,* 121 F.3d 34, 40 (2d Cir.1997) (waiver of rights was knowing and voluntary despite evidence of a mental disability where defendant stated he understood his rights and signed a waiver form prior to confessing).

Petitioner also claims that his interrogation was inherently coercive because of its fourteen hour duration. While the length of an interrogation is undeniably one factor that should be considered when determining whether a statement was voluntary, no single factor will control. *Green,* 850 F.2d at 900. The hearing court concluded that the length of the interview did not necessarily invalidate McKinney's statement since he was permitted frequent breaks, and to speak with his mother. Opinion at 11–12. Although the Appellate Division did not specifically address this portion of petitioner's challenge to his statement, it noted that "County Court properly denied the motion [of petitioner] to suppress his statements to police", apparently declining to disturb the hearing court's findings. *See McKinney,* 302 A.D.2d at 993, 755 N.Y.S.2d 541. The suppression hearing testimony established that petitioner was given drinks and bathroom breaks during the interview, and spoke with his mother for fifteen to twenty minutes. Mar. 23 Hrg. Tr. at 73–79, 69–72. Petitioner also testified that he was given breaks, along with cigarettes and coffee, and confirmed that consulted with his mother. Mar. 26 Hrg. Tr. at 54, 61, 67–70. The state court's findings that the length of the interview did not render petitioner's statement invalid was not contrary to, or an unreasonable application of, clearly established

federal law. *See, e.g., Darwin v. Connecticut,* 391 U.S. 346, 349, 88 S.Ct. 1488, 1489–90, 20 L.Ed.2d 630 (1968) (thirty to forty-eight hour interrogation which included denial of access to an attorney and no breaks rendered confession involuntary); *U.S. ex rel Daniel v. Wilkins,* 292 F.2d 348, 350 (2d Cir.1961) (sixteen hours of almost continuous questioning did not make defendant's statement involuntary where there was no claim of fatigue, no trickery, humiliation or extreme youth); *Mackenzie v. Portuondo,* 208 F.Supp.2d 302, 324 (E.D.N.Y.2002) (length of an interview is but one factor courts consider when determining whether a statement was involuntary); *U.S. v. Guzman,* 11 F.Supp.2d 292, 298 (S.D.N.Y.1998) (while sleep deprivation can be a tool of coercion, defendant's statement was not coerced even though it was made late at night where there was no evidence to suggest defendant expressed fatigue or wanted to end the interview), *aff'd*152 F.3d 921 (2d Cir.1998).

***22** Petitioner's final arguments in support of the contention that his statement was coerced center around his hearing testimony that he used cocaine in the police interview room, that he demanded a lawyer six or seven times, to no avail, and that he signed the *Miranda* waiver form only because police threatened to arrest his wife if he did not cooperate. Dkt. No. 1, Ground 1, Dkt. No. 18, 3–7.The trial court heard petitioner's testimony on each of these allegations, rejecting them as not being credible. Judge Aloi specifically found petitioner's claim that he ingested cocaine in the interview room not to be believable. Opinion at 8. He further found that petitioner "did not appear to be intoxicated or under the influence of drugs and acted in a normal manner during the interviews ..."*Opinion* at 9, 12–13. It should be noted that despite his claims that he was tired and under the influence of cocaine, McKinney testified that he was clever enough to try to "trick" the police by telling them he had information on the burglaries and would provide it, if only he was allowed to speak to his mother. Mar. 26 Hrg. Tr. at 63–69.

The hearing court also rejected petitioner's claims that he repeatedly asked for a lawyer and that police threatened to arrest petitioner's wife if he did not cooperate. It found that petitioner did not ask to speak to a lawyer, and that in fact petitioner was "attempting to maintain a facade of innocence by appearing to cooperate with the police."*Opinion* at 4–5; 6, 9, 12; Mar. 23 Hrg. Tr. at 73, 79. While Detective Stonecypher and Detective MacBlane's testimony that petitioner did not ask for a lawyer (Mar. 23 Hrg. Tr. at 49–52, 73, 79) conflicted with petitioner's testimony that he asked for one six or seven times, (Mar. 26 Hrg. Tr. at 52–54) the hearing court resolved the conflict in the testimony against petitioner. Similarly, the court specifically found that police did not threaten to arrest petitioner's wife during the course of the interview, apparently rejecting petitioner's testimony to the contrary. *Opinion* at 12. The hearing court's credibility determinations are supported in the record and, accordingly, are conclusive. *Tibbs,* 2003 WL 1878075 at *9. Petitioner has failed to show by clear, convincing evidence, that these findings of the state trial court were erroneous.

Based on independent review of the record, I find that the totality of the circumstances establishes petitioner's statement was made of his own free will, and was not the product of coercion by law enforcement officials. Accordingly, I recommend that petitioner's first ground for federal habeas relief should be denied.

C. *Ground Two: Brady Violation*

McKinney next claims that at trial the prosecutor withheld a police report reflecting that during the course of the burglary investigation, police investigated an individual named Mark Perry in connection with his knowledge of the travelers checks stolen from 133 Circle Road. Dkt. No. 1, Addendum 4, at 3; Dkt. No. 18, Traverse, at 8–9, 11). Petitioner characterizes that report as "potentially exculpatory," arguing that it would have shown that someone else was under investigation for the crimes for which he was being tried.*Id.* Petitioner also claims that the prosecutor withheld a police report mentioned by its witness, Teddy Johnson, in Johnson's statement to police.Dkt. No. 1, Addendum 4, at 3; Dkt. 18, Traverse, at 9–10. McKinney contends that this report was also "potentially exculpatory", and could have been used to compare Johnson's version of events with that given by police officials.*Id.*

***23** Each of these claims was raised by the petitioner in the *pro se* supplemental brief submitted in support of the direct appeal of his conviction. *See*Dkt. No. 10, Exh. 3c, Pro Se Supp. Brief, at 16–18. In its decision largely rejecting that appeal, the Appellate Division found that the prosecutor had in fact provided petitioner with "some of the alleged *Brady* material during trial, and defense counsel was given a meaningful opportunity to use that material."*McKinney,* 302 A.D.2d at 995–96, 755 N.Y.S.2d 541. The state appellate court further found that petitioner had "failed to establish that the remaining alleged Brady material exists."*Id.* Since this claim was presented to the state courts and a decision was rendered, it is deemed exhausted, and the deferential AEDPA standard of review applies.

1. ***Clearly Established Supreme Court Precedent***
A habeas petitioner may be entitled to relief upon a showing that the government violated his or her right to due process by failing to turn over "material exculpatory evidence" before trial. *Giglio v. United States,* 405 U.S. 150, 153–54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Strickler v. Greene,* 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Under *Brady* and its progeny, prosecutors must disclose information that is favorable to the defense, either because it is exculpatory, relating to the factual innocence of the defendant, or because it serves to impeach a prosecution witnesses.*Strickler,* 527 U.S. at 280, 119 S.Ct. at 1948; *U.S. v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). Evidence that is favorable because of its impeachment value may be material where the witness has supplied the only evidence linking a defendant to the crime at issue, or where the witness has supplied the only support for an essential element of the crime. *U.S. v. Avellino,* 136 F.3d 249, 256–57 (2d Cir.1998).

A petitioner bears the burden of proving that the prosecution has withheld material information. *Harris v. United States,* 9 F.Supp.2d 246, 275 (S.D.N.Y.1998).“Conclusory allegations that the government ‘suppressed’ or ‘concealed’ evidence do not entitle [the petitioner] to relief.”*Id.* (quotations omitted).*See Strickler,* 527 U.S. at 286, 119 S.Ct. at 1950–51 ("Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review."); *Van Gorden v. Superintendent,* No. 03–CV–1350, 2007 WL 844901, at *8 (N.D.N.Y. Mar. 19, 2007) (Mordue, C.J.) (unsupported, unspecified *Brady* claim dismissed); *Mallet v. Miller,* 432 F.Supp.2d 366, 378 (S.D.N.Y.2006) (*Brady* claim dismissed where supported only by conjecture); *Skinner v. Duncan,* No. 01–CV–6656, 2003 WL 21386032 at *25 (S.D.N.Y. Jun.17, 2003) (*Brady* claim failed because petitioner provided no evidence in support of it); *Ferguson v. Walker,* 00 Civ. 1356, 2002 WL 31246533 at *13 (S.D.N.Y. Oct.7, 2002) (Petitioner's "claim of withheld *Brady* material is without evidence and speculative and must be rejected.").

2. ***Contrary to, or Unreasonable Application of, Clearly Established Supreme Court Precedent***
***24** When analyzed against this backdrop, I find that the record fully supports the Appellate Division's rejection of petitioner's *Brady* claim. I first note that McKinney has not presented any evidence, aside from his bald assertion, that the prosecutor did not disclose reports pertaining to Mark Perry. *See Brady,* 373 U.S. at 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *Harris,* 9 F.Supp.2d at 275. In any event, the record refutes this claim.

On June 4, 2001, prior to the commencement of the trial, petitioner complained that he had not been given Perry's statement. Trial Tr. at 370–72. In response, the prosecutor represented to the court that he had in fact provided Perry's statement to petitioner, and the court confirmed that petitioner had received both the statement and a police report regarding an interview of Perry. Trial Tr. at 373–74. The court explained to petitioner that he could use those reports to show that others were under investigation in connection with the burglaries. Trial Tr. 372–74. On cross examination, McKinney's counsel questioned Detective Dennis Murphy regarding Perry's status as a suspect. Detective Murphy explained that police investigators had learned that Mark Perry had information about the stolen travelers checks, and interviewed him in order to document that information. Trial Tr. at 445–48. He went on to state, however, that Perry was not in possession of the checks, was not a suspect in the burglaries, and in fact had provided information inculpating the petitioner. *Id.* at 446–47, 455.Since the report—which does not appear to exculpate petitioner—was disclosed, and counsel had a meaningful opportunity to utilize it during the course of cross-examining Detective Murphy, petitioner has failed to establish a *Brady* violation insofar as relates to that document.

Petitioner next claims that he was not provided a police report referenced by Teddy Johnson in his statement to police. Specifically, petitioner alleges that Johnson was interviewed in relation to a burglary that took place at 222 Moore Avenue in Syracuse, and that Johnson told police he was in that area to help petitioner steal an air conditioner. Dkt. No. 1, Addendum 4, at 3. Petitioner claims that on the third page of his statement, Johnson stated "I was told by Det. Buske that the *report* indicates etc ...".*Id.* (emphasis added). Petitioner claims that the report referenced by Johnson was not turned over to him, and that it was potentially exculpatory since he could have used the report "to show the facts of what happened that night in sombody [sic] else's words than Teddy Johnson's," and that it supported his position that others were responsible for the crimes for which he was convicted. *Id.*

Petitioner requested the report referenced by Johnson before his trial began. Trial Tr. at 367. In response, the prosecutor

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advised the petitioner and the court that he had "turned over to [petitioner] every single report under that DR number [the number that referenced the 222 Moore Avenue burglary]." Trial Tr. at 367.

***25** As the Fourth Department intimated, the portion of petitioner's *Brady* claim regarding the Johnson report is based upon sheer speculation. Petitioner has failed to attach a copy of Johnson's statement, nor has he identified what he believes to be the content of the report allegedly referenced in the statement, and has failed to establish that other exculpatory reports were withheld, making it all but impossible for this court to engage in any meaningful review of this portion of his *Brady* claim.

In sum, because it appears from the record that all reports were disclosed to defense counsel, and because petitioner had failed to demonstrate that any other allegedly exculpatory reports were withheld, I recommend a finding that the petitioner's *Brady* claim be denied. *Van Gorden,* 2007 WL 844901 at *8.

D. ***Ground Three: Sufficiency of the Evidence***

Petitioner next claims that the evidence adduced at trial was insufficient to support his convictions. Specifically, petitioner claims that the case against him was purely circumstantial, noting that there were no eye-witnesses, no physical evidence, and no fingerprints or DNA evidence linking him to the burglaries. Dkt. No. 1, Ground 3; Traverse at 12–16. Respondent argues that this claim is without merit. Dkt. No. 11, at 21–24.

Like his first two claims, this ground was similarly raised by the petitioner on his direct appeal. Dkt. No. 10, Exh. 3c. App. Br. at 35–45. Addressing the argument, the Fourth Department ruled that the evidence adduced at trial was legally sufficient to establish that "defendant entered the residences of the victims with the intent to commit a crime therein."*McKinney,* 302 A.D.2d at 994, 755 N.Y.S.2d 541. Although the Appellate Division's decision appears to address the sufficiency of the evidence only with respect to the burglary convictions, I note that in his direct appeal petitioner challenged the sufficiency of the evidence on all counts, and argued that "[t]here were no independently proved facts that permitted a direct inference of burglary or larceny."App. Br. at 44. In his habeas petition and Traverse, petitioner now appears also to have challenged the sufficiency of the evidence to sustain all of his convictions. Dkt. No. 1, Ground Three. Dkt. No. 18, Traverse, at 15. Since it appears from a liberal reading of petitioner's direct appellate brief that the challenge to the sufficiency of the evidence on all the charges, including the larceny charges, was fairly presented to the state courts, this claim is deemed exhausted, and the deferential AEDPA standard of review applies. *See Dorsey v. Kelly,* 112 F.3d 50, 52 (2d Cir.1997); *Daye v. Attorney Gen. of New York,* 696 F.2d 186, 191 (2d Cir.1982).

1. ***Clearly Established Supreme Court Precedent***

When engaged in habeas review of an evidence sufficiency claim, a federal court must be particularly respectful of the state courts' determination of the issue. *Fama v. Comm'r of Corr. Srvcs.,* 235 F.3d 804, 811 (2d Cir.2000); *Hernandez v. Conway,* 485 F.Supp.2d 266, 281 (W.D.N.Y.2007). A court may grant habeas relief only if it concludes that "the state court's sufficiency ruling 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' " *Policano v. Herbert,* 453 F.3d 79, 91 (2d Cir.2006) (quoting 28 U.S.C. § 2254(d)(1)). In *Policano,* the Second Circuit specifically held that AEDPA deference applies to sufficiency of evidence claims. *Policano,* 453 F.3d at 91. In fact, the Second Circuit stated that sufficiency review by the federal court is "highly deferential." *Id.* at 91–92.

***26** Under well-established Supreme Court precedent, the court must view the record in the light most favorable to the government, and determine whether any rational trier of fact would have found the essential elements of the crime, as defined by state law, beyond a reasonable doubt. *Policano,* 453 F.3d at 92 (citing *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).*See Jackson v. Virginia,* 443 U.S. 307, 318–19, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979)); *Young v. McGinnis,* 411 F.Supp.2d 278, 312 (E.D.N.Y.2006). A federal court may not grant habeas relief simply because of an independent belief that the state court applied federal law "erroneously" or "incorrectly." *Policano.* 453 F.3d at 92 (citing *Williams,* 529 U.S. at 411, 120 S.Ct. at 1522). Rather, the habeas court must determine that there is "[s]ome increment of incorrectness beyond error."*Id.* (quoting *Francis,* 221 F.3d at 111). In reviewing a sufficiency claim under the AEDPA, the habeas court may not simply apply *Winship* independently, but must look to State law to determine the facts necessary to constitute the elements of the crime.*Id.* (citing *Fama,* 235 F.3d at 811).

To sustain petitioner's convictions for second degree burglary under New York law, the state was required to prove that petitioner knowingly entered or remained unlawfully in a

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dwelling, with the intent to commit a crime therein. N.Y. PENAL LAW § 140.25(2). The requisite intent may be inferred from the circumstances, including the actions of the accused, and may be proven by direct or circumstantial evidence. *Stone v. Stinson,* 121 F.Supp.2d 226, 247 (W.D.N.Y.2000); *People v. Price,* 35 A.D.3d 1230, 1231, 825 N.Y.S.2d 868, 869 (4th Dept.2006), *lv. denied*8 N.Y.3d 926, 866 N.E.2d 462, 834 N.Y.S.2d 516 (2007). To the extent relevant in this instance, in order to establish petitioner's guilt of fourth degree grand larceny, the state was required to establish that petitioner stole property valued in excess of one thousand dollars, and that the property included a credit card. N.Y. PENAL LAW §§ 155.30(1), (4). Finally, to convict petitioner of petit larceny, the state was required to prove that he stole property, without regard to its value. N.Y. PENAL LAW § 155.25.

II. ***Contrary to, or an Unreasonable Application of, Clearly Established Supreme Court Precedent***

The Appellate Division held that there was sufficient evidence to establish petitioner's guilt. *McKinney,* 302 A.D.2d at 993–94, 755 N.Y.S.2d 541. Illuminating its reasoning, the appellate court noted that

> [t]he evidence at trial establishes that items were taken from the victims' residences during the night and that the perpetrator had consumed food or beverages while in the residences, as evidenced by the food and empty bottles left on the kitchen counters there. Defendant admitted to the police that he would consume food while inside a residence committing a burglary. The owner of a convenience store testified that he cashed a traveler's check for an unidentified man and a man whose surname is Johnson. The traveler's check was later identified as one taken from a victim's residence, and Johnson testified that he went with defendant to the convenience store to cash a traveler's check. Johnson further testified that defendant would give items to Johnson to sell, and the victims identified some of those items as their property.

***27** *Id.* Those findings are supported by the record evidence at trial. Petitioner's statements to Johnson and to police officials constituted direct evidence of his guilt. Petitioner confided in Johnson that he obtained the items which he wanted Johnson to sell for him from the University area. Trial Tr. at 479. McKinney admitted to police investigators that he committed burglaries in the University section of Syracuse. *Id.* at 521–22, 539, 755 N.Y.S.2d 541. Petitioner also told the officers that he entered homes through open windows or doors, and that he would prop open outer doors for a swift exit. *Id.* at 540–41.He stated that while inside the homes, he would eat and drink because he "needed fuel." *Id.* at 540–41, 552, 755 N.Y.S.2d 541. Petitioner described being startled by a cat climbing into one of the open windows at a residence he had entered. *Id.* at 552–53, 755 N.Y.S.2d 541.

The evidence at trial amply corroborated these statements. Four burglaries took place between April and June 2000 in residential homes in the University section of Syracuse. The addresses at which those crimes occurred included 133 Circle Road (DeSalvia residence), 543 Cumberland Avenue (Curran residence), 856 Maryland Avenue (Grygus residence), and 1011 Westcott Street (Lentz residence). Trial Tr. 410–11, 428–32, 457–59, 512–16, 810, 814, 831, 839, 843–44. In each of those residences, there was evidence that the intruder had eaten food from the refrigerator or, at the very least, opened the refrigerator. Trial Tr. at 411–12 (133 Circle Road—bread and baloney); *Id.* at 433–35 (543 Cumberland Avenue—beer); *Id.* at 457–58 (856, 755 N.Y.S.2d 541 Maryland Avenue—strawberries and beer); *Id.* at 512 (1011, 755 N.Y.S.2d 541 Westcott Street—refrigerator cracked open). In each, windows and/or doors were open or propped open. Trial Tr. 411, 431–33, 458–59, 511–12. At the Lentz residence, the family cat was climbing in and out of the open window. *Id.* at 511, 755 N.Y.S.2d 541. No one, including petitioner, had permission to enter any of the homes or remove property from them. *Id.* at 412, 434, 459, 514, 585, 755 N.Y.S.2d 541.

That the petitioner committed larceny while in those dwellings, and had the intent to do so, can be inferred from a number of facts. Several pieces of property stolen from the homes were recovered and linked to petitioner, including one of the traveler's checks stolen from 133 Circle Road and cashed by petitioner, along with Johnson, at the M & M market (Trial Tr. at 479–82); a blue bag belonging to the Lentz family, containing petitioner's identification, that was recovered from inside Klint's apartment at Presidential Plaza, to which petitioner had a key (Trial Tr. at 642–44); a calculator and computer drive belonging to Grygas, also

recovered from Klint's apartment (Trial Tr. at 460, 610–14); and a cell phone belonging to one of the Curran family members, recovered from a resident at Presidential Plaza identified to police by Johnson (Trial Tr. 645–46).*See*N.Y. PENAL LAW § 155.25. Property in excess of one thousand dollars was taken from the DeSalvia residence in the form of $900 in traveler's checks and $800 in cash, one of which was cashed by petitioner. Trial Tr. at 481–82, 584–85, 822. *See*N.Y. PENAL LAW § 155.30(1). Several credit cards located inside Eleanor Lentz's briefcase were among the items stolen from the Lentz home, and the bag was recovered from an apartment to which petitioner had a key and, inside the bag, was petitioner's identification. Trial Tr. at 512–515, 642–44, 834. *See*N.Y. PENAL LAW § 155.30(4).

***28** Under the facts and circumstances of this case, it was not irrational for a reasonable factfinder to have found that each element of four counts of second degree burglary, two counts of grand larceny and three counts of petit larceny was proven beyond a reasonable doubt. *See, e.g., Marmulstein v. Phillips,* No. 05–CV–230, 2007 WL 804111, at *2 (N.D.N.Y. Mar.14, 2007) (Hurd, D.J.) ("evidence adduced at trial linking Marmulstein to the burglary included his proximity to the location of the burglary, his statement to a friend the day after the burglary that he had 'hit the jackpot,' his possession of the television and VCR the day after the burglary under suspicious circumstances, his possession of jewelry from the burglary, and his disposition of jewelry taken from the burglary. The Appellate Division found such evidence sufficient as a matter of law to support Marmulstein's burglary conviction. That holding is well supported by the evidence and, in any event, was not " 'contrary to, or involved an unreasonable application of, clearly established Federal law.' "); *Smith v. Walsh,* No. 02 CIV. 5755, 2003 WL 21649485, at *8 (S.D.N.Y. July 14, 2003) ("That the petitioner committed larceny can be inferred from a number of facts. First, shortly after Mr. Smith left the hotel, the security guard testified that he received a complaint from the tourists that their room had been burglarized. When he went to check the room it appeared to be ransacked. Later, police found sums of Czechoslovakian currency in Ms. Smith's purse. The Czech tourists subsequently identified the money as their own. Viewing this evidence in the light most favorable to the prosecution, a rational juror could have found Mr. Smith guilty of burglary beyond a reasonable doubt."); *see also People v. Windbush,* 202 A.D.2d 527, 528, 609 N.Y.S.2d 53 (2d Dept.1994) ("we conclude that the defendant's guilt was established by evidence that (1) the burglarized house appeared to have been broken into, (2) the defendant stipulated that the fingerprints found inside the house on a kitchen cabinet were his fingerprints, (3) the defendant was not authorized to enter the house, and (4) numerous items of property were missing from the house."), *lv. denied*83 N.Y.2d 878, 635 N.E.2d 307, 613 N.Y.S.2d 138 (1994). As such, the Appellate Division did not act contrary to or unreasonably apply Supreme Court precedent in rejecting petitioner's evidence sufficiency claim, and I therefore recommend that petitioner's third habeas ground be denied.

E. *Ground Four: Effectiveness of Trial Counsel*

In his fourth claim petitioner argues, based on a myriad of grounds that appear both on and off the record, that his constitutional right to meaningful representation by counsel was abridged. Based on the face of the record, petitioner claims that his trial counsel failed to 1) obtain fingerprint results from 1011 Westcott Street; 2) obtain reports from a forgery investigation relating to the stolen traveler's checks from 133 Circle Road; 3) obtain reports on a burglary that took place at 222 Moore Avenue; 4) move for severance; 5) properly present *Ventimiglia* issues; 6) keep a transcript of Detective Carr's suppression hearing testimony, instead permitting a read back of his testimony to suffice as preparation for cross-examination rather than demanding a transcript; 7) object to hearsay testimony offered by Detective Carr regarding his dealings with prosecution witness Hans Klint; 8) adequately cross-examine Teddy Johnson and Detectives Carr and Stonecypher; 9) request a missing witness charge regarding Klint; 10) request a jury instruction regarding lesser included charges; 11) object when the prosecutor called petitioner's wife a liar in summation; and 12) object to the admission of a briefcase into evidence. Dkt. No. 1, Ground Four. Petitioner's additional claims, based upon matters going beyond the face of the record, include his contention that 1) counsel was loyal to the court and not to petitioner; 2) counsel issued an unnecessary subpoena for petitioner's wife; and 3) counsel failed to investigate the case and prepare a defense. *Id.*

***29** In support of his direct appeal, petitioner raised a general challenge to the effectiveness of trial counsel in his *pro se* supplemental brief to the Fourth Department. Pro Se. Supp. Br. at i. Specifically, petitioner argued that trial counsel was ineffective and that "if this issue is sufficiently reviewed by this court that it could determine that counsel was ineffective under both state standards; [see *People v. Baldi,* 54 N.Y.2d 137] and under the federal standard; [see *Strictland [sic] v. Washington,* 466 U.S. 668]."*Id.*The

Appellate Division rejected this general claim, explaining that "[t]he evidence, the law and the circumstances of this case, 'viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation' ", in accordance with New York standards, including, *inter alia,* as articulated in *People v. Baldi,* 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981) and *People v. Benevento,* 91 N.Y.2d 708, 697 N.E.2d 584, 674 N.Y.S.2d 629 (1998).[8] *McKinney,* 302 A.D.2d at 995, 755 N.Y.S.2d 541. That determination is entitled AEDPA deference.

1. *Exhaustion*

Some of the specific grounds now raised in McKinney's habeas petition, however, were never raised in the state courts. As a threshold matter, I must therefore determine the legal consequences, if any, associated with this failure to first present the arguments now being made to the state courts before raising them as a basis for federal habeas intervention.

Prior to seeking federal habeas relief, a petitioner must exhaust available state remedies, or establish either an absence of available state remedies or that such remedies cannot adequately protect his or her rights. *Aparicio,* 269 F.3d at 89 (quoting 28 U.S.C. § 2254(b)(1)); *Ellman v. Davis,* 42 F.3d 144, 147 (2d Cir.1994), *cert. denied*515 U.S. 1118, 115 S.Ct. 2269, 132 L.Ed.2d 275 (1985). The exhaustion doctrine recognizes "respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions."*Daye,* 696 F.2d at 191. "Comity concerns lie at the core of the exhaustion requirement."*Galdamez v. Keane,* 394 F.3d 68, 72 (2d Cir.2005), *cert. denied by Galdamez v. Fischer,* 544 U.S. 1025, 125 S.Ct. 1996, 161 L.Ed.2d 868 (2005). Though both federal and state courts are charged with securing a state criminal defendant's federal rights, the state courts must initially be given the opportunity to consider and correct any violations of federal law. *Id.*"The chief purposes of the exhaustion doctrine would be frustrated if the federal habeas court were to rule on a claim whose fundamental legal basis was substantially different from that asserted in state court."*Daye,* 696 F.2d at 192 (footnote omitted).

This exhaustion requirement is satisfied if the federal claim has been "fairly presented" to the state courts. *See Dorsey,* 112 F.3d at 52 (quoting *Picard v. Connor,* 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)). A claim has been "fairly presented" if the state courts are apprised of "both the factual and the legal premises of the claim [the petitioner] asserts in federal court."*Daye,* 696 F.2d at 191. Thus, "the nature or presentation of the claim must have been likely to alert the court to the claim's federal nature."*Id.* at 192.

***30** When a claim has never been presented to a state court, a federal court may find that there is an absence of available state corrective process under § 2254(b)"if it is clear that the unexhausted claim is procedurally barred by state law and, as such, its presentation in the state forum would be futile."*Aparicio,* 269 F.3d at 90 (citing *Reyes v. Keane,* 118 F.3d 136, 139 (2d Cir.1997)); *Lurie v. Wittner,* 228 F.3d 113, 124 (2d Cir.2000) (federal court may address merits of a habeas petition containing unexhausted claims where there is no further state proceeding for petitioner to pursue or where further pursuit would be futile), *cert. denied*532 U.S. 943, 121 S.Ct. 1404, 149 L.Ed.2d 347 (2001).

As petitioner concedes, twelve of his challenges to the effectiveness of trial counsel, including the failure to object to the admission of evidence and the failure to request certain jury instructions, are based upon facts that appear on the face of the record and, accordingly, could have been raised on direct appeal. *See*Dkt. No. 1, Ground 4 at p. 4. Petitioner cannot now raise these claims in a second direct appeal, since in New York a defendant is "entitled to one (and only one) appeal to the Appellate Division."*Aparicio,* 269 F.3d at 91. Moreover, since "New York does not otherwise permit collateral attacks on a conviction when the defendant unjustifiably failed to raise the issue on direct appeal,"*id.*(citing CPL 440.10(2)(c)), petitioner cannot now properly raise these claims, which are based on the record, by way of a section 440 motion. *Aparicio,* 269 F.3d at 91; *Bossett,* 41 F.3d at 829. *See Hogan v. West,* 448 F.Supp.2d 496, 507 (W.D.N.Y.2006) ("Because there is no reason to believe that the trial record was in any way insufficient to allow the Appellate Division to hear an ineffective assistance of counsel claim based on the failure to object to the prosecutor's summation, any attempt by [petitioner] to seek state court review pursuant to C.P.L. § 440.10 would be futile."). These claims are therefore "deemed exhausted" for purposes of petitioner's habeas petition. *Aparicio,* 269 F.3d at 90; *Spence v. Superintendent, Great Meadow Corr. Fac.,* 219 F.3d 162, 170 (2d Cir.2000); *Senor v. Greiner,* No. 00–CV–5673, 2002 WL 31102612, at *10 (E.D.N.Y. Sept.18, 2002).

2. *Procedural default*

The ineffective assistance arguments now deemed exhausted are also procedurally defaulted. *Aparicio,* 269 F.3d at 90. Accordingly, a federal court may not engage in habeas review of the claim unless the petitioner demonstrates either 1)

both good cause for and actual prejudice resulting from his procedural default, or 2) that the denial of habeas relief would leave unremedied a fundamental miscarriage of justice. *Fama,* 235 F.3d at 809; *Garcia v. Lewis,* 188 F.3d 71, 76–77 (2d Cir.1999); *Levine v. Comm'r of Corr. Servs.,* 44 F.3d 121, 136 (2d Cir.1995). Under this second exception, which is both exacting and intended for the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent[,]"*Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986), "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Id.* at 495, 106 S.Ct. at 2649 (quoting *Engle v. Isaac,* 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783 (1982)).

***31** To establish "cause" sufficient to excuse a procedural default, a petitioner must show that some objective external factor impeded his or her ability to comply with the relevant procedural rule. *Coleman v. Thompson,* 501 U.S. 722, 753, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991) (citing *Murray,* 477 U.S. at 488); *Resprepo v. Kelly,* 178 F.3d 634, 639 (2d Cir.1999). Examples of such external mitigating circumstances can include "interference by officials," ineffective assistance of counsel, or that "the factual or legal basis for a claim was not reasonably available" at trial or on direct appeal.[9] *Murray,* 477 U.S. at 488, 106 S.Ct. at 2645. When a petitioner has failed to establish adequate cause for his or her procedural default, the court need not go on to also examine the issue of prejudice, since federal habeas relief is generally unavailable as to procedurally defaulted claims unless both cause and prejudice are demonstrated. *Stepney v. Lopes,* 760 F.2d 40, 45 (2d Cir.1985); *Long v. Lord,* No. 03–CV–0461, 2006 WL 1977435, at *6 (N.D.N.Y. Mar. 21, 2006) (McCurn, S.J.); *Staley v. Griener,* No. 01 Civ. 6165, 2003 WL 470568, at *7 (S.D.N.Y. Feb.6, 2003). In such a case, absent evidence to show the petitioner's innocence of the crime of conviction, no basis is presented to conclude that the failure to consider the merits of the federal claim would result in a fundamental miscarriage of justice, which has been interpreted as amounting to "an unjust incarceration." *Spence,* 219 F.3d at 170.

Here, petitioner contends that cause is established, arguing that his appellate counsel was ineffective for not challenging trial counsel's ineffectiveness on direct appeal. Dkt. No. 1, at Ground 5. The ineffectiveness of counsel for not raising or preserving a claim in state court will be sufficient to show cause for a procedural default only when counsel was so ineffective that the representation violated the petitioner's Sixth Amendment right to counsel. *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S.Ct. 1587, 1591, 146 L.Ed.2d 518 (2000); *Aparicio,* 269 F.3d at 91. Petitioner's claim that appellate counsel was ineffective, however, is unexhausted since he did not raise it in a state *coram nobis* petition and in any event it is without merit.[10] *Id.* Because petitioner's claim that appellate counsel was ineffective is meritless, it may not serve as "cause" for a procedural default. *Aparicio,* 269 F.3d at 91–92. Although petitioner contends that he is innocent, he has not presented any new evidence that he is "actually innocent" of the crimes for which he was convicted. *See Schulp v. Delo,* 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Since petitioner has not established cause, the court need not address whether petitioner suffered prejudice, and federal review of this claim is barred. *See Calderon v. Thompson,* 523 U.S. 538, 559, 118 S.Ct. 1489, 1502, 140 L.Ed.2d 728; *Coleman,* 501 U.S. at 753; *Stepney,* 760 F.2d at 45; *Long,* 2006 WL 1977435, at *6. Even if this claim was not procedurally barred, petitioner is entitled to no relief because, as discussed below, the claim is without merit.

***32** Three of petitioner's additional claims, in which he asserts that trial counsel was loyal to the court and not to him, that counsel issued an unnecessary subpoena to petitioner's wife, and that counsel failed to investigate the case and prepare a defense, were also not presented to the state courts. *See* Dkt. No.App. Br. at 8). The basis for these claims is not apparent on the face of the record and, accordingly, petitioner could still raise them in a CPL § 440.10 motion. These claims are therefore unexhausted. *Reyes,* 118 F.3d at 139 (citing *People v. Harris,* 109 A.D.2d 351,360–61, 491 N.Y.S.2d 678, 687 (2d Dept.1985) (holding that trial record was insufficient to require that an ineffective assistance of counsel claim relating to alleged faulty legal advice be brought on direct appeal), *lv. denied,*66 N.Y.2d 919, 489 N.E.2d 779, 498 N.Y.S.2d 1034 (1985)).

A federal court may, in its discretion, review unexhausted claims and deny them on the merits if they are "plainly meritless" (*Rhines v. Weber,* 544 U.S. 269, 277, 125 S.Ct. 1528, 1535, 161 L.Ed.2d 440 (2005)) or "patently frivolous." *McFadden v. Senkowski,* 421 F.Supp.2d 619, 621 (W.D.N.Y.2006); *Wheeler v. Phillips,* No 05–CV–4399, 2006 WL 2357973, at *5 (E.D.N.Y. Aug.15, 2006). Since petitioner's unexhausted claims are indeed plainly meritless, I have chosen to address them. 28 U.S.C. § 2254(b)(2).

3. ***The Merits***
Under the well-established standard governing such claims, in order to prevail on an ineffective assistance of counsel claim a petitioner must show both that 1) his or her counsel's performance was deficient, in that it failed to conform to an objective, reasonableness threshold minimum level, and 2) that deficiency caused actual prejudice to the defense, in that the petitioner was effectively deprived of a fair trial, the results of which were reliable. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052,2064, 80 L.Ed.2d 674 (1984); *Murden v. Artuz,* 497 F.3d 178, 198 (2d Cir.2007); *Greiner v. Wells,* 417 F.3d 305, 319 (2d Cir.2005), *cert. denied,*546 U.S. 1184, 126 S.Ct. 1363, 164 L.Ed.2d 72 (2006). To be constitutionally deficient, the attorney's conduct must fall "outside the wide range of professionally competent assistance."*Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066; *Greiner,* 417 F.3d at 319 (citing *Strickland*). An attorney's performance is judged against this standard in light of the totality of the circumstances and from the perspective of counsel at the time of trial, with every effort being made to "eliminate the distorting effects of hindsight[.]"*Strickland,* 466 U.S. at 689,104 S.Ct. at 2065; *Greiner,* 417 F.3d at 619 (citing Strickland).

When reviewing an attorney's performance against this backdrop, a court will generally indulge in a presumption that constitutionally adequate assistance has been rendered, and significant decisions have been made through the exercise of sound professional judgment to which "a heavy measure of deference" is afforded. *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066; *Greiner,* 417 F.3d at 319 (citing *Strickland*). In a case such as this, a petitioner must establish that his or her attorney omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker; it is not enough to show only that counsel omitted a nonfrivolous argument, as an attorney has no duty to advance every such argument. *Jones v. Barnes,* 463 U.S. 745,754, 103 S.Ct. 3308, 3314 (1983); *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.) (citing *Jones*),*cert. denied,*513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 35 (1994).

***33** Addressing the second prong of the *Strickland* test, courts have generally held that prejudice is established by showing that there is a "reasonable probability" that but for the deficiency "the result of the proceeding would have been different."*Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *Henry v. Poole,* 409 F.3d 48, 63–64 (2d Cir.2005); *Reed v. Smith,* No. 05–CV–3969, 2006 WL 929376, at *6 (E.D.N.Y. Apr. 11, 2006). Any counsel errors must be considered in the aggregate, rather than in isolation.*Lindstadt v. Keane,* 239 F.3d 191, 199 (2d Cir.2001). The failure to make meritless arguments or objections cannot constitute ineffective assistance.*United States v. Arena,* 180 F.3d 380, 396 (2d Cir.1999), *cert. denied,*531 U.S. 811, 121 S.Ct. 33, 148 L.Ed.2d 13 (2000).

3. ***Contrary To Or Unreasonable Application of Clearly Established Supreme Court Precedent***
Analyzed under these controlling standards, petitioner's claims fail; a review of the record fails to reveal any constitutionally significant shortcoming on the part of petitioner's counsel in properly representing him. At trial, counsel's apparent theory of the case was that he was home with his wife and niece at the relevant times, and that accordingly, he could not have committed the burglaries, and further that the evidence showed, at worst, that petitioner possessed stolen property—a crime for which he was not charged. Trial Tr. at 726–68. Counsel also claimed that others, including Mark Perry and Teddy Johnson, actually committed the crimes for which McKinney was accused. *Id.* Counsel pointed out that there were no witnesses to the actual burglaries, that there was no fingerprint evidence linking McKinney to the crime scenes, that the prosecution's case was circumstantial, and that petitioner's statement was not a confession, but instead little more that "grandiose, boastful talk." *Id.* at 763.The court is unable to conclude that these strategies were not the product of sound professional judgment, but instead indicative of constitutionally deficient representation.

The record also reveals that at the appropriate junctures, McKinney's trial counsel filed appropriate motions, and vigorously cross-examined witnesses. *See* Pro Se Supp. Br. Exh. A; Trial Tr. at 414–18, 424–27, 434–35, 446–55, 462–64, 470–76, 485–92, 494–96, 504–509, 516, 555–68, 575–81, 586–91, 600, 619–36, 652–60. Petitioner's attorney objected repeatedly to the admission of any evidence of uncharged prior burglaries or other crimes (Trial Tr. at 521–27, 528–30), and moved for a mistrial on the ground that too much evidence had been permitted as to uncharged crimes, resulting in an unfair trial. Trial Tr. at 668–70. Counsel moved to suppress petitioner's statement (Hearing Tr. 1, 2), and challenged the validity of Elizabeth McKinney's consent to a search of the couple's apartment. Consent to Search Hearing, June 1, 2001, at 1–39. Counsel also presented a meaningful an alibi defense, Trial Tr. at 670–708, and moved for a trial order of dismissal

at the close of the People's case, making specific arguments as to each crime charged, and later renewed that motion at the close of petitioner's case. Trial Tr. at 666–68, 709–10. Indeed, counsel's strategy proved partially successful when petitioner was acquitted of three counts of the indictment, including one count of second degree burglary. Trial Tr. 876–78.

***34** One aspect of McKinney's ineffective assistance claim surrounds his counsel's alleged failure to obtain fingerprint reports for the 1011 Westcott Street burglary. This claim is fatally undermined by the record, which shows that on June 6, 2001, the prosecutor did in fact receive a fingerprint report for 1011 Westcott Street from Officer William Donahue, and immediately provided it to McKinney's counsel. Trial Tr. at 591. The report, used by trial counsel on cross-examination, revealed that Donahue compared fingerprints lifted from the point of entry at 1011 Westcott Street to petitioner's fingerprints, and determined that the two did not match. *Id.* at 603–04, 607.Since petitioner's trial counsel received the report when it became available, and successfully used it on cross-examination, this claim of ineffectiveness should therefore be denied.

Petitioner further claims that his trial counsel should have obtained police reports from a forgery investigation relating to the traveler's checks stolen from 133 Circle Road, but failed to do so. At trial, petitioner argued that he had not received these reports, and additionally asked for statements of Veronica and Mark Perry and Teddy Johnson. Trial Tr. at 370–71. The prosecutor turned over to defense counsel Mark Perry's statement and the reports relating to the police interview of Mark Perry, and explained that Veronica Perry did not give a written statement. Trial Tr at 370–71, 374–75. Trial counsel used that information to cross-examine Detective Dennis Murphy regarding the nature of the forgery investigation involving Veronica and Mark Perry's knowledge of the stolen checks, and whether they were suspects in the burglary investigation. Trial Tr. at 446–55. Since the reports were obtained and effectively used at trial, this allegation that trial counsel was ineffective should also be denied.

Petitioner also contends that his trial counsel was ineffective for not obtaining reports for a burglary at 222 Moore Avenue. This claim similarly should also be dismissed, since the record shows that petitioner was not charged with this burglary, and in any event every police report pertaining to that burglary was turned over to trial counsel. Trial Tr. at 366–68.

Petitioner additionally argues that his trial counsel should have sought a severance of the five separate burglary charges, for purposes of trial, but failed to do so. This claim is refuted by the record. Petitioner attached a copy of trial counsel's Affidavit in Support of Pretrial Motions to his Pro Se Supplemental Brief on direct appeal. Dkt. No. 10, Exh. 3c, Pro Se Supp. Br. at Exh. A. In paragraphs five through nine, trial counsel specifically moved for such a severance. *Id.* This claim should also be dismissed.

Petitioner next asserts that trial counsel was ineffective with regard to the presentation of *Ventimiglia* issues. Under New York law, the People must seek a ruling from the trial court before introducing evidence of uncharged crimes at trial. *People v. Ventimiglia,* 52 N.Y.2d 350, 420 N.E.2d 59, 438 N.Y.S.2d 261 (1981). When evidence of uncharged crimes is part of the history of the charged crimes, it is admissible. *Pena v. Fischer,* No. 00 civ 5984, 2003 WL 1990331, at *10 (S.D.N.Y. Apr.20, 2003).

***35** In this instance McKinney's trial counsel did in fact object to the admission of any testimony regarding uncharged crimes. Specifically, counsel objected to the introduction of 1) any testimony that petitioner had been in state prison; 2) Johnson's anticipated testimony that petitioner was with him to commit a burglary that was not completed; 3) Detective Carr's anticipated testimony that petitioner admitted to between twenty-five and fifty burglaries; and 4) Detective Stonecypher's anticipated testimony regarding prior burglaries petitioner discussed in his statements. Trial Tr. at 8–10, 12, 16–19. The prosecutor argued that petitioner's references in his statement to uncharged burglaries were inextricably interwoven with his confession to the five burglaries for which he was charged. *Id.* at 13–14.In response to petitioner's arguments, the trial court stated that it would admonish the jury to consider evidence only as it related to the crimes for which petitioner was charged, and in fact fulfilled that promise during the trial. Trial Tr. at 14, 442–43, 482–83, 551. The court also ruled that the prosecutor should be limited to proving only admissions by the petitioner that pertained to the charged crimes. *Id.* at 18–24.During Detective Stonecypher's testimony, trial counsel objected to a general reference to burglaries, and the court again instructed the prosecutor to narrow Stonecypher's testimony regarding petitioner's admissions to having committed prior burglaries to those that were inextricably interwoven. Trial Tr. at 523–31. Counsel then engaged in a lengthy cross-examination and established that petitioner never identified to police the

houses he burglarized, and never specified the food consumed by him at the houses or the property taken from them. Trial Tr. at 559–61, 562–63, 565–68. On the record before me, I cannot say that counsel ineffectively handled the *Ventimiglia* issues in this case.

Petitioner further claims his trial counsel failed to demand that Detective Carr's suppression hearing testimony be formally transcribed, instead relying upon a read-back of that testimony in preparation for cross-examination. Counsel did in fact request a transcript of the relevant trial excerpts, and noted petitioner's objection to permitting Carr to testify without it; unfortunately, however, the court stenographer had not yet completed the transcript by the time it was needed. Trial Tr. at 588. The trial court offered to have the stenographer read Carr's testimony to counsel and petitioner, and counsel agreed. Trial Tr. at 589, 609. Counsel cross-examined Carr extensively. Trial Tr. at 619–36. Petitioner does not now explain how having a formal transcript of Carr's suppression hearing testimony would have changed the outcome of the trial. This claim should also be dismissed.

Petitioner's next contention, to the effect that trial counsel was ineffective for not objecting to hearsay testimony offered by Detective Carr regarding his conversations with Hans Klint, is equally unavailing. The record reveals that trial counsel objected twice to Carr's testimony regarding Klint on hearsay grounds. On the first occasion, the objection was overruled. Trial Tr. at 611. The second objection, however, was sustained, and the trial court issued a cautionary instruction directing the jury to disregard Carr's testimony that Klint told Carr petitioner delivered stolen property to Klint's apartment.*Id.* at 612–13, 438 N.Y.S.2d 261, 420 N.E.2d 59. Trial counsel then extensively cross-examined Carr regarding his dealings with Klint and the location of the stolen property in his apartment. Trial Tr. at 628–30, 633–36. Since counsel did exactly what petitioner claimed he failed to do, this portion of his claim is similarly deficient.

***36** Petitioner also claims that his trial counsel did not adequately cross-examine Teddy Johnson and Detectives Stonecypher and Carr. Petitioner does not explain what was deficient about counsel's questioning, however, nor has he established any prejudice resulting directly from this alleged shortcoming. In any event, the record discloses that counsel vigorously cross-examined these witnesses. Trial Tr. at 485–92, 494–96, 555–68, 575–81, 619–36. This claim should therefore be dismissed.

Petitioner also alleges that his trial counsel's performance was ineffective because he did not timely request a missing witness charge for Hans Klint. [11] While McKinney's counsel did ultimately request such a charge, he did so after both the prosecutor and petitioner had rested. Trial Tr. at 711–12. The Appellate Division found that the request for this instruction was therefore untimely. *McKinney,* 302 A.D.2d at 995, 755 N.Y.2d at 541. Notably, the trial court explained to petitioner that it was denying his request for a missing witness instruction not because it was untimely, but because the court did not feel that the charge was warranted based upon the facts of the case and the witnesses. Trial Tr. at 713–14. Whether a missing witness charge should be given lies in the sound discretion of the trial court. *Moore v. West,* No. 03 CV 0053, 2007 WL 1302426, at *16 (N.D.N.Y. May 1, 2007) (Scullin, S.J). Thus, even if counsel's request for such an instruction had been timely, it appears unlikely that it would have been granted.

In any event, this element of petitioner's ineffectiveness claim also fails because in light of his inability to establish resulting prejudice. To be entitled to a missing witness charge under New York law, petitioner would have had to show that 1) Klint was knowledgeable about an issue material to the trial; 2) that he was expected to give noncumulative testimony favorable to the prosecution, and 3) that Klint was available to the prosecution. *Farr v. Greiner,* No. 01 CR 6921, 2007 WL 1094160, at *13 (E.D.N.Y. Apr.10, 2007); *People v. Macana,* 84 N.Y.2d 173, 196, 615 N.Y.S.2d 656, 639 N.E.2d 13 (1994), *lv. denied,*82 N.Y.2d 756, 624 N.E.2d 184, 603 N.Y.S.2d 998 (1993); *People v. Gonzalez,* 68 N.Y.2d 424, 427, 502 N.E.2d 583, 509 N.Y.S.2d 796 (1986). Petitioner has not set forth any evidence to show that Klint would have provided favorable testimony for the prosecution. In fact, his argument is exactly the opposite—that Klint would testify that it was Teddy Johnson, and not the petitioner, who brought the stolen property to Klint's apartment. Trial Tr. at 723–24. *See Moore,* 2007 WL 1302426 at *18 (petitioner's claim that he was improperly denied a missing witness charge did not provide grounds for habeas relief where petitioner failed to show, among other things, that the witness would have testified favorably for the prosecution).

Similarly, petitioner has failed to establish that he would have obtained a greater benefit had the court instructed the jury on the adverse inference permitted under the missing witness charge. Counsel noted in his summation that Klint had not testified, pointing out that according to the testimony of police officers most of the recovered stolen property

including, "[e]verything but the metal box and the traveler's checks", came out of Klint's apartment. Trial Tr. at 744. Counsel told the jury, "[h]e [Klint] didn't come in and tell you anything about how it [the property] got there. How long it had been there. Just, he didn't do it ... That is testimony you do not have in this case."*Id.* Since defense counsel was permitted to emphasize Klint's absence in his summation, "there is no reasonable probability that, but for the untimeliness of counsel's request, the result of the proceeding would have been different."*Cruz v. Conway,* No. 05 CV 4750, 2007 WL 1651855, at *6 (E.D.N.Y. Jun. 6, 2007) (no prejudice as a result of counsel's untimely request for a missing witness charge where counsel argued the point to the jury).*See* *Farr v. Greiber,* No. 01 Civ. 6921, 2007 WL 1094160, at *14 (E.D.N.Y. Apr.10, 2007) ("Since defense counsel was permitted to emphasize those witness's absence in summation, there is no prejudice to petitioner."(rejecting habeas claim that trial court erred in denying missing witness charge)); *Ramos v. Phillips,* No. 05 Civ. 0023, 2005 WL 1541046, at *9 (E.D .N.Y.2005) (rejecting ineffective assistance claim because "it cannot be said that defendant would have obtained a greater benefit had the jury been permitted to consider the adverse inference contained in the missing witness charge" where defense counsel highlighted absence of witness in summation). I therefore recommend the denial of this aspect of the petition.

***37** Petitioner next claims that his trial counsel was ineffective for not requesting a jury instruction regarding what he considers to be the "lesser included offense" of possession of stolen property, despite counsel's argument to the jury that the evidence showed, at worst, that McKinney was guilty of that charge. Dkt. No. 1, Ground Four. Under New York law, a trial court "may submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater...."N.Y. CRIM. PROC. LAW § 300.50(1). Based upon the evidence at trial regarding the value of the stolen property, only criminal possession of stolen property in the fourth and fifth degrees would arguably have been applicable in this case. N.Y. PENAL LAW §§ 165.45(1), (2); 165.40. As petitioner's counsel likely appreciated, however, those charges are not properly considered as lesser included offenses of fourth degree grand larceny or second degree burglary. *See, e.g.* *People v. Kohl,* 19 A.D.3d 1155, 1156, 798 N.Y.S.2d 276, 277 (4th Dept.2005) (fourth degree criminal possession of stolen property is not a lesser included offense of fourth degree grand larceny or second degree burglary); *People v. Perez,* 156 A.D.2d 7, 12, 553 N.Y.S.2d 659, 662 (1st Dept.1990) (fifth degree possession of stolen property is not a lesser included offense of second degree burglary), *lv. denied*76 N.Y.2d 794, 559 N.E.2d 693, 559 N.Y.S.2d 999 (1990). Thus, if counsel's theory that petitioner was guilty of no more than possession of stolen property had been accepted by the jury, petitioner would have been acquitted of his crimes actually charged. In this instance, counsel cannot be deemed ineffective for failing to make a meritless request for an inapplicable jury instruction.

I note further that having independently canvassed the applicable sections of the New York Penal Law, I find that no reasonable view of the evidence supports a finding that petitioner committed any other lesser included offenses. For example, a jury could not reasonably view the evidence and find that petitioner was guilty of criminal trespass in the second degree, which is recognized as a lesser included offense of second degree burglary, because the evidence established that petitioner entered the homes with the intent to remove property from them and not to simply enter or remain without permission in the homes. *See* *People v. Peyton,* 244 A.D.2d 976, 665 N.Y.S.2d 218 (4th Dept.1997) (second degree criminal trespass is a lesser included offense of second degree burglary), *lv. denied*91 N.Y.2d 896, 691 N.E.2d 1036, 669 N.Y.S.2d 10 (1998); *People v. Hoyle,* 211 A.D.2d 973, 621 N.Y.S.2d 756 (3d Dept.1995) (no error to decline to charge second degree criminal trespass as a lesser included offense of first degree burglary where no reasonable view of the evidence supported defendant's claim that he committed the lesser and not the greater), *lv. denied*86 N.Y.2d 736, 655 N.E.2d 714, 631 N.Y.S.2d 617 (1995). Similarly, a jury could not reasonably view the evidence and find that petitioner was guilty of petit larceny, a lesser included offense of fourth degree grand larceny, because the value of the items taken from Donald DeSalvia exceeded $1,000, and petitioner stole credit cards from Eleanor Lentz. *See*N.Y. PENAL LAW §§ 155.30(1), (4). Since any request to charge lesser included offenses in all likelihood would have been denied, petitioner was not prejudiced by trial counsel's failure to make such a request.

***38** To the extent that petitioner claims counsel was ineffective because he would not "champion" petitioner's objection to the trial court's circumstantial evidence charge, that claim should also be dismissed. It should initially be noted that petitioner does not point to a specific deficiency in connection with the court's circumstantial evidence charge. In any event, the record is clear that counsel indeed made

an exception to the charge. Trial Tr. at 860. The court noted the objection, but found that the instruction had been clear.*Id.* Since his trial counsel lodged an objection regarding the disputed instruction, petitioner's claim is without merit.

Petitioner next claims that his trial counsel should have objected to portion of the prosecutor's closing in which he called petitioner's wife a liar. Although the prosecutor asserted that in her testimony petitioner's wife was not being truthful, and pointed out that she testified she would do anything for petitioner, the prosecutor did not call petitioner's wife a liar. Trial Tr. at 783. Those remarks were in fair response to trial counsel's closing argument, to the effect that the jury should believe petitioner's wife over Johnson, implying that Johnson was incredible. Trial Tr. at 751–53, 755–57. *See Rivera v. Ercole,* No. 07 Civ. 3577, 2007 WL 2706274, at *20 (S.D.N.Y. Sept.18, 2007) (prosecutor's remarks were not a ground for habeas relief when they are a proper response to defense counsel's attack on the credibility of witnesses) (citations omitted). This claim should therefore be dismissed.

Finally, petitioner claims that his trial counsel was ineffective for not objecting to the admission into evidence of a bag/briefcase belonging to Eleanor Lentz, recovered from Klint's closet and containing petitioner's identification. Petitioner claims counsel should have objected because his prison identification was found inside the bag, and the jury was permitted to draw adverse and impermissible conclusions from the identification. While there was testimony that petitioner's identification was found inside the bag, there was no testimony that it was a prison identification. Trial Tr. at 513–15, 614, 620–21, 629. In any event, when the prosecutor offered the bag and its contents into evidence, trial counsel did in fact object to its admission, although on a different ground, arguing that the bag had been locked in an office before it was submitted to an evidence locker, and law enforcement officers had commingled it with other items in the room. Trial Tr. at 649–50. The court overruled that objection. *Id.* at 650.I cannot say on the face of this record that trial counsel was ineffective on this ground, or that petitioner suffered prejudice, and therefore recommend that this ground be dismissed.

Petitioner's remaining unexhausted claims, in which he asserts that trial counsel was loyal to the court and not to petitioner, that counsel issued an unnecessary subpoena to petitioner's wife, and that counsel failed to investigate the case and prepare a defense, are plainly without merit. As noted above, the record demonstrates that trial counsel vigorously represented petitioner by filing appropriate motions, making appropriate arguments, and even supporting petitioner's many attempts to make a record regarding what petitioner considered to be important issues, including allegations of ineffectiveness. *See, e.g.,* Trial Tr. at 353–85, 544–51, 667–69, 712–15; Sent. Tr. at 3–38. Petitioner's claim that counsel failed to conduct a competent investigation into the case is refuted by the record, which shows that not only was counsel prepared at every stage of the case, but that he presented an alibi defense, and his representation resulted in acquittal of three of the charges. Trial Tr. at 670–708, 876–77. Finally, assuming trial counsel issued or caused to be issued a subpoena to petitioner's wife, that action was appropriate under New York's Criminal Procedure Law § 610.10 and 610.20(3), which provide for the use of subpoenas to ensure a witness's notice of an appearance and his or her attendance.

***39** In sum, trial counsel's strategy decisions throughout the trial, viewed in their totality rather than in isolation, were not unreasonable under *Strickland,* and his counsel was not ineffective merely because petitioner may have disagreed with his strategy, or because the strategy was partially unsuccessful. *See Minigan v. Donnelly,* No. 01–CV–0026A, 2007 WL 542137, at *22–23 (W .D.N.Y. Feb. 16, 2007) (citing *People v. Benevento,* 91 N.Y.2d at 712, 697 N.E.2d at 587, 674 N.Y.S.2d at 632 (a reviewing court "must avoid confusing true ineffectiveness with mere losing tactics ... a simply disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after trial, does not suffice."); *Jenkins v. Unger,* 03 cv 1172, 2007 WL 911889, at *6 (N.D.N.Y. Mar.22, 2007) (Kahn, D.J.) (discussing reluctance to second-guess counsel's trial strategy simply because that strategy was unsuccessful). Petitioner has not established that counsel was ineffective or that he suffered prejudice, in that the outcome would have been different had counsel only listened to petitioner. Accordingly, I recommend that petitioner's claim that trial counsel was ineffective based upon the fifteen grounds discussed above.

F. ***Ground Five: Effectiveness of Appellate Counsel***

Petitioner also claims that appellate counsel was ineffective because 1) counsel failed to raise trial counsel's ineffectiveness; 2) counsel failed to raise all but two of the claims petitioner directed him to raise; 3) counsel had previously represented the petitioner, thereby creating a conflict; and 4) counsel did not argue his case, opting instead to permit the appeal to be submitted on the briefs. Dkt. No. 1, at Ground Five. Respondent argues that these claims are both unexhausted, and without merit. Dkt. No. 11, 31–33.

Petitioner raised a general claim on direct appeal that his appellate counsel was ineffective. Pro Se Supp. Br. at i. The Appellate Division pointed out that this claim could be raised in a state *coram nobis* petition, but went on to find the claim lacking in merit. [12] *McKinney,* 302 A.D.2d at 995, 755 N.Y.2d 541. As with his claims of trial counsel ineffectiveness, petitioner did not raise the specific challenges now contained in his habeas petition in the state courts.

New York State law makes available a specific procedure, a state writ of error *coram nobis* petition, for raising a claim that a convicted defendant's appellate counsel was ineffective. *People v. Bachert,* 69 N.Y.2d at 598–99, 509 N.E.2d at 321, 516 N.Y.S.2d at 626. *See Hust v. Costello,* 329 F.Supp.2d 377, 379 (E.D.N.Y.2004); *Jackson v. Moscicki,* 99 Civ. 2427 & 9746, 2000 WL 511642, at *9 (S.D.N.Y. Apr.27, 2000). A coram nobis petition is the only vehicle available to a New York convicted defendant to exhaust a claim that appellate counsel was ineffective for federal habeas purposes. *Garcia v. Scully,* 907 F.Supp. 700, 706–707 (S.D.N.Y.1995). Despite that available remedy, to date petitioner failed to raise his ineffective assistance of appellate counsel claims through petitioning for a writ of error *coram nobis* to the Appellate Division; and, because there is no time limit for filing a writ of error *coram nobis* in state court, that avenue is still available to the petitioner. *Id.* Accordingly, petitioner's challenges to appellate counsel's effectiveness are unexhausted. 28 U.S.C. § 2254(b); *Dorsey,* 112 F.3d at 52. Because these unexhausted claims are "plainly meritless," however, *Rhines,* 544 U.S. at 277, I will address them. 28 U.S.C. § 2254(b)(2); *Wheeler,* 2006 WL 2357973, at *5.

***40** Analysis of an ineffective assistance of appellate counsel claim is informed by the same considerations as pertain to a claim of ineffective assistance generally; to prevail on such a claim, a petitioner must demonstrate that 1) appellate counsel's performance fell below an objective standard of professional reasonableness; and 2) but for appellate counsel's "unprofessional errors," the results of the proceedings would have been different, and as such, the error caused the petitioner to suffer prejudice. *Smith v. Robbins,* 528 U.S. 259, 285–86, 120 S.Ct. 746, 764, 145 L.Ed.2d 756 (2000); *Strickland,* 466 U.S. at 688, 694. When challenging the effectiveness of appellate counsel, a petitioner must show that his or her appellate attorney "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."*Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.1994), *cert. denied*513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 35 (1994); *Clark v. Stinson,* 214 F.3d 315, 322 (2d Cir.2000), *cert. denied*531 U.S. 1116, 121 S.Ct. 865, 148 L.Ed.2d 778 (2001). A petitioner must show more than counsel's failure to raise a non-frivolous argument, as counsel is required to use professional judgment when deciding to concentrate on a few key issues while eliminating weaker arguments, and is not required to advance every argument urged by the petitioner. *Evitts v. Lucey,* 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985); *Jones v. Barnes,* 463 U.S. 745, 751–52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983); *Sellan,* 261 F.3d at 317. The Sixth Amendment does not require that all colorable state law arguments be raised on direct appeal. *Sellan,* 261 F.3d at 310.

In support of McKinney's direct appeal, his appellate counsel filed a sixty-two page brief in which he advanced five arguments apparently deemed by him to have the greatest likelihood of success. Counsel likely recognized, as analyzed above, that there was no merit to any of petitioner's claims that his trial counsel was ineffective. Appellate counsel cannot be faulted and considered as ineffective for failing to make a meritless claim. *See Torres v. McGrath,* 407 F.Supp.2d 551, 562 (S.D.N.Y.2006) (" '[f]ailure to make a meritless argument does not amount to ineffective assistance' ") (*quoting Arena,* 180 F.3d at 396). Although petitioner claims that he sent appellate counsel a twenty page letter detailing each additional argument which he believed had merit and should be raised, counsel was not required to raise every claim urged by the petitioner. *Evitts,* 469 U.S. at 394, 105 S.Ct. at 835.

Petitioner further claims that his appellate counsel's representation of him presented a conflict of interest, since that attorney had previously represented him in connection with an appeal, which petitioner also did not feel had been handled correctly. Petitioner's "conclusory allegations, without more, are insufficient to create even the appearance of a conflict of interest ."*Garfield v. Poole,* 421 F.Supp.2d 608, 613 (W.D.N.Y.2006). Even assuming that the fact appellate counsel previously represented him on an appeal would constitute a potential conflict, it is irrelevant because "petitioner cannot show that appellate counsel's representation would have been any different regardless of his affiliation."*Torres v. Strack,* No. 96–CV–0846, 1998 WL 59452, at *7 (N.D.N.Y. Feb. 10, 1998) (Pooler, J.).

***41** Finally, petitioner claims that he suffered prejudice because his counsel did not argue his case in the Appellate Division, opting instead to submit the case on the briefs. In

the Appellate Division, Fourth Department, oral argument is permitted in most criminal appeals, with the exception of those that challenging the severity of a sentence imposed, but is not required. *See* N.Y. Sup.Ct.App. Div. 4th Dept. R. 1000.11. In this instance petitioner has failed to allege how the outcome of his appeal would have been different, and that his conviction would have been reversed, had counsel argued the case. Moreover, the fact that the Appellate Division modified the judgment by vacating the sentences imposed on the grand larceny convictions and remitted the case for re-sentencing flies in the face of any argument that the Appellate Division looked unfavorably upon counsel's decision to submit the case for review on the briefs without oral argument.

Having found no constitutionally significant deficiency in the performance on the part of his attorney, I recommend that petitioner's ineffective assistance of appellate counsel claim be denied.

G. ***Sixth Ground & Excessive Sentence/Cruel and Unusual Punishment***

Petitioner next claims that the sentence of twenty years to life, imposed for the burglary convictions and based upon his status as a persistent violent felony offender, was cruel and unusual for two reasons. First, while acknowledging that second degree burglary is classified as a violent felony offense under New York law, McKinney nonetheless contends that being sentenced as a violent felony offender was not constitutional in this case because he was never threatening or physically violent during the course of committing the crimes for which he was convicted. Dkt. No.1, Addendum 3, Ground Six. Additionally, McKinney claims that he was not given the minimum sentence possible and that instead the sentence was enhanced based on speculation about other crimes for which he was not convicted. [13] *Id.* Respondent counters by arguing that this claim both is not cognizable, and is without merit. Dkt. No. 11, at 33–35.

This portion of McKinney's petition overlooks the firmly established principle that "[n]o federal constitutional issue is presented where, as here, the sentence is within the range prescribed by state law."*White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992) (*citing Underwood v. Kelly,* 692 F.Supp. 146 (E.D.N.Y.1988), *aff'd mem.,*875 F.2d 857 (2d Cir.1989), *cert denied*493 U.S. 837, 110 S.Ct. 117, 107 L.Ed.2d 79 (1989). Petitioner was convicted of four counts of second degree burglary, class C violent felonies. Trial Tr. at 814–44. Petitioner had two prior convictions for the very same crime, one in 1991 and the other in 1987. N.Y. PENAL LAW § 70.02(1)(b); Sent. Tr. at 39. Second degree burglary was classified as a violent felony offense in New York as early as 1978, well before petitioner's 1991 and 1987 convictions for that crime. *See People v. Morse,* 62 N.Y.2d 205, 214, 476 N.Y.S.2d 505, 465 N.E.2d 12 (1984), *appeal dismissed by Vega v. New York,* 469 U.S. 1186, 105 S.Ct. 951, 83 L.Ed.2d 959 (1985). The trial court thus properly determined that petitioner was a persistent violent felony offender, based upon these two prior violent felony convictions and the fact that he was again convicted of the same violent felony offense. Sent. Tr. at 39. *See*N.Y. PENAL LAW § 70.08(1)(a). Under New York law, the authorized sentence for a persistent violent felony offender carries a minimum range of between sixteen years and twenty-five years, with a mandatory maximum sentence of life in prison. N.Y. PENAL LAW § 70.08(2), (3)(b). The sentence imposed in this instance, twenty years to life in prison on each count of second degree burglary, was well within that range.

***42** Based upon these circumstances the Appellate Division correctly concluded that the lower court properly sentenced the petitioner as a persistent violent offender. *See McKinney,* 302 A.D.2d at 994, 755 N.Y.S.2d 541. I note, moreover, that although the trial court could have ordered that the four sentences run consecutively, since the crimes for which he was convicted were not the result of a single act, but rather constituted four distinct crimes, the court instead exercised its discretion and ordered all of the sentences to run concurrently. *See*N.Y. PENAL LAW § 70.25; *People v. Walsh,* 44 N.Y.2d 631, 484 N.E.2d 126, 407 N.Y.S.2d 97 (1985).

Petitioner alleges that the state court improperly based its sentence upon uncharged crimes for which he was not convicted. "[A]t sentencing, 'the judge may consider hearsay, evidence of uncharged crimes, dropped counts of an indictment, and crimes charged that resulted in acquittal."*Jones v. Donnelly,* 487 F.Supp.2d 403, 416 (S.D.N.Y.2007) (quoting *Arocho v. Walker,* No. 01–CV–1367, 2001 WL 856608 at *4 (S.D.N.Y. July 27, 2001). Contrary to petitioner's argument, however, the record shows that the state court based its sentence not solely upon petitioner's prior convictions, or on speculation concerning uncharged crimes, but rather on the crimes for which he was convicted. When passing sentence, the court observed that "one of the most serious crimes that someone can commit is knowingly and unlawfully entering into someone's home."Sent. Tr. at 40. Judge Aloi went on to explain that petitioner made his victims feel unsafe in their own homes.

Id. While the court noted that petitioner had been involved "in these kinds of crimes for many years" and it was apparent that petitioner "continued to commit these crimes after being released from prison," that remark was amply supported by petitioner's convictions in this case. Sent. Tr. at 40. The Appellate Division's rejection of this claim was therefore neither contrary to nor an unreasonable application of clearly established federal law, and this ground of the petition should be denied.

McKinney also claims that his sentence constitutes cruel and unusual punishment, in violation of the Eighth Amendment. That amendment, however, forbids only extreme sentences which are "grossly disproportionate" to the crime of conviction. *Lockyer v. Andrade,* 538 U.S. 63, 72–73, 123 S.Ct. 1166, 1172–73, 155 L.Ed.2d 144 (2003); *Harmelin v. Michigan,* 501 U.S. 957, 995, 111 S.Ct. 2680, 2701, 115 L.Ed.2d 836 (1991). It is well-established that a sentence of imprisonment that is within the limits of a valid state statute is not cruel and unusual punishment in the constitutional sense. *See White,* 969 F.2d at 1383; *Lou v. Mantello,* No. 98–CV–5542, 2001 WL 1152817, at *13 (E.D.N.Y. Sept.25, 2001). The Supreme Court has held that, even for certain offenses less serious than manslaughter, sentences of incarceration for longer than twenty-five years are not grossly disproportionate. *See Staubitz v. Lord,* 03 CV 0671, 2006 WL 3490335, at *2 (E.D.N.Y. Dec.1, 2006) (*citing Ewing v. California,* 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (twenty-five years to life for grand theft) and *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (life in prison without the possibility of parole for cocaine possession). McKinney's sentence thus did not run afoul of the Eighth Amendment's prohibition against cruel and unusual punishment.

***43** In sum, since the sentence imposed was plainly within the limits authorized by statute, and was not grossly disproportionate to the crime of conviction, this ground of McKinney's petition should be denied.

IV. *SUMMARY AND RECOMMENDATION*

The vast majority of the arguments now raised by the petitioner were presented to and rejected by the state courts. Having carefully reviewed the record, applying the requisite deferential standard, I am unable to conclude that any of the state court's determinations were either clearly erroneous or represent unreasonable applications of clearly established Supreme Court precedent. Certain of McKinney's fifteen claims that trial counsel was ineffective are either "deemed exhausted" and procedurally barred, or are unexhausted; in any event, each is without merit. McKinney's three claims of appellate counsel ineffectiveness are unexhausted, but plainly meritless. It is therefore hereby

RECOMMENDED, that the petition in this matter be DENIED and dismissed in all respects, and it is further hereby

RECOMMENDED, based upon my finding that McKinney has not made a "substantial showing of the denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c)(2), that a certificate of appealability not issue with respect to any of the claims set forth in his petition.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten (10) days within which to file written objections to this report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN (10) DAYS WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(e), 72; *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993).

It is further ORDERED that the Clerk of the Court serve a copy of this report and recommendation upon the parties electronically.

All Citations

Not Reported in F.Supp.2d, 2009 WL 666396

Footnotes

1 On *de novo* review, a district court will ordinarily refuse to consider arguments, case law and/or evidentiary material that could have been, but was not, presented to the magistrate judge in the first instance. *See, e.g., Paddington Partners v. Bouchard,* 34 F.3d 1132, 1137–38 (2d Cir.1994) ("In objecting to a magistrate's report before the district court, a party has no right to present further testimony when it offers no justification for not offering the testimony at the hearing before the magistrate.") [internal quotation marks and citations omitted]; *Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters,* 894 F.2d 36, 40, n. 3 (2d Cir.1990) (district court did not abuse discretion in denying plaintiff's request to present additional testimony where he "offered no justification for not offering the testimony at the hearing before the magistrate").

2 *See also* *Vargas v. Keane,* 93–CV–7852, 1994 WL 693885, at *1 (S.D.N.Y. Dec.12, 1994) (Mukasey, J.) ("[Petitioner's] general objection [that a] Report ... [did not] redress the constitutional violations [experienced by petitioner] ... is a general plea that the Report not be adopted ... [and] cannot be treated as an objection within the meaning of 28 U.S.C. § 636."), *aff'd,*86 F.3d 1273 (2d Cir.), *cert. denied,*519 U.S. 895, 117 S.Ct. 240, 136 L.Ed.2d 169 (1996).

3 To the extent that Petitioner argues that certain portions of Magistrate Judge Peebles' Report–Recommendation are erroneous solely because they do not cite Petitioner's Traverse, the Court can find no legal support for such a proposition. *See* *Deck v. Varner,* 99–CV–4818, 2001 WL 1417617, at *1, 3, 6 (E.D.Pa. Nov.8, 2001) (rejecting habeas petitioner's argument that magistrate judge erred by failing to address various facts and arguments raised in his traverse).

4 The Court notes that the trial court concluded that Petitioner's claim that he asked for an attorney was not credible. As noted by Magistrate Judge Peebles in his Report–Recommendation, because Petitioner has not come forward with evidence to refute the hearing court's factual findings, the findings are presumed to be correct. (*See*Dkt. No. 24, at 29 [Rep.-Rec.].)

5 Petitioner's explanation for not previously submitting Johnson's sworn statement is that he "was under the mistaken belief that ... [the] statement was part of the trial record."(Dkt. No. 29, Part 1, at 16 [Opp. to Rep.-Rec.].) Petitioner had access to a complete copy of the trial record through appellate counsel, and presumably was (or could have been, upon his request) provided with that complete copy of the trial record when his relationship with appellate counsel ended. In addition, the Court notes that more than five (5) months passed between the date on which Respondent served its Memorandum of Law on Petitioner and the date on which Petitioner filed his Traverse. (*Compare* Dkt. Nos. 10, 12 [Decl. and Affid. of Serv., dated 3/17/05] *with*Dkt. No. 18 [Traverse, dated 8/26/05].) The Court finds that Petitioner's purported mistake, which was caused by neglect, is not a compelling justification for failing to offer this evidence to Magistrate Judge Peebles. *See* *Housing Works, Inc. v. Turner,* 362 F.Supp.2d 434, 438–39 (S.D.N.Y.2005) (mistaken belief of immateriality of evidence omitted from record not "compelling reason" for supplementing record during objection to magistrate judge's report-recommendation); *Crown Heights Jewish Community Council, Inc. v. Fischer,* 63 F.Supp.2d 231, 234–35 (E.D.N.Y.1999) (mistake due to "uncertainty" as to need did not constitute "sound basis" for supplementing record during objection to magistrate judge's report-recommendation); *U.S. Fidelity and Guar. Co. v. J. United Elec. Contracting Corp.,* 62 F.Supp.2d 915, 917–18 (E.D.N.Y.1999) (being "overwhelmed by a number of legal proceedings" not an adequate justification for supplementing record during objection to magistrate judge's report-recommendation). This rule applies even to pro se habeas corpus petitioners. *See, e.g.,* *Forman v. Artuz,* 211 F.Supp.2d 415, 418, n. 8 (S.D.N.Y.2000) (concluding that petitioner's evidence, raised for the first time during his objection to magistrate judge's report-recommendation, was untimely).

6 The sworn statement states as follows. On June 14, 2000, Johnson drove Petitioner to "the 400 blk of E. Colvin St. near Berwyn Ave." and waited in the car, "knowing [Petitioner] was going to steal some stuff."(*See*Dkt. No. 29, Part 1, at 39 [Obj. to Rep.-Rec., Exh. B].) After waiting "at least an hour," Johnson "decided to get out of the car and see what was going on."(*Id.*)"Once [Johnson] got out of the car, [he] realized that [he] had accidentally" locked the keys in the car. (*Id.*)"Shortly thereafter, [Petitioner] showed up ... carrying a blue colored canvass bag ...." (*Id.*)When Johnson told Petitioner what happened, Petitioner "walked off, all pissed off." (*Id.*) The police arrived later "to see what was going on, and eventually towed the car." (*Id.*)

7 Detective Stonecypher's report was prepared after Petitioner's June 20, 2000, interview with the police and (according to Petitioner) contained Petitioner's confession of crimes that he committed in the past, unrelated to the crimes he was subsequently convicted of committing.

8 *See, e.g.,* *People v. Barnes,* 50 N.Y.2d 375, 379–80, 429 N.Y.S.2d 178, 406 N.E.2d 1071 (1980) (noting that when a conviction depends entirely upon circumstantial evidence, although the finder of fact must undertake a "rigorous function" in order to find guilt beyond a reasonable doubt, "the ultimate burden of proof which must be borne by the People" is not altered "with a case of purely circumstantial evidence.")

9 *See, e.g.,* *U.S. v. Lugo Guerrero,* 524 F.3d 5, 8–9 (1st Cir.2008) (finding that a confession of having committed two prior robberies was admissible in the prosecution's case in chief because the statements were not obtained in violation of defendant's *Miranda* rights). The Court has already concluded that the statements that Petitioner made during his discussion with law enforcement officials did not violate Petitioner's *Miranda* rights. *See, supra,* Part III.B. of this Decision and Order.

10 *See, e.g.,* *People v. Athanasatos,* 40 A.D.3d 1263, 836 N.Y.S.2d 343, 345–46 (N.Y.App.Div.., 3d Dept.2007) (allowing "police officer to testify regarding a nearly identical incident involving ... defendant that took place the day before the alleged burglary in New York" because such extrinsic evidence established a common scheme or plan).

11 The Court notes that the twelve challenges are accurately detailed in Magistrate Judge Peebles's Report–Recommendation. (*See*Dkt. No. 24, at 53–54 [Rep.-Rec.].)

12 The Appellate Division rejected Petitioner's general claim, finding instead that his trial counsel provided "meaningful representation" in accordance with New York standards. *People v. McKinney,* 302 A.D.2d 993, 995, 755 N.Y.S.2d 541 (N.Y.App.Div., 4th Dept.2003).

1 *U.S. v. Wade,* 338 U.S. 218, 388 S.Ct. 1926 (1967); *People v. Huntley,* 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

2 In this proceeding petitioner does not challenge the validity of Judge Aloi's findings with respect to either the *Wade* hearing or the consent hearing.

3 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

4 *People v. Sandoval,* 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).

5 Although petitioner claims that he was re-sentenced on the grand larceny convictions to an indeterminate term having a minimum of two years and a maximum of four years (Dkt. No. 1, at Ground Six), I am unable to confirm that information in light of the lack of anything in the record reflecting the outcome of the re-sentencing on those convictions.

6 In the past, when wrestling with interpretation and application of the AEDPA's deference standard the Second Circuit had suggested, although leaving open the question, that deference under section 2254(d) is not mandated if a state court decides a case without citing to federal law or otherwise making reference to a federal constitutional claim in a manner adequate to justify deference under AEDPA, in which case pre-AEDPA standards would apply. *Washington,* 255 F.3d at 52–55;*see also Noble,* 246 F.3d at 98. That court recently clarified in *Sellan,* however, that the question of whether or not a state court makes specific reference to a constitutional principle is not controlling.

7 In his opinion in *Sellan,* Chief Judge Walker acknowledged that enlightenment in state court decisions as to the manner of disposition of federal claims presented would greatly enhance a federal court's ability, on petition for habeas review, to apply the AEDPA deference standard. *Sellan,* 261 F.3d at 312. He noted, however, that a state court's failure to provide such useful guidance does not obviate a federal court's duty to make the analysis and pay appropriate deference if the federal claim was adjudicated on the merits, albeit tacitly so. *Id.*

8 The interplay between the well-accepted standard for judging an attorney's performance under the Sixth Amendment and the prevailing test under New York law, particularly with respect to the prejudice prong of the controlling analysis, is an issue which has received increasing attention, with recent federal decisions reflecting some degree of tension between the two points of view. See, *e.g., Henry v. Poole,* 409 F.3d 48 (2d Cir.2005), *cert. denied,*546 U.S. 1040, 126 S.Ct. 1622 (2006). Prior to rendering its decision in *Henry,* the Second Circuit had previously held that the "meaningful representation" test applied by the New York courts is not "contrary to" the governing federal standards, for purposes of the AEDPA, even though the prejudice prong of its analysis is significantly less reaching than under its federal counterpart. *See, e.g., Lindstadt v. Keane,* 239 F.3d 191, 198 (2d Cir.2001) (citing *Loliscio v. Goord,* 263 F.3d 178, 192–93 (2d Cir.2001) and *Eze v. Senkowski, 321* F.3d 110, 122–24 (2d Cir.2003)). Whether that viewpoint will stand the test of time, particularly in light of the Supreme Court's decision in *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), is subject to some doubt. *See Henry,* 409 F.3d at 68–72.

9 It should be noted, however, that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error .' " *Coleman,* 501 U.S. at 753, 111 S.Ct. at 2566–67 (quoting *Murray,* 477 U.S. at 488, 106 S.Ct. at 2645).

10 This issue is more fully discussed further on in this report. *See* pp. 64–87, *post.*

11 "A missing witness charge allows the jury to draw an adverse inference that the testimony of uncalled witnesses would have been unfavorable to the party that declined to call them."*Glover v. Bennett,* No. 98–CV–0607, 2001 WL 1862807, at *5 (N.D.N.Y. Feb. 26, 2001) (Sharpe, M.J.) (citation omitted), adopted, *Glover v. Bennett,* No. 98–CV–0607 (Dkt. No. 23) (N.D.N.Y. Sept. 27, 2001) (Mordue, J.), *aff'd without op., Glover v. Bennett,* No. 01–2633 (No. 98–CV–0607, Dkt. No. 30) (2d Cir. Mar. 4, 2003), *cert. denied, Glover v. Bennett,* 539 U.S. 907, 123 S.Ct. 2258, 156 L.Ed.2d 119 (2003).

12 The Fourth Department also found that a challenge to the effectiveness of appellate counsel "may be raised on direct appeal from a judgment of conviction and, with an adequate record, is properly reviewable."*McKinney,* 302 A.D.2d at 995, 755 N.Y.2d 541. I note that in so ruling, the Appellate Division cited to the New York Court of Appeals decision in *People v. Vasquez,* 70 N.Y.2d 1, 3, 509 N.E.2d 934, 516 N.Y.S.2d 921 (1987). *Vasquez,* however, dealt with appointed appellate counsel's failure to follow proper procedures for filing an *Anders* brief (*Anders v. California,* 386 U.S. 738, 744, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)). The Court of Appeals specifically stated that the procedures to be followed to collaterally attack appellate counsel's effectiveness—as petitioner is doing here—were detailed in its decision in *People*

v. Bachert, 69 N.Y.2d 593, 509 N.E.2d 318, 516 N.Y.S.2d 623 (1987). That procedure requires a defendant to challenge appellate counsel's ineffectiveness by initiating a state *coram nobis* proceeding. *Id.*

13 McKinney does not appear to be challenging the sentences imposed for grand larceny and petit larceny.

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Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Richard MILLS, Petitioner,
v.
John B. LEMPKE, Eric Schneiderman, Respondents.

No. 11–CV–0440 (MAT). | May 3, 2012.

Attorneys and Law Firms

Richard Mills, Romulus, NY, pro se.

DECISION and ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** Petitioner *pro se* Richard Mills ("Mills" or "Petitioner") has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his detention in state custody. He is currently incarcerated at Five Points Correctional Facility based on a 2004 judgment entered in Genesee County Court following a jury verdict convicting him of Attempted Assault in the First Degree, Attempted Murder in the First Degree, Reckless Endangerment in the First Degree, two counts of Criminal Possession of a Weapon in the Third Degree, and Criminal Possession of Marihuana in the Third Degree.

II. Factual Background and Procedural History

A. The Underlying Criminal Convictions

In 2002, Mills pled guilty in Genesee County Court (Noonan, J.) to charges of Attempted Murder in the Second Degree and Criminal Possession of Marihuana and was sentenced to 10 years imprisonment with five years post-release supervision. The conviction was later vacated by the trial court in October 2003, because it had unlawfully accepted a waiver of the indictment on the Class A felony of Attempted Murder in the First Degree.

The charges were then presented to a grand jury and an indictment was returned on or about October 23, 2004. On December 13, 2004, Petitioner was convicted following a jury trial on charges of Attempted Murder in the First Degree, Attempted Assault in the First Degree, Reckless Endangerment in the First Degree, two counts of Criminal Possession of a Weapon in the Third Degree and Criminal Possession of Marihuana in the Third Degree. Mills was sentenced to an indeterminate term of imprisonment of 20 years to life on the first degree attempted murder conviction; a determinate 15–year sentence on the attempted first degree assault conviction; an indeterminate sentence of two and one-third to seven years on the first degree reckless endangerment conviction; two concurrent terms of two and one-third to seven years on the two convictions for third degree criminal possession of a weapon; and an indeterminate sentence of one and one-third to four years on the criminal possession of marihuana conviction.

On April 28, 2006, the Appellate Division, Fourth Department, unanimously affirmed the conviction, and the New York Court of Appeals denied leave to appeal on November 30, 2006. Petitioner's various collateral state-court attacks on his convictions were unsuccessful.

B. The 2006 Federal Habeas Proceeding

On December 16, 2006, while Petitioner's third post-conviction motion to vacate the conviction pursuant to New York Criminal Procedure Law ("C.P.L.") § 440.10, was pending, he filed a petition for a writ of habeas corpus in this Court, *Mills v. Poole,* 06–CV–842(RJA) (VEB) (W.D.N.Y.). On May 14, 2008, Magistrate Judge Victor E. Bianchini issued a Report and Recommendation, recommending that the petition be dismissed and that no certificate of appealability issue as to any of Petitioner's claims. District Judge Richard J. Arcara adopted the Report and Recommendation in full on July 1, 2008, thereby denying the petition for habeas corpus with prejudice.

***2** Petitioner filed two separate notices of appeal from Judge Arcara's Order dismissing the petition, as well as a request for a certificate appealability. The United States Court of Appeals for the Second Circuit denied a certificate of appealability and dismissed the appeals on August 5, 2008, finding that Petitioner had not made a substantial showing of the denial of a constitutional right.

Petitioner then filed a motion to vacate the judgment dismissing his habeas petition pursuant to Fed.R.Civ.P. 60(b), which was denied by the Court (Arcara, D.J./ Bianchini, M.J.).*See Mills v. Poole,* 06–CV–0842(RJA) (VEB) (W.D.N.Y. Apr. 28, 2010). On May 4, 2010, Petitioner filled a notice of appeal which the Second Circuit dismissed on December 21, 2010.

3. The 2011 State–Court Resentencing
According to exhibits submitted with the instant petition and the first amended petition, the New York State Department of Corrections and Community Supervision ("NYSDOCCS") advised Judge Noonan that Mills was required to be resentenced because the judge had not imposed a term of post-release supervision concomitant with the determinate sentence on the conviction for first degree attempted assault. *See* Letter from Helene C. Antonelli, Petitioner's Exhibit ("Ex.") 1 at 1–1, Petitioner's Record Volume Two ("R2") (manually filed) (citing N.Y. CORR. LAWW § 601–d ("Whenever it shall appear to the satisfaction of the department that an inmate in its custody, or to the satisfaction of the division of parole that a releasee under its supervision, is a designated person, such agency shall make notification of that fact to the court that sentenced such person, and to the inmate or releasee.")).

Genesee County Assistant District Attorney Lawrence Friedman wrote to Judge Noonan indicating that pursuant to New York Penal Law ("P.L.") § 70.85, he consented to "reinstate the imposition of the originally imposed determinate sentence of imprisonment without any term of post-release supervision."Letter of Lawrence Friedman, Esq., Ex. 1 at 1–8(R2). On January 18, 2011, Mills submitted a letter to Judge Noonan "in anticipation of any resentencing proceedings", objecting to the presentence investigation report ("PSI"), notifying the court of his "intent to submit memorandums and evidence or documents", and requesting the appointment of stand-by counsel to assist him. Ex. 1 at 1–2 & *id.* at 1–2–1–8(R2).

By means of an order dated January 31, 2011, Judge Noonan resentenced Petitioner on the 2004 conviction for Attempted Assault in the First Degree, stating that pursuant to P.L. § 70.85 and with the consent of the prosecutor, the 15–year determinate sentence originally imposed for the attempted first degree assault conviction was "reimposed without any term of post-release supervision". Genesee County Court Order dated January 31, 2011, Ex. 1 at 1–10(R2). The sentences on the remaining 2004 convictions remained as originally imposed. *Id.* at 1–11(R2).

***3** Petitioner moved to "reargue" Judge Noonan's determination on the basis that he was not afforded a hearing and counsel with regard to the resentencing, and making a request for Judge Noonan's recusal. Judge Noonan denied the motion, noting that reimposition of the original sentence was statutorily authorized, and, moreover was warranted in this case inasmuch as the additional post-release supervision would have been redundant of the lifetime parole supervision mandated in light of Petitioner's attempted murder conviction. Judge Noonan found that Petitioner could not be considered aggrieved given the determination not to enhance Petitioner's determinate sentence by imposing a term of postrelease supervision. Since Petitioner was not prejudiced by the resentencing, Judge Noonan found, holding a hearing and appointing counsel would have been an unnecessary expenditure of public resources. Finally, Judge Noonan concluded, the denial of a hearing and counsel did not indicate bias on his part since the determination had a neutral, rational basis—namely, the avoidance of undue expense.

Petitioner filed another motion in the trial court pursuant to C.P.L. §§ 440.10 and 440.20 seeking to vacate his sentences based upon Judge Noonan's refusal to produce him and assign counsel for purposes of the resentencing. In an order dated September 21, 2011, Judge Noonan held that contrary to Petitioner's contention, resentencing under Corr. Law § 601–d only implicated the postjudgment imposition of a term of post-release supervision, and did not afford the opportunity to be resentenced *de novo. See People v. Lingle,* 16 N.Y.3d 621, 634–35, 926 N.Y.S.2d 4, 949 N.E.2d 952 (2011) (holding that a trial court lacks discretion to reconsider the incarceratory component of a defendant's sentence at a resentencing pursuant to N.Y. Corr. Law § 601–d and that the Appellate Division may not reduce the prison sentence on appeal in the interest of justice). Judge Noonan held that a defendant's right to be heard and represented by counsel is only required where an additional term of post-release supervision was contemplated and in Mills's case, the prosecution had consented to reimposition of the original sentence without any post-release supervision. Accordingly, Judge Noonan determined, there was no need to produce Mills for a hearing and assign counsel.

Undeterred, Mills again sought to challenge the resentencing, arguing that Judge Noonan's unreasonable delay in resentencing him had divested the trial court of jurisdiction. Mills sought to have the indictment dismissed pursuant to C.P.L. § 380.30(1). In an order dated December 29, 2011, Judge Noonan held that the resentencing had been accomplished within a reasonable time after he had received notification from NYSDOCCS concerning the need for resentencing, and noted that his resentencing order had not been vacated or modified, and indeed had been honored by NYSDOCCS.

Mills moved for renewal and reargument of the December 29, 2011 order. Judge Noonan denied the motion insofar as it sought, once again, his recusal from the case. Finding that Mills had not established that he had overlooked any relevant facts or misapplied controlling law in rendering the prior decision and order, *see* N .Y. Civ. P. Law & R. 2221(d)(2), Judge Noonan denied leave to reargue.

***4** Petitioner filed a notice of appeal from Judge Noonan's resentencing order and moved to proceed as a poor person. He claims that he has received no acknowledgment from the Appellate Division, Fourth Department of his motion for leave to appeal as a poor person nor a docket number for the notice of appeal. Therefore, it appears that the appeal is still pending. Petitioner has also filed a number of state court motions and proceedings with respect to the resentencing.

4. The 2011 Habeas Proceeding

Mills commenced the instant federal habeas proceeding on May 10, 2011, by filing a Petition (Dkt # 1). Prior to Respondent being directed to answer, Mills filed a First Amended Petition (Dkt # 7), along with voluminous exhibits. The 100–page, 436–paragraph First Amended Petition raises twenty-six (26) grounds for relief. Grounds One and Two relate to the resentencing, pursuant to which the sentence originally imposed in 2004 for the attempted first degree assault conviction was reimposed without any term of postrelease supervision. Grounds Three through Twenty–Four, and Ground Twenty–Six all relate solely to the criminal proceeding that resulted in the 2004 convictions for which Mills in incarcerated. Ground Twenty–Five claims constitutional infirmities in the appellate processes with regard to the original 2004 convictions and the 2011 resentencing.

Also pending are a Motion to Stay the Petition (Dkt # 3); and two Motions to Consolidate (Dkt6 & 10) the instant proceeding with a pending civil rights action, *Mills v. Genesee County, et al.,* 11–CV–0383A(M) (W.D.N.Y.). Mills also has filed a Motion for Permission to Conduct Discovery (Dkt # 8).

For the following reasons, the Court denies the motions to join claims, parties and to consolidate (Dkt6 & 10), and denies permission to conduct discovery (Dkt # 8). The Court directs Respondents to file an answer and memorandum of law in response to the first amended petition (Dkt # 7) and a separate response to Petitioner's motion to stay and hold the first amended petition in abeyance (Dkt # 3).

III. The Motions to Consolidate (Dkt6 & 10)

Petitioner moves to join claims and parties and to consolidate the instant proceeding with a separate civil rights action commenced by him as a pro se litigant, *Mills v. Genesee County, et al.,* 11–CV–0383A(M) (W.D.N.Y.). He asserts that it would serve the interest of the Court and the parties as well as save judicial resources because the habeas petition and the civil rights lawsuit matter "contain relatively some grounds that are identical in nature."Declaration of Richard Mills ("Mills Decl."), ¶ 7 (Dkt # 6).

Rule 42(a) of the Federal Rules of Civil Procedure provides for the consolidation of actions pending before the court which involve "a common question of law or fact."FED. R. CIV. P. 42(a). The two cases which Mills is seeking to consolidate have different defendants and raise different legal issues. Mills's civil action names a laundry-list of defendants, but Judge Noonan is the only individual who appears in both lawsuits. Thus, contrary to Mills's contention, there is virtually no overlap between the two cases. Moreover, the claims against Judge Noonan, which seek monetary, injunctive, and declaratory relief, in all likelihood will be dismissed under the doctrine of absolute judicial immunity. *See MacPherson v. Town of Southampton,* 664 F.Supp.2d 203, 211 (E.D.N.Y.2009) (noting that with the passage of the Federal Courts Improvement Act of 1996, Pub.L. No. 104–317, 110 Stat. 3847 (1996), amending 42 U.S.C. § 1983, the doctrine of absolute judicial immunity now extends to cover suits against judges where the plaintiff seeks not only monetary relief, but injunctive relief as well, unless preceded by a declaration, or by a showing that such declaratory relief is unavailable) (citing, *inter alia, Jacobs v. Mostow,* 271 Fed. Appx. 85, 88 (2d Cir.2008) (unpublished opn.) (affirming dismissal of plaintiff's claims for prospective injunctive relief under Rule 12(b)(6) where complaint failed to allege "a violation of a prior declaratory decree")). In addition, the claims against Judge Noonan are subject to dismissal for lack of subject matter jurisdiction because they are barred by the *Rooker–Feldman* doctrine, [1] which stands for the general proposition "that federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments."*Hoblock v. Albany County Bd. of Elections,* 422 F.3d 77, 84 (2d Cir.2005).

***5** Although Petitioner is challenging the same conviction in both the instant petition and the civil action, the actions, for the most part, do not involve common questions of law or fact.

In particular, the law applicable to adjudicating habeas corpus petitions and § 1983 actions is distinctly different. Pursuant to *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), an action pursuant to 42 U.S.C. § 1983 does not lie unless the plaintiff can also

> prove that the ... sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a ... sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 486–87.

Mills has failed to show that consolidation would further the interests of judicial economy or avoid unnecessary delays or confusion in the resolution of these two proceedings. Because Mills has not met his burden of demonstrating that consolidation under FED. R. CIV. P. 42(a) is warranted, the motions seeking that relief (Dkt6 & 10) are denied with prejudice.

IV. Motion for Permission to Conduct Discovery

Petitioner requests permission to conduct discovery claiming that *Brady* [2] materials were withheld and have not been fully disclosed, and that he has raised a judicial bias claim that has never been "adjudicated squarely on the merits." Declaration of Richard Mills in Support of Motion for Discovery, ¶ 10 (Dkt # 8).

Under Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts, discovery is available only by leave of the court. A petitioner must support the request with reasons demonstrating "good cause" for invoking discovery mechanisms, namely, "specific allegations" that give the court "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief."*Bracy v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (quotation omitted). Generalized statements regarding the possibility of the existence of discoverable material cannot yield "good cause." *E.g., Green v. Artuz,* 990 F.Supp. 267, 271 (S.D.N.Y.1998) (citation omitted). The district court may, in its discretion, deny discovery where the petitioner provides no specific evidence that the requested discovery would support his habeas corpus petition. *Id.*

Petitioner lists several pages of document demands that he claims will establish his actual innocence and the bias of the trial judge. Some of the materials, such as the documents relating to the resentencing and reports from the Monroe County Public Safety Laboratory, either are part of the state court records from the first habeas proceeding or will be produced as part of the state court records in this proceeding. Indeed, it appears from the voluminous exhibits Mills has submitted to the Court, he already has much of this information. The remainder of the document requests concern irrelevant material—such as the financial records of Judge Noonan and other Genesee County Public officials. Mills also makes several broad requests for documents that are immaterial to his habeas claims, such as all communications between every Genesee County Public official involved in any aspect of his various criminal proceedings.

***6** The Court finds that Mills's request for discovery is nothing more than a fishing expedition. His overbroad and irrelevant discovery demands at worst border on abusive litigation tactics and at best do not suggest the existence of any evidence that has not already been produced or which could somehow advance his habeas claims. Mills's reasons for requesting discovery are based on speculation and surmise, which does not amount to "good cause" warranting the utilization of discovery procedures. Therefore, the Court exercises its discretion to deny the motion for discovery (Dkt # 8) with prejudice.

V. The First Amended Petition and 28 U.S.C. § 22244(b)

Petitioner raises twenty-six grounds for habeas relief in his First Amended Petition (Dkt # 7), some of which challenge the January 31, 2011, resentencing by the Genesee County Court. Almost all of them challenge the underlying 2004 convictions, which was upheld after following Mills's first collateral attack in federal court. Some of those claims are newly raised, while some were already adjudicated in Mills's first habeas petition. The Court therefore must determine whether the instant petition violates the general prohibition against second or successive habeas applications.

Under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub.L. 104–132, 110 Stat. 1214) ("AEDPA"), a "claim presented in a second or successive habeas corpus application under section 2254 that was

presented in a prior application shall be dismissed."28 U.S.C. § 2244(b)(1). A claim in a second or successive petition must be dismissed even if not presented in a prior habeas petition, unless the claim rests on new law made retroactive by the Supreme Court, newly discovered evidence, or a petitioner's actual innocence. *See*28 U.S.C. § 2244(b)(2). The question presented here is whether the current petition is a second or successive application under 28 U.S.C. § 2244(b), given that Mills was subsequently resentenced under a new judgment in state court after his first habeas petition was dismissed.

The Supreme Court recently addressed the scope of 28 U.S.C. § 2244(b) in *Magwood v. Patterson,* —— U.S. ——, 130 S.Ct. 2788, 2797, 2802, 177 L.Ed.2d 592 (2010), which involved a state prisoner's successful challenge to his death sentence in a federal habeas corpus petition. Following a new state sentencing hearing, the petitioner again was sentenced to death, and he brought a second petition pursuant to 28 U.S.C. § 2254 challenging the newly imposed death sentence. The United States Supreme Court held that the second petition was not a "second or successive" habeas corpus application within the meaning of 28 U.S.C. § 2244(b) for even though the second petition raised a claim for relief that could have been brought in the first petition, the second petition was challenging a new judgment for the first time.

The *Magwood* majority's textual analysis of 28 U.S.C. § 2254(b) convinced it that the phrase "second or successive" must be interpreted with respect to the judgment challenged, not the claim presented. 130 S.Ct. at 2797–98;*accord, e.g., Johnson v. United States,* 623 F.3d 41, 44 (2d Cir.2010).[3] Where there is a "new judgment intervening between the two habeas corpus petitions, an application challenging the resulting new judgment is not 'second or successive' at all."130 S.Ct. at 2802.

***7** In *Magwood,* the petitioner only raised issues challenging the imposition of the death penalty at sentencing. because Magwood was not attempting "to challenge his underlying conviction," 130 S.Ct. at 2802, the Supreme Court specifically refrained from addressing whether its "reading of § 2244(b) would allow a petitioner who obtains a conditional writ as to his sentence to file a subsequent application challenging not only his resulting, *new* sentence, but also his original, *undisturbed* conviction,"*id.*(emphases in original). Justice Kennedy's dissent, joined by Chief Justice Roberts, and Justices Ginsburg and Alito, criticized the majority for interpreting AEDPA's reference to "second or successive" as applying to "applications", rather than to "claims", thereby making "the nature of the claims raised in the second application ... irrelevant."*Id.* at 2807 (Kennedy, J., dissenting). Justice Kennedy argued that the majority's interpretation "would allow a challenger in Magwood's position to raise any challenge to the guilt phase of the criminal judgment against him in his second application, since a 'new' judgment-consisting of both the conviction and sentence-has now been reentered and all of the errors have (apparently) occurred anew."*Id.* at 2808 (Kennedy, J., dissenting).

Mills's case "falls squarely within the category of cases which the *Magwood* majority specifically declined to address, and which the dissent warned about, that is, a petitioner who has obtained relief solely as to one aspect of the case, resulting in the entry of a new judgment and sentence, who then files a second section 2254 application challenging not only his new sentence, but his original, undisturbed convictions."*Arenas v. Walker,* No. EDCV 11–1499–MLG, 2012 WL 294688, at *3 (C.D.Cal. Feb.1, 2012). Courts interpreting *Magwood* have held that a petition challenging a new judgment will not be deemed a successive or second petition under 28 U.S.C. § 2244(b), even where, as here, the claims presented could have been presented in a prior habeas corpus petition. *Accord, e.g., Arenas,* 2012 WL 294688, at *3; *Lesko v. Wetzel,* Civil Action No. 11–1049, 2012 WL 1111226, at *9 (W.D.Pa. Apr.2, 2012); *Riley v. Conway,* No. 06–CV–1324 (DLI)(JO), 2011 WL 839477, at *4 (E.D.N.Y. Mar. 7, 2011) (after petitioner's resentencing (not as a result of a conditional grant of a petition for a writ of habeas corpus but rather upon a remand directed by the Appellate Division), petitioner brought a second petition and the district court held that "where a state prisoner's Section 2254 petition is his first collateral attack on the 'intervening judgment' between his first and second § 2254 petitions, the petition is not successive under 28 U.S.C. § 2244(b)") (citing *Magwood,* 130 S.Ct. at 2801, 2803);*see also Johnson v. United States,* 623 F.3d at 45–46 (applying *Magwood* to federal prisoner's § 2255 motion and concluding that "where a first habeas petition results in an amended judgment, a subsequent petition is not successive regardless of whether it challenges the conviction, sentence, or both"); *Campbell v. Secretary for the Dept. of Corrs.,* No. 10–12404, 447 Fed.Appx. 25, *27, 2011 WL 4840725, *3 (11th Cir. Oct.13, 2011) (vacating the district court's denial of what it had interpreted as a Rule 60(b) motion and remanding for consideration of whether the motion should be construed as a later-in-time § 2254 petition that was not subject to § 2244(b)'s restrictions because there had been an intervening resentencing; noting that "the judgment to which AEDPA

refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention"); *Martin v. Bartow,* 628 F.3d 871, 877–78 (7th Cir.2010) (observing that *Magwood* permitted challenges that could have been raised previously and that *Magwood* was not limited to resentencing).

***8** Based upon the majority's holding in *Magwood* and upon the dissent's characterization of the scope of the majority's ruling, this Court concludes that the current habeas petition, filed after Petitioner's resentencing in state court, is not "second or successive" within the meaning of 28 U.S.C. § 2244(b), because there was a new, intervening judgment between the first and second petitions. *See Arenas,* 2012 WL 294688, at *3; *Lesko,* 2012 WL 1111226, at *9; *Riley,* 2011 WL 839477, at *4;*see generally Magwood,* 130 S.Ct. at 2803, 2808.

VI. Improper Designation of the Attorney General As a Respondent

The "proper person to be served in the usual § 2254 habeas case is either the warden of the institution in which the (prisoner) is incarcerated ... or the chief officer in charge of state penal institutions."Advisory Committee Note to Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts. "This is because it is the 'custodian' who must make the return certifying the true cause of detention, 28 U.S.C. § 2243, and who will have to carry out the order of the court if the writ is granted ."*DeSousa v. Abrams,* 467 F.Supp. 511, 512 (S.D.N.Y.1979). John Lempke, as Superintendent of the prison where Mills is housed, was properly named as a respondent, but Eric Schneiderman, the Attorney General of New York, was not.

In light of Petitioner's *pro se* status and the fact that this in no way will prejudice Respondent, the Court, in the interest of judicial efficiency, will deem the petition amended to change the name of Respondent to John Lempke, Superintendent of Five Points Correctional Facility.

VII. Orders

IT IS HEREBY ORDERED THAT

1. Petitioner's motions to join claims, parties and to consolidate (Dkt6 & 10) are denied with prejudice.

2. Petitioner's motion for permission to conduct discovery (Dkt # 8) is denied with prejudice.

3. Respondent shall file and serve an answer to the first amended petition, in accordance with Rules 4 and 5 of the Rules Governing Section 2254 Cases in the United States District Courts ("the Habeas Rules"), within sixty (60) days of the date of entry of this Order. The answer shall state any and all proceedings that were conducted in relation to the 2011 resentencing and the 2004 criminal proceedings. Under the authority of Rule 4 of the Habeas Rules, the Court hereby directs Respondent to provide to the Court the transcript of all the state-court proceedings referenced above, together with any records of, and documents relating to, such proceeding. Such documents will be filed in the official record of this case

4. Respondent also shall file and serve by the above date a memorandum of law addressing each of the issues raised in the first amended petition.

5. Within thirty (30) days of the date this order is served upon the custodian of the records or any other official having custody of the records of the proceedings in Genesee County Court at issue now before this Court, such records shall be submitted to Respondent or Respondent's duly authorized representative.

***9** 7. If Petitioner appealed from the judgment of conviction and/or the resentencing order or from an adverse judgment or order in a post-conviction proceeding, under the authority of Habeas Rule 4, the Court hereby directs Respondent to provide to the Court a copy of the briefs, the record on appeal, and the opinions of the appellate courts, if any, and such documents will be filed in the official record of this case.

8. Petitioner shall have forty-five (45) days upon receipt of Respondent's answer to file a written response to the answer and memorandum of law.

9. Within thirty (30) days of the date this order is filed with the Clerk of Court, Respondent may file a motion for a more definite statement or a motion to dismiss the first amended petition, accompanied by appropriate exhibits which demonstrate that an answer to the first amended petition is unnecessary. The timely filing of such motion shall extend the time for filing an answer for twenty (20) days, but the failure of the Court to act upon the motion to dismiss or a more definite statement within that time shall not further extend the time for filing an answer.

10. With his answer and opposition and memorandum of law, Respondent shall also file a response to Petitioner's motion to stay the first amended petition and hold it in abeyance (Dkt # 3). Petitioner shall file his opposition, if any, when he files his reply to Respondent's answer.

11. The Clerk of Court shall serve a copy of the first amended petition (Dkt # 7); exhibits (Record Volumes One and Two (Manually Filed, Dkt # 1); Record Volume Three (Dkt # 2); Record Volume Four (Dtk # 4); Motion for a Stay (Dkt # 3); and a copy of this Order, by certified mail, upon the Office of the Attorney General, Federal Habeas Unit, 120 Broadway, 12th Floor, New York, New York 10271–0332. The Clerk of Court shall serve and a copy of the First Amended Petition (Dkt # 7) only upon Respondent John B. Lempke, Superintendent of Five Points Correctional Facility, 6600 State Route 96, Romulus, New York 14541. To advise appropriate Genesee County officials of the pendency of this proceeding, the Clerk of Court shall also mail a copy of this order to Lawrence Friedman, Esq ., District Attorney of Genesee County, One West Main Street Batavia, New York 14020.

12. The Clerk of the Court is directed to terminate Eric Schneiderman as a respondent and to revise the caption of this action accordingly.

ALL OF THE ABOVE IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1574749

Footnotes

1 There are four requirements for the application of *Rooker–Feldman:* (1) “the federal-court plaintiff must have lost in state court”; (2) “the plaintiff must complain of injuries caused by a state court judgment”; (3) “the plaintiff must invite district court review and rejection of that judgment”; and (4) “the state-court judgment must have been rendered before the district court proceedings commenced.”*Hoblock,* 422 F.3d at 85 (internal citations and quotations omitted). Mills's case fits all of these criteria.

2 *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

3 Notably, the Second Circuit in *Johnson* held that its prior decision in *Galtieri v. United States,* 128 F.3d 33 (2d Cir.1997), could not be reconciled with *Magwood. Galtieri,* which involved a motion to vacate pursuant to 28 U.S.C. § 2255 motion, held that where an amended judgment altered a portion of the sentence but did not affect the conviction, “a subsequent 2255 motion will be regarded as a ‘first’ petition only to the extent that it seeks to vacate the new, amended component of the sentence, and will be regarded as a ‘second’ petition to the extent that it challenges the underlying conviction or seeks to vacate any component of the original sentence that was not amended.”128 F.3d at 37–38.

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United States District Court,
W.D. New York.

Tyrone MONROE, Petitioner,
v.
David ROCK, Respondent.

No. 09–CV–6366 (MAT). | May 10, 2011.

Attorneys and Law Firms

Michele J. Hauser, New York, NY, for Petitioner.

Nancy A. Gilligan, Rochester, NY, for Respondent.

ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** Petitioner Tyrone Monroe ("petitioner"), who is represented by counsel, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the constitutionality of his conviction of Assault in the First Degree (N.Y. Penal L. § 120.10(1)) and two counts of Criminal Possession of a Weapon in the Second Degree (former § 265.03(2)) in Monroe County Court following a jury trial before Judge Patricia D. Marks. Petitioner was sentenced as a second violent felony offender to aggregate terms of imprisonment totaling thirty two years, determinate, followed by an aggregate term of post-release supervision of ten years.

II. Factual Background and Procedural History

Petitioner's conviction stems from two incidents that occurred on July 22 and August 15, 2003, during which petitioner shot Derrick Thompson in the groin while in the vicinity of Phelps and Fulton Avenue in the City of Rochester. Trial Tr. 218–220.

Following his conviction, petitioner filed a brief in support of his appeal to the Appellate Division, Fourth Department, arguing that: (1) the trial court erroneously admitted statements by the victim as "excited utterances"; and (2) the trial court abused its discretion by precluding evidence of the victim's positive cocaine test from the day of the shooting. Resp't Appx. D. The Appellate Division unanimously affirmed the judgment of conviction. *People v. Monroe,* 39 A.D.3d 1279, 833 N.Y.S.2d 832 (4th Dept.2007), *lv. denied,*9 N.Y.3d 867, 840 N.Y.S.2d 897, 872 N.E.2d 1203 (2007).

By motion dated August 31, 2007, petitioner moved in Monroe County Court pursuant to N.Y.Crim. Proc. L. ("C.P.L.") § 440.10 to vacate the judgment on the ground that his attorney failed to properly represent him during plea negotiations. Resp't Appx. H. The county court denied petitioner's application, and leave to appeal that decision was denied by the Appellate Division, Fourth Department. Resp't Appx. K, O.

Petitioner now seeks a writ of habeas corpus, alleging that his trial counsel was constitutionally ineffective. Petition ("Pet.") ¶ 12, Ground One. Respondent filed an answer and memorandum of law in opposition to the petition, asserting the defense of untimeliness under 28 U.S.C. 2244(d). In the alternative, respondent asserts that petitioner's claim of ineffective assistance of counsel should be dismissed because it is without merit. Resp't Mem. at 7–13. Petitioner has not filed a reply memorandum of law; his time to do so as provided in the scheduling order expired and he has not sought an extension of time. Accordingly, the matter is deemed submitted and ready for decision.

For the reasons that follow, the petition is dismissed as time-barred.

III. Discussion

A. The petition is untimely under 28 U.S.C. § 2244(d).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1214, a one-year statute of limitations applies to the filing of applications for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). In general, the one-year period runs from the date on which the petitioner's state criminal judgment becomes final. *Ross v. Artuz,* 150 F.3d 97, 98 (2d Cir.1998) (citing 28 U.S.C. § 2244(d)(1)(A)); *accord Smith v. McGinnis,* 208 F.3d 13, 16 (2d Cir.2000). A conviction is considered "final" "once 'the judgment of conviction [has been] rendered, the availability of appeal exhausted, and the time for petition for certiorari ... elapsed.'"*McKinney v. Artuz,* 326 F.3d 87, 96 (2d Cir.2003) (quoting *Teague v. Lane,* 489 U.S. 288, 295, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (citation and internal quotation marks omitted in original), citing *Clay v. United States,* 537 U.S.

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522, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) (noting the "long-recognized, clear meaning" of "finality" in the post-conviction relief context as the time 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")).

***2** Here, the Appellate Division affirmed petitioner's conviction on direct appeal, and the New York Court of Appeals denied permission to appeal on July 6, 2007. Petitioner thereafter had ninety (90) days in which to file a petition seeking a writ of certiorari in the United States Supreme Court. *McKinney,* 326 F.3d at 96 (citing Sup.Ct. R. 13(1) ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."). Because petitioner did not file a petition for certiorari seeking review of the New York state-court decisions in the United States Supreme Court, his conviction became final on October 4, 2007, ninety (90) days after the date of the order denying his application for leave to appeal to the New York Court of Appeals. *Id.*

Petitioner was required within one year from that date, or until October 4, 2008, in which to timely file his federal habeas petition. *See*28 U.S.C. 2244(d)(1)(A). The instant petition was filed with this Court on July 15, 2009, 284 days after the one-year limitations period expired on October 4, 2008.

AEDPA contains a tolling provision, however, which provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."28 U.S.C. § 2244(d)(2); *accord Smith v. McGinnis,* 208 F.3d at 16. Petitioner's C.P.L. § 440.10 motion filed on August 31, 2007, is a "properly filed application" for state-court collateral review within the meaning of 2244(d)(2). However, it does not account for the 284 days of tolling needed to the petition timely filed.

Petitioner's C.P.L. § 440.10 motion was filed on August 31, 2007, before his conviction became final and the statute of limitations began to run. The Court observes that Section 2244(d)(2)'s tolling applies only if a state post-conviction motion was "pending" during the one-year limitations period, which, in petitioner's case, did not begin until October 4, 2007. *Smith,* 208 F.3d at 16 (citing *Bennett v. Artuz,* 199 F.3d 116, 119 (2d Cir.1999), *aff'd,*531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000)).[1] Thus, the time that the § 440 motion was pending between the date of filing, August 31, 2007, and October 3, 2007, is excluded from the statutory tolling because it occurred *prior* to the commencement of the one-year limitations period on October 4, 2007. *See id.;*28 U.S.C. § 2244(d)(2). The applicable tolling period therefore did not begin until October 4, 2007. *Accord Hall v. Herbert,* Nos. 02Civ.2299, 02Civ.2300, 2004 WL 287115, *5 (S.D.N.Y. Feb. 11, 2004)) ("By the date that Hall's conviction became final, he had already filed his First § 440 .10 Motion. Accordingly, because the AEDPA limitations period only begins to run when a conviction becomes "final," the time prior to February 16, 1997 must be excluded from the calculation of the one-year period within which Hall had to commence his habeas proceeding.); *McKinley v. Woods,* No. 03 CIV 3629, 2007 WL 2816196 (E.D.N.Y. Aug. 7, 2007) (finding that the only post-conviction motion filed by petitioner before his conviction that counted for statutory tolling purposes was the one that remained "under submission" during the one-year limitations period); *Forman v. Artuz,* 211 F.Supp.2d 415 (S.D.N.Y.2000) (stating that the toll under Section 2244(d)(2)"would begin as soon as [petitioner's] conviction became final").

***3** The Court now turns to how much time between October 4, 2007 and July 15, 2009 was tolled by the pendency of petitioner's C.P.L. § 440.10 motion. A "properly filed" application for state review is "pending" for purposes of 28 U.S.C. § 2244(d)(2) until it has achieved final review through the state's post-conviction procedures. *See Carey v. Saffold,* 536 U.S. 214, 220, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002) ("until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.' ") (quotation omitted); *see also Hizbullahankhamon v. Walker,* 255 F.3d 65, 70–72 (2d Cir.2001). In the case of a motion to vacate a conviction under C.P.L. § 440. 10, "final resolution" is achieved once the Appellate Division denies leave to appeal the denial of the trial court's decision on the motion since under New York's procedural rules, no appeal to the Court of Appeals lies from such an order. *Klein v. Harris,* 667 F.2d at 283–84 (citing C.P.L. § 450.90(1); *People v. Williams,* 342 N.Y.S.2d at 76). Thus, once the Appellate Division denies leave to appeal the trial court's denial of a Section 440.10 motion, a petitioner has reached "the end of the road within the state system" with respect to that motion. *Id.* at 284 (quotation omitted)."As a result, the limitations period under AEDPA is not tolled during the pendency of an application to the

Court of Appeals for leave to appeal the Appellate Division's decision on a Section 440.10 motion."*Foster v. Phillips,* No. 03 CIV 3629, 2005 WL 2978686, at *4 (S.D.N.Y.Nov.7, 2005) (citing *Rosario v. Bennett,* No. 01 Civ. 7142, 2002 WL 31852827 (S.D.N.Y. Dec.20, 2002) (further citations omitted in original)).

In petitioner's case, the statute of limitations was tolled from October 4, 2007, until June 16, 2008, the date that the Appellate Division denied leave to appeal the trial court's denial of the C.P.L. § 440.10 motion. *See Foster v. Phillips,* 2005 WL 2978686, at *4 (S.D.N.Y.Nov.7, 2005) (citing *King v. Greiner,* No. 02 Civ. 5810, 2003 WL 57307 (S.D.N.Y. Jan.7, 2003)). To the extent that petitioner alleges that he sought leave to appeal the Appellate Division's denial of leave, *see* Pet. ¶ 11(d) [2], any application to the New York Court of Appeals would not serve to toll the limitations period, because that order was not appealable under New York law, *see*C.P.L. § 450.90(1), and therefore is not a "properly filed application for State post-conviction or other collateral review" within the meaning of AEDPA's statutory tolling provision set forth in 28 U.S.C. § 2244(d)(2).*Accord Sykes v. Hynes,* 322 F.Supp.2d 273, 276 n. 1 (E.D.N.Y.2004) (citing *Artuz v. Bennett,* 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000) ("[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.")). Therefore, the tolling period expired on June 16, 2008, when the Appellate Division denied leave to appeal the trial court's denial of the motion to vacate. *Accord Olivero v. Fischer,* 2004 WL 1202934, at *1 n. 1 (W.D.N.Y.2004); *Sykes v. Hynes,* 322 F.Supp.2d at 276. In sum, the statutory tolling period ran from October 4, 2007 to June 16, 2008, or 256 days. This, however, falls 28 days short of the 284 days of tolling required to make the habeas petition timely; as noted above, the petition was filed on July 15, 2009, 284 days after the limitations period expired. [3]

B. Petitioner is not entitled to equitable tolling of the statute of limitations.

***4** The one-year AEDPA filing limitation is not jurisdictional and, under certain circumstances, may also be equitably tolled. *Acosta v. Artuz,* 221 F.3d 117, 119, 122 (2d Cir.2000) (citing *Smith v. McGinnis,* 208 F.3d at 17). Consequently, the period can be equitably tolled if a petitioner is able to show that extraordinary circumstances prevented him from filing his petition earlier and that he acted with reasonable diligence throughout the period sought to be tolled. *Smith,* 208 F.3d at 17. Petitioner has not alleged extraordinary circumstances, nor does he explain why he filed his petition 284 days after the original statute of limitations had expired. Indeed, he does not even address respondent's arguments regarding the timeliness of his petition. There is therefore no basis for invoking the doctrine of equitable tolling in petitioner's case.

IV. Conclusion

Because petitioner filed his federal habeas petition beyond AEDPA's one-year deadline, and because he was not entitled to sufficient statutory tolling during that period, or for equitable tolling, his federal petition is barred by the statute of limitations. His petition for a writ of habeas corpus must therefore be denied. No certificate of appealability shall issue. 28 U.S.C. § 2253(c)(2).

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1792926

Footnotes

1. The respondent avers that the tolling period began on August 31, 2007, the date petitioner filed his § 440.10 motion in state court. While the Court disagrees with respondent's computation of the tolling period, the Court agrees with his conclusion that the petition is untimely.
2. The petition states that petitioner sought leave to appeal the state court's denial of his § 440.10 motion to the New York State Appellate Division, Fourth Department. Shortly thereafter, petitioner states, "Leave letter just filed; the Appellate Division denied leave."Pet. ¶ 11(e).
3. Stated differently, the tolling period did not begin until October 4, 2007, or the day petitioner's conviction became final. The pendency of his post-conviction proceeding ended on June 16, 2008, which essentially commenced the running of the one-year statute of limitations. Petitioner would have had to have filed his petition no later than June 16, 2009, in order for it to be timely.

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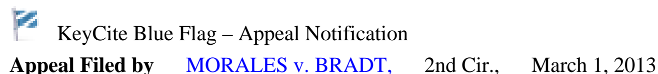
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United States District Court,
W.D. New York.

Edwin MORALES, Petitioner,
v.
Mark L. BRADT, Respondent.

No. 11–CV–00329 (MAT). | Feb. 11, 2013.

Attorneys and Law Firms

Edwin Morales, Attica, NY, pro se.

Paul B. Lyons, Office of New York State Attorney General, New York, NY, for Respondent.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** *Pro se* Petitioner Edwin Morales ("Petitioner") has filed a timely petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging the constitutionality of his custody pursuant to a judgment entered July 2, 2004, in New York State, County Court, Monroe County, convicting him, upon a plea of guilty, of Murder in the Second Degree (N.Y. Penal Law ("Penal Law") § 125.25[1]).

II. Factual Background and Procedural History

On or about April 19, 2004, a Monroe County Grand Jury charged Petitioner with second-degree murder (Penal Law § 125.25[1]). The charges arose from an incident that occurred on April 5, 2004, wherein Petitioner stabbed Brittany Joy Ray multiple times with a knife, causing her death. *See* Monroe County Ind. No. 00286, dated April 16, 2004 at Resp't Ex. A.

On July 2, 2004, Petitioner appeared before Monroe County Judge Patricia D. Marks and entered a plea of guilty to murder in the second degree. Plea Mins. at 7 (Resp't Ex. C). He was subsequently sentenced, in accordance with the plea agreement, to an indeterminate term of twenty years to life imprisonment. Sentencing Mins. at 21–22 (Resp't Ex. C).

In a counseled brief, Petitioner appealed his judgment of conviction to the Appellate Division, Fourth Department on the basis that the county court "fail [ed] to inquire meaningfully of [Petitioner] as to the possible existence of an [e]xtreme [e]motional [d]isturbance defense to intentional murder, despite the fact that the defense was mentioned during [Petitioner's] guilty plea colloquy."*See* Petr' Br. on Appeal, Point I (Resp't Ex. E). On September 28, 2007, the Appellate Division unanimously affirmed the judgment of conviction.*People v. Morales,* 43 A.D.3d 1384, 842 N.Y.S.2d 655 (4th Dep't 2007) (Ex. I); *lv. denied,*9 N.Y.3d 1008, 850 N.Y.S.2d 396, 880 N.E.2d 882 (2007) (Resp't Ex. L).

On March 24, 2008, Petitioner filed in this Court a *pro se* federal habeas corpus petition challenging the same conviction he challenges now in the instant proceeding. *See Morales v. Conway,* 1:08–cv–0024(WMS) (W.D.N.Y.). In that petition, Petitioner argued that his guilty plea was involuntary and coerced, the police violated his Fourth Amendment rights, he was denied an appeal, and his counsel was ineffective. *Id.* at Dkt. No. 1. In a Decision and Order dated April 8, 2008, the Court (David G. Larimer, D.J.) noted that Petitioner's claims appeared to be largely unexhausted, and therefore gave Petitioner the option to amend the petition to withdraw any unexhausted claims, move for a stay and abeyance of the petition, or provide the Court with evidence of exhaustion. *Id.* at Dkt. No. 2. The Court specifically noted, however, that if Petitioner chose to withdraw the entire petition, the statute of limitations would not be deemed tolled during the pendency of his federal habeas petition. *Id.* at 2, n. 1. Petitioner elected to withdraw his petition, and the Court granted Petitioner's motion to do so. *Id.* at Dkt. Nos. 3, 4). Upon granting Petitioner's motion, the Court again noted that "the time for filing a federal habeas petition is ***not*** tolled during the pendency of a first federal habeas petition."*See*Dkt. No. 4 at 2 (emphasis in original).

***2** In a motion dated May 15, 2009, Petitioner applied for a writ of error coram nobis in the Appellate Division, Fourth Department, claiming that he received ineffective assistance of counsel on direct appeal. *See* Pet'r *Pro Se* Coram Nobis Application (Resp't Ex. M) [1] . On October 2, 2009, the Appellate Division summarily denied the motion, and leave to appeal was denied. *People v. Morales,* 66 A.D.3d 1499 (4th Dep't 2009) (Resp't Ex. Q); *lv. denied,*13 N.Y.3d 909, 895 N.Y.S.2d 323, 922 N.E.2d 912 (2009) (Resp't Ex. T).

In a motion dated February 2, 2010, Petitioner moved, pursuant to N.Y.Crim. Proc. Law ("CPL") § 440.10, to vacate his judgment of conviction on the basis that trial counsel provided ineffective assistance of counsel with respect to Petitioner's guilty plea. *See* Pet'r Motion to Vacate (Resp't Ex. U). The Monroe County Court denied Petitioner's motion, and leave to appeal was denied. *See* Resp't Exs. X, Y, AA.

This habeas corpus petition followed. In *pro se* papers dated April 11, 2011, Petitioner seeks habeas relief on the following grounds: (1) the county court violated its "obligation to inquire meaningfully of [Petitioner] whether or not he understood that he might have a defense to intentional murder, namely the affirmative defense of extreme emotional disturbance, after the court itself noted during the plea colloquy that th[e] defense had been 'raised' "; (2) the county court improperly "fail[ed] to advise [Petitioner] of a direct consequence of his conviction," improperly "accept[ed] a plea that was not advantage[ous] to [Petitioner]"; (3) trial counsel was ineffective for the reasons set forth in Petitioner's CPL § 440.10 motion; and (4) ineffective assistance of appellate counsel. *See* Pet. ¶ 22, Points I–V (Dkt. No. 1). Respondent filed an Answer and Supporting Memorandum in opposition to the habeas petition. Dkt. Nos. 17, 18.Petitioner filed a Traverse, and Respondent filed a Reply thereto. Dkt. Nos. 23, 24.On December 27, 2012, Petitioner filed a Response to Respondent's Reply. Dkt. No. 25.

For the reasons that follow, the writ of habeas corpus is denied and the petition is dismissed.

III. Timeliness

Respondent asserts timeliness as an affirmative defense to the petition, maintaining that the petition is time-barred because it was filed after the statutory limitations period had expired and Petitioner has not established that he is entitled to tolling. *See* Answer ¶ 7. Petitioner counters, arguing that the petition is timely because the limitations period was statutorily tolled during the pendency of the "original habeas petition" and his post-conviction proceedings. *See* Pet'r Traverse at p. 2–4.Further, he maintains that equitable tolling is warranted because his attorney withheld certain legal papers from him, which prevented him from filing the instant habeas petition until April 2011. *Id.* at 3. The Court finds that the petition is untimely.

(A) AEDPA's One–Year Statute of Limitations

***3** The Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires that a federal habeas corpus petition be filed within one year of the date on which the Petitioner's state court conviction becomes final. 28 U.S.C. § 2241(d)(1). A habeas petitioner's conviction generally becomes final for AEDPA purposes upon, "either the completion of certiorari proceedings in the United States Supreme Court, or—if the prisoner elects not to file a petition for certiorari—the time to seek direct review via certiorari has expired."*Williams v. Artuz,* 237 F.3d 147, 151 (2d Cir.2001).

In this case, the New York Court of Appeals denied Petitioner's leave application on December 20, 2007. *See* New York Court of Appeals Certificate Denying Leave (Resp't Ex. L). Petitioner's conviction was therefore final ninety days later, on March 19, 2008, and he had one year from that date, or until March 19, 2009, to file his federal habeas petition. Petitioner's habeas petition, which was filed on April 11, 2011, [2] is untimely because it was filed over two years after the one-year limitations expired.

(B) Statutory Tolling

Title 28, Section 2244(d) provides that the limitations period is tolled in "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."28 U.S.C. 2244(d)(2); *see also Fernandez v. Artuz,* 402 F.3d 111, 116 (2d Cir.2005).

In this case, Petitioner is not entitled to statutory tolling. The one-year limitations period was not tolled during the pendency of his initial federal habeas petition. *See Duncan v. Walker,* 533 U.S. 167, 181, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (pendency of a federal habeas petition does not toll AEDPA's statute of limitations). Notably, Petitioner was explicitly alerted to this in the Court's April 8, 2008 Order granting his motion to withdraw his first federal habeas petition (in case no. 08–cv–00244) challenging the same conviction he challenges now in the instant petition.

Likewise, Petitioner's state collateral proceedings did not, as Petitioner asserts, toll the statute of limitations, as both his coram nobis application and his motion to vacate were filed after the March 19, 2009 deadline had already expired. *See Smith v. McGinnis,* 208 F.3d 13, 16–17, n. 2 (2d Cir.2000) (a state collateral proceeding commenced after the one-year limitations period has already expired and does not reset the statute of limitations period). That is, Petitioner's *pro se* coram

nobis application is dated May 15, 2009 and his *pro se* motion to vacate is dated February 2, 2010. *See* Pet'r Coram Nobis Application—copy rec'vd by the Appellate Division (Resp't Ex. M); Pet'r Motion to Vacate (Resp't Ex. U).

Nonetheless, with respect to his *pro se* coram nobis application, Petitioner maintains that he is entitled to statutory tolling because this document was filed on March 13, 2009 (six days prior to the habeas deadline), not May 15, 2009. *See* Pet'r Timeliness Responses (Dkt. No. 6 at ¶ 4 and Dkt. No. 12 at ¶ 10); Traverse at 4–5. To support his contention, he attaches a copy of his *pro se* coram nobis application, which is date-stamped that it was received on March 18, 2009. *See* Timeliness Response (Dkt. No. 12) at Ex. B. However, as Respondent correctly points out, Petitioner has also attached to his Traverse a letter from the Appellate Division, Fourth Department dated March 23, 2009, stating that Petitioner's motion papers were being returned because: (1) the court "does not accept partial filings"; (2) "the notice of motion lacks [a] specified return date"; and (3) petitioner "fail[ed] to file an original and one copy of the motion papers with the Court."*See* Traverse at Ex. A; *see ialso* Pet'r Reply to Resp't Supplemental Memorandum of Law (Dkt. No. 25 at ¶¶ 3–5) (explaining that failure to advise Court that *pro se* coram nobis application was initially rejected by Appellate Division because of filing deficiencies was not done in bad faith). As set forth above, AEDPA's one-year statute of limitations is only tolled during the pendency of a "properly filed" postconviction/collateral proceeding. *See*28 U.S.C. § 2244(d) (2). The Supreme Court has explained that, under § 2244(d)(2), "[a]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings."*Artuz v. Bennett,* 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000). Here, Petitioner's *pro se* coram nobis application was rejected by the Appellate Division due to various filing deficiencies. It was not therefore "properly filed" under the statute and did not toll the limitations period.

(C) Equitable Tolling

***4** Since courts have construed the AEDPA's one-year period as a statute of limitations rather than a jurisdictional bar, courts may equitably toll the period. *See Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000) (citations omitted). However, "[e]quitable tolling applies only in the 'rare and exceptional circumstance[ ].' "*Id.*(quotation omitted).

"In order to equitably toll the one-year period of limitations, [the petitioner] must show that extraordinary circumstances prevented him from filing his petition on time."*Id.* (citation omitted)."In addition, the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll."*Id.* (citation omitted). Moreover, the petitioner must "demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances."*Valverde v. Stinson,* 224 F.3d 129, 134 (2d Cir.2000) (citations omitted).

Petitioner submits he is entitled to equitable tolling because his attorney, Donald M. Thompson, Esq., who he claims to have retained "[o]n or about March 2008" to assist with post-conviction proceedings, withheld the relevant legal papers and materials from him, such that he was prevented from timely filing the instant habeas petition. *See* Traverse at p. 3–10.According to Petitioner, Attorney Thompson "[held] [P]etitioner's legal documents for approximately 11 months" and, when Petitioner could not pay Attorney Thompson's legal fees, Attorney Thompson returned them to him on or about February 24, 2009. *See id.*The Court is unpersuaded by Petitioner's arguments, and finds no basis to equitably toll the limitations period.

As an initial matter, courts have held that lack of access to legal materials or papers does not constitute an extraordinary circumstance that warrants equitable tolling. *See, e.g., Padilla v. United States,* No. 02 Civ. 1142(CSH), 2002 U.S. Dist. LEXIS 22298, 2002 WL 31571733, at *4 (S.D.N.Y. Nov.19, 2002) ("Even if [petitioner] did not have all the necessary materials or experienced a delay in obtaining them, those are not extraordinary circumstances warranting equitable tolling."); *Davis v. McCoy,* No. 00 Civ. 1681(NRB), 2000 U.S. Dist. LEXIS 9760, 2000 WL 973752, at *2 (S.D.N.Y. July 14, 2000) (petitioner's inability to obtain necessary court papers for more than two years not extraordinary circumstance). In any event, assuming *arguendo* that Petitioner's alleged lack of access to his legal papers for "approximately 11 months" while they were purportedly in the possession of Attorney Thompson constituted extraordinary circumstances, Petitioner has failed to demonstrate the causal connection between the lawyer's "withholding" of Petitioner's legal papers until February 24, 2009 and Petitioner's delay in filing the habeas petition until some two years thereafter on April 11, 2011. *See e.g., Bell v. Herbert,* 476 F.Supp 2d 235, 247–48 (W.D.N.Y.2007)

("Even assuming for the sake of argument that the inability to obtain the information at issue amounted to an 'extraordinary circumstance,' Bell has failed to demonstrate any causal connection between the allegedly withheld information and the lateness of his habeas petition."). Notably, Petitioner does not explain how the allegedly-withheld legal papers were even necessary in the preparation of the instant petition insofar as the claims are nearly identical to those raised on direct appeal and in Petitioner's *pro se* coram nobis application. *See Lee v. Portuondo,* No. 02 CV 3990(SI), 2003 WL 22173078, at *5 (E.D.N.Y. Apr.29, 2003) ("Assuming, for argument's sake, that the loss of petitioner's trial records by his privately retained counsel is [an extraordinary circumstance for purposes of equitable tolling], petitioner fails to demonstrate any causal connection between the lost papers and the lateness of his filing of the instant petition. In particular, petitioner makes no effort to explain why his state criminal records were necessary to advance any of the claims alleged in his petition."); *Anderson v. O'Gara,* No. 01 Civ. 5712, 2002 U.S. Dist. LEXIS 13263, 2002 WL 1633917, at *5 (S.D.N.Y. July 23, 2002) (equitable tolling denied where, *inter alia,* the petitioner had not shown that his inability to obtain the transcripts prevented him from filing his habeas petition); *De La Rosa v. Keane,* No. 01 CV 4718, 2001 U.S. Dist. LEXIS 19398, 2001 WL 1525257, at *2 (E.D.N.Y. Nov.13, 2001) (denying equitable tolling because petitioner did not need to have the trial minutes in his possession to advance his claim of ineffective assistance of counsel). Accordingly, the Court finds no basis to equitably toll the statute of limitations.

***5** In sum, the petition is untimely and is therefore dismissed with prejudice on this basis.

IV. Conclusion

For the reasons stated above, the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Dkt. No. 1) is dismissed because it is untimely. Because Petitioner has failed to make "a substantial showing of a denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the Court declines to issue a certificate of appealability. *See, e.g., Lucidore v. New York State Div. of Parole,* 209 F.3d 107, 111–113 (2d Cir.2000). The Court also hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal as a poor person. *Coppedge v. United States,* 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

Petitioner must file any notice of appeal with the Clerk's Office, United States District Court, Western District of New York, within thirty (30) days of the date of judgment in this action. Requests to proceed on appeal as a poor person must be filed with United States Court of Appeals for the Second Circuit in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 600176

Footnotes

1 Respondent's Exhibit M is Petitioner's properly-filed *pro se* coram nobis application. Respondent's Exhibit N is Petitioner's *pro se* coram nobis application bearing the date-stamp "received March 13, 2009", which was not properly filed in the Appellate Division (*see* discussion *infra); see also* Resp't Answer at ¶ 5 (stating that Appellate Division has no record of any filing by Petitioner in March 2009). Thus, the Court cites to Exhibit M here in reference to Petitioner's properly-filed *pro se* coram nobis application.

2 *See Nobles v. Kelly,* 246 F.3d 93, 97 (2d Cir.2001) (under the "prison mailbox rule," which applies to habeas petitions, the filing date is presumed to be the date on which an inmate's petition is received by prison officials). Here, the petition was signed on April 11, 2011, and was subsequently filed in this Court on April 19, 2011.

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United States District Court,
E.D. New York.

Manuel PEREZ, Petitioner,
v.
Robert ERCOLE, Respondent.

No. 09–CV–1985 (SLT). | Dec. 30, 2010.

Attorneys and Law Firms

Manuel Perez, Stormville, NY, pro se.

Alyson Joy Gill, New York State Office of the Attorney General, New York, NY, for Respondent.

MEMORANDUM & ORDER

TOWNES, District Judge.

***1** *Pro se* petitioner Manuel Perez, who was convicted in New York State Supreme Court, Queens County, of Robbery in the First Degree, Robbery in the Second Degree, Criminal Mischief in the Fourth Degree, and Resisting Arrest, seeks a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. Perez alleges that he was denied due process and effective assistance of counsel because: (1) the trial court should have appointed new counsel to represent him at the post-verdict competency hearing; (2) the trial court should have expanded the hearing to determine whether he was competent at trial; (3) the trial court should not have sentenced him because he was unfit; (4) the trial court lacked jurisdiction over his case because his grand jury waiver of immunity was invalid; and (5) the police lacked probable cause to arrest him. For the reasons set forth below, the petition is denied.

I. BACKGROUND

This case stems from three robberies committed at gunpoint —two in bodegas and one in a parked car—that took place in Corona, Queens, in January 2002. The last victim alerted police and less than an hour later spotted Perez at a nearby restaurant, where officers recovered a gun and empty magazine. They arrested Perez, whom four witnesses separately identified during lineups the next day. Forensics also matched the gun to the shell casing recovered from the first bodega. Perez was charged under New York state law with three counts of Robbery in the First Degree, two counts of Burglary in the Second Degree, and one count each of Robbery in the Second Degree, Reckless Endangerment in the First Degree, Criminal Mischief in the Third Degree, and Resisting Arrest. The burglary charges were dismissed on the People's motion at the commencement of trial and the reckless endangerment charge was dismissed on a defense motion prior to jury deliberations.

A. Pretrial Suppression Hearing

On February 19 and 21, 2003, the trial court held a hearing pursuant to *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) and *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) to address Perez's motion to suppress (1) identification testimony, which included identification at the restaurant and at the lineups; and (2) physical evidence, which included the gun and magazine. (*See* S.H. at 4) [1] .

Three witnesses testified at the hearing. Police Officers Keri Hoovert and Christopher Camacho stated that they were involved in canvassing for the person who robbed a man in his parked car in the early morning hours of January 29, 2002. (S.H.6–8, 35–36). According to their testimony, the complainant rode with them for approximately forty-five minutes, and then stated that he saw the perpetrator, later identified as Perez, inside a well lit restaurant with large front windows. (S.H.7, 36, 39–41). Perez was sitting on a stool at the bar and Officer Hoovert saw him stand up, “futsing with his waistband, pulling his pants, pulling his shirt,” and walk to the back of the restaurant before returning to his seat. (S.H.8–9). The officers asked Perez to step outside, where they observed the complainant confirm the identification, performed a pat-down on Perez, and recovered a gun magazine from his right front pants pocket. (S.H.9–10, 38). Officer Camacho then proceeded to the back of restaurant, where he located a black handgun inside an empty case of beer bottles. (S.H.38). Officer Hoovert placed Perez under arrest. (S.H.10). On January 30, 2002, just after midnight, Detective Kenneth Paccio held a series of lineups related to the investigation of that and two prior robberies. (S.H.56). He testified that four witnesses separately identified Perez from the lineups. (S.H.58–60).

***2** Justice Joseph Grasso denied Perez's motion to suppress in its entirety. (S.D.7). As to identification, the court determined that the canvass was proper, where the complainant was in the police van and the first

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identification through the restaurant windows "seemed to be a self-generated one."(S.D.6). The court found that this identification "in and of itself establishes probable cause" and that the additional identification after Perez exited the restaurant was merely confirmatory. (S.D.6–7). Justice Grasso also concluded that there was probable cause to place Perez in the lineup and that the lineup itself was fair. (S.D.7). As to the physical evidence, the court found that Perez had no standing to challenge the seizure of the gun because there was no expectation of privacy at the restaurant and "[i]t appears in any event that the property would have been abandoned in an attempt by Mr. Perez to conceal that weapon."(S.D.7).

B. Pretrial Section 730 Examination

On April 7, 2003, defense counsel Thomas Sheehan, Esq., requested an examination pursuant to New York Criminal Procedure Law ("CPL") § 730.30,[2] to assess Perez's fitness to stand trial. (H–1.2). When asked whether he knew the charges against him, Perez claimed, "I don't know anything." (H–1.3). Perez also stated that he was on medication for depression and had been hearing voices. (H–1.2–3). The court granted the request for examination, which the People did not oppose. (H–1.3). On May 8, 2003, the court reviewed the Section 730 reports, concluded that Perez was not fit to proceed, and committed him to the jurisdiction of the Mid–Hudson facility, a secure adult psychiatric center. (H–2.3).

On September 25, 2003, the court opened the conference by noting that Perez had been released from Mid–Hudson where those overseeing his care "are of the view that [Perez has] been restored to competence."(H–3.3). Perez was being held in the mental health unit at Rikers Island and was receiving medication three times a day. (H–3.3). The court found that "Perez gives the appearance of being competent," a position both sides accepted. (H–3.4). The court also commented that "nobody is saying that the man is necessarily without psychiatric problems. He may well have them. We are talking about a very narrow sense of competence as defined in Article 730 of the Criminal Procedure Law."(H–3.4).

C. Request for New Counsel

After a number of perfunctory appearances, Justice Evelyn L. Braun held a conference on March 23, 2004, during which Perez sought to have a new attorney assigned to his case. Displaying a certain knowledge of procedure, Perez stated: "I feel that my attorney's represented me bad. I was denied a 30.30[3] because he hadn't showed up several times."(H–5.4). Perez also complained that he was "being persecuted by this Court," prompting Justice Braun to respond, "I don't think you are being persecuted, I think you are playing games."(H–5.6). Defense counsel averred that there had been an "irreparable" breakdown of cooperation in the relationship with his client. (H–5.8). Justice Braun ultimately relieved Mr. Sheehan and recused herself from the case, though criticizing Perez's "ridiculous remarks and allegations." (H–5.11). In closing the conference, the court concluded that Perez "obviously ... has some personality problems that don't affect ... his ability to go to trial."(H–5.11). From that point forward, defense counsel Andrew S. Wogan, Esq., represented Perez as trial counsel. (H–6.2–4).

D. Trial

***3** The People's evidence at trial would have permitted a reasonable juror to find as follows. (The defense did not call witnesses).

1. Kiko Groceries Robbery

Eduardo Checo testified that at the time of the incident he was working at Kiko Groceries, a small bodega he owned in Queens. (Tr. 325–26, 343). On January 12, 2002, at approximately 9:15 p.m., he was taking care of customers alone, when another person entered the bodega and stood back from the others waiting to pay. (Tr. 327–28). Checo thought that the person was just another customer until he walked up to Checo at the counter, "pulled out a weapon and he fired a shot. And he said, this is a holdup."(Tr. 328, 329). The bullet landed in front of the counter and "went into the Coca Cola refrigerator," whereupon two remaining customers dropped to the floor. (Tr. 329, 330). Checo testified that the shooter pointed the gun at him and demanded his money and jewelry. (Tr. 330). After Checo relinquished approximately $700 to $800, two chains, and a ring, the perpetrator left the store and Checo called the police, who collected "a spent bullet and ...copper jacket" at the scene. (Tr. 330–31, 620). Checo stated that during the confrontation, he and the perpetrator stood face to face with only the counter between them and that the store was lit as brightly as the courtroom. (Tr. 331–32). On cross examination, Checo admitted that he had used and pleaded guilty to possession of cocaine during the same year as the robbery. (Tr. 343–44).

2. Baez Grocery Robbery

The prosecution also called Jose Baez, who owned and worked at the Baez Grocery in Corona, Queens. (Tr. 377, 382). Baez testified that on January 28, 2002, at approximately 3 p.m., a beer vendor had just left the bodega when an unknown man entered and purchased peanuts. (Tr. 378–80). Jose Baez's brother, Francis Baez, and a friend, Francisco Reinoso, arrived at the store just before Jose Baez gave the man change. (Tr. 380). Reinoso testified that he had recently seen the same man in the neighborhood. (Tr. 534–36, 550–51). The man departed and Jose Baez went downstairs to use the bathroom, leaving his brother and Reinoso in the grocery area. (Tr. 380, 389, 584). According to Reinoso, who said he was a police officer in Santo Domingo, the man returned to the bodega approximately five minutes later (while Jose Baez was still in the basement) and put a gun to Reinoso's back. (Tr. 518–19). The man said in Spanish that it was a robbery and Reinoso should give him everything. (Tr. 519). He also demanded that Francis Baez give him money from the cash register. (Tr. 520, 587). When Francis Baez said he had no money and knew nothing about money in the store, the man proceeded to empty the cash register himself. (Tr. 521, 587). Reinoso also gave the man his watch and bracelet. (Tr. 521, 590). After some confusion with ordering Francis Baez to go down to the basement, the perpetrator lowered his gun, ran out of the bodega, and departed in a livery cab. (Tr. 522–23, 590–91).

3. Parked Car Robbery

***4** John Gutierrez testified that on January 29, 2002, at approximately 4:10 a.m., he saw a man approaching as he left a Queens restaurant and began to walk to his parked car. (Tr. 469–70). It seemed as though the man was following him, so Gutierrez walked past his car toward a sanitation truck he saw on the corner—but the truck left before he reached it. (Tr. 470–71, 486). After Gutierrez returned to and entered his car, the man knocked on the window, "pulled a gun," and demanded money. (Tr. 471–72). Gutierrez said he was the "wrong person," but the man repeated his demand and warned that "this is the reason why people around here ... get killed."(Tr. 473). Gutierrez relinquished approximately $150 to $200 in case before the man departed. (Tr. 473).

Gutierrez immediately flagged down a police van and said he was just robbed. (Tr. 474). At the two officers' request, Gutierrez got in the van and canvassed for approximately forty-five minutes until they approached a restaurant and Gutierrez told the officers he thought he saw the perpetrator inside. (Tr. 475–76, 400, 430). The restaurant was well lit with two large and unobstructed frame windows; the police van also had a strobe light pointed at the front. (Tr. 401–02, 431). The officers testified that they saw the man inside stand up, place his hand in his waistband, and then walk to the back left of the restaurant, where he was briefly hidden behind a door. (Tr. 402–03, 432). The officers stood at the entrance of the restaurant and asked the man to step outside, which he did. (Tr. 403–04, 433–34). Gutierrez testified that when the police officers brought the man over for a better look, Gutierrez "knew it was him and ... told them that was him." [4] (Tr. 477). Officer Hoovert placed Perez in handcuffs and patted him down for weapons, recovering an empty magazine clip for a nine millimeter gun from Perez's front pants pocket. (Tr. 406, 435–36). At that point, Officer Camacho testified that he went to the back of the restaurant where he had seen Perez disappear earlier and retrieved a semi-automatic handgun, without a clip, from inside an empty case of beer bottles. (Tr. 436). He brought it over to the van and Gutierrez stated that he recognized it from the robbery. (Tr. 437, 478).

Both officers testified that Perez became "erratic" and began to scream, kick, and curse. (Tr. 407, 441). Officer Hoovert ultimately placed Perez into a different police car and, as the arresting officer, vouchered the gun and magazine clip. (Tr. 408–09). Officer Phillip Adaszewski, who manned that police car, testified that Perez kicked out the driver's side back window and Emergency Services Unit responded, which deals with situations such as emotionally disturbed or barricaded people. (Tr. 506, 510–11). When ESU arrived, Perez was placed in a physical restraint. (Tr. 512). On cross examination, Officer Adaszewski maintained that he did not hear or see anything that led him to believe Perez was having difficulty breathing. (Tr. 509). [5]

4. Lineups and Forensics

***5** Assistant District Attorney Peter Lomp testified that he observed the lineups conducted in the early morning hours of January 30, 2002, at the 115th Precinct. (Tr. 459–60). Perez was given the opportunity to choose his own number as one of six individuals included in the lineups. (Tr. 461, 462). All four witnesses, including Reinoso (Tr. 527), Francis Baez (Tr. 591–92), Checo (Tr. 336–38), and Jose Baez (Tr. 383–84) each independently identified Perez during the separate lineups, (Tr. 616). The entire procedure took eight minutes. (Tr. 467).

Additionally, Detective Anthony Pellicio, who served in the Firearms Analysis Section of the New York Police Department, testified that he compared cartridge components

recovered from the first robbery scene to samples produced from a "test fire" of the vouchered gun. (Tr. 626, 634). He determined that (1) the piece of copper jacketing lacked sufficient characteristics to form a conclusion, but (2) the shell casing was in fact fired from the same firearm as the test samples. (Tr. 644–45).

E. Verdict

On July 27, 2004, the jury found Perez guilty of three counts of Robbery in the First Degree, and one count each of Robbery in the Second Degree, Criminal Mischief in the Fourth Degree, and Resisting Arrest. (Tr. 753–57). At the conclusion of the proceedings that day, defense counsel requested and the court ordered a pre-sentence examination of Perez. [6]

F. Competency Hearing

On September 28, 2004, the trial court noted that it had received a report from clinical psychologist Dr. Jennifer Mathur indicating that Perez, "according to her view[,] is unfit to proceed."(H–7.2). The court therefore ordered a Section 730 examination in aid of sentencing. (H–7.2). Justice Seymour Rotker also considered and denied Perez's *pro se* application that the verdict be set aside, *inter alia,* on the ground that police fabricated probable cause evidence —commenting that "I must say for a person who is not competent to proceed, he did a very workman like legal motion." [7] (H–7.3).

On March 24, 2005, after receiving the Section 730 report, the court held a hearing to determine Perez's competency for sentencing. (H–8.2). Four experts testified as to their examinations of Perez and their competency conclusions.

1. Dr. Jennifer Mathur

First, Dr. Mathur testified that she found Perez not fit to be sentenced based on "his presentation, depressed mood and anxiety as well as suicidal ideation" and her feeling that "he was at risk for self-injury."(H–8.4–5). She commented that Perez had a history of alcohol, heroin, and cocaine abuse. (H–8.8). Dr. Mathur admitted, however, that she "had some questions about whether [Perez] was exaggerating his impairment of memory as well as psychosis," and that her recommendation "was based specifically on the risk of self injury that [she] believed to exist."(H–8.5–6).

2. Dr. Richard Weidenbacher

Forensic psychiatrist Dr. Richard Weidenbacher next testified that Perez was not competent to proceed because the doctor "felt that [he] could not say that [he] knew that [Perez] would not hurt himself."(H–8.14). Like Dr. Mathur, Dr. Weidenbacher "had a strong suspicion" that Perez was malingering and that his statements during the exam were "contrived and disingenuous," including "his ostensible or apparent rumination or impulse thought about suicide."(H–8.13). Still, Dr. Weidenbacher explained that "frustrated" defendants sometimes hurt themselves "even if they don't really want to kill themselves," so he was "conservative" in his report. (H–8.13–14, 16). Dr. Weidenbacher also commented that he had "no grounds at all at this point to propose that [Perez] was ... incompetent during trial," in part because he trusted that an officer of the court would have intervened. (H–8.15). Moreover, the doctor stated that in reviewing Perez's *pro se* application previously denied by the court, "no matter who the author was for sure in terms of who wrote it down, it points to a certain amount of resourcefulness and, probably, a certain amount of detailed memory" on the part of Perez. (H–8.24).

3. Dr. Narasimhan Narasimhan

***6** Psychiatrist Dr. Narasimhan Narasimhan testified that he had treated Perez for approximately two weeks in 2004, and had more recently performed a Section 730 examination. (H–8.32). Dr. Narasimhan diagnosed Perez with an adjustment disorder that can occur in response to a stressful event. (H–8.34). He did not find acute psychotic or suicidal disorders at the time of examination and felt that Perez appeared to be alert to his surroundings. (H–8.34). Dr. Narasimhan also stated, in answer to the court's question, that even someone with depression and suicidal ideation could be able to participate in the events taking place around him. (H–8.39–40).

4. Dr. Elizabeth Owen

Finally, forensic psychologist Dr. Elizabeth Owen testified that she met with Perez on three occasions. (H–8.41–42). She determined that Perez was oriented as to person and place, that he understood the charges against him, and that he could assist his attorney, but nevertheless found him unfit for sentencing "[p]rimarily" based on the stressful nature of the proceedings and Perez's suicide risk. (H–8.43, 47–48). Dr. Owen also performed memory tests which suggested that Perez was malingering or at least "trying to present himself as more impaired that he really is" and "exaggerating his psychiatric

symptoms." (H–8.45, 47). In her report, Dr. Owen noted that Perez described a conspiracy among "anyone associated with the case" and complained that police officers were buying witnesses to testify against him as early as 1996. (H–8.51, 53).

5. Fitness Determination

Defense counsel contended that the People had not met their burden because three of the four expert witnesses found Perez not fit to proceed. (H–8.58). In response, the prosecutor pointed to the legal definition of an incapacitated person as one who "lacks capacity to understand the proceedings against him or to assist in his own defense."(H–8. 59 (quoting CPL § 730.10(1)). She argued that none of the experts had found Perez incapacitated within that definition and those who found him unfit had done so "purely from a concern that he might harm himself."(H–8.63). The court ultimately agreed with the People's position, finding that "based upon the credible evidence" Perez was fit to proceed to sentencing. (H–8.67). Perez thereupon complained that he felt dizzy and the court scheduled another hearing to allow him to decide whether he wanted to challenge the constitutionality of the conviction. (H–8.70).

G. Sentence

At the March 29, 2005, conference, defense counsel informed the court that Perez had tried to commit suicide and that he was back in the psychiatric hospital. (S.2–3). Additionally, Perez submitted what appeared to be a second *pro se* motion, labeled "Addendum/Rebuttal," to vacate the verdict on the grounds that he was incompetent to stand trial and that his counsel had failed to move for a Section 730 examination prior to trial. (*See* Reply Ex. C). Having reviewed the submission, the court noted for the record that "whatever the paperwork is, if it constitutes a motion, which I can't figure out if it does or doesn't, I am returning it to the defendant" because it was written by a non-attorney inmate from Rikers Island and therefore "inappropriate at this time." (S.3). As the court began the sentencing process, Perez objected in a series of exchanges with Justice Rotker, stating:

> ***7** I am in no condition to talk at all at this moment. I tried to commit suicide yesterday and I don't feel good .... And that's what I intend to go on doing. I'll take my life .... I need another day. I am not feeling well .... My medication has me very dizzy.

(S.5–6). When the court decided to proceed, noting that "based upon his prior situation [Perez] may or may not be malingering," Perez immediately indicated to his attorney that he wanted to challenge his predicate felony status:

> MR. WORGAN: Judge, I think that the challenge he is making is the tenyear period.
>
> THE COURT: You spoke to your client? And what is he saying?
>
> MR. WORGAN: He is saying that the 1990 conviction is without the tenyear statute for predicate status.
>
> THE COURT: This is what he told you?
>
> MR. WORGAN: Just now.
>
> THE COURT: Let the record note that the defendant seems to be conversant with the legal issues with regard to this question concerning the fact of his prior felony convictions.

(S.6–7). After reviewing the dates and the statutory requirements, defense counsel conceded that the conviction was within the ten-year period and the court found Perez to be a second felony offender. (S.8–9, 15).

At that point, Perez interjected that he "need[ed] two or three days" and was "in no condition to receive a sentence."(S.20). He also stated that:

> [M]ost of the evidence in this case is fabricated. It is evidence made up by the assistant district attorney and by the police. Probable cause, it was also fabricated, and they also used a man to give false testimony, John Gutierrez, so he can fabricate probable cause.

(S.20). In response, Justice Roker stated that Perez "is really a malingerer ... what he says and the way he says it. I think defendant is playing the system or trying to play the system, and I won't have any of it."(S.21). The court thereupon sentenced Perez to twenty years for each count of First Degree Robbery, twelve years for Second Degree Robbery, and one year for each misdemeanor count, to run concurrently. (S.21–22). The court also imposed five years of post-release supervision. (S.22). Perez's final comment at the hearing was to confirm with his attorney that he wanted to file a notice of appeal. (S.22–23).

H. Post–Conviction Procedural History

1. Direct Appeal

Perez appealed his conviction to the Appellate Division, Second Department, claiming that the trial court improperly deprived him of due process and effective assistance of counsel by failing (1) to appoint new counsel for the post-verdict competency hearing and inquire about Perez's competence at trial; and (2) to declare him unfit at sentencing. (Resp. Ex. 1 at 2). On December 11, 2007, the Appellate Division unanimously rejected Perez's claims. *People v. Perez,* 46 A.D.3d 708, 847 N.Y.S.2d 226 (2d Dep't 2007). As an initial matter, it concluded that the trial court "providently exercised its discretion in declining to consider an addendum to the pro se motion" authored by someone other than Perez or his attorney—and where "the defendant himself disavowed authorship of the addendum in open court."*Id.* at 709, 847 N.Y.S.2d 226. The Appellate Division therefore held that Perez's claim concerning appointment of new counsel was unpreserved and, in any event, without merit. *Id.* at 708, 847 N.Y.S.2d 226. As to the issue of competency at trial, Perez had been found fit to proceed prior to trial, the trial record did not suggest that Perez was unfit during trial, and "nothing in the [*pro se*] addendum, even if it were properly considered by the [trial court], was sufficient to indicate" otherwise. *Id.* at 709, 847 N.Y.S.2d 226. Finally, the Appellate Division found that the trial court had properly determined that Perez was fit to proceed to sentencing by a preponderance of the evidence. *Id.*

***8** By letter dated January 31, 2008, Perez sought leave to appeal the affirmance of his conviction to the New York Court of Appeals. (Resp.Ex. E).[8] On March 7, 2008, Associate Judge Eugene F. Pigott, Jr., summarily denied that application. *People v. Perez,* 10 N.Y.3d 814 (2008) (Table). Perez's conviction therefore became final on June 5, 2008, "when the ninety-day period following final state court review for seeking a writ of certiorari to the United States Supreme Court ... expired."*Brownridge v. Miller,* No. 06–CV–6777 (RJD)(SMG), 2010 WL 2816265, at *4 (E.D.N.Y. Feb. 19, 2010) (citing *McKinney v. Artuz,* 326 F.3d 87, 96 (2d Cir.2003)).

2. Collateral State Court Proceedings

On May 29, 2008, Perez moved *pro se* for a writ of error *coram nobis* in the Appellate Division, claiming that his appellate counsel was ineffective because she had failed to raise a claim of ineffective assistance of trial counsel[9] on direct appeal. (Resp. Ex. F at 11–12). The Appellate Division summarily denied this application on August 12, 2008. *People v. Perez,* 54 A.D.3d 382, 861 N.Y.S.2d 950 (2d Dep't 2008).

On November 5, 2008, Perez filed a *pro se* motion in New York Supreme Court to vacate his conviction pursuant to CPL § 440.10. (Resp.Ex. I). Perez claimed that the trial court (1) lacked subject matter jurisdiction because his grand jury waiver of immunity was invalid; and (2) should not have sentenced him because he was mentally incompetent. (*Id.* at 3, 13, 861 N.Y.S.2d 950). Later in these papers, Perez also argued that police officers did not have probable cause to arrest him and that the robbery accusations "were completely fabricated." (*Id.* at 21, 861 N.Y.S.2d 950). By order dated January 27, 2009, Justice Fernando M. Camacho denied Perez's motion, holding that (1) the grand jury claim was procedurally barred because it was record-based and had not been raised on direct appeal; and (2) the mental competency claim was barred because it had been raised and rejected on direct appeal and related solely to the validity of the sentence, not the conviction. (Resp.Ex. K). It does not appear that the court made explicit findings concerning Perez's probable cause argument. On May 21, 2009, the Appellate Division denied Perez's request for leave to appeal that decision. (*See*Docket No. 7 at 2).

I. Habeas Petition and Related Motions

Perez's petition is dated April 27, 2009, and was received by the Pro Se Office of this Court on May 6, 2009. (Docket No. 1). In his petition, Perez raises five claims, culled from his direct appeal and collateral attacks: (1) the trial court should have appointed new counsel to represent him at the post-verdict competency hearing; (2) the trial court should have expanded the hearing to determine whether he was competent at trial; (3) the trial court should not have sentenced him because he was unfit; (4) the trial court lacked jurisdiction over his case because his grand jury waiver of immunity was invalid; and (5) the police lacked probable cause to arrest him. (*see id.* ¶ 13). As Respondent concedes, the petition is timely. (Resp.'s Mem. at 17). Respondent also concedes, and the Court agrees, that Perez has exhausted all of his asserted claims through direct and collateral review in state court, as required by 28 U.S.C. § 2254(b)(1).

***9** On May 29, 2009, the Court referred Perez's motion to appoint counsel to Magistrate Judge Marilyn D. Go for

determination. On June 2, 2009, Judge Go denied the motion without prejudice, finding that Perez had not made a sufficient showing because his claims were not likely to be substantive and the legal issues were not complex. (Docket No. 6). On July 12, 2010, after Respondent had filed opposition papers and Perez had filed his reply, Perez filed a motion for leave to seek production of documents, expansion of the record, and appointment of counsel. (Docket Nos. 27–28). This Court denied his application for appointment of counsel for substantially the same reasons as Judge Go, and reserved decision as to his production requests. (Docket No. 29).

II. DISCUSSION

A. Procedural Default

As a preliminary matter, a claim resolved by a state court on independent and adequate state procedural grounds is generally not subject to habeas review by a federal court. *See Coleman v. Thompson,* 501 U.S. 722, 729–30, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Harris v. Reed,* 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). Moreover, when the last reasoned opinion on a particular claim explicitly applies a state procedural default, the federal court "will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits."*Ylst v. Nunnemaker,* 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Still, a federal court may review such a claim "if the petitioner can demonstrate 'cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.'"*Gardner v. Fisher,* 556 F.Supp.2d 183, 193 (E.D.N.Y.2008) (quoting *Coleman,* 501 U.S. at 750).

B. Standard of Review

Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, a writ of *habeas corpus*"shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication ... resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented,"28 U.S.C. § 2254(d)(2).

A state court decision is "contrary to" clearly established federal law if the state court applies a rule that contradicts governing Supreme Court precedent or the state court confronts a set of facts that is materially indistinguishable from a Supreme Court decision and arrives at a different result. *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A decision is an "unreasonable application" of clearly established federal law if the state court's application is "objectively unreasonable." *Id.* at 409.An erroneous application of federal law is not necessarily an unreasonable one. *Id.* at 410–11.Instead, the standard "falls somewhere between 'merely erroneous and unreasonable to all reasonable jurists.'"*Jones v. Stinson,* 229 F.3d 112, 119 (2d Cir.2000) (quoting *Francis S. v. Stone,* 221 F.3d 100, 109 (2d Cir.2000)).

***10** Although a federal court may also grant a habeas writ if a state court decision on the merits "was based on an unreasonable determination of the facts,"28 U.S.C. § 2254(d)(2), such factual determinations are "presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence,"§ 2254(e)(1).

C. Perez's Application

1. Ineffective Assistance

Perez argues that the trial court should have appointed him new counsel for the post-verdict competency hearing because, as he attempted to assert in a second *pro se* motion/addendum, his trial counsel was ineffective for failing to request an earlier Section 730 examination. (Pet. Ex. A at 20–22; Reply at 15). On direct appeal, the Appellate Division found that the trial court had properly exercised its discretion in declining to consider this motion and therefore the ineffectiveness claim was unpreserved for review. *Perez,* 46 A.D.3d 708, 847 N.Y.S.2d 226. Indeed, while the Supreme Court has long recognized a criminal defendant's right to a full defense under the Sixth Amendment, *see Faretta v. California,* 422 U.S. 806, 818, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), it has also held that a state court is not "require[d] ... to permit 'hybrid' representation,"*McKaskle v. Wiggins,* 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). In this case, Perez was not entitled to have every *pro se* motion considered by the trial court "[a]bsent invocation of his right to represent himself without the assistance of counsel."*Delgado v. Duncan,* No. 02–CV–4929 (JBW), 2003 WL 23185682, at *5 (E.D.N.Y. Nov.4, 2003) (collecting cases). Accordingly, the state court's "refusal to entertain Petitioner's *pro se* motion[ ]

because Petitioner was represented by an attorney is neither contrary to nor an unreasonable application of federal law as interpreted by the Supreme Court."*Potter v. Green,* No. 04–CV–1343 (JS), 2009 WL 2242342, at *10 (E.D.N.Y. July 24, 2009). Review by a federal court of the merits of Perez's underlying ineffective assistance claim therefore would be inappropriate and habeas relief unwarranted.

2. *Sua Sponte* Competency Hearing

Perez also argues that "it was incumbent upon the [trial] court to ... address [his] argument in his *pro se* motion that he was incompetent at trial."(Pet. Ex. A at 26). As noted, it was neither contrary to nor an unreasonable application of federal law for the trial court to decline to consider Perez's second *pro se* motion/addendum, and the Appellate Division found the underlying claim unpreserved for review. *See Perez,* 46 A.D.3d at 708, 847 N.Y.S.2d 226. Nevertheless, the Second Circuit has clearly stated that "when the trial court neglects its duty to conduct a hearing on competence, the defendant's failure to object or to take an appeal on the issue will not bar collateral attack" because a state court cannot "constitutionally apply a procedural default rule to a possibly incompetent defendant."*Silverstein v. Henderson,* 706 F.2d 361, 366–67 (2d Cir.1983) (citations omitted). The question on the merits, therefore, is whether the trial court should have *sua sponte* expanded the competency hearing to consider Perez's mental fitness at trial.

***11** The Supreme Court "has held that where the evidence raised a sufficient doubt as to a defendant's competence to stand trial, the failure of the trial court to conduct a competency hearing *sua sponte* violates due process."*Nicks v. United States.,* 955 F.2d 161, 168 (2d Cir.1992) (citing *Pate v. Robinson,* 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)); *see Drope v. Missouri,* 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (defendant lacking legal capacity "may not be subjected to a trial"). However, a trial court is not required to order a competency examination if it "has not been given reasonable cause to believe that a defendant may be incompetent" or else the process "could be abused to provide an automatic continuance of the trial date at a defendant's request."*Medina v. McGinnis,* No. 04 Civ. 2515(SHS)(AJP), 2004 WL 2088578, at * 12 (S.D.N.Y. Sept. 20, 2004) (collecting cases).*See United States v. Nichols,* 56 F.3d 403, 414 (2d Cir.1995) (Due Process Clause only requires a hearing "if the court has 'reasonable cause' to believe that the defendant has a mental defect rendering him incompetent").

The Supreme Court has long acknowledged that there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated."*Drope,* 420 U.S. at 180. Ultimately, the "inquiry is whether, in light of what was then known, the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial."*Nicks,* 955 F.2d at 169. In support of his contention that the trial court erred by failing to expand the competence hearing *sua sponte,* Perez relies primarily on his history of mental illness as well as the expert testimony indicating that his condition may have deteriorated during trial. (Pet. Ex. A at 26–28; Reply at 19–20, 23–24). This claim fails for at least two reasons.

First, the trial court had the opportunity to observe Perez during the entire trial and post-verdict proceedings. For instance, while Perez often complained that he did not understand what was happening and that he did not feel well, he also—sometimes at the same proceeding—directed his counsel to challenge his predicate felony status, assisted in submitting a *pro se* motion that the court did consider, and had his counsel confirm on the record that he wanted to file a notice of appeal. (S.6–7, 22–23). Respondent also notes from the record that Perez understood his right to be present at side-bar conferences, assisted his attorney during jury selection, and was able to provide his identification information after the verdict. (Resp. Opp. at 25–26). Second, the trial court was privy to Perez's mental health history as part of the competency hearing ordered for sentencing. With that background, the justice still noted on numerous occasions that Perez appeared to be malingering, an assessment shared to a large degree by the Section 730 examination experts themselves.

***12** Based upon the foregoing facts, this Court cannot say that failure to make further inquiry into Perez's competence to stand trial denied him a fair trial. Perez therefore is not entitled to habeas relief on this claim.

3. Fitness at Sentencing

Perez next argues that the trial court should have granted defense counsel's request to adjourn after the Section 703 hearing because Perez was not fit for sentencing. (Pet. Ex. A at 30–31; Reply at 28). As discussed, under New York law, an incompetent person is someone who "as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense."CPL § 730.10(1).

Under federal law, the relevant inquiry is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."*Dusky v. United States,* 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

Perez argues in his papers that he did not have sufficient ability to consult rationally with his lawyer during the predicate felony hearing and sentencing proceeding. (Reply at 26). The record demonstrates otherwise. As noted, immediately after the trial court denied his request to adjourn sentencing, Perez indicated to his attorney that he wanted to challenge his predicate felony status determination. (S.6–7). Indeed, the court noted for the record "that that the defendant seems to be conversant with the legal issues" under discussion at the hearing. (S.7).

Additionally, while Perez is correct that three of the four experts testified that he was not fit to be sentenced, they also conceded (1) that their findings were based almost exclusively on a concern that Perez would try to harm himself; and (2) that Perez may have been malingering or exaggerating certain symptoms. (H.8.5, 13, 14, 16, 24, 45, 47–48, 63). Risk of self-injury, though undoubtedly a serious issue, does not necessarily mean a defendant lacks the capacity to understand or participate in the proceedings against him. The court specifically questioned the expert witnesses on this distinction and ultimately determined that Perez was fit for sentencing under the legal definition "based upon the credible evidence." (H–8.67). The Appellate Division affirmed.*Perez,* 46 A.D.3d at 708, 847 N.Y.S.2d 226. In the context of a habeas petition, such factual determinations are "presumed to be correct" and Perez has failed to show by clear and convincing evidence that the state court's decision "was based on an unreasonable determination of the facts."28 U.S.C. § 2254(d)(2), (e)(1).

4. Grand Jury Immunity Waiver

Perez's fourth claim is that the trial court lacked jurisdiction to adjudicate his case because his waiver of immunity before the grand jury was defective. (Pet. Ex. B at 11, 13–14). This claim fails for two reasons. First, the Appellate Division found it procedurally barred because it was record-based but had not been raised on direct appeal. (Resp.Ex. K). Second, "[i]t is well-settled that federal habeas corpus review is not available to test the sufficiency of an indictment charging a crime within the state court's jurisdiction."*Anderson v. Kelly,* No. CV 91–1354(DRH), 1992 WL 175665, at *4 (E.D.N.Y. July 14, 1992) (citing *Knewel v. Egan,* 268 U.S. 442, 446, 45 S.Ct. 522, 69 L.Ed. 1036 (1925)); *see also Lopez v. Riley,* 865 F.2d 30, 32 (2d Cir.1989) ("[C]laims concerning a state grand jury proceeding are ... foreclosed in a collateral attack brought in a federal court."). Moreover, any defects in the indictment were "rendered harmless" upon Perez's conviction by the petit jury. *United States v. Mechanik,* 475 U.S. 66, 73, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986). Indeed, contrary to Perez's jurisdictional assertions, "defects in an indictment do not deprive a court of its power to adjudicate a case."*United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Perez's grand jury claim therefore is denied.

5. Probable Cause

***13** Perez's final claim concerns his assertion that police lacked probable cause for his arrest and that the robbery accusations were "completely fabricated." (Pet. Ex. B at 21). Perez indicates in his papers that "[t]his claim is based on [a] Fourth Amendment violation, where the trial court did not conduct [a] reasoned method of inquiry into relevant questions of facts and law in relation to petitioner's arrest."(Reply at 29). Perez initially raised this claim as part of his § 440 motion, (Resp. Ex. I at 21), which the Appellate Division denied in its entirety, (Resp.Ex. K). [10]

The authority of a federal court to conduct habeas review of Fourth Amendment claims is extremely narrow. *See Stone v. Powell,* 428 U.S. 465, 482, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Palacios v. Burge,* 589 F.3d 556, 561 (2d Cir.2009) ("[*Stone*] bars us from considering Fourth Amendment challenges raised in a petitioner's petition for habeas relief."). As a general rule, Fourth Amendment claims are not reviewable by a federal court unless the petitioner shows that he was deprived of a "full and fair opportunity to litigate" the issue in state court. *Graham v. Costello,* 299 F.3d 129, 133–34 (2d Cir.2002) (citing *Stone,* 428 U.S. at 481–82). To make such a showing, a petitioner must demonstrate (1) that the state failed to provide corrective process to address the alleged Fourth Amendment violation; or (2) that there was an "unconscionable breakdown" in that corrective process. *Capellan,* 975 F.2d at 70.

Perez fails to satisfy either prong. First, it is well settled that "federal courts have approved New York's procedure for litigating Fourth Amendment claims, embodied in [CPL] § 710.10 *et seq.* (McKinney 1984 & Supp.1988), as being facially adequate."*Id.* at 70 n. 1 (quoting *Holmes v. Scully,* 706 F.Supp. 195, 201 (E.D.N.Y.1989)). Second, Perez has not

shown an "unconscionable breakdown" in that procedure. He argues that "it was imperative for [the] trial court to grant a Dunaway [11] hearing to ascertain the legality of petitioner's arrest" and that "[h]ad the trial justice concluded that there was no probable cause to arrest, the case would have been thrown out."(Reply at 35).

In this case, however, the state court held a pretrial suppression hearing, during which two arresting officers and a detective in charge of the lineups testified and were cross-examined as to the circumstances surrounding Perez's arrest and identification. Although the proceedings were labeled as Mapp/Wade hearing, defense counsel directly asserted that "there [was] no probable cause to *arrest* my client," (S.H.23) (emphasis added), and Justice Grasso explicitly ruled on that issue based upon the facts presented:

> THE COURT: Let me get it out of the way. There's probable cause. The point out by the civilian witness in and of itself is sufficient under case law to establish probable cause.

(S.H.24). Defense counsel argued that the officers should have taken into account other evidence and offered to provide supporting case law, which the court agreed to consider. (S.H.24–25). In denying the motion to suppress, however, Justice Grasso ultimately maintained his conclusion that "[t]he identification inside the bar in and of itself establishes probable cause. That's probable cause ... There was probable cause to place the defendant in a lineup."(S.D.6–7).

***14** Moreover, when Perez complained to the court at a later conference that his attorney "was supposed to put in a motion for the evidence that the Assistant District Attorney fabricated," (H–4.6), Justice Barry Kron confirmed on the record that "[a]ll the appropriate requests to suppress evidence were made and hearings were conducted before Judge Grosso. Whether you are happy with the ultimate result that was reached, has nothing to do with the fact that [defense counsel] was representing you in an appropriate fashion."(H–4.7). Indeed, the Second Circuit has noted in the habeas context that "all that the Supreme Court required was that the state provide the *opportunity* to the state prisoner for a full and fair litigation of the Fourth Amendment claim."*Capellan,* 975 F.2d at 70 (citation and internal bracketing omitted) (emphasis in original). Perez had that opportunity and his trial counsel vigorously contested the issue of probable cause in the arrest context, though the trial court did not ultimately agree with his position.

In sum, having availed himself a full and fair opportunity to litigate his Fourth Amendment claim in state court through New York's corrective procedures, Perez may not raise it on federal habeas review.

D. Motion for Production and to Expand the Record

This Court previously reserved decision as to Perez's request for production of documents and expansion of the record. (Docket No. 29). Perez argues in his motion that certain "transcripts and documents" should be produced because they are relevant to his allegation that his counsel failed to "vehemently seek a ruling on my probable cause claim."(Docket No. 27 Ex. 1 at 3). [12]

As the Supreme Court has stated, a "habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course."*Bracy v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). In particular, Rule 6(a) of the Rules Governing Section 2254 Cases provides that a petitioner is entitled to seek discovery "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."Good cause exists "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief."*Bracy,* 520 U.S. at 908–09 (quoting *Harris v. Nelson,* 394 U.S. 286, 300, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969)). Perez has made no such showing. Indeed, this Court has determined that Perez had a full and fair opportunity to litigate his Fourth Amendment probable cause claim, which is the subject of the discovery he now seeks. Accordingly, his motion for production of documents and expansion of the record is denied.

III. CONCLUSION

For the reasons set forth above, the instant petition for a writ of *habeas corpus* (Docket No. 1) and the motion for production (Docket No. 27) are denied in their entireties. A certificate of appealability shall not be issued because Petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Court certifies that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States,* 369 U.S. 438, 444–45, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

***15 SO ORDERED.**

All Citations

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Footnotes

1 "S.H." refers to the transcript of the pretrial suppression hearing on February 19 and 21, 2003. "S.D." refers to the transcript of the proceeding on March 3, 2003, when the court denied the suppression motion. "H–1.," "H–2.," "H–3.," "H–4.," "H–5.," and "H–6." refer to the transcripts of the pretrial proceedings on April 7, May 8, September 25, and September 30, 2003, and March 23 and June 7, 2004, respectively. "Tr." refers to the trial transcript. "H–7." and "H8." refer to the transcripts of the post-verdict proceedings on September 28, 2004, and March 24, 2005, respectively. "S." refers to the transcript of the sentencing on March 29, 2005. "Resp. Ex." refers to the exhibits annexed to Respondent's declaration dated September 18, 2009. (Docket Nos. 14–20). "Pet. Ex." refers to the exhibits annexed to Perez's petition. (Docket No. 1). "Reply Ex." refers to the exhibits annexed to Perez's traverse papers filed in hard copy on November 25, 2009. (Docket No. 25 ("Reply")).

2 Section 730.30(1) requires that a court "issue an order of examination when it is of the opinion that the defendant may be an incapacitated person."Section 730.10(1) defines an incapacitated person as one "who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense."

3 CPL Section 30.30 addresses speedy trial limitations under New York law, providing the time periods within which the prosecution must be ready for trial or dismiss the case.

4 Perez has contended at various times that there was no one in the police van. (*See, e.g.,* S. 20; Reply at 30–31; Reply Ex. A Aff. ¶ 13).

5 Perez maintains that he kicked out the window because he was suffering an asthma attack. Ambulance records show that Perez was treated with oxygen after he presented with respiratory distress and had been sprayed with mace. (*See* Reply Ex. A (attached as Exhibit C to Perez's error *coram nobis* motion)).

6 Page 759, the last page of the transcript relating to the verdict, appears to be missing, but context from the subsequent proceeding and Respondent's papers indicates that defense counsel requested an examination as part of the pre-sentence report under CPL § 390. (*See* Tr. 758; H–7. 2; Resp. Opp. at 8).

7 Perez notes in his papers, as he stated to the court, that the author of his purportedly *pro se* motions was actually another Rikers Island inmate, Blake Wingate, a law library clerk. (Reply Ex. C; S. 2–3).

8 An initial letter request may have been sent on January 7, 2008, though that letter does not appear in the record before this Court. (*See* Resp. Ex. G at 6).

9 It seems that Perez was referring to the purported ineffectiveness of Mr. Sheehan, who represented him at the pretrial proceedings, as well as Mr. Wogan, who represented him at trial.

10 Although it appears that the Appellate Division did not specifically address Perez's probable cause claim in denying the motion, that is of no moment. The Second Circuit has refused to "infer that an unconscionable breakdown occurred" in this context, noting that it would "place us in the position of dictating to state courts that they must issue opinions explicitly addressing the issues presented or else face 'second guessing' by the federal courts."*Capellan v. Riley,* 975 F.2d 67, 72 (2d Cir.1992) (citing *Coleman,* 501 U.S. at 739 ("[W]e have no power to tell state courts how they must write their opinions.")).

11 A hearing pursuant to *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), is held on a motion to suppress proof obtained from an illegal arrest.

12 It is worth noting that Perez, exhibiting a fair degree of legal savvy, has previously sought—and obtained—similar records through Freedom of Information letter requests and Article 78 state court proceedings. Indeed, on July 21, 2008, Justice Emily Goodman so-ordered a stipulation signed by Perez and New York City Police Department's legal counsel, providing for disclosure of twenty-two pages "consisting of copies of the Command Log maintained by the 115th Precinct for the dates of January 29, 2002, and January 30, 2002, subject to redaction ... of confidential information."(Reply Ex. G, "Stipulation of Settlement").

Although Perez later complained of missing "facts that either were or should have been in the log book,"(*id.,* Letter to Justice Goodman, dated Aug. 25, 2008, at 1), the legal department had already confirmed that all pages had been disclosed and "nothing pertaining to [Perez's] arrest has been redacted,"(*id.*Letter to Perez, dated August 20, 2008, at 1).

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Lamar Jermaine ROUNDTREE, Petitioner,
v.
Robert KIRKPATRICK, Respondent.

No. 11–CV–6188 (MAT). | April 23, 2012.

Attorneys and Law Firms

Lamar Jermaine Roundtree, Alden, NY, pro se.

Paul B. Lyons, Office of New York State Attorney General, New York, NY, for Respondent.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** *Pro se* petitioner Lamar Jermaine Roundtree ("Roundtree" or "Petitioner"), an inmate at Wende Correctional Facility, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 11, 2011. The petition challenges the constitutionality of a judgment of conviction entered against Roundtree on July 19, 2006, in the New York State Supreme Court, Monroe County, convicting him, following a jury trial, of intentional murder and two counts of criminal possession of a weapon.

II. Factual Background and Procedural History

The convictions here at issue stem from a shooting on June 26, 2005, outside Classics Bar on Thurston Road in the City of Rochester. The intended target was Detron Parker ("Parker"), a man with whom Roundtree had an ongoing dispute over a necklace. Unfortunately, Petitioner missed Parker and instead hit Lisa Barker ("Baker"), an innocent bystander. Baker later died at the hospital.

Roundtree was indicted on two counts of second degree murder (intentional and depraved indifference), and one count each of second and third degree criminal possession of a weapon, respectively. Roundtree's jury trial commenced April 25, 2006.

A. The Trial

1. The Prosecution's Case

a. Detron Parker

Parker testified that he had known Roundtree "from around the neighborhood" since middle school. T.396. [1] They were once friends but, beginning around April of 2005, they had been engaged in a dispute over a gold necklace worth about $2,500, which Roundtree had borrowed from Parker but never returned. Roundtree told Parker that Parker would have to fight him to get back the chain. T.396–400, 423–25, 465–67.

On the evening of June 25, 2005, Parker had gone to Classics Bar and Grill at 685 Thurston Road where he saw Roundtree wearing a white T-shirt and a red baseball cap. T.400–01, 423, 426, 461. Parker was wearing a red, white, and blue baseball jersey and a white "do rag". T.420–21. The two men made eye contact but did not speak to each other. T.401, 428, 617, 632.

At around 1:30 a.m., Parker left the bar and stood talking to a friend, Arthur Long ("Long"), on the sidewalk in front of a garage door on Thurston Road just north of, and directly next door to, the bar entrance. T.402–03. At some point, Parker noticed a lot of people trying to move out of the way. As Parker turned around, he made eye contact with a man, whom he identified in court as Roundtree. Roundtree was wearing a hooded sweatshirt and running across Thurston Road towards Parker. T.405–06, 408–09, 442. Petitioner was pointing a handgun—which Parker said may have been black with a brown handle—at Parker. T.405–07. As Parker dove to the ground, he saw Roundtree (who was about six feet away) fire two shots at him. T.411–12. The second shot was fired at a distance of "[n]ot even two feet" from Parker. T.409–12. Parker tried to crawl beneath a car parked in front of the garage door, and watched as Roundtree ran back across Thurston Road. T.412, 428–29. After the shooting was over, Parker thought he had been shot, so he had a friend drive him to the hospital where he was treated for a dislocated thumb. T.415–16.

***2** When questioned on cross-examination about three pending criminal charges and one prior uncharged bad act, Parker invoked his Fifth Amendment privilege against self-incrimination. T.443–50.

b. Tasharra Brock

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A second eyewitness, Tasharra Brock ("Tasharra"), confirmed Parker's account of the shooting. After arriving at Classics at about 11:30 p.m., Brock she spoke with a man wearing a "red, white and blue jersey," whom she identified in court as Roundtree. T.522–524. Roundtree recommended that she "not ... buy the drink because he was going to shoot the bar up."T.523. Brock told him not to do it, and then walked away and told her sisters about Roundtree's threat. T.524.

Later, as she was standing on the sidewalk outside the bar talking with her sisters, Brock saw a car parked in the driveway in front of the garage door next to the bar entrance with about ten people were standing around the car. T.526–27. Brock saw Roundtree jog across the sidewalk toward the car parked by the garage door. He was wearing a hooded sweatshirt and holding a handgun. T.527–30, 537, 543.

When he reached the car, Brock saw Roundtree fire three shots and run back across Thurston Road, heading south towards Brooks Avenue. T.530–33, 537–39, 543–44. Brock then heard three or more shots, but she could not determine the source. T.534.

c. Darrio Henry

A third eyewitness, Darrio Henry ("Henry"), tentatively identified Roundtree as the shooter. Henry, who had known Petitioner "[s]ince grade school," and had seen him "a million times" since then, testified that he saw Petitioner and Parker staring at each other inside Classics on the night of the shooting. T.614–17, 621, 632. Later, as Henry was leaving the bar, but before he exited the front door, he saw a man in a hooded sweatshirt, carrying what looked like a black gun, run across Thurston Road. The man ran out of Henry's sight, but Henry heard two gunshots.

Henry then saw the man in the hooded sweatshirt run toward the intersection of Thurston Road and Brooks Avenue. T.619–23, 633–34. At around that time, Henry heard three more shots fired. T.623.

Although Henry only saw "part of" the man's face due to the hood, Henry recognized him as Petitioner, based on the man's build and gait. T.619–21, 626, 632–33. Although Petitioner and his brother, LaShawn, looked similar to each other, Henry was "sure" that the man in the hoody was not Petitioner's brother. Henry did not see LaShawn at Classics that night. T.630–31.

d. Kanza Williams

A fourth eyewitness, Kanza Williams ("Williams"), identified Petitioner as having stood across the street from Classics wearing a hooded sweatshirt. However, Williams did not see the shooting.

Williams had been at Classics with her ex-boyfriend and her mother. Williams saw her ex-boyfriend talking to Petitioner, whom she identified in court. Petitioner was wearing a red and white basketball jersey, a baseball cap, and gold caps on his lower teeth. T.308–11, 320–23. Williams left Classics at around 1:30 a.m. and walked across the street to the Rite Aid Pharmacy parking lot to her car.

***3** There, Williams noticed Petitioner standing alone, "kind of hidden" behind a large bush next to the parking lot. T.309, 312–15, 333. She "glanced" at Petitioner, but did not "stare directly in his face." T.328–29, 331–32. He was wearing a hoody pulled over his head, and had his right hand positioned by his waistband. T.314–17, 322. It "looked really suspicious" to Williams. Having "a feeling that something was about to happen," Williams phoned a friend who was inside the bar and told her to leave. T.317. Williams then picked up the rest of her party, commenting to her ex-boyfriend that "[t]he guy that I saw in the bushes looks exactly like your friend you were talking to."T.329–31. They drove away before any shooting took place. T.318–19.

e. Other Eyewitnesses

Several other eyewitnesses either saw Roundtree at Classics on the night of the shooting or witnessed the shooting, but did not see the shooter's face and thus could not identify Petitioner as the shooter. Dumka Viator ("Viator") testified that at the time of the shooting, he was sitting in his car, parked facing north on Thurston Road across the street from Classics. T.471–73. Viator noticed a car parked in the driveway in front of the garage door next to Classics. One woman was sitting on the hood of the car talking to another woman standing nearby. T.473–74, 492, 494–95. Viator saw a man "tiptoeing" right in front of Viator's car, wearing a hoody and carrying a "silver-ish" pistol. T.475–78, 491–92, 496, 498. Viator could not see the man's face, and "guessed" that the man was around five feet, ten inches tall. T.475, 498, 500. The man crossed Thurston Road in a "slight jog," bumped into a man talking on a cell phone, and then fired one shot when he was two or three feet away from the woman sitting on the car. T.478–81, 487, 489–90, 493–94, 499. The woman fell to the ground. T.480.

Viator saw the shooter then run south on Thurston Road and across Brooks Avenue towards Snuffy's Birdland, a restaurant on the corner of Thurston and Brooks. T.482–84. Viator believed that two more shots were fired after the shooter ran across Brooks Avenue, but he could not tell where the shots came from. T.484–85, 496.

Leslie Gordon ("Gordon") testified that, at around 1:40 a.m., she was standing outside Classics talking with her childhood friend, Lisa Baker, who was sitting on the hood of a car parked in front of the garage door just north of Classics. T.553, 557–58, 575. Since it was a warm night, a lot of people were milling around outside the bar. T.558–60, 577. As Gordon and Baker were preparing to leave, Baker got off the car. Gordon heard a loud gunshot from "really close," "right behind" Gordon, and then, within seconds, heard "a few more shots" coming from "a little further away," "from like Brooks Avenue." T.561–65, 568–69, 578–81. Gordon did not see the shooter. T.564.

Shawndell Hemphill ("Hemphill"), the bouncer at Classics, recalled Petitioner, whom he had seen on previous occasions, entering the bar on the night of the shooting at approximately 1:00 a.m. with a man named "Feon." T.502–03, 520. Hemphill described Petitioner as "maybe six feet, two or three inches" tall, and weighing "maybe 250 pounds". T.514–15. When Petitioner left the bar about an hour later, Hemphill saw him walk south towards the intersection of Thurston and Brooks. T.504–05, 513. Later, while Hemphill was standing just inside the bar's front door, he saw (through the bar's window) a man in a hoody come across the street and start shooting with a gun that "[m]ight have been silver." T.506–08, 511, 517–18. Hemphill did not see the shooter's face, however. He heard "maybe four or five" shots, but stayed inside the bar during the entire incident. T.510, 517. Hemphill then saw the man run towards Brooks Avenue in the direction of Snuffy's Birdland. T.510–11, 513.

***4** Shawn Anderson ("Anderson") testified that, between 1:30 and 2:00 a.m., he was sitting in his SUV parked on Thurston Road, next to some bushes, just across the street from Classics. T.337–39. He noticed a black man, about six foot two or three inches tall, stooping in front of Anderson's SUV. The man was facing Classics, wearing a long-sleeved hoody with the hood up. T.336–40, 342, 344, 349–50, 355–57. Anderson could not see the man's face, but observed that he was holding a large "chrome-colored" handgun. T.340–41, 344. The man at first moved slowly, in a "stalking" manner, and ran across Thurston Road towards Classics, where some people were standing. Anderson then heard, but did not see, one shot fired. T.343.

Walter Monroe ("Monroe") testified that at about 1:30 a.m., he was sitting in his car, parked on Thurston Road outside of Classics, waiting for a friend. T.358–62, 368–69. Monroe saw a man come across Thurston Road from the sidewalk adjacent to the Rite Aid parking lot. The man had a "sneaky" or "lurking" manner, wore a hoody with the hood up, and was five feet, eight inches to six feet tall. The man, who passed five to ten feet in front of Monroe's car, was carrying a "very nickel plated or shiny gun" in his right hand. T.364–67, 373. Monroe could not see the man's face, however. T.366. Monroe promptly called his friend, Gregory McKnight ("McKnight"), did a U-turn, and drove north on Thurston Road. After hearing two shots, he drove back to the bar. T.367–73.

McKnight testified that he left Classics near closing time after receiving a call from Monroe. T.375–78. McKnight walked around the corner and proceeded west on Brooks Avenue, when he heard at least two or three gunshots coming from the area of the bar. After McKnight got into his car, parked on Brooks Avenue, he heard two or three more shots coming from "real close." T.378–83, 393. Because McKnight was ducking for cover, he did not see who fired the shots. After the shooting stopped, McKnight saw a "guy with a chrome gun with a hoody on his head," about five feet nine inches to six feet tall, running east on the Brooks Avenue sidewalk. T.383–85.

f. The Forensic Medical Evidence

After the shooting, Baker was responsive but in critical condition. T.184, 189–90, 204–06, 230–33, 565–70. At 2:02 a.m., paramedics transported her to Strong Memorial Hospital, where she died. T.208, 233–34, 570. Based on the autopsy, Baker was found to have died of a gunshot wound to the torso. Specifically, a single bullet entered her back; passed through her rib cage, right lung, diaphragm, and liver; and exited through her abdomen. No bullets or projectiles were recovered during the autopsy. T.769–79.

g. The Ballistics Evidence

Examination of a steel garage door adjacent to Classics revealed a hole about sixteen inches off the ground. There had been no holes in the garage door prior to the shooting. The police also discovered a "bullet strike mark" on the pavement in an alleyway or "tunnel" behind the garage door.

A projectile was recovered on the ground in the rear of the alleyway, along with a plastic bucket with two bullet holes. T.206–18, 223–24, 264–65, 270–72, 292–300, 547–49. The prosecution's firearms examiner, John Clark ("Clark") testified that the projectile could have been fired from a .38 Special or .357 Magnum revolver, but it could not have been fired from a .380 caliber semi-automatic pistol. T.666–68, 701–02, 730, 736–37. The parties stipulated that blood found on the projectile in the alleyway matched the victim's DNA. T.646–51.

***5** Examination of the victim's blouse revealed partially burned gunpowder around the bullet holes, predominantly those around the bullet hole on the back of the blouse. T.670–73, 756–57. This indicated that the bullet was fired from no more than five to six feet away. T.268–69, 277, 283, 668–73, 701, 710–11, 713–14, 734, 736, 739, 756–64.

Clark later conducted a reconstruction at the scene to determine the trajectory of the fatal bullet based on the location of the hole in the garage door and the strike mark on the pavement inside the alleyway. T.674–78, 681–85. He determined that, based upon the height of the firearm if fired from different distances from the garage door, the gun would have had to have been fired more than seven feet of the ground if the shooter was twenty feet away from the garage door. T.686–87. The street was more than thirty feet from the garage door. Thus, the fatal bullet could not have been fired from a passing car or from across the street, but must have been "fired from close range." T.685–87, 691–94, 728, 732–33, 740–41.

The police also discovered three .380–caliber shell casings on the Brooks Avenue sidewalk approximately twenty to forty feet west of Thurston Road, just around the corner from Classics. T.191–92, 249–50, 255–57, 280–81, 289–92. The firearms examiner determined that the shell casings were all fired from the same .380 caliber semi-automatic pistol. T.660–66, 705–06. According to the firearms examiner, certain damage to a glass window at Snuffy's Birdland, at the corner of Thurston Road and Brooks Avenue, could have been caused by bullets fired from a .380–caliber pistol on Brooks Avenue. T.673–74, 694–98. However, bullets causing the damage at Snuffy's could not also have caused the hole in the garage door on Thurston Road. T.698–700, 734–36.

2. The Defense Case

a. Petitioner's Testimony

Petitioner testified on his own behalf that he was not at Classics or in the nearby area on the night of the murder but instead spent the night riding around alone in his car. He went to a bar at about midnight, and then went to his girlfriend's house at about 12:45 a.m., although she was already asleep. T.948–49, 956–57, 959–60. Because he was alone, nobody could verify his whereabouts. T.961. He also claimed that he is frequently mistaken for his brother, LaShawn, whom he described as 5′11″ or 6′0″ and approximately 220 to 225 pounds. T.947. Petitioner described himself as "[l]ike six-four" and 275 to 280 pounds.[2] T.947. Petitioner denied that he and Parker had had a dispute over a gold necklace, but admitted that he and Parker had been in a fight two years earlier. T.953–54, 958. Petitioner's supervisor testified that petitioner worked a full forty-hour week following the shooting. T.840.

b. Other Defense Witnesses

J.W. Hardy, Jr. ("Hardy") testified that he was at Classics on the night of the murder, where he saw and greeted his barber, who happened to be Petitioner's brother, LaShawn Roundtree ("LaShawn"). T.793–95, 804–05, 823–25. Hardy testified that LaShawn looks similar to Petitioner. T.794. Hardy also saw Parker in the bar, wearing a white "do-rag." T.792–93. When Hardy was outside the bar smoking a cigarette, he heard a "big boom." T.795, 797, 809. Turning around, Hardy saw Parker fire a handgun and "[saw] a lady fall." T.798, 809–12. According to Hardy, Parker was facing toward the garage door when he fired. T.825–29. Parker then "dropped the gun, shook his hand, reached down and grabbed the gun."T.798, 810–12. Parker and another man ran across the street, got into a car, and drove north. T.799, 812–13. Hardy never told authorities about what he witnessed that night, claiming that he was afraid to do so because he was violating the terms of his parole by being out after curfew. T.815–18.

***6** Simone Chatman ("Chatman") testified that she was outside the entrance to Classics when she saw "some guys across the street from the bar under the trees."T.896, 899–901. One of them then "ran from across the street with a gun," and she then heard "around four" gunshots. T.897, 903. She described the shooter as a "tall, slim" black male, wearing a hooded sweatshirt. Although Chatman did not see the shooter's face, she did not think that the shooter had the same "physical appearance" as Petitioner. T.897–901.

William Barclay, Jr. ("Barclay") testified that he was outside the entrance to Classics just before 2:00 a.m., when he heard

three sets of gunshots. T.931–940. He did not, however, see any individuals actually shooting. T.937, 940–41.

The jury also listened to a recording of a 911 call made by Lena Brock ("Lena") after the shooting. T.918–26. Lena told the 911 operator that the shooter was wearing a "do-rag," a blue shirt, and shorts. *See* T.1002–03, 1047 (summary of Lena's phone call by attorneys in their summations). Lena did not testify, however.

Petitioner's firearms examiner, Dennis Caliri ("Caliri"), agreed with the prosecution's expert that the recovered .38– or .357–caliber projectile could not have been fired from the recovered .380–caliber casings. T.852–56, 870. Caliri testified that he found a hole in the front brick wall of Classics, which, he opined, was caused by a nine millimeter projectile. T.859–64, 907. He conceded that the hole could have been caused by something other than a bullet, and that he did not know when the hole was created. T.907–16. Caliri also testified that a person could injure a thumb by mishandling a revolver or a semi-automatic pistol. T.857–58.

Harold Beemer, M.D. ("Dr.Beemer"), an orthopedic surgeon, provided testimony interpreting Parker's hospital records from immediately after the shooting. Parker apparently sustained a dislocated left thumb during the incident. Dr. Beemer testified that this was consistent with "gripping something that recoiled violently." T.874–886. Dr. Beemer acknowledged that such an injury could also have been caused by diving onto the pavement, but he believed that a more likely cause was gun recoil. T.886–87, 890–92.

3. The Verdict and Sentencing

The trial judge did not dismiss the depraved indifference murder count, as requested by defense counsel, but did not submit it to the jury. The jury returned a verdict finding Petitioner guilty of intentional murder and guilty of possession of a weapon in the second and third degrees. T.1095–98.

Petitioner moved to set aside the verdict based upon the affidavit of Eric Dolman ("Dolman"), who claimed to have committed the murder. Petitioner was later forced to withdraw his motion after the prosecution established that Dolman was actually incarcerated at the time of the homicide. *See* S.2–3. [3]

Petitioner was sentenced to an indeterminate term of imprisonment of 25 years to life for the murder charge, a determinate term imprisonment of 15 years plus five years of post-release supervision for the second degree weapons charge, and a determinate term of imprisonment of seven years plus three years of post-release supervision for the third degree weapons charge. sentencing. The trial court ruled that the sentences for the two weapons convictions were to be served concurrently with each other, but consecutively to the murder sentence. S.16–17.

B. Post–Conviction Proceedings

***7** On July 9, 2010, the Appellate Division, Fourth Department, of New York State Supreme Court, modified Petitioner's sentences to run concurrently with each other but otherwise affirmed the judgment of conviction. *People v. Roundtree,* 75 A.D.3d 1136, 904 N.Y.S.2d 636 (4th Dept.2010). The New York Court of Appeals denied leave on September 22, 2010. *People v. Roundtree,* 15 N.Y.3d 855, 909 N.Y.S.2d 33, 935 N.E.2d 825 (2010).

C. The Federal Habeas Proceeding

Petitioner filed a *pro se* habeas corpus petition with this Court, dated April 11, 2011, simply incorporating by reference his appellate brief from his direct appeal. In response to Respondent's motion for a more definite statement pursuant to FED. R. CIV. P. 12(e), Petitioner submitted a "Reply Affidavit" stating that he "seeks review on every issue raised in his Federal Habeas Corpus Petition/Appellant Brief". Respondent then informed the Court that he would liberally construe the petition to incorporate all claims raised in Petitioner's brief on direct appeal to the Appellate Division, which was submitted as an attachment to the petition.

After Respondent answered, Petitioner moved for a "stay and abeyance" so that he could pursue certain unexhausted claims in state court. In a Decision and Order dated October 6, 2011, the Court (Siragusa, D.J.) denied the motion without prejudice, and directed Petitioner to "file a motion to amend his petition, along with a proposed amended petition, and a motion for stay-and-abeyance, which explains why he is entitled to the relief he seeks ....“ Order dated Oct. 6, 2011, at 7 (Dkt.# 17). Specifically, Judge Siragusa directed Petitioner to "explain why he failed to exhaust the claims sooner, and how the claims have merit." *Id.* at 7 n. 5, 909 N.Y.S.2d 33, 935 N.E.2d 825 (Dkt. # 17). Petitioner has now submitted a renewed motion for "stay and abeyance." *See* Dkt. # 19. Along with his motion to stay ("Stay Mot.") (Dkt.#

19), Petitioner submitted a pleading which appears to be a "proposed amended petition" (Dkt.# 18). Respondent filed a memorandum of law in opposition to the stay motion (Dkt.# 20), to which Roundtree filed a reply (Dkt.# 21).

For the reasons that follow, the motion to amend and motion to stay are denied with prejudice. Roundtree's request for a writ of habeas corpus is denied and the original petition is dismissed.

III. The Motion to Stay and Motion to Amend

A. Overview of the Pleadings

As Respondent notes, the proposed amended petition ("Am.Pet.") appears to be a duplicate of the original petition. As did the original petition, the amended petition's four enumerated grounds for relief simply reference Petitioner's counseled appellate brief on direct appeal by stating, "See Attached Brief" when asked to list the claims for habeas relief. *See, e.g.,* Proposed Amended Petition, ¶ 12(a) (Dkt.# 18). The proposed amended petition also states that Petitioner is "[i]n the process of filing Post Conviction Motion, raising Actual Innocence, Ineffective Assistance of Counsel and or Newly Discovered Evidence."Am. Pet., ¶ 13(b) (Dkt.# 18). [4]

***8** Petitioner's Motion to Stay sheds some light on the nature of the proposed amended claims. *See* Application For Stay and Abeyance ("Stay Appl."), ¶ 11 *et seq.* Construing the pleading with an extremely lenient eye, the two claims that this Court can discern in the stay motion as follows: First, Roundtree appears to raise a claim of ineffective assistance of trial counsel based upon a ballistics report obtained during a Freedom of Information Law request dated January 2, 2011, which Roundtree states establishes someone else was the shooter. *Id.,* ¶ 4, 11, 909 N.Y.S.2d 33, 935 N.E.2d 825. Second, Petitioner's "newly discovered evidence" claim apparently refers to another ballistics report obtained as the result of the F.O.I.L request, "grand jury minutes", and a "waiver of appeal".*Id.,* ¶ 8, 909 N.Y.S.2d 33, 935 N.E.2d 825. The reference to a claim of "Actual Innocence" appears to encompass all of this allegedly exculpatory evidence, which, according to Roundtree, exonerates him and establishes the culpability of a third party.

B. Application of the *Rhines* Standard

The Supreme Court stated in *Rhines v. Weber* that "it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had [1] good cause for his failure to exhaust, [2] his unexhausted claims are potentially meritorious, and [3] there is no indication that the petitioner engaged in intentionally dilatory litigation tactics."544 U.S. at 278. On the other hand, the Supreme Court explained, even if a petitioner had "good cause" for the failure to exhaust the claims first, it would be an abuse of discretion to grant a stay when the claims are "plainly meritless." *Id.* at 277 (citing 28 U.S.C. § 2254(b)(2)). Evaluating Roundtree's motion to stay against the considerations set forth by the Supreme Court in *Rhines v. Weber, supra,* the Court concludes that it would be an abuse of discretion to utilize the stay-and-abeyance procedure in this case.

With regard to the "good cause" prong, Petitioner acknowledges that he first sought to pursue his new claims by sending a F.O.I.L. request on January 2, 2011, to the Monroe County Public Safety Laboratory, seeking all reports, tests, notes, intake form, etc., produced in connection with his case number, as well as all documentation produced relative to those reports. Stay Mot., ¶ 4 (Dkt.# 19). However, Petitioner's trial was held in 2006, and he has not explained why he waited nearly five years before filing the F.O.I.L. request.

Petitioner has also failed to establish that his new claims are not plainly meritless. The Court agrees with Respondent that Roundtree's papers are less than clear. He appears, however, to allege that his trial counsel rendered ineffective assistance by not following up on two ballistics reports issued in Petitioner's case by the MCPSL. Stay Mot., ¶¶ 7–11 (Dkt.# 19). The reports alleged to be important each relate to Petitioner's case, which was assigned number 1387/05. *See* T.662; Stay Mot., Exhibits ("Exs.) E & F (Dkt.# 19).

***9** Petitioner does not claim-nor can he-that the prosecution failed to disclose these reports to trial counsel prior to trial. Instead, Petitioner appears to argue that he only recently obtained the reports through his F.O.I.L. requests, and thereby learned that trial counsel allegedly did not investigate the information contained in the reports. *Id.* The Court agrees with Respondent's interpretation of Petitioner's pleadings as faulting his counsel on two grounds-failing to investigate Jose Torres ("Torres") and Reginald Weaver ("Weaver") as having been the shooter.

First, Petitioner argues that "Report # 9 show[s] that Jose Torres (Indictment # 2007–0158) was arrested on or about February 11, 2007 and charged with Possession of a Firearm (380 Auto Caliber handgun) matching the exact ballistics in

petitioner's case."Stay Mot., ¶ 8 (Dkt.# 19). In support of this assertion, Petitioner attaches the following documents: (1) Monroe Public Safety Laboratory Report # 9, which describes ballistics tests on the .380–caliber shells recovered from the crime scene in Petitioner's case; and (2) the indictment of Torres for possession of a "380 auto caliber semi-automatic pistol." Stay Mot., Ex. E (Dkt.# 19). As Respondent points out, however, both the prosecution's firearms expert and the expert retained by the defense testified that the victim in this case could *not* have been killed by a .380–caliber semi-automatic pistol. Instead, the projectile that killed the victim could have been fired from a .38 Special or .357 Magnum revolver. *See* T.666–68, 701–02, 730, 736–37, 852–56, 870. Thus, Petitioner is plainly incorrect that this line of inquiry involving the .380–caliber shells would have led to discovery that Torres was the actual shooter, because the gun Torres was accused of possessing could not have been the gun that fired the shots that killed Baker. In other words, Report # 9 was not exculpatory.

Furthermore, the record does not support a finding that trial counsel neglected to investigate the issue of the .380–caliber shells recovered from the murder scene. Trial counsel elicited from the prosecution's firearms expert that the .380–caliber shells found around the corner had been matched to a weapon used in a different shooting. T.718–19. It is thus apparent that counsel was aware of the issue involving the .380–shells. Further investigation would have been fruitless for the reasons discussed above.

Second, Petitioner argues that trial counsel failed to properly investigate "Report # 8," which contains a comparison between (1) the projectile that killed the victim in Petitioner's case, and (2) a .38–caliber revolver recovered in the unrelated arrest of Parker's companion, Weaver. As Petitioner notes, Parker told police at the time that Weaver had accompanied him to the Classic Bar and Grill on the night of the murder. *See* Stay Mot., Ex. F ("Supporting Deposition" by Parker to the police) (Dkt.# 19). Weaver later pled guilty in an unrelated matter to possessing a .38–caliber revolver. In any event, as Petitioner recognizes, Report # 8 determined that the comparison between the projectile that killed Baker and the revolver recovered in Weaver's case was "inconclusive," as the weapon "could neither be identified nor eliminated" as the murder weapon. Stay Mot., ¶¶ 9–10 & Ex. F (Dkt.# 19). Thus, contrary to Petitioner's contention, Report # 8 was and is not conclusive evidence of his "actual innocence".

***10** Furthermore, the record supports a finding that trial counsel did investigate this potential lead. As Respondent points out, defense counsel had the trial court sign a subpoena directed to the Rochester Police Department demanding all records involving Weaver's arrest for possession of a .38–caliber revolver. *See* T.838–39.

In short, Petitioner has not demonstrated good cause for his failure to exhaust the ineffective assistance claims sooner or that these unexhausted claims are potentially meritorious. To the contrary, there is no basis for concluding that the reports obtained via the F.O.I.L. request are new evidence of Petitioner's actual innocence or that they demonstrate that trial counsel committed errors that prejudiced the defense. In these circumstances, invoking the stay-and-abeyance procedure would be an abuse of discretion. Accordingly, Petitioner's motion for a stay and motion to amend the petition are denied with prejudice.

IV. Exhaustion and Procedural Default

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State...."28 U.S.C. § 2254(b)(1)(A); *see also, e.g., O'Sullivan v. Boerckel,* 526 U.S. 838, 843–44, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). The exhaustion requirement is not satisfied unless the federal claim has been fairly presented to the state courts by invoking one complete round of the state's established appellate review process. *O'Sullivan,* 526 U.S. at 843–44.

Respondent concedes that Petitioner has exhausted all of his habeas claims except for two-that the evidence presented to the grand jury was insufficient and that the verdict was against the weight of the evidence. Respondent argues that because Petitioner raised both claims solely in state law terms, he failed to fairly present the claims in constitutional terms to the state courts. *See Baldwin v. Reese,* 541 U.S. 27, 30–33, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (finding ineffective appellate counsel claim to be unexhausted where petitioner raised it solely in state law terms in state court). As discussed below, these two claims, in addition to being unexhausted, are not cognizable on habeas review. Because resolution of the claims based upon their failure to raise a constitutional question is more expeditious than addressing the exhaustion issue, the Court elects to proceed in that manner.

V. Analysis of the Petition

The standard set forth in the Antiterrorism and Effective Death Penalty Act (the "AEDPA"), applies to this case since Roundtree filed his petition after AEDPA's effective date. *See Brown v. Artuz,* 283 F.3d 492, 498 n. 2 (2d Cir.2002). Nevertheless, since each of Petitioner's claims fails under the less deferential pre-AEDPA standard, there is no need to conduct the AEDPA's more intricate analysis. *Cf. Kruelski v. Connecticut Superior Court for the Jud. Dist. of Danbury,* 316 F.3d 103, 106–07 (2d Cir.2003) (suggesting, in post-AEDPA cases, that habeas courts assess first whether state court's ruling was erroneous under "correct interpretation" of the federal law at issue, then whether the ruling was unreasonable).

A. Insufficiency of the Evidence to Support the Indictment

***11** The Second Circuit has held that "[i]f federal grand jury rights are not cognizable on direct appeal where rendered harmless by a petit jury, similar claims concerning a state grand jury proceeding are a *fortiori* foreclosed in a collateral attack brought in federal court."*Lopez v. Riley,* 865 F.2d 30, 32 (2d Cir.1989) (citing *United States v. Mechanik,* 475 U.S. 66, 70, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) ("[T]he petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.").

Roundtree's claim of error based upon the alleged insufficiency of the evidence presented to the grand jury was rendered harmless by the petit jury's return of guilty verdict after trial. *See Lopez,* 865 F.2d at 33 ("The particular claims of impropriety before the grand jury in this case concern the sufficiency of the evidence, a failure to develop exculpatory evidence by the prosecutor, the presentation of prejudicial evidence and error in explaining the law. Each of these alleged improprieties was cured in the trial before the petit jury, which convicted. Under *Mechanik,* therefore, error before the grand jury, if any, was harmless.").

B. Verdict Against the Weight of the Evidence

Petitioner incorporates his claim on direct appeal that the verdict was against the weight of the evidence, in which he asked the Appellate Division to exercise its statutory authority to reverse or modify a conviction where it determines "that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence."N.Y. CRIM. PROC. LAW § 470.15(5). While a legal insufficiency claim is based on federal due process principles, Petitioner's a "weight of the evidence" argument is a pure state law claim grounded in the criminal procedure statute. *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 (N.Y.1987).

Because Roundtree's weight of the evidence claim implicates only state law, it cannot provide a basis for habeas relief. *See*28 U.S.C. § 2254(a) (permitting federal habeas corpus review only where the petitioner has alleged that he is in state custody in violation of "the Constitution or a federal law or treaty"); *Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (habeas corpus review is not available where there is simply an alleged error of state law). Roundtree's weight-of-the-evidence claim accordingly is dismissed as not cognizable. *See, e.g., Ex parte Craig,* 282 F. 138, 148 (2d Cir.1922) (holding that "a writ of habeas corpus cannot be used to review the weight of evidence ..."), *aff'd,*263 U.S. 255, 44 S.Ct. 103, 68 L.Ed. 293 (1923).

C. Insufficiency of the Evidence to Support the Convictions

1. Procedural Default

***12** Respondent argues that this claim is procedurally defaulted because the Appellate Division denied this claim by relying upon an independent state procedural ground-namely, that the defendant must make a specific trial order of dismissal after he presents a case-in-chief. Under the doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule."*Martinez v. Ryan,* ––– U.S. ––––, ––––, 132 S.Ct. 1309, 1316, ––– L.Ed.2d ––––, –––– (2012) (citations omitted). Although the contemporaneous objection rule "is a firmly established and regularly followed New York procedural rule, it will not bar [a habeas court] from reviewing the federal claim on the merits if the application of the state rule to this case is exorbitant."*Garvey v. Duncan,* 485 F.3d 709, 718 (2d Cir.2007). Under the particular facts of Petitioner's case, there is an issue as to whether defense counsel substantially complied with the rule given the realities of trial, and, therefore, whether demanding perfect compliance with the rule would serve a legitimate

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governmental interest. *Cotto v. herbert,* 331 F.3d 217, 240 (2d Cir.2003) (summarizing *Lee v. Kemna,* 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002)). Accordingly, in the interest of judicial economy, the Court proceeds to consider Roundtree's insufficiency-of-the-evidence claim, which is readily disposed of on the merits. *See Lambrix v. Singletary,* 520 U.S. 518, 523, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (stating that bypassing procedural questions to reach the merits of a habeas petition is justified in rare situations, "for example, if the [underlying issues] are easily resolvable against the habeas petitioner, whereas the procedural bar issue involved complicated issues of state law").

2. Merits

"[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *Jackson v. Virginia,* 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (quotation omitted). "When it considers the sufficiency of the evidence of a state conviction, '[a] federal court must look to state law to determine the elements of the crime.' " *Fama v. Commissioner of Corr. Servs.,* 235 F.3d 804, 811 (2d Cir.2000) (citation omitted). A habeas court is required to consider the trial evidence in the light most favorable to the prosecution, and must uphold the conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Under *Jackson v. Virginia,* 443 U.S. at 319 (emphasis in original). The court must defer to the jury's assessment of the strength of the evidence and the credibility of the witnesses, and may not substitute its view of the evidence for that of the jury. *Id.*

Here, Petitioner argues that the evidence was insufficient to support any of the three charges for which he was convicted. Under New York law, "[a] person is guilty of murder in the second degree when ... [w]ith intent to cause the death of another person, he causes the death of such person or of a third person ...." N.Y. PENAL LAW § 125.25(1). A person is guilty of Criminal Possession of a Weapon in the Second Degree when he possesses a loaded firearm "with intent to use the same unlawfully against another." N.Y. PENAL LAW (former) § 265.03(2). " 'Possess' means to have physical possession or otherwise to exercise dominion or control over tangible property." N.Y. PENAL LAW § 10.00(8).Section 265.15(4) of the Penal Law provides that the possession of any weapon "is presumptive evidence of intent to use the same unlawfully against another." N.Y. PENAL LAW § 265.15(4). A person is guilty of Criminal Possession of a Weapon in the Third Degree when he possesses a loaded firearm outside his home or place of business. N.Y. PENAL LAW (former) § 265.02(4).

***13** Viewing the evidence in the light most favorable to the prosecution, and drawing all permissible inferences in the prosecution's favor, a rational fact-finder could have found that the elements of each of the three crimes had been established beyond a reasonable doubt. There was no dispute at trial that, in the early morning of June 26, 2005, someone shot Baker in front of Classics Bar with a .38–or .357–caliber revolver, causing her death. Petitioner did not dispute that the shooter intended to kill someone, thereby satisfying the *mens rea* element under a theory of transferred intent. *People v. Fernandez,* 88 N.Y.2d 777, 781, 650 N.Y.S.2d 625, 673 N.E.2d 910 (1996). ("The doctrine of 'transferred intent' serves to ensure that a person will be prosecuted for the crime he or she intended to commit even when, because of bad aim or some other 'lucky mistake,' the intended target [here, Parker] was not the actual victim [i.e., Baker]."). The only issue in dispute was the identity of the shooter.

With regard to identity, the prosecution supplied several witnesses identifying Petitioner as the shooter. Parker, Tasharra, Henry, Williams, and Hemphill saw Petitioner at Classics on the night of the shooting, contrary to Petitioner's testimony that he was never at the bar that night. Prosecution witnesses Parker, Tasharra, Henry, Hemphill, Anderson, Monroe, Viator, and defense witness Chatman testified that the shooter wore a hoody and jogged across Thurston Road before shooting Baker. Four witnesses specifically identified Petitioner as the man in the hoody: Parker and Tasharra identified Petitioner as the shooter wearing a hooded shirt; Henry identified Petitioner as the shooter based on his gait and build; and Williams identified Petitioner as wearing a hoody and standing near the bushes across the street from Classics at closing time. Tasharra also testified that Petitioner told her earlier, inside the bar, "not to buy the drink because he was going to shoot the bar up."T.523.

Under both federal and state law, " 'the testimony of a single, uncorroborated eyewitness is generally sufficient to support conviction.' "*United States v. Frampton,* 382 F.3d 213, 222 (2d Cir.2004) (quotation omitted); *see also People v. Arroyo,* 54 N.Y.2d 567, 578, 446 N.Y.S.2d 910, 431 N.E.2d 271 (N.Y.), *cert. denied,*456 U.S. 979, 102 S.Ct. 2248, 72 L.Ed.2d 855 (1982). Here, the testimony of multiple eyewitnesses supported the identity element of the offenses. It was the proper role of the jury-not this habeas court-to resolve any

minor inconsistencies in their testimony (e.g., the shooter's exact height or the color of the shooter's shirt).*See Gruttola v. Hammock,* 639 F.2d 922, 928 (2d Cir.1981) (rejecting habeas petitioner's insufficiency-of-the-evidence claim and holding that jury was entitled to believe prosecution witnesses despite inconsistencies in their testimony).

Petitioner's testimony that he was not at Classics on the night of the shooting was contradicted by five witnesses, and this false alibi testimony indeed could be considered evidence of his guilt. *See People v. Loliscio,* 187 A.D.2d 172, 176, 593 N.Y.S.2d 991 (2d Dept.1993) ("There is overwhelming evidence of the defendant's consciousness of guilt. Most obviously, there is the evidence of his lies to the police and his attempt to create a false alibi, noted above."), *habeas corpus denied, Loliscio v. Goord,* 263 F.3d 178, 190–91 (2d Cir.2001).

***14** In addition, Petitioner's chief eyewitness, Hardy, had a substantial criminal record. Hardy also asserted facts which were contradicted by all of the other eyewitnesses, including that the shooter was Parker; was not wearing a hoody and dropped his gun after firing; and that after running off with another man, the shooter jumped into a car on Thurston Road and drove north. Petitioner's only other eyewitness was Chatman, whose testimony was less than definitive: She testified that she did not see the shooter's face but believed that the shooter did not have the same physical appearance as Petitioner.

The Court further notes there is no requirement under New York law that the murder weapon be recovered by the police or introduced in evidence at trial. *See, e.g., People v. Gragnano,* 63 A.D.3d 1437, 1440, 885 N.Y.S.2d 369 (3d Dept.2009) ("[T]he evidence adduced at trial sufficiently established [assault and criminal possession of a weapon] notwithstanding the fact that the witnesses never saw the weapon and police were not able to recover it."), *appeal denied,*13 N.Y.3d 939, 895 N.Y.S.2d 329, 922 N.E.2d 918 (2010).

Petitioner's other arguments are belied by, or mischaracterize, the record. First, Petitioner argued that the evidence demonstrated that Petitioner was in the street or across the street at the time of the shooting and therefore, based on the firearms examiner's testimony that the distance between the weapon and the victim was three to five feet when the fatal shot was fired, and the trajectory of the shot, Petitioner could not have been the person who fired the shot. However, as Respondent points out, Parker, Tasharra, Viator, and Gordon testified that the man wearing a hoody ran onto the sidewalk in front of the garage door before firing pointblank at the victim. William, Monroe, and McKnight did not see the shooting. Henry, Hemphill, Anderson, and Chatman did not provide testimony as to where the shooter precisely was standing when he fired. It is apparent that none of the eyewitnesses witnesses testified that Petitioner was "in or across the street" at the time of the shooting, as Petitioner assumes in support of this argument.

Petitioner's second argument relies on this chain of inferences: Because the man in the hoody was seen around the corner on Brooks Avenue, where the .380 casings were found, he must have fired the .380 rounds. Therefore, the man in the hoody could not have killed Baker, because the firearms experts agreed that Baker was killed with a .38–or .357–caliber revolver, and not a .380–caliber semi-automatic pistol. Petitioner concludes that even if he was the man in the hoody, he could not have fired the fatal .38–or .357–caliber rounds, because the man in the hoody fired the .380 rounds.

The Court agrees with Respondent that this argument relies on speculation and surmise. None of the witnesses testified to seeing who fired the shots that were heard from the direction of Brooks Avenue, if the .380 casings do indeed correspond to those shots-something which could not be ascertained by either firearms examiner. Apart from Hardy, no witness testified to seeing anyone other than the man in the hoody with a gun. Petitioner could and did argue that the .380 casings showed that the man in the hoody did not fire the fatal shot, but there was nothing in the record compelling the jury to accept that argument. In other words, for purposes of an insuffciency-of-the-evidence analysis, there was nothing in the record making it irrational for the jury to prefer the prosecution's argument which was supported by the direct testimony of eyewitnesses who saw Petitioner open fire just a few feet away from Baker.

D. Ineffective Assistance of Trial Counsel

1. The *Strickland* Standard

***15** To demonstrate a violation of his Sixth Amendment right to the effective assistance of counsel, a petitioner must show that his attorney's representation was deficient in light of prevailing professional norms and that prejudice inured to him as a result of that deficient performance.*Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To satisfy the first prong, counsel's conduct must

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have "so undermined the proper functioning of the adversarial process" that the process "cannot be relied on as having produced a just result[.]" *Id.* at 686. As to the second prong, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional" conduct, the result of the trial would have been different. *Id.* at 694. " '[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.' " *Greiner v. Wells,* 417 F.3d 305, 319 (2d Cir.2005) (alterations in original) (quoting *Strickland,* 466 U.S. at 697).

2. Application of *Strickland* to Counsel's Alleged Errors

a. Failure to Renew Motion for a Trial Order of Dismissal

Petitioner asserts, as he did on direct appeal, that trial counsel was ineffective because he failed to preserve Petitioner's sufficiency of the evidence claim by failing to renew the motion for a trial order of dismissal. The Appellate Division rejected this claim, finding that, "[i]n view of [the Appellate Division's] determination that the evidence [was] legally sufficient to support the conviction," petitioner "was not denied effective assistance of counsel based on defense counsel's failure to renew the motion for a trial order of dismissal inasmuch as he failed to show that the motion, 'if made, would have been successful.' " *Roundtree,* 75 A.D.3d at 1137, 904 N.Y.S.2d 636 (quoting *People v. Marcial,* 41 A.D.3d 1308, 1308, 837 N.Y.S.2d 815 (4th Dept.2007)).

As Respondent argues, the same reasoning mandates rejection of Petitioner's ineffectiveness claim here. Because the Appellate Division ruled in the alternative that Petitioner's sufficiency of the evidence claim was meritless, Petitioner cannot show that he was prejudiced by trial counsel's failure to preserve the claim. *See, e.g., Baker v. Kirkpatrick,* 768 F.Supp.2d 493, 501 (W.D.N.Y.2011) ("[Petitioner] cannot demonstrate that he was prejudiced by the failure to preserve the insufficiency-of-the-evidence since the Appellate Division considered the merits of the issue notwithstanding the lack of preservation."); *Gonzalez v. Cunningham,* 670 F.Supp.2d 254, 263–64 (S.D.N.Y.2009).

b. Pursuit of "Inconsistent and Incoherent" Defense Theories

Roundtree argues that trial counsel presented inconsistent and incoherent defense theories in relation to the evidence that Parker dislocated his thumb. Roundtree concedes that trial counsel offered helpful evidence that Parker's thumb injury could have been caused by improperly firing a handgun, but he complains that counsel only elicited "in passing" that Parker could have been injured by mishandling a .38–or .357–caliber revolver, i.e., the murder weapon. Roundtree faults counsel for what he describes as counsel's excessive focus on evidence that Parker was injured by firing .380–caliber pistol, which was not the murder weapon. The Appellate Division rejected this argument, finding that Roundtree had failed to demonstrate the absence of strategic or other legitimate explanations for the alleged shortcoming. *Roundtree,* 75 A.D.3d at 1138, 904 N.Y.S.2d 636 (citation and internal quotation marks omitted).

***16** Roundtree's complaints in this regard are belied by the record. Counsel did not pursue "incoherent" or "inconsistent" theories but instead, cogently and consistently, pursued the defense that Petitioner had been misidentified as the shooter and that Parker killed Baker. In his opening statement, trial counsel pointed out that no physical evidence tied Petitioner to the shooting. T.177, 180. Counsel also fulfilled his promise to produce testimony that Petitioner did not shoot Baker, calling several witnesses who testified affirmatively that someone else was the gunman or that the shooter's appearance did not match that of Petitioner.

In furtherance of the theory that Parker was the shooter, counsel noted that Parker had dislocated his left thumb during the gunfight and emphasized Parker's repeated lies about his injury to the police and medical personnel. T.178–79. Trial counsel elicited from both the prosecution's and the defense's firearms examiners that a person could injure his thumb by improperly firing either a revolver or a semi-automatic pistol. T.717–18, 857–58. The undisputed testimony was that Baker was killed with a revolver. Thus, the testimony obtained by counsel supported the defense theory that Parker dislocated his thumb when he fired the murder weapon. Counsel's theory also was supported by Hardy's eyewitness testimony identifying Parker as the shooter. Thus, the record establishes that trial counsel competently presented what essentially was the only defense available in light of Petitioner's testimony that he was not at the bar that night, and made the most of the potentially favorable evidence involving Parker's dislocated thumb.

c. Failure to Pursue a Justification Defense

Petitioner complains that trial counsel did not pursue a justification defense which could have explained or excused Petitioner firing the .38 caliber weapon, a claim which the

Appellate Division rejected as an unsupported attack on counsel's trial strategy.

Counsel's decision not to pursue a justification defense represents a tactical choice that is "virtually unchallengeable." *Strickland,* 466 U.S. at 690. In this case, pursuit of a justification defense would have foreclosed the defense of misidentification, which was the most viable defense available to Roundtree. *See, e.g., Thomas v. Zon,* No. 04–CV–0471, 2009 WL 605231, at *10–11 (W.D.N.Y. Mar. 6, 2009) ("To the extent that a justification defense would have required petitioner to admit to the shooting, such a defense would have conflicted with the chosen strategy of arguing mistaken identity ...."). In addition, a mistaken identity defense allowed the jury to return a verdict of not guilty on all counts, but an assertion that the shooting was in self-defense would not have provided a defense to weapons possession charges in the indictment. *Thomas,* 2009 WL 605231, at *11 (citing *Spragion v. Smith,* No. CV–04–1880, 2005 WL 3535158, at *6 (E.D.N.Y. Dec. 23, 2005)). Moreover, a justification defense simply was not plausible in light of the testimony that Petitioner had been hiding in the bushes and then ran out with his gun drawn. T.315, 340–341, 364–365. It is nearly inconceivable that defense counsel would have been able to obtain a jury instruction on the justification defense in light of evidence presented at trial.

d. Failure to Call Petitioner's Brother to Testify

***17** Petitioner asserted that, although witnesses testified that petitioner "bore a strong resemblance to his brother," LaShawn, whom Petitioner's appellate counsel asserted was in the gallery of the courtroom during trial. Petitioner argues that although the defense put forth was mistaken identity, counsel inexplicably never called LaShawn to testify that he was present at Classics Bar the night of the shooting. Again, the Appellate Division found that petitioner "failed to demonstrate the absence of strategic or other legitimate explanations for [counsel's] alleged shortcomings."*Roundtree,* 75 A.D.3d at 1138, 904 N.Y.S.2d 636 (citation and internal quotation marks omitted).

As an initial matter, Petitioner has never supplied an affidavit from LaShawn to substantiate the claim that he indeed would have testified to being at Classics that night. "It is too easy for a defendant to claim after the fact, without supporting evidence, that he provided leads and information to his counsel that would have resulted in his exoneration if used."*Mallet v. Miller,* 432 F.Supp.2d 366, 388 (S.D.N.Y.2006)."Habeas claims based on complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified [to] are largely speculative."*Lou v. Mantello,* No. 98–CV–5542 (JG), 2001 WL 1152817, at *10 (E.D.N.Y. Sept.25, 2001) (interior quotation and citation omitted); *see also Ortiz v. Artus,* No. 06 Civ. 6444, 2008 WL 2369218, at *7 (S.D.N.Y. June 9, 2008) (rejecting ineffective counsel claim where petitioner failed to submit affidavit from alleged alibi witness; "petitioner's conclusory assertion that his wife would have provided exculpatory testimony is insufficient to establish ineffective assistance of counsel"), *report and recommendation adopted,*2010 WL 3238994 (S.D.N.Y. Aug.11, 2010). Here, Petitioner cannot establish how, if at all, he was prejudiced by counsel's failure to call LaShawn since he has not demonstrated that LaShawn would have provided the hoped-for testimony.

Furthermore, "the tactical decision of whether to call specific witnesses-even ones that might offer exculpatory evidence-is ordinarily not viewed as a lapse in professional representation."*United States v. Schmidt,* 105 F.3d 82, 90 (2d Cir.1997); *accord United States v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir.1987). Here, defense counsel had a reasonable strategic basis for not calling LaShawn as Petitioner's own testimony regarding the difference between his and LaShawn's builds foreclosed such a mistaken identity defense. Petitioner described LaShawn as 5′11″ or 6′0″ and approximately 220 to 225 pounds, and described himself as "[l]ike six-four" and 275 to 280 pounds, a sizeable difference. T.947. In addition, Henry testified that he was certain that he saw Petitioner, and not LaShawn, at Classics on the night of the murder. T.630–31.

d. Inadequate Cross–Examination of Firearms Expert

***18** Petitioner argues that trial counsel permitted the prosecution's firearms examiner to testify about bullet ricochet evidence, glass damage, and strike mark evidence without any foundation establishing either that the testing conducted was sufficiently accepted within the scientific community or that the witness was sufficiently qualified by either training or experience to offer expert testimony. Petitioner argues that trial counsel should have demanded a hearing to voir dire the expert, and "could have and should have kept this evidence out with appropriate objections to the qualifications of the expert's qualifications [sic] and to the subjects testified to as not proper topics for expert testimony."Defendant's Appellate Brief at 41–42.

"The conduct of examination and cross examination is entrusted to the judgment of the lawyer, and an appellate court on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken."*Eze v. Senkowski,* 321 F.3d 110, 127 (2d Cir.2003) (citations and internal quotation marks omitted). Notably, Petitioner does not explain how the firearms expert's qualifications could have been attacked, but merely lists boilerplate questions typically asked when qualifying an expert witness.

Here, Clark testified to his extensive training and experience in, among other things, bullet trajectory analysis and shooting reconstructions, and stated that he had testified as a firearms expert in over one hundred cases. T.653–59. He clearly was sufficiently qualified, and his conclusions were based upon an *in situ* investigation and reconstruction of the shooting. *Cf. People v. Chambers,* 6 A.D.3d 454, 454–55, 773 N.Y.S.2d 883 (2d Dept.2004) (prosecution failed to lay a proper foundation for admission of expert's bullet trajectory analysis, which was based solely on examination of photographs of automobile in which alleged shooting took place, and involved no examination of automobile itself). Furthermore, bullet trajectory analyses have long been a proper subject of expert testimony. *E.g., People v. Dewey,* 23 A.D.2d 960, 960, 261 N.Y.S.2d 193 (4th Dept.1965).

e. Untimely Request for a Missing Witness Jury Instruction

Petitioner argues that trial counsel erred by asserting a belated request for a missing witness instruction as to Parker's friend, Long; and Feon, who was seen with Petitioner at Classics. *See* T .978–80. To be entitled to a missing witness charge under New York law, Petitioner was required to show that 1) the absent witness was knowledgeable about an issue material to the trial; 2) that he was expected to give noncumulative testimony favorable to the prosecution, and 3) that the absent witness was available to the prosecution. *E.g., People v. Macana,* 84 N.Y.2d 173, 177, 615 N.Y.S.2d 656, 639 N.E.2d 13 (1994).

The trial court denied the request, noting that it was untimely. T.980. In addition, the trial court observed, Long was "not available and [was] not under the People's control," as he had left for Russia one month before trial. T.978, 980–81. Similarly, there was no evidence in the record that "Feon" was either available, under the prosecution's control, or in possession of non-cumulative testimony favorable to the prosecution. The only reference to Feon at trial was testimony by Hemphill, the bouncer, that Petitioner entered Classics on the night of the shooting with a man named Feon. T.502–03, 520.

***19** To succeed on the claim that the judge erroneously declined to give a jury instruction, a habeas petitioner must show that the judge's omission (1) violated New York law and (2) resulted in a deprivation of his right to due process. *Jackson v. Edwards,* 404 F.3d 612, 621 (2d Cir.2005). Petitioner has offered no evidence whatsoever-much less clear and convincing evidence-that the trial court's factual findings regarding the uncalled witnesses were erroneous. They therefore must be presumed correct. *See*28 U.S .C. § 2254(e)(1). Accordingly, petitioner has not shown that failure to give a missing witness instruction was even an error of state law. *See, e.g., Moultrie v. Marshall,* No. 06 Civ. 5419, 2009 WL 3097102, at *7 (S.D.N.Y. Sept. 28, 2009) (denying habeas relief based on trial court's failure to issue missing witness instruction as to informant, where petitioner had not overcome presumption of correctness accorded to trial court's finding that informant was not under the prosecution's control). It follows that Petitioner cannot establish prejudice resulting from the tardiness of defense counsel's request because there is no reasonable probability that the instructions would have been granted had they been timely.

E. Erroneous Evidentiary Rulings

A state court's evidentiary rulings, even if erroneous under state law, do not present constitutional issues cognizable under federal habeas review. *See Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *accord Hawkins v. Costello,* 460 F.3d 238, 244 (2d Cir.2006) (citing *Crane v. Kentucky,* 476 U.S. 683, 689, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). "In order to prevail on a claim that an evidentiary error deprived the defendant of due process under the Fourteenth Amendment he must show that the error was so pervasive as to have denied him a fundamentally fair trial ...."*Collins v. Scully,* 755 F.2d 16, 18 (2d Cir.1985). Here, Roundtree has not demonstrated any errors of state evidentiary law, let alone errors of constitutional magnitude.

1. Erroneous Display of Autopsy Photo to Witness

First, Petitioner first claims that the trial court improperly permitted the prosecutor to display to the victim's friend, Gordon, the autopsy "mug shot" of the victim in order to make the witness cry on the stand, and thereby appeal to the jury's sympathies.

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In New York, photographs are generally admissible if they tend to prove or disprove some material fact in issue, even if the photographs "portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury."*People v. Pobliner,* 32 N.Y.2d 356, 369–70, 345 N.Y.S.2d 482, 298 N.E.2d 637 (N.Y.1973) (internal quotation marks and citations omitted), *cert. denied,*416 U.S. 905, 94 S.Ct. 1609, 40 L.Ed.2d 110 (1974). Petitioner cited no authority for the proposition that an admissible exhibit cannot be shown to a witness if the witness might cry. Rather, the decisions Petitioner cited, *e.g., People v. Pobliner,* 32 N.Y.2d at 369–70, 345 N.Y.S.2d 482, 298 N.E.2d 637, involved graphic photographs shown to a jury.

***20** Even though defense counsel was willing to stipulate to the identity of the victim, the prosecution was not required to accept that stipulation. *See People v. Hills,* 140 A.D.2d 71, 79–80, 532 N.Y.S.2d 269 (2d Dept.1988) (stating that "a defendant's offer to stipulate is not a sound basis for precluding the prosecution from presenting relevant material evidence as to an element of a charged crime").

2. Erroneous Testimony by Firearms Examiner

Petitioner claims that the trial court erred by permitting the prosecution's firearms examiner to testify that the .380–caliber rounds fired from the .380–caliber casings recovered could have caused the glass damage he observed at Snuffy's Birdland, and that it would be impossible for one of those same bullets to have ricocheted off the glass and caused the hole in the garage door in the alleyway near where the victim was shot. *See* T.695, 697–99. As the firearms examiner was properly qualified as an expert, it was appropriate for him testify about whether bullets could have caused the damage observed at Snuffy's and the possible ricochet paths of such bullets.

3. Erroneous Exclusion of Testimony Regarding Petitioner's Statements to Police

Petitioner contends that the trial court wrongly precluded testimony by Investigator Charles Dominic ("Dominic") and by Petitioner describing Petitioner's allegedly exculpatory conversation with Dominic following his arrest. *See* T.600–03, 951. "New York law is well-settled that exculpatory statements by an accused constitute hearsay and are inadmissible."*Shaheed v. Martuscello,* No. 10 Civ. 3288, 2011 WL 73144, at *5 (E.D.N.Y. Jan.10, 2011) (citing, *inter alia, People v. Brown,* 159 A.D.2d 956, 956, 552 N.Y.S.2d 784 (4th Dept.1990) ("The court properly rejected defendant's attempt to introduce as evidence his written statement made to police shortly after he was taken into custody. The statement was not contrary to defendant's penal interest ....") (citations omitted)). Dominic's statements to Petitioner during the interview were irrelevant and plainly an attempt to admit Petitioner's statements to Dominic-which were inadmissible hearsay-through the "back door." T.601–02.

4. Erroneous Restriction of Cross–Examination

Petitioner asserts that the trial court erred by precluding trial counsel from eliciting from Dominic that (1) Parker did not tell the investigator that he went to Strong Memorial Hospital, contrary to Parker's direct examination testimony; (2) Dominic had been given differing descriptions of the shooter; and (3) the description of the shooter provided to Dominic matched Parker, not Petitioner.

This line of testimony involved a collateral matter directed solely at the Parker's credibility. In attempting to impeach Parker with "prior inconsistent statements" while cross-examining a different witness, Dominic, defense counsel ran afoul of the collateral impeachment rule. *People v. Inniss,* 83 N.Y.2d 653, 657–58, 612 N.Y.S.2d 360, 634 N.E.2d 961 (1994) (citing *People v. Pavao,* 59 N.Y.2d 282, 288–289, 464 N.Y.S.2d 458, 451 N.E.2d 216 (1983) ("It is well established that the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility.")). Defense counsel had already covered that material on Parker's cross-examination, where it was appropriate. Defense counsel was bound by Parker's answer during crossexamination, and the trial court did not err in precluding further pursuit of this collateral issue. *E.g., In re Blaize F.,* 50 A.D.3d 1182, 1183, 855 N.Y.S.2d 284 (3d Dept.2008) (citing *People v. Bellamy,* 26 A.D.3d 638, 641, 809 N.Y.S.2d 287 (2006)).

***21** Defense counsel's question to Dominic as to whether he was given different descriptions of the shooter was improper because, *inter alia,* it called for a hearsay response. *See McLean v. McGinnis,* 29 F.Supp.2d 83, 93 (E.D.N.Y.1998) ("Tee's repetition of Garcia's alleged out-of-court physical description of the second shooter constitutes hearsay. Respondent argues, therefore, that the testimony concerning Garcia's prior identification and description could properly have been admitted as substantive evidence only if the surrounding circumstances demonstrated that it had such strong probative value and indicia of reliability that the

State had no legitimate interest in precluding the testimony on grounds of unreliability. I agree with respondent that petitioner has not met this standard here.") (internal citation omitted).

Finally, defense counsel's question to Dominic as to whether an unidentified individual provided a description of the shooter as being "about 195, plus or minus 10 pounds," was an attempt to introduce an out-of-court statement by an unavailable declarant for the truth of the matter therein, and therefore inadmissible hearsay.

F. Denial of Jury Instruction

Petitioner claims that the trial court erred by refusing to charge the jury that, in order to convict him of criminal possession of a weapon, it would have to find that he possessed the murder weapon. The Appellate Division summarily rejected this claim as "lacking in merit." *Roundtree,* 75 A.D.3d at 1138, 904 N.Y.S.2d 636.

The Court agrees with Respondent that this contention is academic because the jury, by finding him guilty of intentional murder, necessarily found that he did, in fact, possess the murder weapon. *See United States v. Carrillo,* 229 F.3d 177, 186 (2d Cir.2000) ("Notwithstanding the trial court's failure to instruct the jury that an overt act is an essential element of the crime of conspiracy under New York law, the jury necessarily found an overt act committed in furtherance of each murder conspiracy.").

G. Erroneous Imposition of Consecutive Sentences

Petitioner claimed on direct appeal, and the prosecution conceded, that the trial court erred by imposing consecutive sentences for second degree murder and possession of the murder weapon. As a result, the Appellate Division directed that Petitioner's sentences be modified to run concurrently.*Roundtree,* 75 A.D.3d at 1138, 904 N.Y.S.2d 636. Accordingly, Petitioner's habeas claim requesting the same relief must be denied as moot. *See Paul v. Ercole,* No. 07 Civ. 9462, 2010 WL 2899645, at *7 (S.D.N.Y. June 10, 2010) ("Two of petitioner's claims are moot because the Appellate Division has already granted petitioner the relief he was seeking on those claims. In the Appellate Division, petitioner prevailed on his claim that the sentence imposed for the count of criminal possession of a weapon in the third-degree was illegal and that the imposition of DNA databank fee violated the prohibition against ex-post facto laws."), *report adopted,* 2010 WL 2884720 (S.D.N.Y. July 21, 2010).

H. Vindictive Sentencing

***22** Petitioner argued on direct appeal that the trial court's comments at sentencing suggested that the sentence was intended to punish Petitioner for unsuccessfully exercising his right to a trial. At sentencing, defense counsel argued for leniency on the ground that the trial court had indicated prior to trial that if Petitioner pled guilty, it would be willing to agree to a sentence of twenty years to life imprisonment. S.13. The trial court responded, "Where do you think that [i.e., the plea offer] is at this point? Do you think that's valid at this point?"S.13. The trial court also observed that, following Petitioner's rejection of the plea option, the offer was "no longer on the table." S.14–15. From these comments, Petitioner inferred that the trial court vindictively sentenced him for exercising his constitutional rights. This Court disagrees.

The imposition of a penalty upon an individual for choosing to exercise a constitutionally protected right is, of course, improper. *Bordenkircher v. Hayes,* 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). The mere fact that the sentence imposed following trial is lengthier than the offer made during plea negotiations does not indicate that a defendant has been punished for exercising his right to proceed to trial. *E.g., Corbitt v. New Jersey,* 439 U.S. 212, 219, 223, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) ("There is no doubt that those homicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed."); *United States v. Araujo,* 539 F.2d 287, 292 (2d Cir.1976). The trial judge here never stated or implied that the sentence was based on Roundtree's refusal of the plea offer. His statements referring to the plea offer were made solely in response to defense counsel's reminder to the judge that he had agreed to a 20–to–life sentence if Petitioner had pled guilty, as part of defense counsel's advocacy on behalf of Petitioner for a less-than-maximum sentence.

I. Denial of Due Process at Sentencing

Petitioner also argues that the court erred by stating at sentencing that "the jury determined that [petitioner] committed perjury at the trial by their verdict. They have said you are a liar under oath."S.15. A judge's discretion in sentencing is "largely unlimited either as to the kind of information he may consider, or the source from which it may

come," with the exception of "materially false" information. *Hili v. Sciarrotta,* 140 F.3d 210, 215 (2d Cir.1998) (citation and internal quotation marks omitted).

Even if the judge's comments were ill-advised, they did not deprive Petitioner of his constitutional rights. Although Petitioner was not indicted for perjury, it is not unreasonable to conclude that the jury found that he had lied under oath, as the guilty verdict rendered could not possibly be reconciled with Petitioner's sworn testimony that he was not present at, or in the vicinity of, Classics at the time of the murder. In addition, a sentencing court may take into account a defendant's untruthfulness under oath during trial. *See United States v. Dunnigan,* 507 U.S. 87, 97–98, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (affirming sentence enhancement for unindicted perjury under federal Sentencing Guidelines; noting that "[i]t is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process"); *accord, e.g., United States v. Anderson,* 59 F.3d 164, 1995 WL 391964, at *1 (1st Cir. June 29, 1995).

J. Harsh and Excessive Sentence

***23** Roundtree contends that the sentence imposed by the court for the murder conviction was harsh and excessive. When he raised this claim on his direct appeal, Petitioner urged the Appellate Division to reduce the sentence under N.Y. CRIM. PROC. LAW §§ 470.15(2)(c), 470.15(6)(b), which gives the state court broad plenary power to modify a sentence that is unduly harsh or severe, though legal. The Appellate Division concluded that the sentence was not unduly harsh or severe. *Roundtree,* 75 A.D.3d at 1138, 904 N.Y.S.2d 636.

A petitioner's assertion that a sentencing judge abused his discretion in sentencing is generally not a federal claim subject to review by a habeas court. *See Fielding v. LeFevre,* 548 F.2d 1102, 1109 (2d Cir.1977) (holding that petitioner raised no cognizable federal claim by seeking to prove that state judge abused his sentencing discretion by disregarding psychiatric reports) (citing *Townsend v. Burke,* 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948)). Where, as here, a defendant's sentence is within the statutory range provided for by New York law, courts in this Circuit have held that it does not present a constitutional claim amenable to review in a federal habeas corpus. *See, e.g., White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992) ("No federal constitutional issue is presented where, as here, the [habeas petitioner's] sentence is within the range prescribed by state law.") (citing *Underwood v. Kelly,* 692 F.Supp. 146 (E.D.N.Y.1988), *aff'd mem.,*875 F.2d 857 (2d Cir.1989).

Under New York law, second degree murder is a class A–I felony, see N.Y. PENAL LAW § 125.25(1), punishable by an indeterminate term of imprisonment having a minimum of 15 to 25 years and a maximum of life. *See*N.Y. PENAL LAW § 70.00(2), (3). As Petitioner concedes, his indeterminate term of twenty five years to life imprisonment falls within the applicable statutory range. Therefore, his harsh-and-excessive sentence claim does not present a constitutional question cognizable on habeas review.

VI. Conclusion

For the reasons stated above, Lamar Jermaine Roundtree's petition (Dkt.# 1) for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied, and the petition is dismissed. Roundtree's motion for leave to file an amended petition (Dkt.# 18) and motion for a stay and abeyance (Dkt.# 19) are dismissed with prejudice for the reasons discussed above.

Because Roundtree has failed to make a substantial showing of a denial of a constitutional right, the Court declines to issue a certificate of appealability. *See*28 U.S.C. § 2253(c)(2). The Court also hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal as a poor person. *Coppedge v. United States,* 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

Petitioner must file any notice of appeal with the Clerk's Office, United States District Court, Western District of New York, within thirty (30) days of the date of judgment in this action. Requests to proceed on appeal as a poor person must be filed with United States Court of Appeals for the Second Circuit in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

***24 IT IS SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2012 WL 1413054

Footnotes

1 Citations to "T. ___" refer to pages from the transcript of Roundtree's trial.

2 Petitioner was arrested on July 1, 2005, at which time his height was recorded as 6′2″ and his weight as 275 pounds. T.594–97. Petitioner had removable gold caps on his lower teeth. T.597–98.

3 Citations to "S. ___" refer to the transcript of Petitioner's sentencing hearing.

4 However, Petitioner has not commenced exhaustion proceedings in state court with regard to his claims of "Actual Innocence, Ineffective Assistance of Counsel and or Newly Discovered Evidence" because he apparently believes he requires a decision on the stay motion in order to do so. *See* Petitioner's Response (Dkt.# 21).

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United States District Court,
E.D. New York.

Ernest SEALY, Petitioner,
v.
Michael GiAMBRUNO, Respondent.

No. 07-CV-1195 (NGG). | Sept. 4, 2008.

Attorneys and Law Firms

Ernest Sealy, Lords Valley, PA, pro se.

Tziyonah Miriam Langsam, Office of the District Attorney, Kings County District Attorneys Office, New York State Attorney Generals Office, Brooklyn, NY, for Respondent.

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, District Judge.

***1** On March 14, 2007, *pro se* petitioner Ernest Sealy ("Petitioner") filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 2004 conviction in Kings County, New York for Criminal Possession of a Weapon in the Third Degree and Criminal Sale of a Firearm in the Third Degree. Petitioner claims that he was deprived of his due process rights when the trial court refused to provide a missing witness charge and when the prosecutor elicited testimony that improperly bolstered prior testimony identifying Petitioner in a lineup. For the reasons set forth below, both of these claims are procedurally barred from habeas review. The petition is therefore denied.

I. LEGAL STANDARD

Federal courts "do not review arguments procedurally defaulted in state court if the finding of default constitutes an 'independent and adequate state ground' for the state court's decision."*Brown v. Greiner,* 409 F.3d 523, 532 (2d Cir.2005). This rule applies when a "state court has expressly relied on a procedural default as an independent and adequate state ground, even where the state court has also ruled in the alternative on the merits of the federal claim."*Green v. Travis,* 414 F.3d 288, 294 (2d Cir.2005) (internal citation omitted).

Procedural default may be avoided when a petitioner shows (1) cause for the default and prejudice or (2) "that failure to consider the claim will result in miscarriage of justice, *i.e.,* the petition is actually innocent."*Sweet v. Bennett,* 353 F.3d 135, 141 (2d Cir.2003); *see Marrero Pichardo v. Ashcroft,* 374 F.3d 46, 53-54 (2d Cir.2004) (miscarriage of justice would occur as a result of procedural default of claim in motion challenging removal order that was "virtually certain to succeed if considered on appeal").

II. DISCUSSION

The decision of the Appellate Division denying the claims Petitioner here raises clearly states that it was relying on procedural default as an independent and adequate state ground. *People v. Sealy,* 35 A.D.3d 510, 826 N.Y.S.2d 358 (N.Y.App.Div.2006) ("The defendant's application [for a missing witness charge] was untimely, as it was made during the charge conference, well after both sides had rested"; "The defendant's contention that a detective's testimony improperly bolstered a prior identification of the defendant at a lineup is unpreserved for appellate review, since he failed to object to the allegedly improper testimony.").

In his reply brief, submitted after he received Respondent's brief asserting that his claims were procedurally defaulted, Petitioner does not argue cause and prejudice for the procedural default or that he is actually innocent.[1] These claims are therefore procedurally defaulted. *See Smith v. Duncan,* 411 F.3d 340, 347-48 (2d Cir.2005) (noting petitioner's failure to argue cause and prejudice or actual innocence).

III. CONCLUSION

Because Petitioner did not properly raise his claims in the state courts, he is procedurally defaulted from raising them in this habeas petition. The petition is therefore DENIED. As Petitioner has not made a substantial showing of the denial of any constitutional right, no certificate of appealability shall issue. Pursuant to 28 U.S.C. § 1915(a), *in forma pauperis* status is denied for the purposes of any appeal The Clerk of Court is directed to close this case.

***2** SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 4106947

Footnotes

1 Petitioner argues that the state trial court entertained the merits of his request for a missing witness charge in spite of the fact that it may not have been timely made. This does not excuse the procedural default. *See People v. Pendleton,* 156 A.D.2d 725, 549 N.Y.S.2d 478 (N.Y.App.Div.1989) (relying on procedural default to dismiss claim relating to missing witness charge on appeal even though trial court considered the merits of the claim during trial).

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United States District Court,
N.D. New York.

Ijal SUDLER, Petitioner,
v.
Patrick GRIFFIN, Respondent.

No. 9:12–CV–0367. | Aug. 26, 2013.

Attorneys and Law Firms

Ijal Sudler, Fallsburg, NY, pro se.

Hon. Eric T. Schneiderman, Attorney General of the State of New York, The Capitol, Thomas B. Litsky, Esq, Assistant Attorney General, of Counsel, Albany, NY, for Respondent.

ORDER

NORMAN A. MORDUE, Senior District Judge.

***1** The above matter comes to me following a Report–Recommendation by Magistrate Judge Andrew T. Baxter, duly filed on the 1st day of August 2013. Following fourteen (14) days from the service thereof, the Clerk has sent me the file, including any and all objections filed by the parties herein.

After careful review of all of the papers herein, including the Magistrate Judge's Report–Recommendation, and no objections submitted thereto, it is

ORDERED that:

1. The Report–Recommendation is hereby adopted in its entirety.

2. The petition is denied and dismissed. A certificate of appealability is denied.

3. The Clerk of the Court shall serve a copy of this Order upon all parties and the Magistrate Judge assigned to this case.

IT IS SO ORDERED.

REPORT–RECOMMENDATION

ANDREW T. BAXTER, United States Magistrate Judge.

This matter has been referred to me for Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rules N.D.N.Y. 72.3(c).

Petitioner brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging a judgment of conviction rendered in the Albany County Court on February 15, 2008. Petitioner was convicted after a jury trial of two counts of Criminal Possession of a Controlled Substance, Third Degree, N.Y. Penal Law § 220.16[1] (Counts One and Three); one count of Criminal Possession of a Controlled Substance, Fourth Degree, N.Y. Penal Law § 220.16 [12] (Count Four); one count of Criminal Possession of a Controlled Substance, Fourth Degree, N.Y. Penal Law § 220.09[1] (Count Two); and one count of Criminally Using Drug Paraphernalia, Second Degree, N.Y. Penal Law § 220.50 [2] (Count Six). [1] Petitioner was sentenced as a second felony offender to an aggregate determinate sentence of thirty years to be followed by three years of post-release supervision. The Appellate Division, Third Department affirmed his conviction on July 22, 2010, and the New York Court of Appeals denied leave to appeal on December 1, 2010. *People v. Sudler,* 75 A.D.3d 901, 906 N.Y.S.2d 373 (3d Dep't 2010), *lv. denied,* 15 N.Y.3d 956, 917 N.Y.S.2d 116, 942 N.E.2d 327 (2010).

Petitioner raises eight grounds in his amended petition for this court's review:

(1) the police lacked probable cause for petitioner's arrest and for the search warrant for Apartment 405, Bleeker Terrace ("apartment 405") [2];

(2) Detective Vincent should not have been permitted to testify as both a fact and expert witness;

(3) the trial court gave an improper jury instruction on the purpose of summations;

(4) the prosecutor engaged in misconduct by using the personal term "I" when asking the jury to find the petitioner guilty;

(5) the evidence was insufficient to establish petitioner's guilt;

(6) the trial court should have granted petitioner's motion for a mistrial after the prosecutor elicited testimony about an uncharged crime that was not part of the People's *Molineux*[3] application;

***2** (7) ineffective assistance of trial counsel for failing to preserve the claims in grounds 2, 3, and 4, above; and

(8) the county court improperly found petitioner to be a second felony offender, and directed that certain sentences run consecutively.

Am. Pet. at 7–8, Dkt. No. 5. Respondent has filed an answer and memorandum of law, together with the pertinent state court records. (Dkt.Nos.12–14). For the following reasons, this will recommend dismissal of the petition.

DISCUSSION

I. *Factual Background*

After receiving tips from two informants that petitioner was in the area with drugs, the City of Albany Police Department surveilled petitioner's vehicle and apartment 405. Police also listened to a cellular telephone conversation while an informant made arrangements for a controlled purchase of crack cocaine from petitioner. Soon afterward, police arrested Boshaun Gregory, who was driving petitioner's car to deliver the drugs. Petitioner was arrested after he arrived at the scene to retrieve his car. After obtaining a warrant, police searched apartment 405 and found narcotics and drug paraphernalia. *See People v. Sudler,* 75 A.D.3d at 901–02, 906 N.Y.S.2d 373.

Petitioner was indicted on three counts of criminal possession of a controlled substance in the third degree, one count of criminal possession of a controlled substance in the fourth degree, one count of criminal possession of marijuana, and one count of criminally using drug paraphernalia in the second degree. Petitioner's motion to suppress physical evidence was denied, and petitioner fled. As a result, petitioner was tried in absentia by a jury. *See People v. Sudler,* 75 A.D.3d at 902, 906 N.Y.S.2d 373. Petitioner was subsequently arrested pursuant to a bench warrant on February 7, 2008, and sentenced on February 15, 2008 to thirty years of incarceration followed by three years of post-release supervision. (Feb. 15th Sent. Tr. 2, 15, Dkt. No. 13–2).

II. *Suppression*

A. Legal Standards

In *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the Supreme Court held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a petitioner may not challenge an allegedly unconstitutional search and seizure in an application for federal habeas relief. *Id.* at 481–82;*see also Capellan v. Riley,* 975 F.2d 67, 70 (2d Cir.1992). The Second Circuit has determined that review of a Fourth Amendment claim in a habeas corpus application is proper only if: (1) the state has provided no corrective procedures at all to redress the alleged Fourth Amendment violations; or (2) the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in that process. *See Capellan,* 975 F.2d at 70; *Gates v. Henderson,* 568 F.2d 830, 839–40 (2d Cir.1977). New York provides an approved mechanism for litigating Fourth Amendment claims. *See Capellan,* 975 F.2d at 70 (citing N.Y.Crim. Proc. § 710.10 et seq.).

B. Application

***3** Petitioner argues, as he did in his appeal to the Appellate Division, that his conviction should be overturned because his motion to suppress evidence should have been granted. (*See* Am. Pet. 7–9; Dkt. No. 5). Petitioner bases his claim on the allegation that the officers arrested him and obtained a search warrant for apartment 405 without probable cause. *Id.* Petitioner's Fourth Amendment claim is barred from federal habeas review by *Stone v. Powell.*Petitioner utilized New York State's mechanism by making his motion to suppress, which the trial court denied. Petitioner then appealed the trial court's decision, and the Appellate Division denied his appeal and upheld the decision of the trial court. Petitioner has not here alleged any facts that would demonstrate an unconscionable breakdown of the process. Based upon *Stone,* petitioner cannot now challenge the legality of his arrest and the validity of the search warrant. Petitioner's claim based on the Fourth Amendment is barred from federal review and should be dismissed.

III. *Molineux*

A. Legal Standards

Evidentiary questions are generally matters of state law and raise no federal constitutional issue for habeas review. *See*

Estelle v. McGuire, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1999) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions[;][i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States"). A decision to admit evidence of a defendant's uncharged crimes or other bad acts under *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286 (N.Y.1901), constitutes an evidentiary ruling based on state law. *Sierra v. Burge,* No. 06–CV–14432, 2007 WL 4218926, at *5 (S.D.N .Y. Nov. 30, 2007) (citing *Roldan v. Artuz,* 78 F.Supp.2d 260, 276–77 (S.D.N.Y.2000) ("A habeas claim asserting a right to relief on *Molineux* grounds must rise to the level of a constitutional violation ... because *Molineux* is a state law issue.") (citations omitted)). Federal courts may issue a writ of *habeas corpus* based upon a state evidentiary error only if the petitioner demonstrates that the alleged error violated an identifiable constitutional right, and that the error was "so extremely unfair that its admission violates fundamental conceptions of justice."*Dunnigan,* 137 F.3d at 125 (quoting *Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)); *see Jones v. Conway,* 442 F.Supp.2d 113, 130 (S.D.N.Y.2006). Petitioner "bears a heavy burden because evidentiary errors generally do not rise to constitutional magnitude."*Sierra,* 2007 WL 4218926, at *5 (quoting *Copes v. Shriver,* No. 97–2284, 1997 WL 659096, at *3 (S.D.N.Y. Oct.22, 1997) (citations omitted)).

B. Application

Petitioner claims that the trial court erred when it denied petitioner's motion for a mistrial and petitioner's motion to set aside the verdict on the ground that the prosecution had allegedly violated *Molineux.*(Am.Com pl.10–11, Dkt. No. 5) The prosecutor elicited testimony from Detective Vincent that petitioner had previously supplied drugs to informant Ernestine Smith on an occasion not charged in the indictment. (Am.Compl.10–11, Dkt. No. 5). Trial counsel objected to this testimony, and moved for a mistrial on the ground that the uncharged crime was not part of the prosecutor's *Molineux* application. (October 16 Trial Tr. 11–12, Dkt. No. 13–11).

***4** The trial court found that petitioner knew that Smith had allegedly worked with police to set up the transaction with petitioner that was the subject of the indictment; thus petitioner had sufficient notice of the uncharged crime as being an intrinsic part of the indicted charges against petitioner. (October 16 Trial Tr. 14, Dkt. No. 13–11). The trial court denied petitioner's motion and gave the jury a limiting instruction. (Oct. 16 Trial Tr. 67–68, Dkt. No. 13–11).

The above issues raised only an evidentiary claim that was not resolved in petitioner's favor. He did not claim in state court, and he does not claim here, that his *Molineux* claim rose to the level of a constitutional claim. Here, petitioner is merely rearguing his state evidentiary claim. Because petitioner failed to assert his claim based on *Molineux* in federal constitutional terms, this claim is noncognizable and should be dismissed. [4]

IV. *Exhaustion*

A. Legal Standard

"Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, ... thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights."*Baldwin v. Reese,* 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) (citing *Duncan v. Henry,* 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865, (1995) (internal quotation and other citations omitted); 28 U.S.C. § 2254(b)(1). The prisoner must "fairly present" his claim in each appropriate state court, including the highest court with powers of discretionary review, thereby alerting that court to the federal nature of the claim. *Id.;Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994).

"A habeas petitioner has a number of ways to fairly present a claim in state court without citing 'chapter and verse' of the Constitution, including '(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.' " *Hernandez v. Conway,* 485 F.Supp.2d at 273 (quoting *Daye v. Attorney General,* 696 F.2d 186, 194 (2d Cir.1982)).

B. Application

Petitioner exhausted his prosecutorial misconduct claim, his legal sufficiency claim, and his ineffective assistance of counsel claim. Petitioner failed to exhaust his expert witness claim and his jury charge claim relating to the purpose of summation because he failed to assert them in federal constitutional terms, and neither of these claims "immediately" brings to mind a right protected by the federal constitution. (Pl.'s Appellate Div. Br. 23–35, Dkt. No. 13–1). As stated above, evidentiary rulings are generally based

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on state law principles. *See Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1999) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions[;][i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States"). The same is true for claims relating to jury charges. *Saracina v. Artus,* 452 Fed. App'x 44, 46 (2d Cir.2011) (citing *Estelle,* 502 U.S. at 67–68). Thus, petitioner has failed to exhaust his expert witness claim and his jury charge claim.

***5** Respondent argues that petitioner also failed to exhaust his sentencing claims, because he failed to raise them in any form on direct appeal. (Def.'s Br. 22–23; *see also* Pet.'s Appellate Div. Br., Dkt. No. 13–1). However, petitioner has two sentencing claims. Respondent is correct that petitioner failed to make his claim based on the court sentencing him as a second felony offender in federal constitutional terms. (*See* Pet.'s Appellate. Div. Br. 50–52, Dkt. No. 13–1). As will be discussed below, that portion of petitioner's sentencing claims is noncognizable on federal habeas review. However, petitioner made his sentencing claim based on the alleged gross disproportionality of his sentence in federal terms when he cited *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), in his direct appeal to the appellate division. (Pl.'s Appellate Div. Br. 51, Dkt. No. 13–1). Petitioner argued that serving two concurrent sentences consecutively to his other two concurrent sentences, totaling 30 years of incarceration, was grossly disproportionate. (Pet.'s Appellate Br. 50–52, Dkt. No. 13–1). Thus, one of petitioner's sentencing claims is exhausted while the other is not.

If a petitioner has failed to exhaust his state-court remedies, but such remedies are no longer available, then his claims are "deemed" exhausted, but may also be barred by procedural default. *See Bossett v. Walker,* 41 F.3d at 828; *Aparicio v. Artuz,* 269 F.3d 78, 90 (2d Cir.2001).

V. *Procedural Bar*

A. Legal Standard

A federal judge may not issue a writ of habeas corpus if an adequate and independent state-law ground justifies the prisoner's detention, regardless of the federal claim. *See Wainwright v. Sykes,* 433 U.S. 72, 81–85, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). A federal habeas court generally will not consider a federal issue in a case if a state court decision " 'rests on a state law ground that is independent of the federal question and adequate to support the judgment.' " *Garvey v. Duncan,* 485 F.3d 709, 713 (2d Cir.2007) (quoting *Lee v. Kemna,* 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002)) (emphasis added). This rule applies whether the independent state law ground is substantive or procedural. *Id.*

A state prisoner who has procedurally defaulted on a federal claim in state court may only obtain federal habeas review of that claim if he can show both cause for the default and actual prejudice resulting from the alleged violation of federal law, or if he can show that he is "actually innocent." *Clark v. Perez,* 510 F.3d 382, 393 (2d Cir.2008) (internal quotation and citations omitted). "Cause" exists if "the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule."*Murray v. Carrier,* 477 U.S. 478, 488 (1986). Prejudice exists if there is a "reasonable probability" that the result of the proceeding would have been different absent the alleged constitutional violation.*Stickler v. Greene,* 527 U.S. 263, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

B. Application

1. Prosecutorial Misconduct

***6** Petitioner argues that the prosecutor committed misconduct by using the personal term "I" when asking the jury to find the petitioner guilty. (Am. Pet. at 10, Dkt. No. 5). During his summation, the prosecutor stated, "ladies and gentlemen, I'll ask you to find the defendant guilty" and "what I'm asking you to do is hold [petitioner] responsible."(October 18–19 Trial Transcript 472, 475, Dkt. No. 13–12).

The Appellate Division found that petitioner's prosecutorial misconduct claim was not preserved for appellate review because no objection on that ground was made during the trial. *People v. Sudler,* 75 A.D.3d at 905, 906 N.Y.S.2d 373 (citing, *inter alia,*N.Y.Crim. Proc. Law § 470.05(2). The Appellate Division also held that "the prosecutor's use of the word 'I' during summation 'was merely stylistic and not an impermissible expression of personal opinion,' " and that the "prosecutor's further comments were neither so egregious nor pervasive as to deprive defendant of a fair trial." *People v. Sudler,* 75 A.D.3d at 906, 906 N.Y.S.2d 373 (citations omitted). New York's contemporaneous objection rule provides that issues not raised at trial, and issues that are not preserved by a specific objection at the time of a claimed error, will not be considered on appeal. N.Y.Crim.

Proc. Law § 470.50(2). Petitioner has not established cause [5] or prejudice, and his claim based on prosecutorial misconduct is procedurally barred from federal habeas review. *Id.*

2. Sufficiency of Evidence

Petitioner argues that the evidence was insufficient to establish his guilt beyond a reasonable doubt because witness testimony was incredible as a matter of law. (Am.Pet.10, Dkt. No. 5). The Appellate Division found that petitioner's claim based on alleged legal insufficiency was not preserved for appellate review because trial counsel's general motion for a trial order of dismissal at the close of proof was not sufficient to preserve this claim as it was not specifically directed at the alleged error. *People v. Sudler,* 75 A.D.3d at 904, 906 N.Y.S.2d 373 (citing, *inter alia,*N.Y.Crim. Proc. Law § 290.10; *People v. Gray,* 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919 (1995) (internal quotation marks omitted). The Appellate Division also found that trial counsel's post-trial motion to set aside the verdict on the insufficiency ground was properly denied because an appellate court cannot address an insufficiency argument unless it has been properly preserved for review during trial. *People v. Sudler,* 75 A.D.3d at 904, 906 N.Y.S.2d 373 (citing, *inter alia,*N.Y.Crim. Proc. Law § 330.30[1]; *People v. Hines,* 97 N.Y.2d 56, 61, 736 N.Y.S.2d 643, 762 N.E.2d 329 (2001) (internal quotation marks omitted)).

Petitioner has not alleged cause or prejudice, and he has not established actual innocence. Thus his claim based on the alleged insufficiency of the evidence is procedurally defaulted and barred from federal habeas review on adequate and independent state law grounds. *Id.*

3. Expert Testimony

Petitioner claims that because Detective Vincent was not declared an expert, it was improper for him to offer expert testimony. (Am. Pet. at 9–10, Dkt. No. 5). At trial, Detective O'Hare testified that he recovered crack cocaine, small plastic bags, a plastic plate, razor blades, and a safe containing cocaine from a bedroom at Apartment 405. (Trial Trans. 343–44, 353–54, Dkt. No. 13–11). Detective Vincent then testified that he had been working on narcotics cases for a number of years, participating in over a thousand arrests, and that plastic bags, like the ones seized inside Apartment 405, are "commonly used to package narcotics" for sale. (Trial Trans. 40–41, Dkt. No. 13–11). Because petitioner failed to raise this claim in Federal Constitutional terms on direct appeal, this claim is unexhausted. However, this claim is also procedurally barred because trial counsel did not object to this evidence. Petitioner has not established cause [6] or prejudice, and his claim based on Detective Vincent testifying as an expert is procedurally defaulted and barred from federal habeas review on adequate and independent state law grounds. [7] *Id.*

4. Jury Charge

***7** Petitioner claims the trial court gave an improper instruction on the purpose of summations. (Am. Pet. at 10; Dkt. No. 5). The court instructed the jury:

> In their summations, counsel will refer to the evidence that you have heard and seen during the course of this trial and will suggest to you certain inferences and conclusions which they, in their opinion, believe may be properly drawn from the evidence. And that's the purpose of summations.
>
> If you find that an attorney's analysis of the evidence is correct and that the evidence as summed up and analyzed by that attorney is accurate, and if you find that the inferences and conclusions which you're asked to draw are logical and sensible, then you are at liberty to adopt those inferences and conclusions either in whole or in part. On the other hand, if you believe that either attorney's analysis of the facts or inferences and conclusions which you're asked to draw are illogical or not supported by the evidence, then you may disregard them in while or in part. You are, of course, free to draw your own conclusion from the evidence.
>
> Please bear in mind, ladies and gentlemen, that nothing the attorneys say in their summations is evidence and nothing that I will say during my instructions to you is evidence. You have heard all of the evidence. You and you alone are the sole and exclusive judges of the facts in this case ...

(October 18–19 Trial Tr. 432–33, Dkt. No. 13–12). The court also instructed the jury on summations during final jury instructions:

> In their summations, the District Attorney and defense counsel have commented on the evidence and have suggested to you certain inferences and conclusions you might reasonably and logically draw from the evidence. The summations of counsel are, of course, not evidence. However, if the

> arguments of counsel strike you as reasonable and logical and supported by the evidence, you may adopt them. On the other hand, if you find those arguments to be unreasonable or illogical or unsupported by the evidence, you may reject them. In the last analysis, it is the function of you the jurors to draw your own inferences or conclusions from the evidence as you recollect it and as you found that evidence to be credible and believable.

(October 18–19 Trial Tr. 481–482, Dkt. No. 13–12).

The Appellate Division found that petitioner's claim based on an inappropriate jury charge was not preserved for appellate review because no objection on that ground was made during the trial. *People v. Sudler,* 75 A.D.3d at 905, 906 N.Y.S.2d 373 (citing, *inter alia,*N.Y.Crim. Proc. Law § 470.05(2). Petitioner has not established cause [8] or prejudice, and his jury charge claim is barred from federal habeas review on adequate and independent state law grounds. [9] *Id.*

VI. *Review of Remaining Claims on the Merits*

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that, when a state court has adjudicated the merits of a petitioner's claim, a federal court may grant an application for a writ of habeas corpus only if "the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."28 U.S.C. § 2254(d).*See also, e.g., Noble v. Kelly,* 246 F.3d 93, 98 (2d Cir.2001); *Brown v. Alexander,* 543 F.3d 94, 100 (2d Cir.2008). This is a "difficult to meet," and "highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt."*Cullen v. Pinholster,* ––– U.S. ––––, ––––, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) (citations omitted).

***8** A state-court decision is "contrary to" clearly established federal law if the state court's conclusion on a question of law is "opposite" to that of the Supreme Court or if the state court decides a case differently than the Supreme Court's decision "on a set of materially indistinguishable facts."*Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision involves an unreasonable application of clearly established Supreme Court precedent if it correctly identifies the governing legal principle, but unreasonably applies or unreasonably refuses to extend that principle to the facts of a particular case. *Id.*

Under the AEDPA, a state court's factual findings are presumed correct, unless that presumption is rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). If the state court failed to decide a claim "on the merits," the pre-AEDPA standard of review applies, and both questions of law and mixed questions of law and fact are reviewed *de novo. Washington v. Shriver,* 255 F.3d 45, 55 (2d Cir.2001).

B. Application

1. Ineffective Assistance of Counsel

Petitioner exhausted his ineffective assistance of counsel claim, and the state court denied this on the merits. Petitioner argues that trial counsel was ineffective because he did not object to Detective Vincent's testimony, the jury instructions, or the prosecutor's use of the pronoun "I" in his summation. (Am.Pet.11, Dkt. No. 5). The general standard for ineffective assistance of counsel, which applies to both trial and appellate counsel, was articulated by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 687–696, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McKee v. United States,* 167 F.3d 103, 106 (2d Cir.1999) (*Strickland* standard also applies to effectiveness of appellate counsel). This test requires an affirmative showing that counsel's performance fell below an objective standard of reasonableness, and that prejudice resulted because there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 688, 694.

When assessing counsel's performance, courts " 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *Jackson v. Leonardo,* 162 F.3d 81, 85 (2d Cir.1998) (quoting *Strickland,* 466 U.S. at 689). Courts should not use hindsight to second-guess sound tactical decisions made by attorneys. *McKee v. United States,* 167 F.3d at 106 (citing *Strickland,* 466 U.S. at 689).

In evaluating the prejudice component of *Strickland,* a "reasonable probability" that the outcome of the proceeding

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would have been different means "a probability sufficient to undermine confidence in the outcome."*Strickland,* 466 U.S. at 694, Unlike the performance determination, the prejudice analysis may be made with the benefit of hindsight. *McKee v. United States,* 167 F.3d at 106–107 (citing, *inter alia, Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)).*See also Mickens v. Taylor,* 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (explaining the limited exceptions to general rule requiring showing of prejudice).

***9** As explained above, the Appellate Division addressed petitioner's claims based on trial counsel's failure to object to Detective Vincent testifying as an expert, the trial court's jury instructions regarding summations, and the prosecutor's use of the pronoun "I" in his summation. The Appellate Division found each claim to be meritless, and trial counsel cannot be faulted for failing to raise a meritless objection. *See United States v. Arena,* 180 F.3d 380, 396 (2d Cir.1999) ("Failure to make a meritless argument does not amount to ineffective assistance.").

2. Sentencing

Petitioner claims that his sentence was excessive because 1) the trial court improperly sentenced him as a second felony offender based on a previous Connecticut felony conviction without proof that petitioner was actually the defendant in that case and 2) because the trial court directed that the sentence imposed for the two counts based on the cocaine seized from Boshaun Gregory's person (Count One and Count Two) run consecutively to the sentences imposed for the two counts based on the cocaine seized from inside Apartment 405 (Count Three and Count Four). [10] (Am. Pet. 11; Dkt. No. 5).

i. Sentencing as a Second Felony Offender

Petitioner's claim that the trial court improperly sentenced him as a second felony offender is noncognizable. [11] "[W]hether a New York Court erred in applying a New York recidivist sentencing enhancement statute is a question of New York State law, not a question of fact, and the province of a federal habeas court is not to reexamine state-court determinations on state-law questions."*Gilbo v. Artus,* No. 9:10–CV–0455, 2013 U.S. Dist. LEXIS 5539, *50, 2013 WL 160270 (N.D.N.Y. Jan.15, 2013) (quoting *Saracina v. Artus,* 452 Fed. App'x 44, 46 (2d Cir.2011) (internal quotations and citations omitted).

ii. Consecutive Sentences

In his appeal, petitioner argued that his sentence was excessive and grossly disproportionate. (Pet.'s App. Br. 50–51, Dkt. No. 13–1). Petitioner also cited *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), when discussing the alleged disproportionality of his sentence, which allowed the Appellate Division to consider petitioner's sentence in federal constitutional terms. Thus, petitioner's claim that his sentence was disproportionate was exhausted, and this court will now consider whether the court's denial of petitioner's sentencing claim was contrary to, or an unreasonable application of clearly applicable federal constitutional law.

The Eighth Amendment forbids only *extreme* sentences which are "grossly disproportionate" to the crime of conviction. *Lockyer v. Andrade,* 538 U.S. 63, 72–73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). The Second Circuit has consistently held that "[n]o federal constitutional issue is presented where ... the sentence is within the range prescribed by state law."*White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992).*See also, Ewing v. California,* 538 U.S. 11, 25, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003); *Ross v. Conway,* 9:08–CV–731, 2010 U.S. Dist. LEXIS 141102, *52, 2010 WL 5775092 (N.D.N.Y. Dec.6, 2010).

***10** Petitioner contends that his sentence of two concurrent fifteen-year sentences consecutive to two concurrent fifteen-year sentences followed by three years of post-release supervision was harsh and severe. The crime of third-degree criminal possession of a controlled substance is a Class B felony, requiring a determinate sentence of 9 to 25 years (*see*N.Y. Penal Law § 70.06(3)[b]), and period of post-release supervision of 2 to 12 years (*see*N.Y. Penal Law § 70.70(3)(b) [i]). Petitioner's sentences fell within the applicable statutory range and, in response to an Eighth Amendment claim on appeal, the Appellate Division found that the sentence was not unduly harsh or severe. *People v. Sudler,* 75 A.D.3d at 906, 906 N.Y.S.2d 373.

The Second Circuit has consistently held that "[n]o federal constitutional issue is presented where ... the sentence is within the range prescribed by state law."*White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992).*See also Bellavia v. Fogg,* 613 F.2d 369, 373–74, n. 7 (2d Cir.1979) (sentencing is properly the province of the state legislature, and long mandatory sentence imposed pursuant to statute did not constitute cruel and unusual punishment); *Ewing v. California,* 538

U.S. 11, 25, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). The Eighth Amendment forbids only extreme sentences which are "grossly disproportionate" to the crime of conviction. *Lockyer v. Andrade,* 538 U.S. 63, 72–73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

"The gross disproportionality principle reserves a constitutional violation for only the extraordinary case."*Id.* at 77.Outside of the context of capital punishment, successful challenges to the proportionality of particular sentences under the Eighth Amendment have been "exceedingly rare." *Rummel v. Estelle,* 445 U.S. 263, 272, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). The Supreme Court in *Lockyer* held that a state appeals court's determination that a habeas petitioner's sentence of two consecutive prison terms of 25 years to life for petty theft under California's "Three Strikes" law was not disproportionate, did not constitute cruel and unusual punishment, and was not an unreasonable application of clearly established Supreme Court law.*Lockyer,* 538 U.S. at 77. Under these standards, the Appellate Division's decision that the petitioner's sentence of 30 years was not unduly harsh or severe is not contrary to, or an unreasonable application of clearly applicable federal constitutional law.

WHEREFORE, based on the findings above, it is

RECOMMENDED, that the petition be **DENIED and DISMISSED,** and it is further

RECOMMENDED, that a certificate of appealability be **DENIED.**

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. These objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.****Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of HHS,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b) (1); Fed.R.Civ.P. 72.

All Citations

Slip Copy, 2013 WL 4519768

Footnotes

1 Count Five of the indictment was dismissed at the close of proof on stipulation of the parties. (Oct. 16 Trial Tr. 419, Dkt. No. 13–11).

2 Apartment 405 at Bleeker Terrace, Building 4, in Albany, was occupied by Kristle Walker. She had given petitioner a key, and told police that petitioner stayed there from time to time.

3 *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286 (1901) (a defendant is entitled to a pre-trial hearing to determine the admissibility of the defendant's uncharged crimes as part of the People's direct case).

4 In any event, petitioner has not demonstrated that evidence of his prior dealings with Ernestine Smith was improperly admitted under New York law. This evidence was admitted not to show petitioner's propensity to possess and sell drugs, but to show how he became the target of the investigation and to give background about Ernestine Smith's prior interactions with petitioner and her role in the investigation. The Appellate Division held that the testimony was admissible because it was "inextricably interwoven with the charged crimes," "probative of intent to sell," and "more probative than prejudicial." *People v. Sudler,* 75 A.D.3d at 904, 906 N.Y.S.2d 373. The admission of this testimony did not render the trial "so extremely unfair" as to "violate fundamental conceptions of justice." *Dunnigan,* 137 F.3d at 125.

5 Petitioner also raises counsel's failure to object to this and other alleged evidentiary errors in the context of ineffective assistance of counsel, which, if successful, could constitute cause. *See* *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000). In order to establish cause for a procedural default, the ineffective assistance of counsel claim must be exhausted in the state courts as an independent claim. *Id.* For the reasons discussed in the section analyzing petitioner's ineffective assistance of counsel claims, this court finds that counsel was not ineffective. Therefore, even though petitioner properly exhausted his ineffective assistance of counsel claim, it cannot serve to establish cause for the purpose of overcoming the procedural default.

6 Petitioner also raises counsel's failure to object to this and other alleged evidentiary errors in the context of ineffective assistance of counsel, which, if successful, could constitute cause. *See* note 5, above. For the reasons below, this court finds that counsel was not ineffective. Therefore, even though petitioner properly exhausted his ineffective assistance of counsel claim, it cannot serve to establish cause for the purpose of overcoming the procedural default.

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7 The Appellate Division also held that Detective Vincent's testimony that the plastic bags found in Apartment 405 were the type usually used to package drugs and that the circumstances indicated that the drugs found by police were packaged with the intent to sell were not within the knowledge and experience of the average juror. *People v. Sudler,* 75 A.D.3d at 905, 906 N.Y.S.2d 373. The Appellate Division pointed out that under New York State law, qualified police officers may testify as experts, no explicit explanation that the officer was testifying as an expert was required, and Detective Vincent's testimony as to his education, training, and experience in narcotics investigations provided a sufficient foundation. *Id.* (citing *People v. Hicks,* 2 N.Y.3d 750, 751, 811 N.E.2d 7, 778 N.Y.S.2d 745 (2004); *People v. Davis,* 235 A.D.2d 941, 943, 653 N.Y.S.2d 404 (1997); *People v. Lamont,* 21 A.D.3d 1129, 1132, 800 N.Y.S.2d 480 (2005).

8 Petitioner also raises counsel's failure to object to this and other alleged evidentiary errors in the context of ineffective assistance of counsel, which, if successful, could constitute cause. *See* note 5, above. For the reasons discussed below, this court finds that counsel was not ineffective. Therefore, even though petitioner properly exhausted his ineffective assistance of counsel claim, it cannot serve to establish cause for the purpose of overcoming the procedural default.

9 The Appellate Division also found that petitioner's jury charge claim was meritless, finding that "it [was] readily apparent when read in context that the court did no more than instruct that each side would be presenting its theory of the case," and that the charge "fairly instructed the jury on the correct principles of law to be applied to the case."*People v. Sudler,* 75 A.D.3d at 905–06, 906 N.Y.S.2d 373 (internal quotations and citations omitted).

10 The one-year determinate sentence for Count Six, a misdemeanor, merged with the other sentences. (Feb. 15 Sentencing Tr. 15; Dkt. No.13–12).

11 The court also notes that this claim is not exhausted, because petitioner did not bring the claim on his direct appeal. (*See* Pet.'s App. Br. 50–52, Dkt. No. 13–1). Although petitioner did raise sentencing claims on appeal, they were related to the alleged disproportionality of his sentence, as will be discussed in the next section. Because the claim is unexhausted, and petitioner would not be able to return to state court to raise this claim, the claim is also procedurally defaulted. *See* *Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994) (If a petitioner has not exhausted his state-court remedies, but no longer has remedies available in state court with regard to these claims, they are "deemed" exhausted, but are also procedurally defaulted.) A state prisoner who has procedurally defaulted on a federal claim in state court may only obtain federal habeas review of that claim if he can show both cause for the default and actual prejudice resulting from the alleged violation of federal law, or if he can show that he is "actually innocent." *Clark v. Perez,* 510 F.3d 382, 393 (2d Cir.2008) (internal quotation and citations omitted). Petitioner cites no cause or prejudice. This is an alternative basis for dismissal of this claim.

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United States District Court,
W.D. New York.

Latchmie TOOLASPRASHAD, Petitioner,
v.
Todd TRYON, Assistant Field
Office Director, Respondent.

No. 12CV734. | April 11, 2013.

Attorneys and Law Firms

Latchmie Toolasprashad, Batavia, NY, pro se.

Gail Y. Mitchell, U.S. Attorney's Office, Buffalo, NY, for Respondent.

Order

HUGH B. SCOTT, United States Magistrate Judge.

***1** Before the Court is the *pro se* petitioner's motion to reconsider (Docket No. 17) denial (*see*Docket No. 16) of his motion to compel discovery in this habeas corpus proceeding under 28 U.S.C. § 2241 (Docket No. 11) and his motion (Docket No. 12) for appointment of counsel.

BACKGROUND

This case is in a series of actions commenced in this Court (among others) by petitioner in his attempt to challenge his removal from the United States, the lawfulness of his pre-removal detention, and the conditions under which he is detained at the Buffalo Detention Facility, in Batavia, New York, while awaiting disposition of his removal proceedings (*see Toolasprashad v. Tryon,* No. 11CV696; *Toolasprashad v. Tryon,* No. 11CV840 (consolidated with 11CV696); *Toolasprashad v. Immigration & Customs Enforcement,* [1] No. 11CV922 (action under FOIA; hereinafter referenced as "No. 11CV922"); *Toolasprashad v. Tryon,* No. 12CV14 (consolidated with 11CV696); *Toolasprashad v. Tryon,* No. 13CV74 (habeas proceeding commenced in the United States Court of Appeals for the Second Circuit and later transferred to this Court); *Toolasprashad v. Tryon,* No. 13CV80 (suing ICE officers for allegedly talking publicly about plaintiff and his proceedings)). Some of these cases were closed (Nos.11CV696, 11CV840, 12CV14, 13CV74).

The present case, No. 12CV734, is a habeas corpus proceeding, pursuant to 28 U.S.C. § 2241, challenging his detention in the custody of the United States Department of Homeland Security at the Buffalo Detention Center.

Petitioner moved to compel discovery of documents from his immigration file that underlie his removal proceedings and seeks the results of correspondence he sent regarding the absence of legal reference materials at the Buffalo Detention Facility (Docket No. 11, Pet'r Motion). Petitioner also sought appointment of a volunteer lawyer to assist him in presenting this matter (Docket No. 1, Pet. at 6; *see*Docket No. 12).

This Court denied petitioner's request for discovery relative to his writ of habeas corpus because, under Rule 6(a) of the Rules Governing Section 2254 Cases (Docket No. 16, Order of Feb. 26, 2013, at 3–4). This Court then denied his motion for appointment of counsel in this action (*id.* at 5).

Petitioner now moves for reconsideration, repeating his arguments that the Buffalo Detention Center, in effect, lacks a law library sufficient for him to respond (even to research the cases cited in this Court's Order) (Docket No. 17, Pet'r Motion at 1). Petitioner contends that discovery here would show that his immigration matter was resolved in his favor but immigration staff did not consider these documents (*id.*).

DISCUSSION

I. Reconsideration Standard

Habeas proceedings under 28 U.S.C. § 2241, unlike other habeas provisions, lack specific rules governing these proceedings. Under Federal Rule of Civil Procedure 81(a)(4), the Federal Rules of Civil Procedure apply to proceedings for habeas corpus "to the extent that the practice in those proceedings: (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, the Rules Governing Section 2255 Cases; and (B) has previously conformed to the practice in civil actions."

***2** Furthermore, none of the habeas provisions, including § 2241, or their special rules has a rule governing procedure for reconsideration of decisions. Courts have borrowed the Federal Rules of Civil Procedure for reconsideration motions, *see Thomas v. United States,* No. 02 Civ. 6254, 2005 U.S.

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Dist. LEXIS 18677, at *5, 2005 WL 2104998 (S.D.N.Y. Sept. 1, 2005) (in § 2255 habeas proceeding on Government's motion to reconsider applying district court's Local Civil Rules 6.3 for reconsideration motions); *Gordon v. Poole,* No. 07CV494, 2008 U.S. Dist. LEXIS 1655, at *4, 2008 WL 111193 (W.D.N.Y. Jan. 9, 2008) (Scott, Mag. J.) (in § 2254 habeas proceeding where parties later consented to proceed before Magistrate Judge, objections of petitioner deemed to be motion for reconsideration under Federal Rules of Civil Procedure 52(b), 59(e), or 60(b)). Under Federal Rule of Civil Procedure 60, the grounds for reconsideration are correction of a clerical mistake arising from oversight or omission, Fed.R.Civ.P. 60(a), mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud, misrepresentation, or misconduct by opposing party; the judgment is void or satisfied; or "any other reason that justifies relief,"Fed.R.Civ.P. 60(b) (1)-(6). Mistake here is the application of the incorrect habeas statute and its procedural rules. The previous Order erroneously referred to 28 U.S.C. § 2254 and the rules governing those proceedings, without reference to § 2241. Petitioner is in federal, and not state, custody. Hence, his habeas proceeding is under 28 U.S.C. § 2241. As discussed below, this Court appropriately applied the procedures under the Section 2254 Rules in this federal custody habeas proceeding. Insofar as petitioner seeks reconsideration of his motion, that relief is **granted;** his underlying motion is considered next.

II. Discovery in Habeas Proceeding under Section 2241

Under 28 U.S.C. § 2241, "a petitioner is entitled to habeas relief if he is 'in custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c) (3)," *Yosef v. Killian,* 646 F.Supp.2d 499, 504 (S.D.N.Y.2009) (Maas, Mag.Recommendation), *adopted by,* 646 F.Supp.2d 499, 502 (S.D.N.Y.2009). Courts have adopted the Rules Governing Section 2254 Cases, including its discovery Rule 6 (cited in the previous Order, Docket No. 16, Order of Feb. 26, 2013, at 3), in habeas proceedings under § 2241, *see Yosef, supra,* 646 F.Supp.2d at 504 n. 4 (Docket No. 14, Resp't Memo. at 3–4); *see also Harris v. Nelson,* 394 U.S. 286, 294, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969) (not applying Federal Rules of Civil Procedure discovery rules to habeas proceeding); *Thompson v. Lappin,* Civil No. 07–2694, 2008 U.S. Dist. LEXIS 49574, at * 1, *4, 2008 WL 2559303 (D.N.J. June 24, 2008) (applying § 2254 Rules to habeas proceeding by federal prisoner serving sentence in state prison under § 2241); *Alexis v. Holmes,* No. 03CV25, 2004 U.S. Dist. LEXIS 27204, at *8, 2004 WL 2202646 (W.D.N.Y. Sept. 29, 2004) (Scott, Mag. J.) (denying immigration habeas petitioner's motion to conduct discovery where petitioner failed to demonstrate that discovery was necessary to determine the petition); *Lo Duca v. United States,* No. CV–95–713, 1995 U.S. Dist. LEXIS 21155, at *44, 1995 WL 428636 (E.D.N.Y. July 12, 1995) (in extradition proceeding, while discovery is available, it is not a right of the relator and within the discretion of the district court, denying motion for discovery). In immigration habeas proceedings under § 2241, a petitioner is not entitled to discovery as a matter of course, *Yosef, supra,* 646 F.Supp.2d at 504 n. 4 (citing cases); *see also*Rules Governing Section 2254 Cases Rule 6(a); *Bracy v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); *Harris v. Nelson,* 394 U.S. 286, 295, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969) (Docket No. 14, Resp't Memo. at 3–4), unlike the discovery available in most civil litigation, cf. Fed.R.Civ.P. 26. In *Yosef,* the district court applied the good cause standard under Rule 6(a), see Rules Governing Section 2254 Cases Rule 6(a), and held that absent a showing of good cause, the decision whether to allow such discovery is left to the discretion of this Court, *Yosef, supra,* 646 F.Supp.2d at 504 n. 4.

***3** Upon reconsideration under the proper standard, this Court, in the exercise of its discretion and absent a showing of good cause by petitioner, **reiterates the denial** of petitioner's motion for discovery. Petitioner seeks discovery of material that may or may not have been before immigration authorities in the removal process. In habeas proceedings, the record before the institution that decided the petitioner's fate is fixed, hence usually there is no need for discovery. As previously found (Docket No. 16, Order at 4), petitioner here challenges his continued detention by ICE at the Buffalo Detention Center, including in his challenge the conditions of his confinement (for example, the dearth of legal materials at the Detention Center). As noted by respondent (Docket No. 14, Resp't Memo. at 4), none of petitioner's discovery requests are related to that detention. Instead, petitioner seeks the results of correspondence or other documents about inquiries into his immigration status (*see id.*Ex. A, Resp't Responses to Pet'r's Discovery Request Nos. 1–6; Docket No. 11, Pet'r Motion at 1–2) or the absence of legal reference materials at the Buffalo Detention Center (Docket No. 14, Resp't Memo., Ex. A., Responses to Request Nos. 7–8), which involves the conditions of his confinement. Petitioner now argues that these documents are relevant to his habeas Petition because it shows materials ignored by immigration officials that would have shown his citizenship. The documents responsive to those demands, however, would not expose relevant evidence that would advance this habeas proceeding.

Therefore, petitioner's motion for reconsideration (Docket No. 17) of his denied motion to compel this discovery based upon his requests (Docket No. 11) is **denied.**

III. Appointment of Counsel

Petitioner also seeks reconsideration of the decision to deny (without prejudice) appointment of counsel for this action (Docket No. 17, Pet'r Motion at 4–5). As previously noted (Docket No. 16, Order at 5), counsel was appointed to petitioner in No. 11CV922 (No. 11CV922, Docket No. 30;*see also id.,*Docket No. 36). Possibly the intersection of petitioner's claims in No. 11CV922 and his habeas petition in 12CV734 may suggest to his appointed counsel in the former action that he may seek appointment in this habeas proceeding; this Court, however, will not compel this result at this time.

Petitioner's motion for appointment of counsel in this case (Docket No. 12;*see also*Docket No. 1, Pet. at 6 & n. 7; Docket No. 15, Pet'r Notice, at 1) is **denied.**Upon further consideration, this Court adheres to its earlier findings in light of the factors required by law, *see Cooper v. A. Sargenti Co.,* 877 F.2d 170, 174 (2d Cir.1989) (counsel may be appointed in cases filed by indigent petitioner where it appears that such counsel will provide substantial assistance in developing petitioner's arguments, the appointment will otherwise serve the interests of justice, and where the petitioner has made "a threshold showing of some likelihood of merit"); *Hodge v. Police Officers,* 802 F.2d 58 (2d Cir.1986); *In re Martin–Trigona,* 737 F.2d 1254 (2d Cir.1986) (appointment of counsel within the discretion of the Court). Nothing new has been shown by petitioner to warrant appointment of counsel at this time; the same conditions petitioner has been in regarding the lack of legal research resources continue today. Based on this review, petitioner's motion to reconsider the denial appointment of counsel (Docket No. 16;*see*Docket No. 12) is **DENIED WITHOUT PREJUDICE AT THIS TIME.**It remains petitioner's responsibility to retain his own attorney or to press forward with his lawsuit pro se. 28 U.S.C. § 1654.

CONCLUSION

***4** For reasons stated above, petitioner's motion to reconsider (Docket No. 17) his denied (*cf.*Docket No. 16) motion to compel discovery (Docket No. 11) is **granted in part** (to consider the motion under the appropriate habeas statutes) but the original motion to compel remains **denied.**Reconsideration (Docket No. 17) of his motion for appointment of counsel (Docket No. 12) remains **denied without prejudice.**

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1560176

Footnotes

1 Hereinafter, Immigration and Customs Enforcement is also referred to as "ICE."

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