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

Caesar STAPLETON, Petitioner,
v.
Charles GREINER, Superintendent,
Sing Sing Correctional Facility, and
Hon. Elliot Spitzer, Attorney General
of the State of New York, Respondents.

No. 98 CV–1971 (RR).
|
July 10, 2000.

Attorneys and Law Firms

Caesar Stapleton, Ossining, Petitioner Pro Se.

The Honorable Charles J. Hynes, District Attorney of Kings County, Brooklyn, By Sholom J. Twersky, Marie–Claude Wrenn, Assistant District Attorney, for Respondents.

Memorandum and *ORDER*

RAGGI, District J.

***1** Caesar Stapleton, proceeding pro se, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994 & Supp.2000). Stapleton was convicted on June 24, 1991, after a jury trial in Kings County of Rape in the First Degree, *see* N.Y. Penal Law § 130.35[1] (McKinney 1998), Sodomy in the First Degree, *see* N.Y. Penal Law § 130.50[1] (McKinney 1998), and two counts of Assault in the Second Degree, *see* N.Y. Penal Law § 120.05[2] (McKinney 1998).[1] He is presently incarcerated serving eight and one-third to twenty-five years for rape, a consecutive term of eight and one-third to twenty-five years for sodomy, and concurrent terms of two and one-third to seven years for each assault charge.

1 The petition named then-Attorney General Dennis C. Vacco a respondent. As Elliot Spitzer has succeeded Mr. Vacco in that office, the court substitutes Mr. Spitzer as respondent for Mr. Vacco. *See* Fed.R.Civ.P. 25(d)(1).

A liberal reading of petitioner's papers suggests that he is challenging his conviction before this court on the grounds that (1) the trial court erroneously admitted evidence procured in violation of the Fourth Amendment; (2) a stricken reference to uncharged bad acts deprived him of due process; (3) limitations on his attorney's cross-examination of the crime victim violated due process; (4) he was denied his constitutional right to a public trial; (5) erroneous jury instructions violated due process; (6) prosecutorial misconduct in offering perjured testimony denied him a fair trial; and (7) both his trial and appellate attorneys were constitutionally ineffective.

Respondent opposes the petition on the grounds that many of the claims are procedurally barred from federal review having been resolved against Stapleton on independent and adequate state law grounds. *See Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (holding that procedural default of a claim under state law can bar federal review unless petitioner shows both good cause to excuse the default and ensuing prejudice or a fundamental miscarriage of justice such as the conviction of a person who is actually innocent); *accord Glenn v. Bartlett,* 98 F.3d 721, 724–25 (2d Cir.1996). Having carefully reviewed the record of state proceedings, this court finds that the state courts did not clearly indicate whether their rejections of petitioner's claims were based on procedural default or lack of merit. In general, this court need not linger over the procedural issue. Assuming that petitioner could clear this hurdle, all but one of his claims would have to be rejected on the merits. The single exception concerns petitioner's claim that his trial counsel was ineffective in failing to secure expert witnesses. For the reasons discussed herein, the court will explore this issue further at a hearing.

Factual Background

1. *The Attack on Lizzette Rodriguez*

On December 5, 1988, Lizzette Rodriguez was brutally assaulted, raped, and sodomized by petitioner, Caesar Stapleton. As the principal prosecution witness against Stapleton, Ms. Rodriguez testified that she became romantically involved with petitioner in 1987, when she was 17–years old. Because Stapleton was then married with five children, he and Ms. Rodriguez carried on their amorous relationship at various apartments rented by petitioner. One of these was located in the basement of

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1353 Myrtle Avenue in Brooklyn, the very building where Stapleton resided with his family. In November 1988, Ms. Rodriguez ended her affair with Stapleton and left Myrtle Avenue to return to her mother's home.

***2** A few weeks later, on the evening of December 5, 1988, Stapleton approached Ms. Rodriguez on the street and, on the pretext that he needed a babysitter for his children, lured her back to Myrtle Avenue. Once in the basement apartment, Stapleton accused Ms. Rodriguez of leaving him for another man. She denied the charge, prompting Stapleton to push her to the floor and to kick and punch her. He then handcuffed her around a pole, gagged her mouth, ripped off her clothes, and proceeded to assault and threaten her for several hours. Among other things, Stapleton whipped Ms. Rodriguez with an electric cord, stuck heated straight pins into her legs, and burned parts of her body with cigarettes and a lit paper bag. At various times, he threatened to subject her to a homosexual assault and to abuse her sexually with the neck of a wine bottle. In the end, he raped and sodomized her.

Twice during this ordeal, Ms. Rodriguez managed to free herself from one of the handcuffs while Stapleton was out of the basement. The first time she did this, Stapleton quickly foiled her escape attempt, beat her, and again secured her to the pole with another pair of handcuffs. The second time Ms. Rodriguez broke free, she successfully fled the building and sought refuge in a nearby bodega.

Juan Hernandez, the owner of the bodega, testified that when Ms. Rodriguez appeared in his store, she was naked except for a dark top and two sets of handcuffs. She was plainly hysterical, and bruises and blood were visible on her face and body. Hernandez gave Ms. Rodriguez a man's jacket to cover herself and called the police.

Meanwhile, Ms. Rodriguez flagged down a police car and reported her attack to Lt. Steven O'Brien. The officer testified that Ms. Rodriguez was bruised and black and blue when he first saw her, with notable red marks around her wrists. She was also sobbing and having difficulty speaking coherently. Eventually, Lt. O'Brien escorted Ms. Rodriguez back to Myrtle Avenue, but neither Stapleton nor Ms. Rodriguez's clothes could be found there.

Thereafter, Officer Ismael Hernandez took Ms. Rodriguez to Woodhull Hospital where the two pairs of handcuffs were cut from her wrists. Ms. Rodriguez's sister, Madelyn Marcano, soon arrived at the hospital. Both Officer Hernandez and Ms. Marcano testified that bruises, scratches, and blood were visible on various parts of Ms. Rodriguez's body. Ms. Marcano also pulled a pin from her sister's leg and gave it to one of the doctors. Ms. Rodriguez testified that she told the emergency room doctor that she had been beaten, but could not recall saying that she had been raped. Thus, Dr. Jean Fleurantin testified that when he examined Ms. Rodriguez on December 5, 1988, he diagnosed blunt trauma to the chest and abdomen but did not perform any gynecological examination.

On the night of December 5, 1988, Ms. Rodriguez also spoke with Police Detectives Michael Russell and Michael Gomez, who proceeded to Myrtle Avenue where, with the consent of Iris Stapleton, petitioner's wife, they entered the basement apartment and recovered a wine bottle, six straight pins, and some white tape, all of which were offered into evidence. [2]

2 This search was the subject of a pre-trial suppression hearing at which Mrs. Stapleton denied giving the officers her consent to enter the apartment. The state judge, after hearing the conflicting testimony and assessing the credibility of the witnesses, rejected Mrs. Stapleton's account and credited that of the police.

***3** The following day, December 6, 1988, Ms. Rodriguez again spoke with Detective Russell and first reported that she had been raped and sodomized. She was subsequently interviewed by Detective Louis Hernandez, to whom the investigation was formally assigned. He testified to seeing bruises on Ms. Rodriguez's face, wrists, and upper body, photographs of which were received in evidence. He also noticed small hole marks in her thigh.

2. *The Defense Case*

The crux of the defense case was that petitioner was not at 1353 Myrtle Avenue on the evening of December 5, 1988, and that Ms. Rodriguez was falsely accusing him of rape. Petitioner's wife testified that her husband had left their home at approximately 5:00 P.M. with one of their children and a friend, Basilio Ramos. As the prosecution noted, this was at odds with her statement to the police on December 5, 1988, that she had not seen her husband at all on the day of the charged crimes. Nevertheless, her trial testimony was somewhat corroborated by Joseph Castillo, who testified that Stapleton, his son, and Basilio Ramos

came to his home at approximately 7:30 P.M. so that Ramos could collect money owed by Castillo.

Mrs. Stapleton and Joseph Castillo further testified that Lizzette Rodriguez was infatuated with petitioner and that in the months before December 5, 1988, they had frequently heard her threaten to report him to the police if he ever broke off their affair. The court would not, however, allow Mrs. Stapleton to testify about a purported telephone conversation among Lizzette Rodriguez, petitioner, and herself, sometime after the charged crimes, during which Mrs. Stapleton recalled Ms. Rodriguez saying that the reason she was making accusations against petitioner was because she still loved him and did not want him to go back to his wife. Mrs. Stapleton and one of her daughters were permitted to testify to the events of December 6, 1988, the day after the charged crimes, when they saw Ms. Rodriguez and members of her family come to Myrtle Avenue and throw Molotov cocktails at the Stapletons' building.

Also testifying for the defense were petitioner's neighbor, Angela Sierra, and his co-worker, Justino Cruz, both of whom stated that they were at the Stapleton home for parts of the evening of December 5, 1988, and that Stapleton was never there. Cruz testified that at one point in the evening he went to the basement to retrieve some musical equipment. He reported seeing Ms. Rodriguez in a room drinking with two unknown men. This was consistent with testimony from Joseph Castillo that he had frequently seen Ms. Rodriguez in the company of other men and that she and petitioner frequently fought about this subject.

3. *Verdict and Direct Appeal*

The jury found Stapleton guilty of first degree rape, first degree sodomy, and two counts of second degree assault.

Represented by new counsel on appeal, the Legal Aid Society, petitioner challenged his conviction on the ground that (1) the introduction of uncharged bad acts deprived him of a fair trial. Stapleton also filed a pro se supplemental brief claiming that (2) the trial court had erroneously denied his motion to suppress evidence recovered from the Myrtle Avenue basement apartment; (3) the prosecution had failed to disclose psychological records of the victim, as required by *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *People v. Rosario,* 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 (1961); (4) the government had relied on perjured testimony from Lizzette Rodriguez to satisfy its burden of proof; and (5) there was prosecutorial misconduct in summation.

***4** On May 16, 1992, the Appellate Division, Second Department, rejected these claims on the merits and affirmed Stapleton's conviction. *See People v. Stapleton,* 204 A.D.2d 580, 612 N.Y.S.2d 178 (2d Dep't 1994). On September 28, 1994, the New York Court of Appeals denied Stapleton's motion for leave to appeal from this decision. *See People v. Stapleton,* 84 N.Y.2d 872, 618 N.Y.S.2d 18, 642 N.E.2d 337 (1994) (Ciparick, J.).

4. *First § 440 Motion*

While his appeal was pending, Stapleton filed a pro se motion pursuant to N.Y.Crim. Proc. Law § 440.10 (McKinney 1994) to vacate his conviction on the ground that (1) he had been denied effective assistance of trial counsel in no less than thirty respects. He subsequently amended the motion to add the claim that (2) the prosecution had failed to meet its disclosure obligations under *Brady* and *Rosario.* The trial court denied this motion on May 12, 1994. *See People v. Stapleton,* No. 8904/89 (N.Y. Sup.Ct. Kings Co. May 12, 1994). Addressing itself exclusively to the Sixth Amendment claim, the court found generally that the vast majority of petitioner's complaints about his trial counsel concerned matters that were part of the trial record. As such, they were properly raised on direct appeal and procedurally barred from § 440 review. In the alternative, the court found that petitioner's claims about his attorney were either vague, ambiguous, or without sufficient factual support to satisfy the standard set by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accordingly, they were rejected as without merit.

On December 5, 1994, the Appellate Division denied Stapleton's motion for leave to appeal the denial of his § 440 motion. *See People v. Stapleton,* No. 94–09716 (2d Dep't Dec. 5, 1994). Petitioner then filed a notice of appeal with the Court of Appeals, which application was dismissed. *See People v. Stapleton,* Ind. No. 89–4/89 (N.Y. Dec. 27, 1994) (Ciparick, J.); N.Y.Crim. Proc. Law § 450.90(1) (McKinney 1994).

5. *Coram Nobis Motion*

In October 1994, Stapleton also challenged his conviction by moving for a writ of error coram nobis on the ground that he had been denied effective assistance of appellate counsel. The motion was denied as without merit on December 12, 1994. *See People v. Stapleton,* 210 A.D.2d 358, 620 N.Y.S.2d 275 (2d Dep't 1994). Petitioner's request for leave to appeal was dismissed on January 10, 1995, the Court of Appeals finding that the Appellate Division ruling was not appealable under N.Y.Crim. Proc. Law § 450.90(1) (McKinney 1994). *See People v. Stapleton,* 84 N.Y.2d 1039, 623 N.Y.S.2d 195, 647 N.E.2d 467 (1995) (Ciparick, J.).

Undeterred, Stapleton promptly filed another coram nobis petition on January 24, 1995, which the Appellate Division treated as a motion for reconsideration. This motion was denied on April 4, 1995. *See People v. Stapleton,* No. 91–06759 (2d Dep't April 4, 1995). Once again, petitioner sought leave to appeal to the New York Court of Appeals. That court again dismissed the application pursuant to N .Y.Crim. Proc. Law § 450.90(1). *See People v. Stapleton,* 85 N.Y.2d 943, 627 N.Y.S.2d 1005, 651 N.E.2d 930 (1995) (Ciparick, J.).

***5** Stapleton moved to renew his application for reconsideration on July 31, 1997. The motion was denied on December 1, 1997, *see People v. Stapleton,* 245 A.D.2d 319, 667 N.Y.S.2d 264 (2d Dep't 1997), and the Court of Appeals dismissed petitioner's motion for leave to appeal pursuant to N.Y.Crim. Proc. Law § 450.90(1), *see People v. Stapleton,* 91 N.Y.2d 881, 668 N.Y.S.2d 579 (1997) (Ciparick, J.).

6. *Second and Third § 440 Motions*

In papers dated January 23, 1997, Stapleton filed a second motion to vacate his conviction pursuant to N.Y.Crim. Proc. Law § 440.10. Petitioner complained that (1) he had been denied his right to a public trial, and (2) errors in the jury charge had denied him a fair trial. Before the court could rule on this application, Stapleton filed a third motion pursuant to § 440.10 on May 15, 1997. In this submission, he argued that (1) the prosecution had procured his conviction by misrepresentation and fraud; (2) limitations on his ability to cross-examine Ms. Rodriguez violated both New York's Rape Shield Law, *see* N.Y.Crim. Proc. Law § 60.42[1], [3] (McKinney 1992), and his federal constitutional rights to confront witnesses and have a fair trial; and (3) the imposition of consecutive sentences for rape and sodomy was illegal. The motions were summarily denied on October 20, 1997, the trial court noting that there was no merit to the claims and that petitioner had exhausted all remedies available to him on his direct appeal. *See People v. Stapleton,* No. 8904/89 (N.Y. Sup.Ct. Kings Co. Oct. 20, 1997).

The record before this court indicates that petitioner did seek leave to appeal this denial, but was unable to do so because of procedural difficulties encountered in securing a copy of the actual order. In seeking to resolve the situation, petitioner wrote in December 1997 to the Clerk of the Supreme Court in Brooklyn, Administrative Judge Ronald J. Aiello, and Court of Appeals Chief Judge Judith S. Kaye and Associate Judge Carmen Beauchamp Ciparick. *See* Correspondence attached to Petition for Writ of Habeas Corpus. In light of this record, respondent raises no exhaustion challenge to the petition.

7. *Habeas Corpus Petition*

In papers dated March 5, 1998, Stapleton petitioned this court for a writ of habeas corpus.

Discussion

I. *Standard of Review*

This court's review of Stapleton's petition is governed by the standards articulated in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104–132, 100 Stat. 1214, 1220 (1996), which significantly amended the federal habeas corpus statute, 28 U.S.C. § 2254. Subsection (d) of § 2254 now provides:

> 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
>
> ***6** (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.

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Recently, the Supreme Court provided some guidance for lower courts in applying these statutory standards, particularly subpart (1). In *Williams v. Taylor,* 529 U.S. 362, ——, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000), Justice O'Connor, writing for the Court, stated that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" should be understood to refer to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." The Court then identified two circumstances under which a state court decision could be deemed "contrary to" clearly established Federal law: when the state court (1) "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law," or (2) "decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Id.* As to the alternative "unreasonable application" clause, the Court held that habeas relief was warranted only "if the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The Court ruled that reasonableness was to be assessed objectively rather than subjectively. *See id.* at 1521–22. Moreover, whatever difficulty there might be in defining the term "unreasonable," courts were cautioned that "an *unreasonable* application of federal law" did not equate with "an *incorrect* application of federal law." *Id.* at 1522. For this reason, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.*

Applying these principles to this case, it is apparent that petitioner is not entitled to federal habeas relief.

II. *Use of Evidence Seized from Myrtle Avenue Basement*

Stapleton submits that the state court's refusal to suppress evidence seized in a warrantless search of the Myrtle Avenue basement apartment violated his Fourth Amendment rights. In fact, the Supreme Court has erected a substantial barrier to federal habeas review of Fourth Amendment claims. In *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), it ruled that

> where the state has provided an opportunity for full and fair litigation of the Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Id. at 481–82. Thus, the issue for this court is not whether it agrees or disagrees with the state judge's ruling on the challenged search. Before this court can even reach petitioner's Fourth Amendment claim, Stapleton must show that New York did not provide an opportunity for full and fair litigation of the issues. *See Capellan v. Riley,* 975 F.2d 67, 70 (2d Cir.1992); *McPhail v. Warden, Attica Correctional Facility,* 707 F.2d 67, 69 (2d Cir.1983); *Gates v. Henderson,* 568 F.2d 830, 839–40 (2d Cir.1977) (en banc). Petitioner cannot satisfy this burden.

***7** Section 710 of New York's Crim. Proc. Law (McKinney 1984 & Supp.1988) clearly provided Stapleton with the opportunity to move for the suppression of unlawfully seized evidence. That procedure has been approved as facially adequate by federal courts in this Circuit. *See Capellan v. Riley,* 975 F.2d at 70 n. 1 (and cases cited therein). Nothing in the record indicates that there was any "unconscionable breakdown" in this otherwise adequate state process when applied to Stapleton's case. *See id.* (discussing extraordinary circumstances that would qualify as an "unconscionable breakdown"). To the contrary, it appears that the state court found the warrantless search "reasonable" under the Fourth Amendment only after holding a full evidentiary hearing on the issue of whether there had been a consent to search. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (consensual searches are an exception to Fourth Amendment warrant requirement); *accord McCardle v. Haddad,* 131 F.3d 43, 48 (2d Cir.1997).

Under these circumstances, not only can Stapleton not show that he was denied a full and fair opportunity to litigate his claim, he cannot show that the court's decision was "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(2). Petitioner's Fourth Amendment claim is denied.

III. *Uncharged Bad Acts*

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Stapleton submits that he was denied due process when the trial court refused to declare a mistrial after Lizzette Rodriguez volunteered information about uncharged bad acts committed by petitioner. Specifically, Ms. Rodriguez testified that when petitioner pressed her as to whether she had left him for another man, she told him she had broken off their relationship because she "couldn't take the beatings anymore." Trial Tr. at 82.[3] In response to a defense objection, the court promptly struck this testimony from the record, but declined to grant a mistrial.

3 Apparently, there had been a pre-trial ruling that the prosecution would not be allowed to ask Ms. Rodriguez about prior physical assaults by petitioner. At the sidebar held after Ms. Rodriguez made the remark at issue, the prosecutor reported that she had cautioned the witness not to testify about such matters, and the court apparently accepted this representation. *See* Trial Tr. at 85.

A state trial court's rulings regarding evidentiary matters will generally not implicate federal due process unless an error is committed that is sufficiently serious to deny petitioner his fundamental right to a fair trial. *See Estelle v. McGuire,* 502 U.S. 62, 71–72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *accord Blisset v. LeFevre,* 924 F.2d 434, 439 (2d Cir.1991). Rulings with respect to uncharged crimes or similar act evidence rarely rise to this level since federal and state trial courts enjoy considerable discretion in deciding when such evidence is properly placed before a jury. *See generally United States v. Bok,* 156 F.3d 157, 165 (2d Cir.1998) (trial judge's rulings on uncharged crime evidence will not be disturbed on appeal unless they were "arbitrary or irrational").

In this case, the trial court did not permit the jury to consider Ms. Rodriguez's testimony regarding past alleged assaults by the defendant. Her statements on this subject were struck, and the jury was specifically advised in the court's closing instructions that stricken evidence was to be disregarded during deliberations. Courts "presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it." *Greer v. Miller,* 483 U.S. 756, 766 n. 8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987). This principle applies to instructions that a jury disregard inadmissible references to uncharged crimes. *See, e.g., United States v. Castano,* 999 F.2d 615, 618 (2d Cir.1993) (jury presumed to follow instruction that it not consider stricken tape recording referring to uncharged firearms); *see also People v. Santiago,* 52 N.Y.2d 865, 866, 437 N.Y.S.2d 75, 76, 418 N.E.2d 668 (1981) (instruction that jury disregard uncharged crime evidence adequate to cure error). Such instructions are particularly appropriate where, as here, the inadmissible statement forms only a small and easily isolated portion of a witness's testimony. In such cases, a jury is not required "to perform olympian mental gymnastics" to follow the instruction. *United States v. Paone,* 782 F.2d 386, 395 (2d Cir.1986); *see also Greer v. Miller,* 483 U.S. at 766 n. 8 (due process implicated only if there is an "overwhelming probability" that the jury will not be able to follow court's instructions (quoting *Richardson v. Marsh,* 481 U.S. 200, 208, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)).

***8** Because the court's decision to strike the uncharged bad act evidence and its subsequent instruction to the jury were adequate to protect Stapleton's right to a fair trial, his due process complaint that he was entitled to a mistrial is rejected as without merit.

IV. *Limitations on Use of Tape Recording and Related Cross Examination*

Stapleton submits that he was denied his due process right to a fair trial and his Sixth Amendment right of confrontation by trial court rulings that prevented him from putting a certain tape recording into evidence and restricted his cross-examination of Ms. Rodriguez pursuant to New York's Rape Shield Law. *See* N.Y.Crim. Proc. Law § 60.42.

As already noted in connection with the last point considered by this court, habeas corpus is not warranted every time a state trial judge makes an erroneous evidentiary ruling. Due process is violated only if an evidentiary error is so serious as to violate a petitioner's fundamental right to a fair trial. *See Estelle v. McGuire,* 502 U.S. at 71–72; *accord Blisset v. LeFevre,* 924 F.2d at 439. That is not this case.

The tape at issue purported to record a conversation between petitioner and Ms. Rodriguez occurring in late January 1990. On the tape, the male participant does most of the talking, commenting at length and in very negative ways about the female's family, her drug use, and her relationship with men. Neither speaker refers to the charged rape. The defense proposed to play the tape at trial and thereafter to question Ms. Rodriguez regarding her relationship with various men referred to thereon.[4]

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4 Precisely because the female speaker on the tape says so little, it appears that Stapleton's real purpose in offering the recording was to broadcast to the jury his own attack on the witness's character. Plainly, a defendant cannot offer his own hearsay statements to achieve this end. *See People v. Weston,* 249 A.D.2d 496, 496, 671 N.Y.S.2d 518, 518–19 (2d Dep't 1998) (defendant's self-serving videotaped statement inadmissible when offered in his favor).

At a pre-trial hearing regarding the admissibility of the recording, Ms. Rodriguez specifically denied that she was the woman whose voice was overheard. This raised a serious question as to how the tape would be authenticated for the jury. The defense did not intend to have Stapleton testify at trial nor did it proffer any other authenticating witness. Instead, counsel proposed to play the conversation—which was in Spanish—and to allow the jury to decide if Ms. Rodriguez was one of the participants. The trial court rejected this suggestion. This ruling was neither erroneous under New York law nor at odds with clearly established federal law as stated by the Supreme Court.

For a tape recording to be admitted in a New York trial, the proponent is required to offer proof of authenticity. *See People v.. Ely,* 68 N.Y.2d 520, 527, 510 N.Y.S.2d 532, 536, 503 N.E.2d 88 (1986). Authenticity can be established in a variety of ways depending upon the circumstances of the particular case: (1) by eliciting testimony from a participant in the conversation that the recording is a complete and accurate reproduction of the conversation, (2) by eliciting similar testimony from a witness to the conversation or to its recording, (3) by proffering participant testimony together with that of an expert whose analysis reveals no alterations, and (4) by establishing an unbroken chain of custody. *Id.* at 527–28, 510 N.Y.S.2d at 536–37, 503 N.E.2d 88. In this case, since Ms. Rodriguez was not prepared to authenticate the tape, it was incumbent upon Stapleton to meet his burden in some other way. He did not do so. His attorney simply proposed to have the jury make a voice comparison. While this may be a permissible way of establishing identity in some cases, *see United States v. Sliker,* 751 F.2d 477, 499–500 (2d Cir.1984) (holding that jury could compare voice on tape with that of witness on the stand), "identity and authenticity are separate facets of the required foundation, *both* of which must be established," *People v. Ely,* 68 N.Y.2d at 528, 510 N.Y.S.2d at 537, 503 N.E.2d 88 (emphasis added). In *Ely,* a defendant admitted that the voice on a tape was hers, nevertheless, the Court of Appeals ruled that more was required to receive the tape since the circumstances raised broader questions about its fairness and accuracy.

***9** In Stapleton's case, there were similar reasons to question authenticity. For example, the defense conceded that the conversation had not been recorded continuously. At the pre-trial hearing, petitioner testified that he had periodically stopped and re-started the tape recorder whenever he perceived there to be noisy distractions in the vicinity of his meeting with Ms. Rodriguez. How he managed these maneuvers without alerting Ms. Rodriguez was never explained, much less what was said during the parts of the conversation that were thus not preserved on tape. Similarly perplexing was the fact that the recording apparently begins with an introduction by petitioner's wife outlining what would follow. Confronted with such curious circumstances, the trial court acted well within its discretion in refusing to receive the tape recording in evidence without proper identification. The ruling did not deny petitioner due process of law.

Stapleton further complains that the trial court impermissibly limited his attorney's ability to cross-examine Ms. Stapleton about her sexual relations with other men. In fact, New York's Rape Shield Law gives a trial judge broad discretion to limit such examination when the evidence would be more distracting than probative. *See* N.Y.Crim. Proc. Law § 60.42. The Supreme Court has ruled that such shield laws do not, on their face, violate a defendant's right to confront witnesses or present a defense, *see Michigan v. Lucas,* 500 U.S. 145, 151–52, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991), and the Second Circuit has reached the same conclusion in rejecting a constitutional challenge to the New York statute, *see Agard v. Portuondo,* 117 F.3d 696, 702–03 (2d Cir.1997), *rev'd on other grounds* 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

In any event, Stapleton was hardly prejudiced by the rulings. Even without the tape recording and even with the limitations placed on the cross-examination of Ms. Rodriguez, the defense took every opportunity to elicit from other witnesses suggestions that Ms. Rodriguez was purportedly involved with many other men both in the Myrtle Avenue apartment and elsewhere.

After carefully reviewing the entire record, the court is satisfied that neither the exclusion of the tape nor any limitations on the cross-examination of Ms. Rodriguez denied petitioner his due process right to present his defense nor his right to confront witnesses.

V. *Denial of Public Trial*

Stapleton submits that his conviction was obtained in violation of his Sixth Amendment right to a public trial. *See* *Duncan v. Louisiana,* 391 U.S. 145, 148 & n. 10, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (holding that Fourteenth Amendment extends Sixth Amendment right to public trials to state proceedings). He complains that the courtroom was closed during voir dire and the jury charge, thereby preventing family and friends from attending those portions of his trial.

Both a criminal defendant and the public at large have a strong interest in open trials. Such proceedings can "improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public the opportunity to observe the judicial system." *Gannett Co. v. DePasquale,* 443 U.S. 368, 383, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). Nevertheless, the right to a public trial is not absolute. The Supreme Court has specifically ruled that closure is constitutionally permissible, even over defense objection, when certain conditions are satisfied. *See* *Waller v. Georgia,* 467 U.S. 39, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) ((1) the party seeking closure must advance an overriding interest that is likely to be prejudiced by open proceedings, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closure, and (4) adequate factual findings must support the closure); *accord* *English v. Artuz,* 164 F.3d 105, 108 (2d Cir.1998); *Ayala v. Speckard,* 131 F.3d 62, 69 (2d Cir.1997) (en banc).

***10** Further, a defendant can waive his right to a public trial. Indeed, the right can be waived by failing to object when closure is apparent. *See* *Levine v. United States,* 362 U.S. 610, 619–20, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960) (rejecting challenge to contempt adjudication made in closed proceeding where defendant had not requested that courtroom be opened to the public); *Martineau v. Perrin,* 601 F.2d 1196, 1198–1200 (1st Cir.1979) (defendant who failed to object when he realized courtroom had been inadvertently locked during trial thereby waived right to public trial); *Vineski v. Scully,* 1993 U . S. Dist. LEXIS 930, at * 14 (S.D.N.Y. Jan. 28, 1993) (defendant who failed to object to closure of suppression hearing waived right to public proceeding).

In this case, the record reveals that Stapleton plainly waived his right to have the courtroom open during the jury charge.

> THE COURT: Do you consent to closing the courtroom during the charge?[5]

5 What is not clear from the record is whether the court proposed to exclude all members of the public during the charge, or whether, as is more common, it allowed public attendance provided persons arrived before the court began its instructions. Many judges lock their courtrooms once they begin to charge a jury to avoid the distractions caused by persons entering and exiting at will.

> MR. KRINSKY [Defense counsel]: Whatever you want.
>
> THE COURT: I am asking for your consent.
>
> MR. KRINSKY: I have no objection... I explained it to Mr. Stapleton through the Court interpreter. There's no problem. He consents to having it closed.

Trial Trans. at 708–09.[6] This part of his Sixth Amendment claim is patently without merit.

6 The trial transcript supplied to this court is consecutively numbered through page 915. Thereafter, for proceedings occurring on June 4, 1991, the page numbering inexplicably reverts to 708. The cited colloquy is from pp. 708–09 of that day's transcript.

As to his complaint about closed voir dire proceedings, the court notes that Stapleton adduces no evidence to support this claim. There is no transcript of these proceedings, a factor that does not weigh in petitioner's favor since trial counsel could have requested a court stenographer to record the voir dire or any part thereof if he wished to preserve for future review any objection to how it was conducted. *See* N.Y. Jud. Law § 295 (McKinney 1983). Further prompting skepticism about the bona fides of Stapleton's claim is the fact that he did not complain about a closed voir dire in his pro se brief on direct appeal nor in

his first § 440 motion, nor in his coram nobis petition. It was only in his second § 440 motion, filed in 1997, some six years after his conviction, that Stapleton asserted that "the courtroom was constantly closed" during voir dire. This conclusory claim is not enough to warrant habeas review.

Even if Stapleton could establish that (1) the courtroom was closed during voir dire, (2) he did object to this procedure, and (3) the court nevertheless ordered closure without considering the factors identified in *Waller,* he would not automatically be entitled to habeas corpus relief. As the Second Circuit recognized in *Brown v. Kuhlmann,* 142 F.3d 529, 544 (2d Cir.1998), some closures, even if erroneous, are not so substantial as "to undermine the values furthered by the public trial guarantee." In *Brown,* the trial judge excluded the public from the courtroom during the testimony of an undercover officer. The Court of Appeals assumed that the closure was unwarranted. Nevertheless, it ruled that a new trial was a disproportionate remedy for the error. *Id.* at 541, 544. The Court explained:

> ***11** If the remedy of a new trial without a showing of prejudice is intended to deter unjustified courtroom closures, then the necessity for that remedy should depend on the degree to which it "could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny." *Levine [v. United States*], 362 U.S. at 619.

Id. at 541. In Stapleton's case, petitioner alleges no prejudice from the alleged voir dire closure. Certainly, he has never challenged the fairness of the jury selection process in any proceeding. Neither does he assert that the state trial judge's purpose was to enforce secrecy to be free of the safeguards of public scrutiny. To the contrary, he states that the court closed the voir dire because of the sexual nature of the charged offense. Whether this was or was not warranted cannot be determined in the absence of any transcript, but even assuming that the courtroom should not have been closed, the circumstances of this case, like those in *Brown v. Kuhlmann* simply do not call for the extraordinary remedy of a new trial.

VI. *Challenge to Jury Instructions*

Stapleton contends that the trial judge's instruction as to the "forcible compulsion" element of the rape and sodomy charges improperly shifted the burden of proof onto the defense.

The Due Process Clause provides that a defendant in a state criminal case cannot be convicted unless the prosecution "persuade[s] the factfinder 'beyond a reasonable doubt' of the facts necessary to establish" the elements of the charged offense. *Sullivan v. Louisiana,* 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "A jury instruction that permits conviction on a lesser standard—by shifting the burden of proof from the prosecution to the defendant ...—is constitutionally deficient." *Vargas v. Keane,* 86 F.3d 1273, 1276 (2d Cir.1996). In Stapleton's case, there was no impermissible shifting of the burden of proof. Indeed there was no error whatsoever in the forcible compulsion charge.

The trial judge instructed the jury that "forcible compulsion means physical force *or* a threat expressed or implied that places a person in fear of immediate death or physical injury to herself." Trial Tr. at 810–11, 813 (emphasis added). This charge was entirely consistent with New York law. *See* N.Y. Penal Law § 130.00(8) (McKinney 1998) (defining "forcible compulsion" as "either: a. use of physical force; or b. a threat, express or implied, which places a person in fear of immediate death or physical injury..."); *see also* CJI(N.Y.)2d 130.35(1) at 398–402 (1996) (state pattern jury instructions).

Stapleton nevertheless submits that the charge was defective because it allowed the jury to convict him on proof of either actual force *or* the threat of force. In support, he cites *People v. Grega,* 132 A.D.2d 749, 517 N.Y.S.2d 105 (3d Dep't 1987). That case is totally inapposite. Its concern was an impermissible variance between the indictment and the proof at trial. In *Grega,* the indictment for rape and sodomy specifically alleged forcible compulsion only by use of physical force. The Third Department ruled that where an indictment specifically limits the forcible compulsion element to one theory, i.e., use of physical force, it was error to instruct the jury that the element could be satisfied in some other way, i.e., through threats. *See id.* at 749, 517 N.Y.S.2d at 106 (quoting Art. I, Sect. 6, of New York State Constitution: "no person shall be held to answer for a capital or otherwise infamous crime ... unless on indictment of a grand jury").

***12** The indictment against Stapleton is readily distinguishable from that in *Grega.* It alleged forcible

compulsion generally, without limiting the prosecution's theory either to the use of force or the threat of force. Neither New York law nor the federal due process clause prohibits alternative means of proving compulsion where, as here, no single method is pleaded in the indictment. *See People v. Aybinder,* 215 A.D.2d 181, 182, 626 N.Y.S.2d 150, 151 (1st Dep't 1995) (upholding court's decision to charge jury that forcible compulsion could be proved by evidence of either physical force or threat of force where "neither the indictment, motion papers nor the prosecutor's opening statement limited the prosecution" to any one theory); *People v. McChesney,* 160 A.D.2d 1045, 1046, 553 N.Y.S.2d 882, 883 (3d Dep't 1990) (holding that where bill of particulars gave defendant notice that prosecution would rely on both force and threat theories of forcible compulsion, jury was properly instructed that proof of either would satisfy the element). Indeed, in such circumstances, a general verdict of guilty will be upheld as long as there is sufficient evidence to support either theory. *See generally Griffin v. United States,* 502 U.S. 46, 56–57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) (holding that due process is not violated by general verdict simply because one of the possible bases of conviction was unsupported by sufficient evidence). In this case, the evidence amply supported both theories of forcible compulsion. Over the course of several hours, Ms. Rodriguez was subjected to both physical abuse and the threat of such abuse before she was raped and sodomized.

The court finds that Stapleton's challenge to the trial judge's instruction on forcible compulsion is without merit.

VII. *Prosecutorial Misconduct/Perjured Testimony*

Stapleton submits that his due process right to a fair trial was violated by the prosecutor's use of perjured testimony from Ms. Rodriguez. In fact, Stapleton adduces no evidence that any statement made by this witness on the stand was false. He simply advances reasons why she should not have been believed. For example, he argues that (1) Ms. Rodriguez testified that Stapleton gagged her, but could not remember when this occurred; (2) she testified that Stapleton doused her with coffee and alcohol in the hours she was held in the Myrtle Avenue basement, yet no police detective or examining doctor testified to smelling those substances; (3) she never testified that she attempted to kick petitioner or otherwise move unrestricted parts of her body during the charged rape and sodomy, undercutting the assertion of forcible compulsion.

These arguments were properly considered, and obviously rejected, by the jury, which is "exclusively responsible for determining a witness' credibility." *United States v. Strauss,* 999 F.2d 692, 696 (2d Cir.1993). "28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them ." *Marshall v. Lonberger,* 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). Instead, a federal court considering a petition for a writ of habeas corpus must view all disputed facts in the light most favorable to the government and draw all inferences, including those relating to witness credibility, in its favor. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Applying these principles to this case, it is apparent that petitioner's claim of prosecutorial misconduct through the use of perjured testimony must be rejected.

VIII. *Ineffective Assistance of Counsel*

***13** Stapleton asserts that both his retained trial counsel and his court appointed appellate counsel were constitutionally ineffective. A prisoner asserting a claim of ineffective assistance of counsel must demonstrate both (1) that counsel's performance was so unreasonable under prevailing professional norms that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and (2) that counsel's ineffectiveness prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. *Accord United States v. Trzaska,* 111 F.3d 1019, 1029 (2d Cir.1997).

When applied to a challenge to the representation afforded by appellate counsel, *Strickland* requires a prisoner to show that "counsel 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), and that 'there was a 'reasonable probability' that [the omitted claim] would have been successful before the [appellate court]," *id.* at 534 (quoting *Claudio v. Scully,* 982 F.2d 798, 803 (2d Cir.1992). In considering the first prong of this test, a reviewing court

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must bear in mind that appellate counsel is not required to raise every colorable claim of error, even if requested to do so by a client. *See Jones v. Barnes,* 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Furthermore, whether *Strickland* is applied to trial or appellate counsel, a reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound [legal] strategy." ' *Strickland v. Washington,* 466 U.S. at 689 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Paramount to the court's consideration of any claim of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [or appeal] cannot be relied on as having produced a just result." *Id.* at 686.

Stapleton's complaints about his counsel's performance on appeal do not satisfy the strict criteria of *Strickland.* Petitioner faults his Legal Aid attorney for not urging reversal on the grounds that (1) his conviction was secured by Ms. Rodriguez's perjury; and (2) the trial court had erred in preventing defense counsel from questioning Ms. Rodriguez about her sexual history. Petitioner was not prejudiced by the first omission, since he presented the perjury claim himself in his pro se brief to the Appellate Division. That court summarily rejected the point as without merit. For the reasons stated in Points IV and VII, *supra,* this court also finds no merit to either the perjury or cross-examination claims. Certainly, appellate counsel cannot be held constitutionally ineffective for failing to raise arguments that are plainly without merit. Indeed, one of the crucial tasks that must be performed by an effective appellate advocate is to isolate out of a voluminous trial record the few key issues most likely to persuade a reviewing court to reverse and not to bury these "in a verbal mound made up of strong and weak contentions." *Jones v. Barnes,* 463 U.S. at 753.

***14** As for trial counsel, Stapleton culls from the "verbal mound" of complaints presented in his § 440 motion the following defects in representation: (1) trial counsel's neglectful pre-trial investigation as evidenced by his failure (a) to retain expert witnesses to authenticate certain potential defense exhibits, and (b) to obtain certain discovery regarding Ms. Rodriguez's mental health; and (2) counsel's willingness to have petitioner's case languish for two years prior to trial.

These alleged omissions must be considered in the context of a record that reveals trial counsel to have been a forceful and determined advocate for his client. *See generally Kimmelman v. Morrison,* 477 U.S. 365, 386, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (court may consider counsel's overall performance in assessing a Sixth Amendment claim). In both pre-trial motions and throughout trial, counsel thoughtfully advanced legal challenges to certain incriminatory evidence relied on by the prosecution. He vigorously cross-examined prosecution witnesses, exposing motives to falsify, inconsistent statements, and inadequate investigative techniques. He presented a plausible alibi defense supported by the testimony of a number of witnesses. He delivered a cogent and carefully-constructed summation urging the jury to find that the proof presented was simply not enough to establish guilt beyond a reasonable doubt.

In light of this record, certain of Stapleton's Sixth Amendment challenges warrant little discussion. For example, although Stapleton faults trial counsel for failing to demand disclosure of a mental health professional consulted by Ms. Rodriguez, the record reveals that he made numerous requests for the witness's psychiatric records. In response, the prosecution turned over one doctor's report for in camera review, after which the trial judge ruled that nothing contained therein warranted disclosure to the defense. *See* Transcript, May 8, 1991, at 70. Apparently, Ms. Rodriguez had also consulted another psychiatrist or psychologist, but despite repeated questioning by the prosecutor, she could not recall the doctor's name. Defense counsel vigorously argued that the matter should be pursued further, but the court ruled that the government had fulfilled its obligation to investigate. *See id.* at 73. Trial counsel is not constitutionally ineffective simply because he fails to persuade the court on a given point.

Similarly without merit is petitioner's claim that counsel unreasonably allowed his case to languish. As Stapleton conceded in his § 440 motion, it was his own failure to pay his attorney that caused the delay in trial. Although he now argues that counsel should have used the time to develop helpful and exculpatory evidence, this claim, as the state court noted, is too vague to permit collateral review.

This leaves only the argument that counsel was ineffective in failing to procure expert witnesses to authenticate potential exhibits such as (1) the excluded tape recorded conversation discussed in Point IV, *supra;* (2) an unsigned vulgar poem written in Spanish and dated May 20, 1989, that Stapleton claims was written to him by Ms. Rodriguez; and (3) two letters purportedly written by Ms. Rodriguez's mother. Preliminarily, the court notes that Stapleton's argument is conclusory. Certainly, he comes forward with no affidavits or other admissible evidence indicating that any expert witness could have identified the voices or handwriting as he proposes. Absent such evidence it is difficult to imagine any prejudice. *See Strickland v. Washington,* 466 U.S. 693 (petitioner must show that attorney error "actually had an adverse effect on the defense"). Indeed, as to the tape recording, even assuming that a voice expert could identify the female speaker as Ms. Rodriguez, this court has already explained in Point IV, supra, why proof of identity would not have been enough by itself to authenticate the recording and have it received in evidence.

***15** As to the poem and letters, however, a closer question is presented as to whether petitioner would have benefitted from an expert identification of authorship. This is because these items do contain statements suggesting that Ms. Rodriguez intended falsely to accuse Stapleton of rape and assault. For example, the poem, which is dated "5/20/89," concludes with the statement: "You have a prior case and with my lies you're going to jail." The first letter from "Maria Mercano," dated "8/5/89," states in part: "Cesar, ... Lizette [sic] accused you falsely. But you deserve it for having spurned her for your wife and for making her suffer so much. Now it is her turn and ours to take revenge." The second letter, dated "12/17/89" and also signed "Maria Mercano," states more ambiguously: "We promise you something of Lizzette, she is under our control, now you have your promise." Plainly, it was part of the defense strategy to suggest that Ms. Rodriguez was falsely accusing Stapleton of the crimes charged. Toward this end, counsel offered testimony from Iris Stapleton and Joseph Castillo that they had heard her threaten to report Stapleton to the police if he ever ended their affair. Indeed, there is no question that trial counsel appreciated the significance of the poem and letters to bolstering this defense since he asked Ms. Rodriguez about them on cross-examination. With respect to the poem, he took particular pains to mark it for identification and to quote from it in an effort both to unnerve the witness and impeach her credibility before the jury.

> Q: Miss Rodriguez, did you write any poem or letter to Mr. Rodriguez—to Mr. Stapleton?
>
> A: Never.
>
> ...
>
> Q: Never?
>
> A: I am not—I can't write Spanish very well.
>
> Q: Do you write in Spanish?
>
> A: I don't write in Spanish very well and I never wrote any poems to him, anyway, never.
>
> Q: You never in any form, be it a poem or in any written form, whatever you want to call it, did you ever write to him in which you told him in written form that, "With my lies you will go to jail"?
>
> A: Never.
>
> MR. KRINSKY (defense counsel): Perhaps I could have this marked?
>
> ....
>
> THE COURT: Yes, you may show it to the witness.
>
> THE WITNESS: That's definitely not my handwriting.
>
> ...
>
> Q: Is that a letter or poem that was written by you to Cesar Stapleton on May 20, 1989?
>
> A. No. Definitely not.
>
> ...
>
> Q: It's not your handwriting?
>
> A: Not my handwriting?
>
> Q: And it wasn't written by you?
>
> A: Not at all.
>
> Q: Had you ever seen that before?
>
> A: No, I haven't.

Tr. Trans. at 342–45. What counsel did not do, however, was seek to offer the poem in evidence through a handwriting expert. Neither did he seek to call Ms. Rodriguez's mother or any handwriting expert with respect to the letters. As already noted, although petitioner cites these omissions in support of his Sixth Amendment claim, he fails to demonstrate that any expert, much less the rape victim's mother, would have testified favorably to him. Nevertheless, this court is of the view that this issue is better resolved after further inquiry of trial counsel as to his reasons for not pursuing the question of who penned the documents.

***16** The court remains mindful that the decision whether or not to call an expert witness generally falls within the wide sphere of strategic choices for which counsel will not be second-guessed on habeas review. *See* *United States v. Kirsh,* 54 F.3d 1062, 1072 (2d Cir.1995) (rejecting direct appeal challenge to trial counsel's failure to call a fingerprint expert); *see generally* *United States v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir.1987) ("The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial"). While in some circumstances, an attorney's failure to arrange for an independent expert examination of critical evidence may be so objectively unreasonable as to violate the Sixth Amendment, *see generally* *Sims v. Livesay,* 970 F.2d 1575, 1578–79 (6th Cir.1992) (holding that in a homicide case where defendant claimed the victim committed suicide, it was constitutionally ineffective for counsel to fail to have an independent expert examine a quilt containing three gunshot holes), that is not so obviously this case. The poem and letters at issue were, after all, exhibits conveniently produced by the petitioner under circumstances that might well have given an experienced defense attorney pause about their authenticity.

Furthermore, in this case it appears that trial counsel's effort to impeach Ms. Rodriguez's credibility with extrinsic evidence of her willingness to lie was rejected by the trial court. Specifically, defense counsel had established through Ms. Rodriguez and Mrs. Stapleton that Ms. Rodriguez had called the Stapleton home at approximately 2:30 A.M. in January 1991. Counsel sought to question Mrs. Stapleton about the conversation, proferring that her testimony, not unlike the poem and letters, would show Ms. Rodriguez's "bias to fabricate these charges against this defendant ." Tr. Trans. at 794. Mrs. Stapleton would testify that she heard Ms. Rodriguez tell petitioner that "she still loves him, the only reason she was doing this was she didn't want him to be with any other woman, and that's the reason why she caused all this trouble." *Id.* Generally, New York courts will permit a witness to be impeached with proof of prior statements that establish a motive to lie or a willingness to suborn perjury. *See* *United States v. Haggett,* 438 F.2d 396, 399–400 (2d Cir.1970) (citing various New York cases and treatises on evidence in holding that prosecution witness could be impeached with testimony from other persons whom he encouraged to commit perjury and to whom he stated that he was "out to get" defendant and would do so by whatever means necessary). Nevertheless, in this case, the trial judge sustained objection to the conversation: "I am exercising my discretion. I am not permitting it." Tr. Trans. at 797. Whether, in light of this ruling, which Stapleton has never challenged in the state courts, petitioner can complain about his counsel's failure to offer other extrinsic evidence of bias, is questionable. Rather than speculate, however, the court will conduct a hearing to ascertain the reason for counsel's choice.

Conclusion

***17** For the reasons stated, the court rejects as without merit all of Caesar Stapleton's federal challenges to his state conviction with the exception of that part of his Sixth Amendment claim faulting trial counsel for not securing expert testimony to identify handwriting on certain documents. Since resolution of this claim may benefit from further development of the record, the court directs the clerk of the court to appoint counsel for petitioner, after which an evidentiary hearing will be scheduled.

SO ORDERED.

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Kent A. JAMES, a/k/a "Gondalini Ali," Movant,
v.
UNITED STATES of America, Respondent.

No. 00 CIV.8818LAKGWG, S297CR185.
|
May 20, 2002.

Attorneys and Law Firms

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Helen V. Cantwell, Assistant United States Attorney, New York.

REPORT AND RECOMMENDATION

GORENSTEIN, Magistrate J.

***1** Kent A. James, a/k/a "Gondalini Ali," proceeding *pro se,* has moved under 28 U.S.C. § 2255 to vacate his judgment of conviction. For the reasons stated below, James' motion should be denied.

I. *BACKGROUND*

A. *Proceedings Before the Trial Court*

On September 8, 1997, a nine-count indictment was filed against James and his co-defendant Johnny Davis, who is also James' brother. *See* Indictment (S2) 97 Cr. 185(SS). Because Davis pled guilty prior to trial, the indictment was subsequently reduced and renumbered to five counts. *See* Petition for Writ of Habeas Corpus Pursuant to 28 U.S. § 2255 dated October 31, 2000 (hereinafter, "Motion to Vacate"), Supplemental Exhibit 2. Pursuant to this superseding indictment, James was charged with the following crimes:

(1) Count One: Manufacturing firearms, namely hand grenades and other bombs in violation of 26 U.S.C. §§ 5822, 5845(a), (f) & (i) & 5861(f);

(2) Count Two: Engaging in the business of manufacturing firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A);

(3) Count Three: Possession of a firearm, namely a Norinco, 7.62 caliber semi-automatic, by a prohibited person in violation of 18 U.S.C. § 922(g) and (2);

(4) Count Four: Possession of a non-registered firearm, namely a pipe bomb, in violation of 18 U.S.C. §§ 5845(a) & (f) & 5861(d); and

(5) Count Five: Possession of C–4 explosives by a prohibited person in violation of 18 U.S.C. § 842(i)(1) and (2).

See Supplemental Exhibit 2 to the Motion to Vacate (hereinafter, "Indictment").

James' trial before then-District Judge Sonia Sotomayor commenced on February 17, 1998 and ended on February 25, 1998. James was convicted by a jury of all five counts and was sentenced principally to a term of 365 months to be followed by three years of supervised release. *See* Judgment, dated August 21, 1998, at 3–4 (hereinafter "Judgment of Conviction"). James is currently incarcerated pursuant to this conviction.

B. *Evidence at Trial*

Viewed in the "light most favorable to the Government," *United States v. Desena,* 287 F.3d 170, 176 (2d Cir.2002), the evidence at trial demonstrated that from about 1991 until about 1997, James manufactured weapons and explosives, including home-made pipe bombs and grenades, for profit.

1. *Activities prior to September 8, 1992* [1]

1 Because of the applicable statute of limitations, the jury was instructed that it had to find that criminal conduct "occurred or continued" on or after September 8, 1992, for purposes of Counts One and Two of the Indictment. (Transcript of Trial ("Tr.") 759).

In brief, the evidence showed that in January 1991, James, a person identified as Jerome Tolden and certain other individuals murdered an individual who had several months earlier shot and wounded Tolden. (Tolden: Tr. 112–20). After the murder, Tolden began visiting James

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at his apartment two to three times a week. (Tolden: Tr. 121). Together, they and some other individuals robbed a drug dealer after disguising themselves as police officers. (Tolden: Tr. 121–23). Tolden saw James make two grenades and James taught Tolden how to make a pipe bomb. (Tolden: Tr. 125–26, 128). James' method of constructing pipe bombs involved laying gunpowder with a stem "across" the pipe. (Tolden: Tr. 129).

***2** On April 9, 1991, Tolden and others committed an armed robbery. (Tolden: Tr. 130–31). To prepare for the robbery, James made at least eight pipe bombs and gave two each to Tolden as well as to others. (Tolden: Tr. 130). The robbery netted the group $25,000 to $30,000 and after the robbery Tolden returned a pipe bomb to James. (Tolden: Tr. 133). Later, two other members of this group were arrested: one had an unexploded pipe bomb (which was admitted at trial) (Tr. 169). The other exploded a pipe bomb during a residential burglary. The exploded fragments of this pipe-bomb were admitted at trial. (Tr. 170–71)

2. *Post–1992 Activities*

In 1993, James told Winston Phillips that he intended to provide "stuff" to one of the individuals with whom he had committed the 1991 murder. (Phillips: Tr. 190). Then, in 1994, James told Phillips that he owned a semi-automatic rifle and knew about guns. (Phillips: Tr. 181–83). James told Phillips he kept his "stuff" at his brother's house. (Phillips: Tr. 183). Later, James went with Phillips to his brother Johnny's apartment to "check on some stuff." (Phillips: Tr. 185). After the three of them went down to the basement, James went into an area of the basement by himself with a knapsack and returned carrying the same knapsack. (Phillips: Tr. 185–87).

A girlfriend of James's, Sonia Tillman, said that she saw James handling or removing weapons from his brother Johnny Davis' apartment sometime in 1994 or 1995. (Tillman: Tr. 297–99). Sometimes he took a black duffel bag with him. (Tillman: Tr. 304–05). When James needed to get into the basement of Davis' apartment building, James would obtain the key from Davis. (Tillman: Tr. 303). In July 1995, Tillman broke up with James shortly before the birth of their daughter. (Tillman: Tr. 286–87). Tillman then found two bags in her apartment, one of which contained two guns, a silencer, and two ammunition clips, and the other of which contained Islamic books, books on how to make bombs and "some sort of explosives" that were tied with wire. (Tillman: Tr. 289–91). When Tillman asked about these items, James told her "[t]he less you know the better for you ." (Tillman: Tr. 293). A photograph was introduced a trial with James holding an SKS Norinco 7.62 caliber rifle, which was identified as having been taken while Tillman was pregnant with James' daughter. (Tillman: Tr. 307–09).

In 1996, a paid confidential informant pretended to be interested in buying explosives from James. (Tr. 369). In taped conversations, James agreed to supply bombs and grenades to the informant and repeatedly acknowledged that he made bombs and grenades. *See* Supplemental Appendix, *United States v. Johnny Davis,* 98–1506 (2d Cir. filed January 26, 1999) ("Supplemental Appellate Appendix") (SA–9 to SA–84), at SA–13 ("I make homemade grenades"); *see also id.* at 12, 19–21, 47.

On February 12, 1997, the FBI executed a search warrant at Davis' apartment. An agent recovered multiple weapons as well as an operable pipe bomb and ammunition from the apartment itself. (Trahon: Tr. 33, 42–44). From the basement, they recovered a green army duffel bag in a locked room in the basement of the building that contained C–4 explosives, white plastic PVC pipe, hand grenade bodies, a military electric blasting cap, M–60 igniters, a King disposable cigarette lighter, explosive powder, two thermos containers packed with a mixture of two types of gunpowder and other weapons. (Doyle: Tr. 63–65).

***3** After learning of the FBI's search, James fled to South Carolina. (*See* Phillips: Tr. 196). He told a woman he was seeing there that the bombs in Davis' apartment belonged to him. (Epps: Tr. 338–39; 341–42). James also told her that the FBI was looking for him and he was planning to leave the country. (Epps: Tr. 339). When arrested in South Carolina in April 1997, James was in possession of a King cigarette lighter—the same brand of lighter found in the duffel bag in Davis' basement. (Tr. 361).

Expert testimony was offered to show numerous similarities between the unexploded bomb recovered in the apartment and the unexploded bomb and bomb fragments that were recovered in April 1991. (Kelly: Tr. 84–86, 92–96; Heckman: Tr. 240–54). In addition, the two unexploded pipe bombs had transverse fusing, which occurs where the fuse is "injected from the side,"

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something the expert had never before seen. (Heckman: Tr. 235, 243, 251–52).

C. *Pre–Trial and Post–Trial Motions*

1. *Pre–Trial Motion*

Prior to trial, James moved (a) to preclude the Government from introducing his brother and co-defendant Davis's statements at a joint trial, or in the alternative, to grant a severance pursuant to Fed.R.Crim.P. 14; (b) to require the Government to disclose the identities of all confidential informants; (c) to require the Government to provide a Bill of Particulars pursuant to Fed.R.Crim.P. 7(f); and (d) to compel the Government to disclose which, if any, criminal convictions or prior "bad acts" it would seek to introduce at trial. *See* Pre–Trial Motion, filed August 25, 1997 ("Pre–Trial Motion"), at 9–15. At a hearing on October 14, 1997, the trial court denied James's motion as to his request for severance, disclosure of the identities of the Government's informants and for a Bill of Particulars. The Court directed the Government to provide more detail about any crimes or prior bad acts that it intended to introduce during its case-in-chief. *See* October 14, 1997 Transcript at 8.

On August 11, 1997, James' co-defendant, Davis, moved to suppress the physical evidence seized from his apartment on the ground that the application for the search warrant obtained by the FBI was based on false information furnished by a confidential informant. Davis sought a hearing on whether the Government had either knowingly or recklessly relied on the false information of the informant in seeking the warrant. He also sought a hearing on whether he had given consent to the FBI to search his basement. *See* Notice of Motion, dated August 11, 1997 (describing grounds for Davis's suppression motion). James did not join in this suppression motion. In response to this motion, the Government conceded that a confidential informant had supplied the FBI with false information, which was incorporated into the search warrant. The Government maintained, however, that it had relied on the informant in good faith and that the warrant authorizing the search was valid. The Government also argued that Davis had given his consent to the search of the basement. *See* Pre–Trial Conference Transcript, dated October 14, 1997, at 18. The District Court ordered that a hearing be held preliminarily to determine whether a hearing was warranted under *Franks v. Delaware,* 438 U.S. 154 (1978), and whether Davis had consented to the search. *Id.* James was present at this hearing with his counsel. The Court never decided the motion, however, because Davis and the Government reached a plea agreement.

2. *Motion to Dismiss the Indictment*

***4** On February 11, 1998, shortly before James' trial commenced, James' trial counsel made an oral application to dismiss the Indictment. February 11, 1998 Transcript at 2–9. Trial counsel argued dismissal was warranted because: (a) the prosecution's presentation to the grand jury improperly relied on double and triple hearsay, *id.* at 2; (b) there was no probable cause for the search warrant to have been issued and the grand jury was not adequately apprised of this lack of probable cause, *id.* at 2–3, 6–7; (c) Special Agent Trahon, a federal agent who had testified before the grand jury, had testified on matters about which he was unqualified and had also testified in an unduly inflammatory manner, *id.* at 8; and (d) the Government misled the grand jury into believing that any witness could be located and presented in person to the grand jury, even though the Government knew that one witness, a paid informant who had tape recorded conversations with James in 1996, could not be located. *Id.* at 8–9. The trial court stated that it would not rule on this motion yet and that it needed "motion papers," *id.* at 4, and additional time to "read the grand jury minutes and the cases [defense counsel] is citing." *Id* . at 9. Apparently, James's trial counsel never submitted a written motion to dismiss the Indictment. The Indictment was not dismissed and James proceeded to trial on February 17, 1998. He was convicted on all counts.

3. *The Post–Trial Motion*

Subsequent to trial, James obtained new appointed counsel. The new counsel moved for a judgment of acquittal on the grounds that: (a) the evidence seized from James's brother and co-defendant Davis's basement was improperly admitted at trial; (b) that prior bad act evidence was improperly admitted against James at trial and was unduly prejudicial; (c) the Government's misstatements to the trial court and to the jury in regard to criminal acts that allegedly occurred in 1991 unduly prejudiced James; and (d) that James's trial counsel was ineffective. *See* Post–Trial Motion for Judgment of Acquittal, filed on April 15, 1998 ("Post–Trial Motion"), at 7–32. The specific grounds for the claim that James's

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trial counsel had been ineffective were that counsel had inadequately objected to the admissibility of the materials seized from Davis' apartment and basement; failed to file a suppression motion until the first day of jury selection; failed to seek suppression aggressively; failed to move for a mistrial when the Government referred to 1991 as within the time frame for the jury's consideration of the first two counts of the indictment; and failed to ask for a corrective charge when the indictment and a portion of the transcript was sent to the jury. *Id.* at 30–31. Following sentencing, the trial court denied the Post–Trial Motion in its entirety. Transcript of Sentencing, August 19, 1998 at 28–30.

D. *James' Appeal*

James filed a Notice of Appeal from the Judgment of Conviction on August 25, 1998. On direct appeal, James continued to be represented by the newly appointed attorney who began representing James subsequent to trial. In support of his appeal, James made the following arguments to the Second Circuit: (1) the District Court improperly admitted extrinsic evidence of James's criminal activities in 1991; (2) there was insufficient evidence of criminal conduct within the statutory limitations period to support a conviction on Counts One and Two and such counts were also duplicitous; (3) the seizure of evidence from the co-defendant's apartment violated the Fourth Amendment; (4) trial counsel was ineffective; and (5) the District Court erred in sentencing James. *See* Brief for Defendant Appellant, *United States v. Davis* (2d Cir. No. 98–1506 filed Nov. 23, 1998) ("Appellate Brief"), at 21–48. With respect to the ineffective assistance claim, the specific grounds raised were that (1) to the extent that trial counsel agreed that James lacked standing to challenge the search of Davis' apartment, that waiver constituted ineffective assistance of counsel; (2) counsel failed to identify James' two-year incarceration (from April 1991 until May 1993) as fatal to the Government's theory that the 1991 acts were part of a "continuing offense"; (3) counsel failed to request a clearer charge on the limits of the jury's consideration of extrinsic act evidence; (4) counsel failed to move for a mis-trial when the Government referred to 1991 as being within the operative time frame for the first two counts of the indictment; and (5) counsel failed to object to the jury charge or ask for a correction when the indictment and transcripts were sent to the jury. *Id.* at 41–44; *see also* Reply Brief for Defendant Appellant, filed November 23, 1998, in *United States v. Davis* (2d Cir. No. 98–1506) ("Reply Appellate Brief"), at 20–21.

***5** The Second Circuit rejected all of James arguments. *See United States v. Davis,* 181 F.3d 83 (Table), 1999 WL 316804 (2d Cir. May 14, 1999) (reproduced as Exhibit 30 to Motion to Vacate).

First, the Court ruled that the district court properly admitted extrinsic evidence of James' involvement in criminal activities in 1991 pursuant to Fed.R.Evid. 404(b) because such evidence was relevant to show the origin of the relationship between James and a cooperating witness, to demonstrate the purposes for which James manufactured explosives and to identify James as the maker of the explosives that were seized. Such evidence was also relevant to the charge that he engaged in the business of manufacturing firearms. The Court found that the district court had weighed the probative value of this information against its potential prejudicial effect and had concluded that the evidence was not unduly prejudicial. Accordingly, the Second Circuit declined to "second guess" the district court's determination. *Davis,* 1999 WL 316804, at *1.

Second, the Court found that there was sufficient evidence in the form of the physical evidence seized at Davis's apartment, the tape recordings of James' own statements and testimony from witnesses to sustain James's conviction on Counts One and Two of the Indictment. The Court declined to review James' duplicitous indictment claim as it was not raised prior to trial. *Id.* at *2.

Third, the Court held that James forfeited his claim that the evidence seized from Davis' premises should be suppressed because James failed to raise any suppression arguments with the district court. Further, the Court found that James lacked standing under the Fourth Amendment to contest the search and so his failure to raise the issue to the trial court was not the result of a lapse by his trial counsel. *Id.*

Fourth, the Court found that James' trial counsel was not constitutionally deficient because it found "no defect in any of the charges to the jury that James cites, or in the admission of any evidence." *Id.* at *3.

Lastly, the Court affirmed James' sentence because the upward adjustments that were made to his sentence did not reflect an abuse of discretion. The Court concluded by stating that it had considered all of James's other

arguments and found "no error in his conviction or sentence." *Id.*

James filed a petition for writ of certiorari to the Supreme Court of the United States. Certiorari was denied on November 1, 1999.

E. *The Instant § 2255 Motion*

James' Motion to Vacate is dated October 31, 2000 and was received by the Pro Se Office in the Southern District of New York on November 6, 2000. He supplemented this motion with an additional submission on December 20, 2000. *See* Supplemental Motion to Original Pleading 28 U.S.C. § 2255, dated December 20, 2000 (hereinafter "Sup. Motion to Vacate No. 1"). On January 30, 2001, James submitted another supplement to his Motion to Vacate. *See* Supplemental Motion to Original Pleading 28 U.S.C. § 2255, dated January 30, 2001 (hereinafter "Sup. Motion to Vacate No.2"). The Government responded with a memorandum of law on May 8, 2001, and James filed reply papers on June 2, 2001.

F. *Claims Raised By James in the Motion to Vacate*

***6** James raises numerous claims in the papers submitted in support of his initial Motion to Vacate. In many instances, his 111–page motion continually restates the same arguments regarding the conduct of the trial under multiple headings. The issues, however, have been broadly grouped by James in the following categories and they fairly reflect the arguments that he makes in his motion: [2]

[2] In some instances, James uses letters to subdivide issues within a claim, sometimes numbers, and sometimes nothing at all. To ease the identification of James' claims, the Court lists the claims according to James' system wherever possible, but in other instances has added subdivisions that do not appear in James' submission.

Claim I: Prosecutorial Misconduct Before the Grand Jury: James makes the following claims of alleged misconduct in the grand jury: (a) the Government improperly introduced hearsay statements, Motion to Vacate at 1–6; (b) the Government improperly introduced custodial statements of James' co-defendant, *id.* at 7–8; (c) the prosecutor failed to give a probable cause instruction with regard to constructive versus actual possession, *id.* at 8–9; (d) the Government improperly introduced evidence of the 1996 investigation into one particular grand jury hearing, failed to inform the Grand Jury that "no crime occurred" and failed to inform the grand jurors that the informant from the 1996 investigation was unavailable to testify, *id.* at 9–15; (e) the Government "suppress[ed] ... exculpatory evidence that nigates [sic] guilt, thus demonstrating actual innocence of crimes alleged in Counts One and Two of the Indictment," *id.* at 15–18; (f) the Government "misle[d] the Grand Jury" and "impair[ed] the Grand Jury's independence" by providing false evidence of a continuing offense, when a continuing offense was factually impossible, *id.* at 18–20; (g) a non-expert witness caused "calculated prejudice and increased indignation" through improper "personal and subjective" testimony, *id.* at 20–22; (h), (i), & (j) The Government introduced the perjurious testimony of Agent Trahon through another witness, who read Agent Trahon's prior testimony, *id.* at 23–33; (k) The Government introduced the perjurious testimony of Epps, *id* . at 33–40.

Claim II: That James Is Actually Innocent of the Conduct Charged in Counts One and Two. On this claim, James makes the following arguments: (1) there was insufficient evidence that the crimes charged in Counts One and Two occurred within the relevant statute of limitations period, *id.* at 40–47; (2) it was factually impossible and unconstitutional for the offenses charged in Counts One and Two to be considered as continuing offenses, *id.* at 47–54; and (3) James was the victim of vindictive prosecution, *id.* at 54–61.

Claim III: Ineffective Assistance of Counsel. James alleges that his trial counsel was ineffective in the following ways: (1) trial counsel court failed to file a written application to dismiss the Indictment, *id.* at 61–63; (2) trial counsel did not properly represent James before the grand jury, including failing to examine the grand jury minutes, failing to alert the trial court in defects in the grand jury presentation and failing to alert the trial court that certain witnesses had perjured themselves, *id.* at 63–74; (3) trial counsel (a) failed to move to preclude the use of the informant's taped conversations with James both because the informant was unavailable and because he was a co-conspirator under *Bruton v. United States,* 391 U.S. 123 (1968); (b) "obstructed [James'] right to an alibi offense" and denied James' Sixth Amendment right by failing to call witnesses in support of this defense; (c) failed to alert the trial court and the prosecution to the existence of an affidavit from James' brother and co-defendant,

Johnny Davis, which "makes it clear" that James was not responsible for the contraband found at Davis's apartment and therefore supports James' "actual innocence" and "vindictive prosecution" claims; and (d) failed to seek "the professional assistance of an explosives expert." *Id.* at 74–83.

***7** *Claim IV. Abuse of Discretion.* The trial judge abused her discretion by (a) admitting the tape recordings of James' conversation with the informant because, among other reasons, James would never have agreed to make bombs if the informant were not supplying the money; and (b) denying the defense request for a bill of particulars. *Id.* at 89–93.

Claim V. "Fatal Variance". The proof at trial improperly varied from the charges in the indictment because the government was not able to prove that the offenses charged in counts One and Two of the Indictment took place within the relevant statute of limitations. *Id.* at 93–96.

Claim VI. "Constructive Amendment of the Indictment " The Government constructively amended the Indictment because it failed to prove the actual crime or theory charged in the Indictment. *Id.* at 96–99.

Claim VII. Duplicitous Indictment. Counts One and Two of the Indictment were duplicitous. *Id.* at 99–105.

Claim VIII. Apprendi Issue. James also argues the trial court improperly sentenced James in violation of the rule set forth in *Apprendi v. New Jersey,* 530 U.S. 466 (2000); *id.* at 105–109. In addition, he asserts the Indictment failed to include a penalty provision that would give James notice of his potential punishment. *See* Reply to Government's Response Pleading Pursuant to 28 U.S.C. § 2255, dated June 2, 2001 (hereinafter "Reply Mem."), at re-numbered pages "1—6" following page 24. James asked that this latter claim be examined "within the peramiters [sic] of" the *Apprendi* issue. *Id.* at 3.

G. *Supplemental Motions.*

Following submission of the lengthy Motion to Vacate, James submitted Sup. Motion to Vacate No. 1, in which he states:

> The claim herein at this instance represents that the appeal attorney appointed by the court was ineffective for failing to raise in direct appeal numerous issues as to trial attorney Mr. Howard Leader's, ineffectiveness in representation during pretrial and actual trial (all such issues and there details are embodied in the § 2255 petition). These issues includes the fact that the firm of Shanley & Fisher [the new appellate counsel] had failed to raise in direct appeal all the issues of prosecutorial misconduct (grand jury and the actual trial) at issue number one in the petition pages 1 through 40(A) through (K).
>
> Unconstitutional fatal variance issue number five, in petition at pages 93 through 96.

See Sup. Motion to Vacate No. 1 at 1–2 (errors in original text). While James points in the second sentence of the above paragraph to specific issues that are "include[d]" in his claim, his statement may be interpreted as indicating that he wishes to assert ineffective assistance of appellate counsel with respect to all the issues raised in his original Motion to Vacate.

James filed another document seeking to supplement his Motion to Vacate in which he makes various arguments in support of his claim that there was an "unconstitutional constructive amendment of the indictment," Sup. Motion to Vacate No.2 at 1–2,—a claim that is based on arguments raised in the original Motion to Vacate as well as the argument that the judge's charge to the jury did not precisely track language in the indictment. *Id.* at 3–7.

***8** Finally, in his reply papers, James seeks an evidentiary hearing. Reply Mem. at 2–3.

II. *DISCUSSION*

A. *Law Governing Motions under § 2255*

28 U.S.C. § 2255 provides that:

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to

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> collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Relief under § 2255 is available only "for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Graziano v. United States,* 83 F.3d 587, 590 (2d Cir.1996) (internal quotation marks and citations omitted).

1. *Timeliness of James' Motion to Vacate*

Except in circumstances not applicable here, a section 2255 motion must be filed within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. The Government argues that James's Motion to Vacate is untimely, *see* Memorandum of Law in Opposition to Petition of Kent A. James, a/k/a "Gondalini Ali," Pursuant to 28 U.S.C. § 2255, dated May 8, 2001, at 7 n. 3, on the ground that the petition was not received by the Pro Se Office until November 6, 2000.

James's time to file a § 2255 motion expired on November 1, 2000, a year after the Supreme Court denied James' petition for writ of certiorari on November 1, 1999. James' Motion to Vacate is dated Tuesday, October 31, 2000, as is his affidavit of service stating that the Motion to Vacate was served on the United States Attorney for the Southern District. It was stamped "received" by the Pro Se Office on Monday, November 6, 2000, and was filed on November 20, 2000. If the petition was presented for mailing to prison authorities on October 31, 2001, or even on November 1, 2001, it is timely under *Noble v. Kelly,* 246 F.3d 93, 97 (2d Cir.2001), *cert. denied,* 122 S.Ct. 147 (2001). The fact that it was received by the Pro Se Office from James' prison facility in South Carolina three business days after the last day for filing suggests that the petition must have been presented timely to prison officials for mailing. The Government has presented no evidence suggesting otherwise, even though they obviously have access to any mail log at the federal correctional institution where James was held. Accordingly, the Court assumes that the petition is timely. *See, e.g., Johnson v. Coombe,* 156 F.Supp.2d 273, 277 (S.D.N.Y.2001) (court will generally assume, absent evidence to the contrary, that petitioner gave his petition to prison officials for mailing on the date he signed the petition).

2. *Relationship Between a Section 2255 Motion and a Direct Appeal.*

***9** A § 2255 motion may not be used as a substitute for a direct appeal. *Bousley v. United States,* 523 U.S. 614, 621 (1998) ("Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.") (citations and internal quotation marks omitted); *accord United States v. Frady,* 456 U.S. 152, 165 (1982). Where a movant does not bring a claim on direct appeal that could have been raised on such an appeal, the movant is barred from raising that claim in a subsequent section 2255 proceeding unless he or she can establish both cause for the failure and actual prejudice resulting therefrom. *See, e.g., Amiel v. United States,* 209 F.3d 195, 198 (2d Cir.2000) (citing *Billy–Eko v. United States,* 8 F.3d 111, 113–14 (2d Cir.1993)); *United States v. Canady,* 126 F .3d 352, 359 (2d Cir.1997) (citing *Reed v. Farley,* 512 U.S. 339, 345 (1994)), *cert. denied,* 522 U.S. 1134 (1998); *Campino v. United States,* 968 F.2d 187, 189 (2d Cir.1992). The term "cause" means "something *external* to the petitioner, something that cannot be fairly attributed to him." *Coleman v. Thompson,* 501 U.S. 722, 753 (1991).

Under § 2255, not only are movants barred from raising arguments that could have been made on direct appeal, they are also precluded from using section 2255 to relitigate questions that actually were "raised and considered on direct appeal." *Riascos–Prado v. United States,* 66 F.3d 30, 33 (2d Cir.1995) (citation omitted). The only exception to this rule arises where there has been an intervening change in the law. *See, e.g., Underwood v. United States,* 15 F.3d 16, 18 (2d Cir.1993).

Here, all of James claims could have been raised on appeal, with the exception of Claim VIII, which argues that there has been a change in the law under *Apprendi* and which is discussed in section II.D below. Indeed, some of these claims were actually raised on appeal. *See* section I.D above. As a result, none of James' claims (other than the *Apprendi* claim) is eligible for review absent a showing of cause, prejudice or actual innocence.

B. *James' Claims of Ineffective Assistance of Trial Counsel*

Where a ground raised in a section 2255 motion is based on ineffective assistance of trial counsel, the rule requiring the ground to have been raised on appeal does not

apply because the ineffective assistance of counsel itself provides the "cause" for the failure to appeal the issue. *See, e.g., Bloomer v. United States,* 162 F.3d 187, 192 (2d Cir.1998); *Riascos–Prado,* 66 F.3d 30 at 34–35 (citing *Billy–Eko,* 8 F.3d at 115). The theory behind this rule is that an attorney may not be inclined to argue his or her own ineffectiveness on appeal, that the attorney may find it difficult to identify examples of his or her own ineffectiveness, and that resolution of such claims typically involves consideration of matters outside the record on appeal. *See, e.g., Billy–Eko,* 8 F.3d 111 at 114. Where these grounds do not apply, however, a defendant is obligated to raise ineffective assistance of counsel claims on direct appeal. *Id.* at 115. Thus, the Second Circuit has held that where there is new appellate counsel on direct appeal and the ineffective assistance claim is based solely on the record at trial, section 2255 relief is unavailable. *Id.; accord Bloomer,* 162 F.3d at 192.

***10** In James' case, all of his claims regarding ineffective assistance of trial counsel are based on the record that existed before the trial court. No new facts have been submitted with his petition. James also had new counsel on his appeal. For these reasons, the fact that there are ineffective assistance of trial counsel claims does not provide "cause" for failure to raise these claims on direct review of his conviction. Thus, none of his claims regarding the ineffective assistance of trial counsel are reviewable by this Court.

C. *James' Claims of Ineffective Assistance of Appellate Counsel*

In the supplemental petition, however, James asserts that "the appeal attorney appointed by the court was ineffective for failing to raise in direct appeal numerous issues as to trial attorney Mr. Howard Leader's, ineffectiveness in representation during pretrial and actual trial (all such issues and there details are embodied in the § 2255 petition)." Sup. Mot. to Vacate No. 1 at 1 (errors in original). James subsequently states that these issues "include [ ]" all issues identified in Claim I (none of which were articulated as ineffective assistance claims) and Claim V. *Id.* at 1–2. Because James makes reference to "all such issues ... in the § 2255 petition," his petition may be broadly construed to argue that appellate counsel was ineffective for failing to raise all of the claims James lists in his Motion to Vacate (presumably not including those that were actually raised). *See generally Haines v. Kerner,* 404 U.S. 519 (1972). Included among the claims that appellate counsel should have raised are James' complaints about his trial counsel's effectiveness. *See* Claim III, Motion to Vacate at 61–83.

The Second Circuit has described the law governing claims of ineffective assistance of appellate counsel as follows:

> To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must establish two elements: (1) that counsel's performance "fell below an objective standard of reasonableness," *Strickland [v. Washington*], 466 U.S. 688, 688, 104 S.Ct. 2052 [(1984)], and (2) that there is a "reasonable probability" that, but for the deficiency, the outcome of the proceeding would have been different, *id.* at 694, 104 S.Ct. 2052. The same standard applies to a review of the effectiveness of appellate counsel. *See, e.g., Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.), *cert. denied,* 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 35 (1994). As to the reasonableness of counsel's performance, it does not suffice "for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument." *Mayo v. Henderson,* 13 F.3d at 533. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Actions or omissions by counsel that " 'might be considered sound trial strategy" ' do not constitute ineffective assistance, *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 (quoting *Michel v.. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)), and a court "may not use hindsight to second-guess" counsel's tactical choices, *Mayo v. Henderson,* 13 F.3d at 533; *see Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). A petitioner may rebut the suggestion that the challenged conduct reflected merely a strategic choice, however, by showing that counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo v. Henderson,* 13 F.3d at 533.

***11** *McKee v. United States,* 167 F.3d 103, 106 (2d Cir.1999); *see also Chacko v. United States,* 2000 WL 1808662, at *4 (S.D.N.Y. Dec. 11, 2000) ("If the [§ 2255] petitioner establishes the strength of one of his otherwise procedurally barred claims, then the failure of appellate counsel to raise the claim on appeal may be a basis for an ineffective assistance of appellate counsel claim").

The Seventh Circuit has noted that:

> appellate counsel need not raise all possible claims of error. *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). One of the principal functions of appellate counsel is winnowing the potential claims so that the court may focus on those with the best prospects. Defendants need dedicated, skillful appellate counsel, not routineers who present every non-frivolous claim.

Page v. United States, 884 F.2d 300, 302 (7th Cir.1989); *see Stokes v. U.S.,* 2001 WL 29947, at *4 (S.D.N.Y., Jan. 9, 2001) ("The mere fact that [appellate counsel] was unsuccessful on appeal and did not raise every claim urged by the petitioner does not constitute ineffective assistance of counsel."); *Villegas v. United States,* 1997 WL 35510, at *3 (S.D.N.Y. January 30, 1997) (even "negligence or error in failing to raise [a] claim are not sufficient" to establish cause).

In the specific context of an *appellate* counsel who is being reviewed for ineffectiveness in failing to raise the ineffectiveness of *trial* counsel, the Seventh Circuit has noted that it is not enough for the habeas court to determine that trial counsel has been ineffective. Instead, the Court must decide "whether trial counsel was so *obviously* inadequate that appellate counsel had to present that question to render adequate assistance." 884 F.2d at 302 (emphasis in original).

James has made no substantive argument whatsoever regarding the manner in which his appellate counsel was ineffective. He does not even discuss the appellate brief in this matter, let alone alert this Court to the manner in which this brief either failed to raise appropriate issues, or failed to argue them appropriately.

Nonetheless, because of the Court's obligation to liberally construe the petition, *Haines v. Kerner,* 404 U.S. at 520–21, the Court will review each of James' claims to determine whether there is any basis for concluding that his appellate counsel was ineffective in failing to raise them. James' claims are discussed in the order listed in James' petition, *see* section I.F above, with the exception of his "actual innocence" claim, discussed in section II.E below.

1. *Claim I (grand jury claims).*

James cannot meet the burden required to demonstrate that he received ineffective assistance of appellate counsel with respect to any of the issues listed in "Claim I" because the issues themselves are meritless. *See, e.g., United States v. Cook,* 45 F .3d 388, 392–93 (10th Cir.1995) ("When a defendant alleges his appellate counsel rendered ineffective assistance by failing to raise an issue on appeal, we examine the merits of the omitted issue.... If the omitted issue is without merit, counsel's failure to raise it 'does not constitute constitutionally ineffective assistance of counsel." ') (quoting *United States v. Dixon,* 1 F.3d 1080, 1084 n. 5 (10th Cir.1993)).

***12** It is well established that a guilty verdict at trial remedies any defects or errors in the grand jury indictment. *United States v. Mechanik,* 475 U.S. 66, 72–73 (1986) ("[A] petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendant[ ] with the offense[ ]" and therefore "any error in the grand jury proceeding ... was harmless beyond a reasonable doubt"); *accord United States v. Eltayib,* 88 F.3d 157, 173 (2d Cir.), *cert. denied,* 519 U.S. 1045 (1996); *United States v. Ruggiero,* 934 F.2d 440, 448 (2d Cir.1991). Moreover, a court generally may not dismiss an indictment for errors in the grand jury unless the errors actually prejudiced the defendant. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 257 (1988) (dismissal of indictment appropriate only where "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair"). Prejudice exists where an error or defect in the grand jury proceeding "substantially influenced the grand jury's decision to indict, or ... there is grave doubt that the decision to indict was free from the substantial influence of such violations" *Id.* at 256 (citation and internal quotation marks omitted).

Further, the dismissal of an indictment is warranted only in exceptional circumstances. *United States v. Brown,* 602 F.2d 1073, 1077 (2d Cir.) ("We have approved th[e] extreme sanction [of dismissal of the indictment] only when the pattern of [prosecutorial] misconduct is widespread or continuous."), *cert. denied,* 444 U.S. 952 (1979). Generally, extreme acts of prosecutorial misconduct must be demonstrated before an indictment

will be dismissed. *United States v. Williams,* 504 U.S. 36, 46–47 (1992) (the supervisory power of the court can be used to dismiss an indictment because of misconduct before the grand jury where the misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by [the Supreme Court] and by Congress to ensure the integrity of the grand jury's functions") (citations omitted). The remedy of dismissal has been applied only in extreme situations. *See, e.g., United States v. Hogan,* 712 F.2d 757, 761–62 (2d Cir.1983) (indictment dismissed where the prosecutor's "flagrant and unconscionable" acts included the extensive presentation to the grand jury of false and misleading testimony, misleading and speculative hearsay, speculative and unsupported allegations of other criminal conduct and statements by the prosecutor that defendant was a "real hoodlum" who should be indicted); *United States v. Vetere,* 663 F.Supp. 381, 386–87 (S.D.N.Y.1987) (indictment dismissed where prosecutor made extensive use of false and misleading evidence before the grand jury regarding defendant's alleged criminal background); *cf., United States v. Feola,* 651 F.Supp. 1068, 1131 (S.D.N.Y.1987) (noting that *Hogan* should be limited to its "highly unusual facts" and should not be applied to cases where the prosecutor's alleged misconduct fell far short of the "flagrant and unconscionable" misconduct complained of in *Hogan*), *aff'd,* 875 F.2d 857 (2d Cir.1989).

***13** Nothing in James' litany of complaints about the grand jury process rises to the sort of egregious conduct that justifies dismissal of the indictment. For example, the alleged use of hearsay certainly does not justify dismissal as it is permissible to present hearsay evidence to a grand jury. *See Ruggiero,* 934 F.2d at 447; *accord Costello v. United States,* 350 U.S. 359, 363 (1952). James' claim that the prosecution failed to give the grand jury a proper probable cause instruction is meritless under *Mechanik,* 475 U.S. 66 at 67, 70 (1986), because James was convicted at trial.

James' claim regarding the alleged improper admission of evidence before the grand jury concerning his tape recorded conversations with a paid informant in 1996 was meritless as this is proper evidence to present to a grand jury regardless of the informant's availability. *See* Fed R. Evid. 801(d)(2)(A). James' claim that the prosecution suppressed exculpatory evidence before the grand jury that he had been incarcerated during 1991 is meritless both because the prosecution is not required to present exculpatory evidence to the grand jury, *United States v. Williams,* 504 U.S. 36, 51–52 (1992), and because James' incarceration did not prevent him from having committed the offenses over the much longer time period charged in the indictment. *See also infra* footnote 3.

James claims that federal agents and other witnesses committed perjury before the grand jury. While James repeatedly alleges that an agent stated that there were two pipe bombs found during the February 1997 search, instead of the one he testified to at trial, *see* Motion to Vacate at 24, 26–27, that is hardly the sort of mistaken testimony that would provide a basis for dismissing the indictment given the other overwhelming evidence of James' guilt in this matter. Merely because witness testimony before the grand jury was inaccurate, or misleading, is insufficient to rise to the level necessary to warrant the dismissal of an indictment. *See Bank of Nova Scotia,* 487 U.S. at 260–61 ("To the extent that a challenge is made to the accuracy of [grand jury evidence], the mere fact that the evidence is unreliable is not sufficient to require a dismissal of the indictment."); *see also United States v. Rodriguez,* 1996 WL 479441, at *2 (S.D.N.Y. Aug. 22, 1996) (inaccurate and misleading grand jury testimony, absent actual evidence of perjury, not sufficient to dismiss indictment especially where a guilty verdict ultimately results). The other claims regarding instances of allegedly false testimony or instructions to the grand jury simply do not rise to the extreme level that would justify dismissal of the indictment given the other evidence in the case and James' conviction.

Of course, the issue in this section 2255 motion is not whether arguments could have been made to dismiss the indictment but whether James's appellate counsel's decision not to include such claims on James's direct appeal was "unreasonable" under the "prevailing norms of practice" as required by *Strickland,* 466 U.S. at 688. Because these claims could not be considered a "significant and obvious issue[s]," *id.,* such that their omission from James's direct appeal demonstrates "constitutionally inadequate performance," *Mayo,* 13 F.3d at 533, James has not made out a claim of ineffective assistance of appellate counsel with respect to the arguments listed in his Claim I.

2. *Claim III (Ineffectiveness Assistance of Trial Counsel)*

***14** James makes a number of specific allegations regarding the alleged ineffectiveness of his trial counsel. In each instance, the conduct of trial counsel was either adequate or not "so obviously inadequate that appellate counsel had to present that question to render adequate assistance." *Page,* 884 F.2d at 302 (emphasis omitted).

a. *Ineffectiveness of trial counsel in making the oral pre-trial motion for dismissal of the indictment.* James faults his attorney for not raising his grounds for dismissing the indictment in a written motion, as directed by the trial court. Motion to Vacate at 61–63. These grounds, however, were so weak that appellate counsel cannot be deemed inadequate for deciding not to raise on appeal trial counsel's failure to file a written motion as to these grounds.

The four grounds raised were that: (a) the prosecution's presentation to the grand jury improperly relied on double and triple hearsay; (b) there was no probable cause for the search warrant to have been issued and the grand jury was not adequately apprised of this lack of probable cause; (c) Special Agent Trahon, a federal agent who had testified before the grand jury, had testified on matters about which he was unqualified and had also testified in an unduly inflammatory manner; and (d) that the Government misled the grand jury into believing that any witness could be located and presented in person to the grand jury, even though the Government knew that one witness, a paid informant who had tape recorded conversations with James in 1996, could not be located. February 11, 1998 Transcript at 2–9.

As already noted, a defendant seeking a dismissal of an indictment for matters occurring before a grand jury is faced with an extremely high bar. *Brown,* 602 F.2d at 1077. None of the grounds raised by James, separately or collectively, could possibly have resulted in dismissal of the indictment. As previously discussed, hearsay is permissible in a grand jury presentation. *Ruggiero,* 934 F.2d at 447. Any lack of probable cause for the search warrant would have been properly addressed on a motion to suppress (assuming James had standing to do so), not a motion to dismiss the indictment. The alleged inflammatory comments of Agent Trahon—in telling the grand jury that certain bomb materials brought into the grand jury room could kill the jurors if exploded—was sufficiently inconsequential that it could not possibly call into question the validity of the indictment. The Government's usual statement to the grand jurors that it could obtain witnesses they required did not make the indictment invalid merely because one particular witness—the informant—was not available. That informant did not even testify at trial and, as noted further *infra* section II.C.3, his testimony was not necessary for the admission of the transcripts.

James also argues that trial counsel should have informed the trial court of his incarceration on the ground that he could not have committed the crimes alleged during the period alleged. Motion to Vacate at 67. This claim, however, was specifically raised by his appellate attorney, both on the merits, Appellate Brief at 32–35; Reply Appellate Brief at 1–13 and as an ineffective assistance of counsel claim, Appellate Brief at 43. The argument was rejected on the merits by the Second Circuit. *Davis,* 1999 WL316804, at *2. Accordingly, it cannot be re-argued again in the section 2255 motion. *Riascos–Prado,* 66 F.3d at 33.[3]

3 While this Court thus is precluded from re-visiting the issue, it bears noting that James' incarceration by itself did not prevent him from being found guilty of the offenses in the indictment. With respect to Count Two (charging James with unlawfully manufacturing firearms), there is nothing in the statute, 18 U.S.C. § 922(a)(1)(A), that requires the offense of illegally engaging in the manufacture of firearms without a license to have been occurring on each day throughout the period charged in the indictment. The evidence at trial supported the determination that James entered into a single enterprise of manufacturing weapons, even if it was interrupted during his incarceration. Informing the trial court of his incarceration—as James suggests should have happened—would have been pointless as the Government presented no evidence that James was actively manufacturing weapons during this period. In any event, the jury was in fact informed of James' incarceration to a limited degree because James himself testified that in 1991 and in 1992 he was incarcerated at Rikers Island. Tr. 573, 577.

With respect to Count One—that James had illegally manufactured weapons—it was sufficient to meet the elements of this crime, *see* 26 U.S.C. §§ 5822, 5861(f), to show that James had engaged in the illegal act of making a weapon. The trial judge specifically instructed the jury that in order to convict on this count they had to find that James had "made a firearm." Tr. 761, 762, 763, 765. Thus,

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> James' incarceration was irrelevant to proving this offense.
> Because these claims are without merit, James's appellate counsel's decision not to raise them in the appeal brief was obviously not "unreasonable" under the "prevailing norms of practice," *Strickland,* 466 U.S. at 688. Put differently, these claims are not such "significant and obvious issues," that their omission from James's appellate brief demonstrates "constitutionally inadequate performance." *Mayo,* 13 F.3d at 533.

***15** b. *Ineffectiveness of trial counsel with regard to prosecutorial misconduct in the grand jury.* James argues that his trial counsel was ineffective with respect to alerting the trial court to errors in the presentation of the case to the grand jury. Motion to Vacate at 63–74. These claims are meritless for the reasons discussed *supra* in Section II.C.1. Thus, his appellate counsel was not ineffective for failing to include them in his appellate brief.

c. *Ineffectiveness of trial counsel in failing to move to preclude use of the informant's taped conversations.* James argues that his trial counsel should have moved to preclude the prosecution's use of the 1996 tape recordings made by informant Anthony Pagan. Motion to Vacate at 74–77. This argument is apparently based on James' mistaken view that statements made by Pagan in the tapes were being offered for their truth as evidence against James. The tapes of their conversations, however, were offered solely to show James' conduct—specifically, his statement on the tape that "I make homemade grenades," (Supplemental Appellate Appendix 13) and that his grenade would "crush the brain right through the eardrums." (*Id.* 20–21). Such statements of a defendant are plainly admissible under Fed.R.Evid. 801(d)(2)(A). Thus, appellate counsel properly chose not argue to the Court of Appeals that trial counsel was ineffective for failing to raise this argument.

d. *Trial counsel should have presented additional witnesses.* James argues that his trial counsel should have called three witnesses in support of his "alibi" defense. Motion to Vacate at 78–80. Specifically, James argues that his trial attorney should have subpoenaed his brother Davis, and agents Scott and Trahon, and that he informed his trial attorney that he wanted them called as witnesses.

James suggests the agents should have testified only so that he could show that statements they made before the grand jury, or written statements they made regarding a custodial interview with his brother Davis, were not accurate. Motion to Vacate at 79–80. Such evidence, however, would have been irrelevant at trial, particularly since these three witnesses were not even called by the Government in their direct case. There is obviously no need to impeach a witness who is not called to testify.

With respect to his brother's testimony, James offers an affidavit from his brother, signed several months after the execution of the search warrant, in which Davis states that James did not have control over any part of the premises where the seized materials were found. *See* Motion to Vacate, Exhibit 28. Davis, however, pled guilty prior to trial and thus it is not unreasonable to expect that his credibility would be subject to attack were he to have taken the stand. Moreover, as James' brother, he would obviously have been subject to significant impeachment on account of bias.

James does not specify what conversations he had with his trial counsel regarding the decision to call Davis, except to say that he "wanted" to call Davis and trial counsel informed James that "he did not feel Davis would make a good witness [but] he agreed he will have the judge subpoena him." Motion to Vacate at 79. James provides no information as to what discussion took place between him and his counsel following the prosecution's case when the time came to decide whether to call Davis. More pertinently, James discloses nothing about what information he gave to his appellate counsel regarding this claim. There is thus no basis for concluding that appellate counsel's decision to omit this claim from his arguments regarding ineffective assistance of trial counsel represents the omission of a "significant and obvious issue[.]" *Mayo v. Henderson,* 13 F.3d at 533.

***16** In any event, it is well established that "the decision not to call a particular witness is typically a question of trial strategy that appellate courts are ill-suited to second guess." *United States v. Luciano,* 158 F.3d 655, 660 (2d Cir.1998), *cert. denied,* 526 U.S. 1164 (1999). Generally, the decision "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.), *cert denied,* 522 U.S. 846 (1997); *see also Trapnell v. United States,* 735 F.2d 149, 155 (2d Cir.1983) (decisions by petitioner's counsel concerning which witnesses to call at trial were "matters of trial strategy" and could not form "the

basis for a finding of ineffective assistance."); *Samper v. Greiner,* 2002 WL 334466, at *9 (S.D.N.Y. March 1, 2002) (decision not to call alleged alibi witnesses was "entirely tactical and ultimately reasonable" where the witnesses in question had an "extremely close relationship" to petitioner and there were "differing interpretations of the credibility and usefulness" of the witnesses' testimony.) The decision by James's trial counsel not to call Davis as a witness was supported by the fact that Davis was James's brother and would be subject to impeachment due to bias and that James's trial counsel "did not feel that Davis would make a good witness." Motion to Vacate at 79. Accordingly, James's trial counsel's decision not to call Davis as a witness was a matter of trial strategy that cannot form the basis of an ineffective assistance of counsel claim. *See Luciano,* 158 F.3d at 660.

Finally, there was ample testimony to convict James that did not depend on any information available to Davis, including the testimony of Phillips that James was able to obtain a key to go into the basement at Davis' residence; the testimony of James' girlfriend Tillman that he kept weapons at her apartment; the testimony of Tillman that she saw James handling or removing weapons from Davis' apartment; the photograph of James holding an SKS Norinco 7.62 caliber rifle; and the testimony of the informant with whom James discussed his bomb-and grenade-making activities in 1996. Thus, given this testimony, appellate counsel could reasonably have concluded that—regardless of whether trial counsel had been "unreasonable" in failing to call Davis under the *Strickland* test—there was no basis for arguing that James had been "prejudiced" by this failure. *Strickland,* 466 U.S. at 688. Thus, appellate counsel's decision not to raise this issue in the appeal cannot be said to have fallen below an objective standard of reasonableness under *Strickland.*

e. *Trial counsel was ineffective in not obtaining expert testimony.* James argues that trial counsel should have sought "the professional assistance of an explosives expert." Motion to Vacate at 81–83. The decision whether to call an expert witness at trial generally falls within the realm of strategic choices that should not be second-guessed by a court on review. *See United States v. Kirsch,* 54 F.3d 1062, 1072 (2d Cir.) (trial counsel's decision not to call fingerprint expert "was plainly a tactical decision and hardly bespeaks professional incompetence"), *cert. denied,* 516 U.S. 927 (1995). Despite his claim that his trial counsel was ineffective for failing to retain an expert, James provides no reason to believe that an explosives expert hired by the defense would have offered any exculpatory testimony or indeed any testimony that differed from the Government expert. Indeed, the only specific complaint James makes is that because the Government's expert could not testify that the 1991 bomb and the 1997 bomb were "made by one and the same person," *id.* at 82, the trial attorney should have obtained an expert who could have "pointed out" that the Government expert's conclusion should not be "stretch[ed]." *Id.* However, in his summation to the jury, James's defense counsel did in fact emphasize that the Government's expert "concluded that there wasn't sufficient similarity between these items [the bomb recovered in 1991 and the bomb recovered in 1997] that he was given for him to conclude that these were actually manufactured by the same person. He couldn't do that. Lack of evidence. Not guilty." Tr. at 722. Further, James's trial counsel also demonstrated in his summation that although the expert had testified as to the similar materials used in both the 1991 and 1997 bombs, such materials were so common, and pipe bombs so prevalent, that such similarities were far from conclusive evidence that the two bombs had been manufactured by the same person. *Id.* In sum, James is unable to articulate any argument which would allow this court to second guess his trial counsel's decision not to retain an expert. Accordingly, James provides no grounds for concluding that this was a "significant and obvious" issue such that appellate counsel's decision to omit it from his appellate brief represents ineffective assistance of appellate counsel.[4]

4 James also argues, for the first time in his Reply Mem. at 16, that his trial counsel's failure to obtain an expert witness prevented his from making a pre-trial motion for a *Daubert* hearing. Pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), a trial court must act as a "gatekeeper" to screen expert testimony to ensure that it is reliable. Such a screening may include consideration of whether the expert's theory has been tested and subjected to peer review and publication and the theory's degree of general acceptance and trustworthiness. *See Daubert,* 509 U.S. at 590–594. James makes no showing as to how the Government's expert testimony did not comport with the criteria established in *Daubert.* Nor does he explain how retaining his own expert would have necessitated a hearing and why the result of this hearing would have been the exclusion of testimony of any Government witnesses.

> Accordingly, James' contention in this regard is also meritless and appellate counsel cannot be faulted for not having raised it.

3. *Claim IV: "Abuse of Discretion" Claim*

***17** James identifies two claims as involving an "abuse of discretion" by the trial judge.

First, James asserts that the trial court erroneously admitted the tape-recorded conversations made with the informant in 1996. Motion to Vacate at 83–89. James's main complaint seems to be that because he never actually made the bombs that he promised to make in the conversation with the informant, the conversations were not relevant to the charges against him. This assertion is frivolous. The conversation regarding the offer to make bombs was properly admitted under Fed.R.Evid. 801(d)(2)(A), *see supra* section II. C(2)(c), as directly relevant to the charge that James engaged in the business of making or manufacturing firearms, and it was therefore plainly admissible against James to show his bombmaking activities in 1996. To the extent that the conversation turned to the use of bombs (for example, James' statement to the informant that they bombs can be used to "kill human beings" because the "sound and percussion will ... crush the brain"), Supplemental Appellate Appendix at 21, it was appropriately admitted to give a complete record of the conversation with the informant and because it showed James' motive. James' separate argument that the informant himself had to be called is also frivolous under Fed.R.Evid. 901(a), which has no specific requirement of what testimony must be used to establish that an item of evidence is in fact what it purports to be. *See, e.g., United States v. Barone,* 913 F.2d 46, 49 (2d Cir.1990) (a recorded conversation may be authenticated by the technician who made the recording). Accordingly, appellate counsel properly did not complain in the appeal brief regarding the admission of the conversation with the informant.

Next, James asserts that the trial court abused its discretion when it denied his motion for a Bill of Particulars pursuant to Fed.R.Crim.P. 7. *See* Motion to Vacate at 89–93. This issue was raised by trial counsel in a written brief, *see* Pre–Trial Motion at 12–13, and was denied at a hearing held on October 14, 1997, prior to the start of James's trial. *See* Transcript of October 14, 1997, at 8–9.

The trial court did not abuse its discretion in denying James' motion for a bill of particulars. The decision whether to grant a motion for a bill of particulars rests within the sound discretion of the trial court. *See, e.g., United States v. Walsh,* 194 F.3d 37, 47 (2d Cir.1999). "In exercising that discretion, the court must examine the totality of the information available to the defendant - through the indictment, affirmations, and general pre-trial discovery—and determine whether, in light of the charges that the defendant is required to answer, the filing of a bill of particulars is warranted." *United States v. Bin Laden,* 92 F.Supp.2d 225, 233 (S.D.N.Y.2000). The Second Circuit has "consistently sustained indictments which track the language of a statute and, in addition, do little more than state time and place in approximate terms." *United States v. Salazar,* 485 F.2d 1272, 1277 (2d Cir.1973), *cert. denied,* 415 U.S. 985 (1974). "Generally if the information sought by defendant is provided in the indictment or in some acceptable alternate form, no bill of particulars in required." *United States v. Bortnovsky,* 820 F.2d 572, 574 (2d Cir.1987). The prosecution is not required to particularize all of its evidence, as long as it provides the defendant with adequate information concerning the charges against him. *United States v. Davidoff,* 845 F.2d 1151, 1154 (2d Cir.1988). Thus a " 'bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." ' *United States v. Torres,* 901 F.2d 205, 234 (2d Cir.) (quoting *United States v. Feola,* 651 F.Supp. 1068, 1132 (S.D.N.Y.1987), *cert. denied,* 498 U.S. 906 (1990).

***18** James has not demonstrated that the trial court abused its discretion by denying his motion for a bill of particulars because he has not shown that the charges contained in the indictment were so general that he was not apprised of the specific acts of which he was accused. *See Torres,* 901 F.2d 205 at 234. Rather, he seems to argue that the prosecution did not adequately reveal the means by which they intended to prove when, where, and how the specific charges were committed, particularly in light of James's period of incarceration during 1991. *See* Motion to Vacate at 90–91. The Government, however, is not required to disclose to the defendant the manner in which it will attempt to prove the charges, *see United States v. Wilson,* 565 F.Supp. 1416, 1438–39 (S.D.N.Y.1983), or the means by which the crimes charged were committed, *see United States v. Andrews,* 381 F.2d 377, 378 (2d Cir.1967) (per curiam), *cert. denied,* 390 U.S. 960 (1968). Rather, the

purpose of the bill of particulars is to adequately inform the defendant of the charges against him. *See Bortnovsky,* 820 F.2d 572, 574 (2d Cir.1987). Here, the indictment provided James with sufficient information to allow him to prepare a defense. Because of the lack of merit of this argument, James's appellate counsel reasonably omitted it from his appellate brief.

4. *Claim V: "Unconstitutional Fatal Variance"*

James argues that there was a "fatal variance" in the proof offered at trial and the charges in the indictment. *See* Motion to Vacate at 93–96. The gravamen of James's argument is that the government was unable to prove that the offenses charged in Counts One and Two took place during the relevant statute of limitations period, thus causing a "fatal variance as they have failed to prove the case as charged by the grand jury." *Id.* at 95. James' "fatal variance" claim, however, is indistinguishable from his claim concerning the insufficiency of evidence as to counts One and Two of the Indictment. This matter was actually raised by his appellate counsel, *see* Appellate Brief at 32–35; Reply Appellate Brief at 1–13, and thus appellate counsel could not have been ineffective in failing to raise it. *See, e.g., Douglas v. United States,* 13 F.3d 43, 46 (2d Cir.1993) ("any claim raised on direct appeal from conviction is precluded from [§ 2255] consideration."). [5]

[5] While not relevant to his habeas claim, it bears noting that the Second Circuit rejected James' claim. It found that "[t]he evidence presented at trial, notably the explosives and other materials retrieved from his brother's apartment in 1997, the recordings of James' own statements in 1996, and testimony of James' girlfriend Sonia Tillman as to his activities in 1995 and 1996 amply support conviction on both counts." *Davis,* 1999 WL 316804, at *2.

James also argues in his Reply Mem., apparently for the first time, that "by the judge instructing the jury that they may find the defendant for the charge act up to the date of the superseding indictment that being September 8, 1997, while the date charged by the grand jury is February 12, 1997 ... the judge quite literally added more than six months to the indictment." Reply Mem. at 22 (citing *United States v. Tran,* 234 F.3d 798 (2d. Cir2000), *overruled on other grounds,* 274 F.3d 655 (2001).). The trial judge, however, charged that the jury could only consider criminal conduct that occurred after September 8, *1992* (to comply with the five-year statute of limitations), *see* Tr. 759; it did not charge that the jury could consider conduct after February 12, 1997. Thus, no additional period was added to the indictment. *Tran* holds only that a district court is precluded from trying, accepting a guilty plea from, convicting or sentencing a defendant for a crime that is not charged in the indictment. *Tran,* 234 U.S. at 809. James was convicted of all Five Counts contained in the Indictment and the charge was consistent with the dates stated therein.

5. *Claim VI: "Unconstitutional Constructive Amendment of the Indictment".*

***19** James' claim concerning the alleged "constructive amendment" of the Indictment is not subject to review by this Court. In his Motion to Vacate, James argues that "the government had constructively amended the indictment as they have failed to prove the actual crime, or actual theory charged in the indictment." *See* Motion to Vacate at 96–99. Appellate counsel raised an analogous argument, however, when he argued that there was insufficient evidence that the crimes charged in Counts One and Two occurred during the relevant limitations period. *See* James' Appellate Brief at 32–25; Appellate Reply Brief at 1–16. James is barred from relitigating this issue in his Motion to Vacate. *See Riascos–Prado,* 66 F.3d at 33; *Douglas v. United States,* 13 F.3d at 46.

James makes the additional argument that the Government never proved that he acted "wilfully." Motion to Vacate at 98. Once again, this argument seems grounded on James' repeated contention that he could not have committed the crimes charged in Counts One and Two because he was incarcerated for a portion of this period. *Id.* at 98–99. As already noted, however, this matter was raised by appellate counsel and thus cannot be relitigated here. *See* section II.C.2.a above.

6. *Claim VII: Duplicitous Indictment*

James's claim that Counts One and Two of the Indictment are duplicitous, Motion to Vacate at 99–105, an argument that he concedes was raised by his appellate counsel, Motion to Vacate at 101; *see also* Appellate Brief at 34–35 (arguing that Counts One and Two of the Indictment are duplicitous). The Second Circuit rejected James's duplicitous indictment claim on the ground that it was not raised prior to trial pursuant to Fed.R.Crim.P. 12(b). *Davis,* 1999 WL 316804, at *2. James now argues that the Second Circuit incorrectly ruled that the matter had not

been raised prior to trial because his trial counsel raised the issue in a letter to the Court on January 24, 1998. *See* Motion to Vacate, Ex. 30, at p. 6. Regardless of whether the Second Circuit properly ruled on this point, the fact remains that it was raised by his appellate counsel and thus he cannot be faulted for having given James ineffective assistance by failing to raise it.

As to the merits, James' motion seems not to focus on any duplicity but rather to reiterate his previously-made arguments that his activities in 1991 bore no relation to the time period within the statue of limitations (after September 8, 1992). Motion to Vacate at 102–103. The argument regarding the relevance of his activities in 1991, however, was explicitly raised by appellate counsel in a different context: that of its admissibility under Fed R. Civ. P. 404(b). Appellate Brief at 21–32. It was also explicitly addressed by the Second Circuit in its decision holding that such evidence was relevant to the crime charged and that its relevance outweighed any prejudice to James. *Davis,* 1999 WL 316804, at *1. Thus, this issue too cannot be relitigated in a section 2255 motion.

D. *Claim under Apprendi v. New Jersey*

***20** James also argues that his sentence violates the rule set forth in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), which mandates that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 476 (citation omitted); *see* Motion to Vacate at 105–109. James claims that the trial court violated the due process right articulated in *Apprendi* when it applied sentence enhancements without regard to the statutory maximum sentences for James crimes. Motion to Vacate at 105–109. James also claims that the factual findings made by the trial court during sentencing were not authorized by the jury's guilty verdict and therefore also violated the *Apprendi* rule. *Id.* Assuming without deciding that James' *Apprendi* claim is cognizable on § 2255 review,[6] James' *Apprendi* claim has no merit. *Apprendi* does not apply in a case where the defendant has been sentenced to the statutory maximum or less. *United States v. White,* 240 F.3d 127, 134–35 (2d Cir.2001). In other words, if the trial court sentences a defendant at or below the statutory maximum on each count for which he or she was convicted, the *Apprendi* rule is not triggered, even where each count is to run consecutively rather than concurrently. *Id.; see also Apprendi,* 530 U.S. at 481 ("nothing ... suggests that it is impermissible for judges to exercise discretion ... in imposing a judgment *within the range* prescribed by statute.") (emphasis in original). Nor does the fact that a sentence was enhanced pursuant to federal Sentencing Guidelines trigger *Apprendi* as long as the ultimate sentence for each count is not above the statutory maximum. *United States v. McLeod,* 251 F.3d 78, 82 (2d Cir.2001) ("*Apprendi* is inapplicable to Guidelines calculations that do not result in a sentence on a single count above the statutory maximum for that count."), *cert. denied,* 122 S.Ct. 304 (2001).

6 James was convicted and his direct appeal was decided a year prior to the *Apprendi* ruling in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Following *Teague v. Lane,* 489 U.S. 288, 307 (1989), the Second Circuit has held that a new rule of criminal procedure cannot form the basis for collateral review unless the new rule is one which "place[s] an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit the imposition of a certain type of punishment for a class of defendants because of their status or offense" or is a "new watershed rule[ ] of criminal procedure that [is] necessary to the fundamental fairness of the criminal proceeding." *Blizerian v. United States,* 127 F.3d 237, 241 (2d Cir.1997) (citation omitted), *cert. denied,* 527 U.S. 1021 (1999). Although the Second Circuit has not yet ruled on whether the *Apprendi* rule should apply retroactively on collateral review of a conviction, *Forbes v. United States,* 262 F.3d 143, 146 n. 5 (2d Cir.2001), other Circuit Courts that have addressed this issue have decided that the *Apprendi* rule does not constitute a new "watershed" rule of criminal procedure and should not be applied retroactively on collateral review. *See, e.g., United States v. Sanders,* 247 F.3d 139, 146 (4th Cir.2001); *Jones v. Smith,* 231 F.3d 1227, 1236 (9th Cir.2000).

James was convicted of each of the five counts in the indictment. The maximum sentences of imprisonment were as follows:

Count One:	10 years imprisonment.	*See* 26 U.S.C. § 5871.
Count Two:	5 years imprisonment.	*See* 18 U.S.C. § 924(a)(1)(D).

Count Three:	10 years imprisonment.	*See* 19 U.S.C. § 924(a)(2).
Count Four:	10 years imprisonment.	*See* 26 U.S.C. § 5871.
Count Five:	10 years imprisonment.	*See* 18 U.S.C. § 844(a)(1).

The total aggregate maximum sentence was thus 45 years.

James received a sentence of 30–1/2 years and the sentence for any given count was never more than the maximum statutory punishment. Thus, James was sentenced by the trial court to 10 years imprisonment for Counts One, Three and Four, to run consecutively. He was sentenced to an additional 5 months for Count Five, to run consecutively. He was sentenced to 5 years imprisonment on Count Two to run concurrent with the sentences imposed for Counts One, Three and Four. *See* Judgment of Conviction at 3. Thus, the *Apprendi* rule would have had no effect on James' sentence. [7]

7 James also argues that the Indictment failed to include a penalty provision. Reply Mem. at re-numbered pages "1—6" following page 24. The purpose of an indictment is to provide a statement of the charges against the defendant and it need only cite the statute or provisions "which the defendant is alleged ... to have violated." Fed.R.Crim.P. 7(C)(1). There is no requirement that the indictment contain citations to penalty provisions.

E. *James' Claim of Actual Innocence*

***21** A section 2255 movant may bypass the bar created by their failure to raise an issue on direct appeal if the movant can demonstrate "actual innocence." *See Bousley v. United States,* 523 U.S. 614, 622 (1998); *see also DeJesus v. United States,* 161 F.3d 99, 102 (2d Cir.1998); *Billy–Eko,* 8 F.3d at 113–14. The term "actual innocence" means "factual innocence, not mere legal insufficiency." *Bousley,* 523 U.S. at 623. A claim of actual innocence requires that the movant "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo,* 513 U.S. 298, 324 (1995). In addition, the new evidence must be so strong that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

James, however, has come forth with no new evidence to bolster his actual innocence claim, let alone evidence that meets this rigorous standard. *See* Motion to Vacate at 40–61. Rather, James's "evidence" consists of the same arguments that are raised elsewhere in his Motion to Vacate. Thus, he argues at length that Counts One and Two of the Indictment were legally insufficient, Motion to Vacate at 40–47. This claim, however, was explicitly rejected in his direct appeal due to the overwhelming evidence introduced in support of his guilt. *See Davis,* 1999 WL 316804, at *2). Moreover, because the argument relates only to legal insufficiency, it in no way supports James's claim of actual innocence. *Bousley,* 523 U.S. at 623.

James also argues that he is actually innocent because it was "factually impossible" and unconstitutional for the offenses charged in Counts One and Two to be "continuing offenses" because of his period of incarceration beginning in 1991. *See* Motion to Vacate at 47–54. Again, this argument relies on no new evidence but is instead a variation on his argument made to the Second Circuit that there was insufficient evidence to support Counts One and Two of the Indictment. Thus James has not presented any "new" evidence in support of this claim let alone new scientific evidence, eyewitness accounts, or physical evidence. *Schlup v. Delo,* 513 U .S. at 324.

James also argues at length that he was the victim of a "vindictive prosecution." Motion to Vacate at 55–60. A complaint regarding the alleged motives of the prosecution in bringing the charges, however, is logically irrelevant to whether the defendant is actually innocent of those charges.

Because James' claim of actual innocence is unsupported by any new evidence that was not available at trial, it does not justify any relief under § 2255.

F. *James' Entitlement to an Evidentiary Hearing*

James seeks an evidentiary hearing on his motion. Motion to Vacate at 102; Reply Mem. at 2–3. Section 2255 provides that a court shall hold an evidentiary hearing

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"[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. In *Chang v. United States,* 250 F.3d 79 (2d Cir.2001), the Second Circuit made clear that a court may appropriately rule on a § 2255 motion without a testimonial hearing where (1) the allegations of the motion, accepted as true, would not entitle the movant to relief or (2) the documentary record, including any supplementary submissions such as affidavits, render a testimonial hearing unnecessary. 250 F.3d at 85–86. Here, James is not entitled to an evidentiary hearing because the record before the Court is sufficient to address each of his claims.

CONCLUSION

***22** For the foregoing reasons, it is recommended that James's Motion to Vacate be denied.

Notice of Procedure for Filing of Objections to this Report and Recommendation

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from service of this Report to file any written objections. *See also* Fed.R.Civ.P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan, 500 Pearl Street, New York, New York 10007, and to the chambers of the undersigned at 40 Centre Street, New York, New York 10007. Any requests for an extension of time to file objections must be directed to Judge Kaplan. The failure to file timely objections will result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn,* 474 U.S. 140, 155 (1985).

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

Eric SMALLS, Petitioner,
v.
Michael MCGINNIS, Respondent.

No. 04 Civ.0301(AJP).
|
Aug. 10, 2004.

OPINION AND ORDER

PECK, Chief Magistrate J.

***1** Pro se petitioner Eric Smalls seeks a writ of habeas corpus from his October 2, 1998 conviction of three counts of first degree burglary, three counts of first degree robbery, one count of first degree attempted burglary, eight counts of first degree sexual abuse, and sentence to an aggregate term of thirty-two years imprisonment. (Dkt. No. 2: Pet. ¶¶ 1-4.) *See People v. Smalls,* 287 A.D.2d 277, 277, 731 N.Y.S.2d 16, 16-17 (1st Dep't), *appeal denied,* 97 N.Y.2d 685, 738 N.Y.S.2d 309 (2001). Smalls' ninety-three page habeas petition raises "two" grounds: ineffective assistance of trial counsel (Pet. at 49-88) and ineffective assistance of appellate counsel (Pet. at 13-48). (*See also* Smalls 6/21/04 Traverse.) Each of those claims, however, has numerous subparts-hence a ninety-three page petition. This is yet "another case where petitioner's lengthy laundry-list of claims 'suggests the poverty of his position." ' *Cruz v. Greiner,* 98 Civ. 7939, 1999 WL 1043961 at *1 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J .); *accord Gumbs v. Kelly,* 97 Civ. 8755, 2000 WL 1172350 at *1 (S.D.N.Y. Aug. 18, 2000) (Peck, M.J.); *Adeniji v. Administration for Children Servs.,* 43 F.Supp.2d 407, 438 (S.D.N .Y.) (Wood, D.J. & Peck, M.J.) (quoting *Cooper v. New York State Dep't of Human Rights,* 986 F.Supp. 825, 829 (S.D.N.Y.1997)), *aff'd,* No. 99-7561, 201 F.3d 430 (table), 1999 WL 1070027 (2d Cir. Nov. 18, 1999).

The parties have consented to decision of the petition by me as a Magistrate Judge pursuant to 27 U.S.C. § 636(c). (Dkt. No. 16: Consent Form.)

For the reasons set forth below, Smalls' habeas petition is *DENIED.*

FACTS

Petitioner Eric Smalls was arrested on October 14, 1996 while trying to escape from an attempted burglary, when undercover officers noticed his suspicious behavior and recognized him as fitting the description of the suspect wanted in three prior burglaries with sexual abuse of the victims. (Dkt. No. 13: State Br. at 2.) Between late July and October 1996, Smalls broke into the apartments of three single women living in upper Manhattan, stole property, threatened each victim with a knife, and sexually abused them. (State Br. at 2.) After Smalls' arrest, he initially was released after two victims could not identify him from a line-up, but later rearrested when DNA analysis of his sneakers connected him to one of the victims. (State Br. at 2.)

The Evidence at Smalls' Trial

The July 24, 1996 Attack on S.S. [1]

1 To protect the privacy of the sexual abuse victims, *see* N.Y. Civil Rights Law § 50-b, they will be referred to by their initials instead of names.

In July 1996, S.S. lived at 270 Seamon Avenue in Inwood in a third floor apartment in a building with a recessed entrance from the street and no doorman. (S.S.: Trial Transcript ["Tr."] 54-56.) She filled her prescriptions at the local Rite Aid drugstore on Broadway and shopped at the local Dynasty Supermarket two doors down from the pharmacy. (S.S.: Tr. 55, 79.) On the night of July 23, 1996, S.S. went to bed between 10:30 and 11 p.m. with no lights on in her apartment and two windows open in the living room. (S.S.: Tr. 57-58.) She awoke somewhere between 4:20 and 4:30 a.m. due to "the sensation some one was standing in the door of [her] bedroom," and opened her eyes to see "some one standing in the door of [her] bedroom" with nothing obstructing her view of the individual. (S.S.: Tr. 58, 72.) Through the darkness, she saw that he was "wearing dark sneakers, blue jeans, a dark colored shirt and [a] very light Members Only type jacket," and was "about six feet tall," weighed "about 170 pounds," and "was athletically built but not heavily muscled." (S.S.: Tr. 73.) His skin tone was a "little rough," and "dark with a warm brown undertone," he

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had "short" hair, was "not heavily bearded," and "smelled very strongly of alcohol." (S.S.: Tr. 74-75.) S.S. screamed, and the person moved to the right side of the bed and told her "shh" and "put one hand over [her] mouth and another hand over [her] throat." (S.S.: Tr. 58-59.) He asked her where her money was, and she "told him the money was in the kitchen." (S.S.: Tr. 60.) As she walked down the hallway leading to the kitchen, the man kept his arm around her neck "like a chokehold," and "took out a knife and he poked the side of [her] neck with it." (S.S.: Tr. 60-61.) S.S. described the knife as having a four or five inch blade "where you pull the blade out, [and it has] a place for your finger to attach to pull the blade out." (S.S.: Tr. 62-63.)

***2** After seeing the knife, S.S. stopped screaming and the man walked her into the kitchen where she gave him her wallet. (S.S.: Tr. 63-64 .) Her attacker fondled her right breast and slipped his left hand in the "pant hole" of her underwear, "felt around" the "outside of [her] vagina" and made "little gurgling noises." (S.S.: Tr. 67-68 .) Up to this point, the attacker's "tone" had not been "hostile or violent," but when S.S. told him "no" and to stop, his tone changed and he "sounded angry" and said "don't say no to me." (S .S.: Tr. 68-69.) S.S. "stopped saying no to him" and tried to reason with him, telling him that "he had what he came for" and "if he left now [she] wouldn't say anything to anyone." (S.S.: Tr. 69.) He told S.S. to take him to the front door. (S.S.: Tr. 69-70.) He followed her to the door with his knife at her neck and his other arm around her throat, made S.S. open the door for him and left. (S.S.: Tr. 70-71.) After he left, S.S. called the police. (S.S.: Tr. 71-72.) She determined that her attacker had climbed into her apartment through the living room window. (S.S.: Tr. 81-82.)

S.S. viewed a photo array in April 1997, and identified Smalls and another individual as looking familiar. (S.S.: Tr. 87-88, 92.) In a line-up on May 15, 1997 she picked out Smalls, and when asked how she recognized him, she said that she remembered him entering her apartment, not from seeing his picture in a *New York Times* article about his arrest months before. (S.S.: Tr.75-77, 90-91, 100.) Additionally, at trial S.S. pointed to and identified the Smalls as her attacker. (S.S.: Tr. 83-84.)

On cross-examination, defense counsel pointed out that her attacker was only in her apartment for a short period and that it was dark. (S.S.: Tr. 86-87.) He also asked other questions to cast doubt on her identification of Smalls. (S.S.: Tr. 88-92, 95, 97-98.)

The September 25, 1996 Attack on K.W.

In September 1996, K.W. was living at 62 Park Terrace West, in Inwood, the same neighborhood as S.S. (K.W.: Tr.106.) She lived in a first-floor apartment in a building with a recessed entrance from the street and no doorman. (K.W.: Tr. 107-09.) She also shopped at the same local Rite Aid drugstore and Food Dynasty Supermarket. (K.W .: Tr. 108, 153-54.)

K.W. went to sleep on a futon in her living room at around 11:00 p.m. on the night of Tuesday, September 24, 1996, with her kitchen window part-way open, which she believes is how the intruder entered. (K.W.: Tr. 110-11, 132.) She awoke at around 3:15 a.m. and "saw a man, a stranger standing there, looking at" her, and with the only light coming from the kitchen behind him, she could only see his silhouette, not his face. (K.W.: Tr. 112-13, 130) K.W. immediately told the man to leave and stood up, but he came towards her and "quickly made [her] turn around," so that he was behind her, and he put "his arm around [her] throat." (K.W.: Tr. 112-14.) He pulled out a "sharp" object and held it against her neck. (K.W.: Tr. 114-15.) K.W. told her attacker, "I'm going to cooperate completely." (K.W.: Tr. 115.) He asked her "where is your money?" (K.W.: Tr. 115.) K.W. indicated that it was on the desk in the same room, and her attacker walked her over to the desk, still holding one arm around her throat and with the other holding a knife to it. (K.W.: Tr. 115.)

***3** K.W. gave him her wallet containing $35 and spare cash she kept in an envelope. (K.W.: Tr. 116.) He asked "where is the man of the house?," and K.W. told him that she lived alone. (K.W.: Tr. 117.) He next asked if she had anything else, and she took him to the bedroom, as he continued to walk behind her, and showed him her jewelry. (K.W.: Tr. 118.) He took only one necklace, and K.W. started naming other things, including a camera and tape player, but he "didn't respond at all." (K.W.: Tr. 118-19.) As they walked back to her living room, he "pulled out the electrical connection" of the answering machine, mistaking it for the phone cord. (K.W.: Tr. 126.) When they walked back to her futon, he put his hand "in the front of [her] genital area." (K.W.: Tr. 120-21.) K.W. begged, "please don't do that, you have everything you want," and he told her, "I don't have everything I want." (K.W.: Tr. 121.) He told her to lie down and

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"pushed [her] down too." (K.W.: Tr. 121.) He reassured her that he would not hurt her, and he lay down "behind" her on the futon. (K.W.: Tr. 122.) With his right hand he touched her breasts, and he inserted the other into her vagina and rectum. (K.W.: Tr. 122.) At this point, she could see that his skin was "medium brown." (K.W.: Tr. 122.)

When he was finished, he stood her up and walked her into the bedroom and told her not to call the police because he lived in the neighborhood. (K.W.: Tr. 124-25.) He left her in the bedroom and walked out the front door. (K.W.: Tr. 125.) As soon as he left, K.W. called the police. (K.W.: Tr.130.) K.W. was able to estimate that her attacker was taller than 5#8#, "kind of average height for a man," not "heavy," had an "urban African-American accent," "spoke quietly," "smelled of alcohol," and did not appear angry during their encounter. (K.W.: Tr. 127-29.) On October 14, 1996, she viewed a line-up but was not able to identify anyone because she had not seen her attacker's face. (K.W.: Tr. 147-50.)

The October 5, 1996 Attack on I.M.

In October 1996, I.M. lived at 251 Seaman Avenue in Inwood. (I.M.: Tr. 186.) She lived alone in a second floor one-bedroom apartment in a building with a recessed entrance from the street and no doorman. (I.M.: Tr. 188-89.) Like S.S. and K.W., she shopped at the local Rite Aid pharmacy and Food Dynasty grocery store. (I.M.: Tr. 187.)

On Friday, October 4, 1996, I.M. went to sleep at about 11:00 p.m ., leaving the living room window halfway open. (I.M.: Tr. 189-91.) In the middle of the night, at around 3:00 a.m., she suddenly awoke because she "felt somebody up on me and covering [her] mouth." (I.M.: Tr. 191, 210-11.) She started screaming and the attacker "put a pillow over [her] head and suffocated" her while using his other hand to put a knife to her throat. (I.M.: Tr. 191-92, 194.) She saw that the knife was about four or five inches, and thicker at one end. (I.M.: Tr. 195-96.) As she fought back, the knife cut the palm of her hand, and she began bleeding. (I.M.: Tr. 192.) Her hand continued dripping blood because her blood is thin due to heart medication. (I.M.: Tr. 196-97, 230.)

***4** Her attacker "demanded jewelry and money," and she gave him her engagement ring, wedding ring and watch. (I.M.: Tr. 197.) She discovered that he already had her purse in "a knapsack," and he gave it to her to go through, but she noticed and told him that he had already removed her wallet; he answered, "yeah, blame it on me." (I.M.: Tr. 198-99.) As her hand continued dripping blood, I.M. told the attacker she needed water, and he "took" her to the bathroom, but would not let her turn on the light in order to keep his face hidden. (I.M.: Tr. 199-201.) He repeatedly told her during this time, "Don't look at my face," and she could not see it because the room was dark. (I.M.: Tr. 199.) After she washed her hand, he "pushed" her back to the bedroom and "pulled [her] pants down and threw [her] face down on the bed." (I.M.: Tr. 202.) She started telling him, "please don't hurt me, don't do this to me." (I.M.: Tr. 203.) He "started fondling [her] breast" and inserted his finger into her vagina and rectum. (I.M.: Tr. 203-05.) When she told him not to do this to her since she had children, he asked their ages. (I.M.: Tr. 204.) She told him they were "[a]bout 29 and 31," and "he said they are about [his] age." (I.M.: Tr. 204.) As he touched her, he asked when her husband was coming home, and I.M. told him "we're separated." (I.M.: Tr. 208.) Finally, he let her go. (I.M.: Tr. 206.) The attacker asked "where is the phone" and, after I.M. pointed to it, he "cut the cable of the phone and told [her] don't call the police ... I'm observing you. I live nearby." (I.M.: Tr. 207, 209.) He "grabbed [her] again and with the knife in [her] throat and said take me to the door now." (I.M.: Tr. 210.) After he left, she called her family, and her daughter took her to the hospital to treat her sliced hand. (I.M.: Tr. 211.) The police interviewed her at the hospital. (I.M.: Tr. 226-27.) The only thing she could identify about her attacker was that he had "dark skin," wore "a cap backward," "smelled of alcohol," wore "a knapsack," and his shoes made no noise when he walked across her wooden floors. (I.M.: Tr. 213-16.)

On October 14, 1996, I.M. viewed a line-up, but she was unable to recognize anyone. (I.M.: Tr. 227-28.) On October 30, 1996, I.M. went to the Medical Examiner's office and gave blood for DNA analysis. (I .M.: Tr. 229.)

On cross-examination, defense counsel brought out that the police dusted her apartment but did not find Smalls' prints. (I.M.: Tr. 235-36.) Counsel also pursued, as he had with the other witnesses, that she had given her address to the Rite Aid pharmacist. (I.M.: Tr. 240-41; Johnson: Tr. 406-07.)

The October 14, 1996 Attack on Ella Johnson [2]

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2 Because Ms. Johnson was not sexually abused, her full name can be used.

On October 14, 1996, Ella Johnson lived in an apartment on the first floor of 67 Park Terrace East, a non-doorman building in an "isolated," "residential area" in Inwood. (Johnson: Tr. 380-82, 385-86.) Like the other three victims, she shopped at the local Rite Aid and Food Dynasty stores. (Johnson: Tr. 380-81, 389.)

***5** During the evening of October 14, 1996, Ella Johnson was asleep in her bed when she was suddenly awakened by a "thud or shaking of [her] window." (Johnson: Tr. 388-91.) She looked at the clock in her VCR and saw that it was about 4:00 a.m. (Johnson: Tr. 392.) When she looked at the bedroom window that she had left ajar, she saw the silhouette of a person. (Johnson: Tr. 391-92, 404.) She jumped up, turned on the light, ran towards the image, but changed her mind and headed back to her bed. (Johnson: Tr. 392.) Looking out the window, she saw "the person running south" and noticed he was wearing a "shirt or a sweater" and no hat. (Johnson: Tr. 393-95, 400-01, 404 .) Johnson did not phone the police to tell them what happened until later that morning. (Johnson: Tr. 401.) She viewed a line-up later that day, October 14, 1996, and selected individual number "[t]hree" because she "recognized that the build was similar" to her attacker's build, but she was not certain. (Johnson: Tr. 401-03.)

Smalls' Arrest and Identification, [3] *and the DNA Evidence*

3 The police testimony about Smalls' arrest and identification, from the pretrial suppression hearing and at trial, sufficiently overlapped that the Court will cite to both the hearing and trial testimony instead of having repetitive sections. However, where citation is only to the hearing, it indicates testimony given at the suppression hearing but not before the jury at trial.

From midnight to 8:00 a.m. on October 14, 1996, Sergeant James West was in charge of an undercover team of officers looking for a serial burglar who had sexually attacked and robbed three single women living alone in apartments in an elevated residential area of the 34th precinct. (West: Suppression Hearing ["H."] 6-7, 10; West: Tr. 422-24, 426, 452-54; Maric: Tr. 471, 489-90; Pinzone: Tr. 503.) The prior attacks had all occurred within one block of each other between 1:00 a.m. and 5:00 a.m. (West: H. 7-8; West: Tr. 424-25, 456.) Sgt. West had been given a description of the attacker as a black male, early twenties, thin to muscular build, from 5#10# to 6# tall, soft spoken with alcohol on his breath, carrying some type of bag, and armed with a folding knife. (West: H. 8-9; West: Tr. 424-25, 454-56.)

On October 14, 1996 at approximately 4:00 a.m., Sgt. West and Officer Maric, both dressed in plain clothes, received a radio transmission from Officer Pinzone to be aware of an individual heading their way who fit the suspect's description. (West: H. 12; Maric: H. 66; West: Tr. 428-30, 456; Maric: Tr. 474; Pinzone: Tr. 503-04.) As a man approached them from the steps leading up to the elevated residential area, Sgt. West and Officer Maric followed him as he walked North on Park Terrace East, Ella Johnson's street. (West: H. 12-13; West: Tr. 430; Maric: Tr. 474-76.) Sgt. West and Officer Maric noticed that he was a black male in his early twenties of a thin build, wearing a backpack. (West: H. 12-13; West: Tr. 433.) The officers followed him for several blocks, but lost sight of him when he turned the corner on 216th or 217th Street, and the officers could not find him when they searched the alleys. (Maric: H. 67; West: Tr. 431, 433-35, 457; Maric: Tr. 476-77.) During the period he was out of sight, Ella Johnson was asleep in her bed and was awakened by someone trying to break into her apartment. (Johnson: Tr. 392.)

***6** The officers returned to their car and began circling the area when, at approximately 4:30 a.m., they spotted the individual walking southbound on Park Terrace East back towards the steps. (Maric: H. 68; West: H. 13-14; West: Tr. 431-32, 435, 457; Maric: Tr. 478.) Sgt. West and Officer Maric got out of their car and followed him on foot. (Maric: H. 69; West: H. 14-15; Maric: Tr. 479.) Eventually, Sgt. West called out "Police, can I talk to you for a second?" (Maric: H. 69; West: H. 15; West: Tr. 435, 437, 459-60, 464; Maric: Tr. 479.) In response, the individual started "walking very quickly," then "took off running down the steps" while "trying to take off the backpack that he's carrying." (West: H. 15; Maric: H. 69-70; West: Tr. 436-37, 441, 460, 474; Maric: Tr. 479; Pinzone: Tr. 506-07.) While radioing for backup, Sgt. West and Officer Maric chased the individual down the steps, then east on 215th Street, south to 214th Street, and next back towards Broadway. (Maric: H. 71; West: Tr. 437-39; Maric: Tr. 479-80; Pinzone: Tr. 505-06.) Meanwhile, Police Officers Colon and Weinberg responded to the backup call, intercepted the individual in their car, and pursued him on foot. (Pinzone: H. 129-30; Maric: Tr. 480; Colon: Tr. 423-24.) Finally, the exhausted

individual just stopped and sat down on a park bench and the officers approached him. (Maric: H. 72; Pinzone: H. 130; West: Tr. 440, 466; Maric: Tr. 480.)

Officer Pinzone picked up the individual's backpack and gave it to Sgt. West. (Pinzone: H. 148-49; West: H. 19-20; West: Tr. 441; Pinzone: Tr. 510.) Sgt. West, knowing that the serial robber carried a knife, felt the backpack to see if it contained any weapons. (West: H. 20; West: Tr. 441-42, 464.) Upon feeling something that felt like a folding knife, he opened the backpack and found a folding knife with a four- to five-inch blade knife, and also found a tube of penis-desensitizing cream. (West: H. 20-21; West: Tr. 442; Maric: Tr. 480-81.)

Before being read his rights, the individual was asked a series of questions to ascertain whether he was the man they sought. (Maric: H. 82.) Responding to why he had run, the individual said "I've had dealings with the police before. I'm on parole." (West: H. 17; *see* West: Tr. 467.)[4] The officers also asked him to identify himself and explain what he was doing in the area. (West: H. 17; West: Tr. 447.) He responded that his name was Eric Smalls, and said that he was drunk and had gotten off at the wrong subway stop. (West: H. 17; West: Tr. 448-47.) Sgt. West noticed Smalls was "[s]oft spoken," "well spoken" with "a military manner of speaking" and had "alcohol on his breath." (West: H. 19; West Tr. 451-52; Bonilla: Tr. 535.) Sgt. West was familiar with the neighborhood, and he knew that Smalls' subway story was suspicious because it meant Smalls had apparently walked seven blocks north of the 207th Street stop, where he claimed he mistakenly exited the train, instead of walking south to the Dyckman Projects where he lived. (West: H. 18-19; West: Tr. 447-51.) "[K]nowing that certain parolees have restrictions," such as "prohibitions against drinking and carrying weapons and certain hours of the evening they are not suppose to be out," Sgt. West decided to bring Smalls back to the station house, where they arrived at about 5:00 a.m. (West: H. 22.)

4 The police soon learned that Smalls was on parole from the military for committing burglaries in which he attacked women in Germany, and that he was not supposed to be drinking or carrying weapons while on parole. (West: H. 23-24.)
At trial, the judge had not allowed the parole reference on the prosecutor's direct examination, but allowed it on redirect after finding that defense counsel's cross-examination had opened the door.

***7** Detective Bonilla of the Special Victims Squad, who was investigating the series of prior attacks, read Smalls his *Miranda* warnings, and Smalls refused to answer any questions other than pedigree information. (Bonilla: H. 88-89; Bonilla: Tr. 530-31.) Smalls said he was twenty-six years old, five feet eleven inches tall, and weighted about 170 pounds. (Bonilla: H. 89-90; Bonilla: Tr. 535.) Around noon later that day, October 14, 1996, Detective Bonilla conducted separate lineups viewed by I.M., K.W., and Ella Johnson. (Bonilla: Tr. 537-38.) S.S. did not view the line-up on that day because she was out of the country. (Bonilla: Tr. 538.) Smalls chose to stand in position number three at the line-up. (Bonilla: Tr. 537, 540-41.) I.M. and K.W. were unable to make an identification; however, K.W. recognized Smalls' voice, and she asked numbers three and six to reread a statement because they sounded like her attacker. (Bonilla: H. 91-92; Bonilla: Tr. 541-42.) The fourth victim, Ella Johnson, said that "it possibly could be number three [*i.e.,* Smalls] but she wasn't sure." (Bonilla: H. 91-92.)

A search warrant was issued for Smalls' home on October 14, 1996, the day of his arrest. (Bonilla: Tr. 542-43.) None of the items stolen from the victims' apartments were found in Smalls'apartment. (Bonilla: Tr. 571.) The police recovered four pairs of sneakers, one of which had a spot of blood on the eyelet. (Bonilla: Tr. 543-44, 459-50.) On October 30, 1996, the sneaker with blood was sent to Cellmark Laboratory for testing, along with the knife from Smalls' knapsack and a sample of I.M.'s blood obtained from her on October 30, 1996. (Bonilla: Tr. 552-53, 556; Flaherty: Tr. 644-47.) Dr. Charlotte Word, Deputy Laboratory Director at Cellmark who oversees the work done by the scientists, testified that her lab conducted DNA analysis on all of the items received. (Word: Tr. 653, 661, 669, 673-74.) An insufficient amount of DNA was recovered from the knife for analysis, but the blood on the sneaker was analyzed. (Word: Tr. 675.) The DNA results from the blood on the sneaker and I.M.'s blood were consistent with each other. (Word: Tr. 682.) The results showed that the chance of another individual besides I.M. having the same DNA as that found on Smalls' shoe would be one in fourteen billion Caucasian individuals, one in sixty-one billion African Americans, one in forty-one billion Hispanics. (Word: Tr. 686-87.)

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Six months later, on April 15, 1997, S.S., the third victim, viewed a photo array, where she said her attacker was "possibly number six or five and that she would have to see the person in person to be able to make sure." (Bonilla: H. 94-95; Bonilla: Tr. 557.) Smalls was number five in the photo array. (Bonilla: H. 95.) On May 15, 1997, a line-up was conducted, and Smalls chose to stand in number three again after consulting with his former attorney. (Bonilla: H. 96-97; Bonilla: Tr. 557-58.) The line-up included five fillers who were all black males of a slim or medium build, who matched Smalls as "best as possible at the time." (Bonilla: H. 97; Bonilla: Tr. 557, 566-67.) Pictures were taken of the line-up at the time, with one given to Smalls' attorney, and the other was xeroxed and filed, but it was later "misplaced" before the suppression hearing. (Bonilla: H. 98-99; Bonilla: Tr. 558-603.) The xerox copy was admitted, but it only showed "silhouettes." (H.99-102.) At the line-up, S.S. said she recognized "number three"-Smalls-as the "person who came into [her] apartment." (S.S.: Tr. 76-77; Bonilla: H. 100.)

***8** After the pretrial suppression hearing, on May 15, 1998 Justice Leibovitz issued a sixteen-page decision, denying Smalls' motion to suppress the evidence recovered from him due to an alleged unlawful search and seizure, his statements to the police, and S.S.'s line-up identification. (Dkt. No. 14: Martland Aff. Ex. A: Justice Leibovitz 9/15/98 suppression hearing decision.) [5] Justice Leibovitz found that the police had "lawfully stopped" Smalls and were "permitted to clarify the situation through brief pre-*Miranda* questioning." (Ex. A: Justice Leibovitz decision at 7.) Justice Leibovitz found that Sergeant West "reasonably feared that the knapsack contained the weapon" and was permitted to feel the bag, and once he felt the knife he was permitted to open the bag and remove the knife. (*Id.* at 9-10.) Justice Leibovitz found that "the police had probable cause to arrest [Smalls] for the prior burglaries" because of the "match of time, location and the suspect's description," and also had probable cause to arrest him "on an independent ground, violation of parole." (*Id.* at 10-11 .) Concerning the photo array viewed by S.S., the court found that the photo array was fair because a copy of the array showed that "the fillers fairly resembled him," and S.S.'s "inability to choose between defendant and a filler demonstrated that the procedure was fair." (*Id.* at 13.) Justice Leibovitz determined "that the May 15th lineup itself was not suggestive." (*Id.* at 14.) "While the loss of the original copies of the lineup photographs may give rise to a presumption of suggestiveness, any such presumption was overcome by the information on the lineup expense report and the testimony of Detective Bonilla." (*Id.*) The fillers all had "similar builds, wore short hair and were seated to minimize discrepancies," and overall had a "sufficient resemblance" so that any discrepancies between goatees and mustaches and hair length "were minor details." (*Id.* at 14-15.)

5 References to Exhibits ("Ex.") are to the exhibits to the affidavit of Assistant Attorney General Luke Martland, Dkt. No. 14.

Smalls' Defense

At trial, although Smalls' counsel presented no witnesses, he tried to establish through cross-examination of the prosecution's witnesses the theory that Smalls was framed by the police. Counsel suggested through cross-examination that the DNA evidence did not solve the case because the sneakers were tampered with and someone placed I.M.'s blood on the shoe. (Bonilla: Tr. 575-77; Flaherty: Tr. 650-51; Word: Tr. 689.) Defense counsel pointed out that Smalls' fingerprints were not found in any victim's apartment, and there were discrepancies in the descriptions of the attacker given by the each victim. (Peruzza: Tr. 719; Bonilla: Tr. 578, 588-92.) Defense counsel pointed out that S.S., who was the only victim to positively identify Smalls in a line-up, had read a story in the *New York Times* in January 1997 about the suspect which included a photograph of Smalls, before she made her line-up identification. (S .S.: Tr. 94; Bonilla: Tr. 583-88.) Defense counsel also suggested an alternate suspect, with a criminal record, who worked at the neighborhood drugstore. (*E.g.,* Bonilla: Tr. 593-95.) [6]

6 Defense counsel also respectfully told the judge (outside the jury's presence) that the judge had lost "impartiality as a Judge in this case" and had "actively become a part of the prosecution team in this case." (Tr. 598-600, 602-04.)

***9** In his summation, defense counsel charged that the jury must place great scrutiny on the "credibility of those live witnesses who testified" and said there were "serious contradictions in testimony that goes to explain whether, in fact, you can believe these witnesses." (Defense Summation: Tr. 754, 766.) Defense counsel also suggested that "tampering went on" with the items presented as

evidence in order to solve the case. (Defense Summation: Tr. 755-56.)

In response, the prosecutor's summation highlighted the solid evidence and attacked the defense conspiracy claim, asking "why would the police want to frame Eric Smalls?" (State Summation: Tr. 789-90.) The prosecutor asked, "Why create a scapegoat here? Why frame an innocent man here?" (State Summation: Tr. 791.)

Verdict and Sentence

Smalls was convicted of all counts: three counts of first degree burglary, three counts of first degree robbery, one count of first degree attempted burglary, and eight counts of first degree sexual abuse. (Verdict: Tr. 930-36.) Smalls was sentenced on October 2, 1998 as a second felony offender, and given an aggregate term of thirty-two years imprisonment. (Sentencing Transcript ["S."] 7-8, 17-19.)

Smalls' Direct Appeal

On appeal, Smalls' new appointed counsel argued that: (1) his guilt was not proved beyond a reasonable doubt and, in any event, his conviction was against the weight of the evidence (Ex. B: Smalls 1st Dep't Br. at 18-22), and (2) the trial court had improperly ruled that Smalls' trial counsel had opened the door to Smalls' statement to police that he was on parole (*id.* at 23-33). Smalls also filed a pro se supplemental brief in which he argued that: (1) the police were not justified in stopping him or in searching his backpack (Ex. C.: Smalls Pro Se Supp. 1st Dep't Br. at 2, 7-15), and (2) the trial judge should have sanctioned the prosecution for the loss of the photograph of the May 15, 1997 line-up, which constituted a *Rosario* violation (*id.* at 2, 15-17.)

On October 9, 2001, the First Department affirmed Smalls' conviction, holding:

> The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Moreover, we conclude that the evidence was overwhelming. In addition to reliable identification testimony and evidence of unique modus operandi, DNA testing established that a victim's blood was found on defendant's sneakers.
>
> Defendant's cross examination of a detective suggesting that defendant had an innocent reason for fleeing when approached by the police, as well as his recross-examination of the detective about whether he had knowledge of defendant's thoughts at the time of his arrest, opened the door to the admission of defendant's statement that he ran from the police because he was on parole.
>
> We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

People v. Smalls, 287 A.D.2d 277, 277, 731 N.Y.S.2d 16, 16-17 (1st Dep't 2001) (citations omitted).

***10** The New York Court of Appeals denied leave to appeal on December 20, 2001. *People v. Smalls,* 97 N.Y.2d 688, 738 N.Y.S.2d 304 (2001).

Smalls' C.P.L. § 440.10 Motion

On or about October 8, 2002, Smalls filed a pro se C.P.L. § 440.10 motion to vacate the judgment of conviction. [7] Smalls argued that: (1) the prosecution committed a *Rosario* violation by failing to provide S.S.'s statement and Detective Aponte's notes prior to the suppression hearing; (2) there was "newly discovered" exculpatory evidence; and (3) Smalls had received ineffective assistance of trial counsel. (*See* Ex. I: State § 440 Opp. Br. at 1; Ex. J: Justice Silverman decision at 1.)

[7] The District Attorney's Office was unable to locate Smalls' § 440.10 motion. This summary is based upon the State's Brief, which relies on the People's response to the motion, and Justice Silverman's decision. (Dkt. No. 13: State Br. at 32; Ex. I: State § 440 Opp. Br.; Ex. J: Justice Silverman decision.)

Justice Silverman denied Smalls' C.P.L. § 440.10 motion on December 20, 2002. (Ex. J: Justice Silverman decision denying § 440 motion.) Justice Silverman held that S.S.'s statement and a detective's notes did not constitute *Rosario* material with respect to the suppression hearing because "these individuals did not testify at the suppression hearing." (Ex. J: Justice Silverman decision at 1-2.) In addition, "[s]ince the issue was already raised-or could have been raised-on [Smalls'] direct appeal, it must now be denied pursuant to CPL 440.10(2)(a, c)." (Ex. J: Justice Silverman decision at 2.) Justice Silverman found that it was not clear what "newly discovered evidence" Smalls was claiming had been made available since the close of trial. (Ex. J: Justice Silverman decision at 2.)

Finally, Justice Silverman found there was "no basis to defendant's claim of ineffective assistance of [trial] counsel" because "[t]he trial record and Court file reveal that defense counsel made appropriate pretrial motions, conducted a competent examination of witnesses, and generally presented a proper defense." (Justice Silverman decision at 2.) Justice Silverman did not fault counsel's line of questioning and found that counsel provided "meaningful representation," as required by New York law, and "counsel's efforts should not be second-guessed." (Ex. J: Justice Silverman decision at 3.)

The First Department denied leave to appeal from the denial of the § 440.10 motion on July 10, 2003. *People v. Smalls,* No. M-570, 2003 N.Y.App. Div. LEXIS 8167 (1st Dep't July 10, 2003).

Smalls' Coram Nobis Petition to the First Department

Smalls filed a coram nobis petition with the First Department on October 1, 2002 claiming his appellate counsel was ineffective for: (1) failing to assert that trial counsel was ineffective (Ex. M: Smalls Coram Nobis Petition at 3-21, 47); (2) "failing to raise some valuable evidences to support" the argument that Smalls' guilt had not been proven beyond a reasonable doubt (*id.* at 21-26); (3) "failing to raise the illegal search and seizure" issue (*id.* at 26-35); (4) "failing to raise the *Miranda* warning" issue (*id.* at 35-37); (5) "failing to raise the *Wade* Hearing and reopening of the *Wade* Hearing issues" (*id.* at 37-42); (6) not arguing that the "trial court had erred in not allowing trial counsel to call complainants to testify during *Wade* Hearing" (*id.* at 42); (7) "failing to raise the judicial misconduct issue" (*id.* at 42-45); (8) not raising the *Rosario* and *Brady* issues (*id.* at 45-47); and (9) "failing to submit a reply brief and to give an oral argument" (*id.* at 49).

***11** The First Department denied Smalls' coram nobis petition on June 19, 2003, citing *People v. de la Hoz,* 131 A.D.2d 154, 158, 520 N .Y.S.2d 386, 388 (1st Dep't 1987). *People v. Smalls,* 306 A.D.2d 958, 762 N.Y.S.2d 866 (1st Dep't 2003); *see also* Ex. O: 6/19/03 1st Dep't decision. The New York Court of Appeals denied leave to appeal on October 23, 2003. *People v. Smalls,* 100 N.Y.2d 645, 769 N.Y.S.2d 211 (2003); *see also* Ex. P: Court of Appeals Certificate denying leave to appeal.

Smalls' C.P.L. § 440.20 Motion to Vacate His Sentence

On June 11, 2003, Smalls moved pursuant to C.P.L. § 440.20 to set aside his sentence of thirty-two years because it exceeded "the maximum aggregated term of 30 years" under Penal Law § 70.30. (Ex. Q: Smalls C.P.L. § 440.20 Motion ¶ 6). On October 21, 2003, Justice Fried denied Smalls' motion. (Ex. R: Justice Fried's decision denying § 440.20 motion). The First Department denied leave to appeal on March 4, 2004. *People v. Smalls,* No. M-5489, 2004 N .Y.App. Div. LEXIS 2431 (1st Dep't Mar. 4, 2004). (*See also* Ex. S: D.A.'s 2/26/04 letter opposing leave to appeal; Ex. T: 1st Dep't decision denying leave to appeal.)

Smalls' Federal Habeas Corpus Petition

Smalls submitted a ninety-three page petition for a writ of habeas corpus, asserting that both his trial and appellate counsel were ineffective for numerous reasons. (Dkt. No. 2: Pet.; *see also* Smalls 6/21 Traverse.) Smalls' petition asserts that appellate counsel was ineffective for failing to raise: (1) the *Miranda* issue about his statements (Ex. U: Pet. at 13-15, 62-71); [8] (2) the *Wade* pretrial identification issue (*id.* at 15-20); (3) the judicial misconduct issue (*id.* at 20-26); (4) failing to submit a reply brief or give oral argument (*id.* at 26); and (5) failing to raise claims that trial counsel was ineffective in numerous ways (*id.* at 28-61).

8 The petition, Dkt. No. 2, does not contain page numbers; a copy of it is Ex. U, with page numbers added by the State.

Smalls' petition asserted direct claims of ineffective trial counsel, as follows: (1) failing to cross-examine Detective Bonilla about various things (*id.* at 48-51); (2) failing to cross-examine the complainants about prior inconsistent statements (*id.* at 51-53); (3) counsel had a conflict of interest because he forced Smalls to tell his mother certain information (*id.* at 54-56); (4) failing to call character witnesses (*id* at 56-58); and (5) failing to investigate (*id.* at 58).

Smalls also raises claims of (a) newly discovered evidence (*id.* at 72-73), (b) *Rosario /Brady* violations about the suppression hearing (*id.* at 77-81), and (c) insufficiency of the evidence (*id.* at 82-88).

ANALYSIS

I. *THE AEDPA REVIEW STANDARD* [9]

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9 For additional decisions by this Judge discussing the AEDPA review standard in language substantially similar to that in this entire section of this Opinion, *see, e.g., Gillespie v. Miller,* 04 Civ. 0295, 2004 WL 1689735 at *6-8 (July 29, 2004) (Peck, M.J.); *Castro v. Fisher,* 04 Civ. 0346, 2004 WL 1637920 at *12-14 (S.D.N.Y. July 23, 2004) (Peck, M.J.); *Del Pilar v. Phillips,* 03 Civ. 8636, 2004 WL 1627220 at *7-9 (S.D.N.Y. July 21, 2004) (Peck, M.J.); *Peakes v. Spitzer,* 04 Civ. 1342, 2004 WL 1366056 at *8-10 (S.D.N.Y. June 16, 2004) (Peck, M.J.); *Brown v. Fischer,* 03 Civ. 9818, 2004 WL 1171277 at *4-6 (S.D.N.Y. May 27, 2004) (Peck, M.J.); *Rodriguez v. Goord,* 02 Civ. 6318, 2004 WL 540531 at *10-13 (S.D.N.Y. Mar. 19, 2004) (Peck, M.J.); *Rodriguez v. Senkowski,* 03 Civ. 3314, 2004 WL 503451 at *22-24 (S.D.N.Y. Mar. 15, 2004) (Peck, M.J.); *Hernandez v. Filion,* 03 Civ. 6989, 2004 WL 286107 at *8-10 (S.D.N.Y. Feb. 13, 2004) (Peck, M.J.), *report & rec. adopted,* 2004 WL 555722 (S.D.N.Y. Mar. 19, 2004) (Berman, D.J .); *Gomez v. Duncan,* 02 Civ. 0846, 2004 WL 119360 at *14-16 (S.D.N.Y. Jan. 27, 2004) (Peck, M.J.); *Montalvo v. Annetts,* 02 Civ. 1056, 2003 WL 22962504 at *12-14 (S.D.N.Y. Dec. 17, 2003) (Peck, M.J.) (citing my earlier cases); *Larrea v. Bennett,* 01 Civ. 5813, 2002 WL 1173564 at *14 (S.D.N.Y. May 31, 2002) (Peck, M.J .), *report & rec. adopted,* 2002 WL 1808211 (S.D.N.Y. Aug. 6, 2002) (Scheindlin, D.J.), *aff'd,* No. 02-2540, 368 F.3d 179 (table), 2004 WL 1094269 (2d Cir. May 18, 2004); *Mendez v. Artuz,* 98 Civ. 2652, 2000 WL 722613 at *22 (S.D.N.Y. June 6, 2000) (Peck, M.J.), *report & rec. adopted,* 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000) (McKenna, D.J.), *aff'd,* 303 F.3d 411, 417 (2d Cir.2002), *cert. denied,* 537 U.S. 1245, 123 S.Ct. 1353 (2003); *Fluellen v. Walker,* 97 Civ. 3189, 2000 WL 684275 at *10 (S.D.N.Y. May 25, 2000) (Peck, M.J.), *aff'd,* No. 01-2474, 41 Fed. Appx. 497, 2002 WL 1448474 (2d Cir. June 28, 2002), *cert. denied,* 538 U.S. 978, 123 S.Ct. 1787 (2003).

Before the Court can determine whether Smalls is entitled to federal habeas relief, the Court must address the proper habeas corpus review standard under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

In enacting the AEDPA, Congress significantly "modifie[d] the role of federal habeas courts in reviewing petitions filed by state prisoners." *Williams v. Taylor,* 529 U.S. 362, 403, 120 S.Ct. 1495, 1518 (2000). The AEDPA imposed a more stringent review standard, as follows:

> ***12** (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) ... 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).[10]

10 *See also, e.g., Dallio v. Spitzer,* 343 F.3d 553, 559-60 (2d Cir.2003), *cert. denied,* 124 S.Ct. 1713 (2004); *Eze v. Senkowski,* 321 F.3d 110, 120 (2d Cir.2003) ("AEDPA changed the landscape of federal habeas corpus review by 'significantly curtail[ing] the power of federal courts to grant the habeas petitions of state prisoners.") (quoting *Lainfiesta v. Artuz,* 253 F.3d 151, 155 (2d Cir.2001), *cert. denied,* 535 U.S. 1019, 122 S.Ct. 1611 (2002)); *Christie v. Hollins,* 01 Civ. 11605, 2003 WL 22299216 at *2 (S.D.N.Y. Oct. 7, 2003) (Mukasey, D.J.) ("As Magistrate Judge Peck explained, the 'unreasonable application' clause, and AEDPA more generally, imposes a heavy burden on habeas petitioners.").

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have "independent meaning." *Williams v. Taylor,* 529 U.S. at 404-05, 120 S.Ct. at 1519.[11] Both, however, "restrict[ ] the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams v. Taylor,* 529 U.S. at 412, 120 S.Ct. at 1523.[12] "That federal law, as defined by the Supreme Court, may either be a generalized standard enunciated in the [Supreme] Court's case law or a bright-line rule designed to effectuate such a standard in a particular context." *Kennaugh v. Miller,* 289 F.3d at 42. "A petitioner cannot win habeas relief solely by demonstrating that the state court unreasonably applied Second Circuit precedent." *Yung v. Walker,* 296 F.3d at 135; *accord, e.g., DelValle v. Armstrong,* 306 F.3d at 1200.

11 *Accord, e.g., Parsad v. Greiner,* 337 F.3d 175, 181 (2d Cir.2003), *cert. denied,* 124 S.Ct. 962 (2003); *Jones v. Stinson,* 229 F.3d 112, 119 (2d Cir.2000); *Lurie v. Wittner,* 228 F.3d 113, 125 (2d Cir.2000), *cert. denied,* 532 U.S. 943, 121 S.Ct. 1404 (2001); *Clark v. Stinson,*

214 F.3d 315, 320 (2d Cir.2000), *cert. denied,* 531 U.S. 1116, 121 S.Ct. 865 (2001).

12 *Accord, e.g., Yarborough v. Alvarado,* 124 S.Ct. 2140, 2147 (2004) ("We look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." '); *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 2534 (2003); *Lockyer v. Andrade,* 538 U.S. 63, 72, 123 S.Ct. 1166, 1172 (2003) ("Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." '); *Tueros v. Greiner,* 343 F.3d 587, 591 (2d Cir.2003), *cert. denied,* 124 S.Ct. 2171 (2004); *Parsad v. Greiner,* 337 F.3d at 181; *DelValle v. Armstrong,* 306 F.3d 1197, 1200 (2d Cir.2002); *Yung v. Walker,* 296 F.3d 129, 135 (2d Cir.2002); *Kennaugh v. Miller,* 289 F.3d 36, 42 (2d Cir.), *cert. denied,* 537 U.S. 909, 123 S.Ct. 251 (2002); *Loliscio v. Goord,* 263 F.3d 178, 184 (2d Cir.2001); *Sellan v. Kuhlman,* 261 F.3d 303, 309 (2d Cir.2001).

As to the "contrary to" clause:

> A state-court decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases.... A state-court decision will also be contrary to [the Supreme] Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent.

Williams v. Taylor, 529 U.S. at 405-06, 120 S.Ct. at 1519-20.[13]

13 *Accord, e.g., Price v. Vincent,* 538 U.S. 634, 123 S.Ct. 1848, 1853 (2003); *Lockyer v. Andrade,* 123 S.Ct. at 1173-74; *Tueros v. Greiner,* 343 F.3d at 591; *DelValle v. Armstrong,* 306 F.3d at 1200; *Yung v. Walker,* 296 F.3d at 135; *Kennaugh v. Miller,* 289 F.3d at 42; *Loliscio v. Goord,* 263 F .3d at 184; *Lurie v. Wittner,* 228 F.3d at 127-28.

In *Williams,* the Supreme Court explained that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor,* 529 U.S. at 413, 120 S.Ct. at 1523.[14] However, "[t]he term 'unreasonable' is ... difficult to define." *Williams v. Taylor,* 529 U.S. at 410, 120 S.Ct. at 1522. The Supreme Court made clear that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.*[15] Rather, the issue is "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor,* 529 U.S. at 409, 120 S.Ct. at 1521.[16] "Objectively unreasonable" is different from "clear error." *Lockyer v. Andrade,* 538 U.S. at 75, 123 S.Ct. at 1175 ("The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."). However, the Second Circuit has explained "that while '[s]ome increment of incorrectness beyond error is required ... 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." ' *Jones v. Stinson,* 229 F.3d at 119 (quoting *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir.2000)).[17] "[T]he range of reasonable judgment can depend in part on the nature of the relevant rule." *Yarborough v. Alvarado,* 124 S.Ct. at 2149.[18]

14 *Accord, e.g., Wiggins v. Smith,* 123 S.Ct. at 2534-35; *Parsad v. Greiner,* 337 F.3d at 181.

15 *See also, e.g., Yarborough v. Alvarado,* 124 S.Ct. at 2150; *Wiggins v. Smith,* 123 S.Ct. at 2535; *Price v. Vincent,* 123 S.Ct. at 1853 ("As we have explained, 'a federal habeas court may not issue the writ simply because that court concludes that the state-court decision applied [a Supreme Court case] incorrectly." ') (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S.Ct. 357, 360 (2002)); *Lockyer v. Andrade,* 538 U.S. at 75, 123 S.Ct. at 1175; *Eze v. Senkowski,* 321 F.3d at 124-25; *DelValle v. Armstrong,* 306 F.3d at 1200 ("With regard to issues of law, therefore, if the state court's decision was not an unreasonable application of, or contrary to, clearly established federal law as defined by Section 2254(d), we may

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not grant habeas relief even if in our judgment its application was erroneous.").

16 *Accord, e.g., Yarborough v. Alvarado,* 124 S.Ct. at 2150; *Wiggins v. Smith,* 123 S.Ct. at 2535; *Price v. Vincent,* 123 S.Ct. at 1853; *Lockyer v. Andrade,* 538 U.S. at 75, 123 S.Ct. at 1174-75; *Woodford v. Visciotti,* 537 U.S. at 25-27, 123 S.Ct. at 360-61; *Eze v. Senkowski,* 321 F.3d at 125; *Ryan v. Miller,* 303 F.3d 231, 245 (2d Cir.2002); *Yung v. Walker,* 296 F.3d at 135; *Loliscio v. Goord,* 263 F.3d at 184; *Lurie v. Wittner,* 228 F.3d at 128-29.

17 *Accord, e.g., Eze v. Senkowski,* 321 F.3d at 125; *Ryan v. Miller,* 303 F.3d at 245; *Yung v. Walker,* 296 F.3d at 135; *Loliscio v. Goord,* 263 F.3d at 184; *Christie v. Hollins,* 2003 WL 22299216 at *3.

18 The Supreme Court explained:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 124 S.Ct. at 2149.

***13** Moreover, the Second Circuit has held "that a state court determination is reviewable under AEDPA if the state decision unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to situations which that principle should have, in reason, governed." *Kennaugh v. Miller,* 289 F.3d at 45. [19]

19 *Accord, e.g., Tueros v. Greiner,* 343 F.3d at 591; *Yung v. Walker,* 296 F.3d at 135; *see Yarborough v. Alvarado,* 124 S.Ct. at 2150-51 ("The petitioner contends that if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision. There is force to this argument. Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law. At the same time, the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.") (citations omitted).

Under the AEDPA, in short, the federal courts "must give the state court's adjudication a high degree of deference." *Yung v. Walker,* 296 F.3d at 134.

Even where the state court decision does not specifically refer to either the federal claim or to relevant federal case law, the deferential AEDPA review standard applies:

> For 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. When a state court does so, 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 v. Kuhlman, 261 F.3d at 312; *accord Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 365 (2002) (State court not required to cite Supreme Court cases, or even be aware of them, to be entitled to AEDPA deference, "so long as neither the reasoning nor the result of the state-court decision contradicts them."); *Francolino v. Kuhlman,* 365 F.3d 137, 141 (2d Cir. Apr. 20, 2004) (Where "the Appellate Division concluded its opinion by stating that it had 'considered and rejected defendants' remaining claims,'' AEDPA deference applies.); *Jenkins v. Artuz,* 294 F.3d 284, 291 (2d Cir.2002) ("In *Sellan,* we found that an even more concise Appellate Division disposition-the word 'denied'-triggered AEDPA deference."). [20] "By its terms, § 2254(d) requires such deference only with respect to a state-court 'adjudication on the merits,' not to a disposition 'on a procedural, or other, ground.' Where it is 'impossible to discern the Appellate Division's conclusion on [the relevant] issue,' a federal court should not give AEDPA deference to the state appellate court's ruling." *Miranda v. Bennett,* 322 F.3d 171, 177-78 (2d Cir.2003)

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(citations omitted).[21] Of course, "[i]f there is no [state court] adjudication on the merits, then the pre-AEDPA, *de novo* standard of review applies." *Cotto v. Herbert,* 331 F.3d at 230.

In addition to the standard of review of legal issues, the AEDPA provides a deferential review standard for state court factual determinations: "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). "The petitioner bears the burden of 'rebutting the presumption of correctness by clear and convincing evidence.' " *Parsad v. Greiner,* 337 F.3d at 181 (quoting § 2254(e)(1)).

II. *THE STRICKLAND V. WASHINGTON STANDARD ON INEFFECTIVE ASSISTANCE OF COUNSEL*[22]

20 *Accord, e.g., Dallio v. Spitzer,* 343 F.3d at 559-60; *Parsad v. Greiner,* 337 F.3d at 180-81; *Cotto v. Herbert,* 331 F.3d 217,230 (2d Cir.2003); *Eze v. Senkowski,* 321 F.3d at 121; *Ryan v. Miller,* 303 F.3d at 245; *Aeid v. Bennett,* 296 F.3d 58, 62 (2d Cir.), *cert. denied,* 537 U.S. 1093, 123 S.Ct. 694 (2002); *Norde v. Keane,* 294 F.3d 401, 410 (2d Cir.2002); *Aparicio v. Artuz,* 269 F.3d 78, 93 (2d Cir.2001).

The Second Circuit "recognize[d] that a state court's explanation of the reasoning underlying its decision would ease our burden in applying the 'unreasonable application' or 'contrary to' tests." *Sellan v. Kuhlman,* 261 F.3d at 312. Where the state court does not explain its reasoning, the Second Circuit articulated the analytic steps to be followed by a federal habeas court:

> We adopt the Fifth Circuit's succinct articulation of the analytic steps that a federal habeas court should follow in determining whether a federal claim has been adjudicated "on the merits" by a state court. As the Fifth Circuit has explained, "[W]e determine whether a state court's disposition of a petitioner's claim is on the merits by considering: (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits." *Mercadel v. Cain,* 179 F.3d 271, 274 (5th Cir.1999).

Sellan v. Kuhlman, 261 F.3d at 314; *accord, e.g., Cotto v. Herbert,* 331 F.3d at 230; *Eze v. Senkowski,* 321 F.3d at 121-22; *Norde v. Keane,* 294 F.3d at 410; *Aparicio v. Artuz,* 269 F.3d at 93; *see also Dallio v. Spitzer,* 343 F.3d at 560.

21 The Second Circuit in *Miranda v. Bennett* continued: "Generally, when the Appellate Division opinion states that a group of contentions is either without merit 'or' procedurally barred, the decision does not disclose which claim in the group has been rejected on which ground. If the record makes it clear, however, that a given claim had been properly preserved for appellate review, we will conclude that it fell into the 'without merit' part of the disjunct even if it was not expressly discussed by the Appellate Division." *Id.* at 178.

22 For additional decisions authored by this Judge discussing the *Strickland v. Washington* standard for ineffective assistance of counsel in language substantially similar to this section of this Opinion, *see, e.g., Gillespie v. Miller,* 04 Civ. 0295, 2004 WL 1689735 at *14-16 (S.D.N.Y. July 29, 2004) (Peck, M.J.); *Rodriguez v. Goord,* 02 Civ. 6318, 2004 WL 540531 at *20-22 (S.D.N.Y. Mar. 19, 2004); *Rodriguez v. Senkowski,* 03 Civ. 3314, 2004 WL 503451 at *39 (S.D.N.Y. Mar. 15, 2004) (Peck, M.J.); *Gomez v. Duncan,* 02 Civ. 0846, 2004 WL 119360 at *27 (S.D.N.Y. Jan. 27, 2004) (Peck, M.J.); *Montalvo v. Annetts,* 02 Civ. 1056, 2003 WL 22962504 at *22-24 (S.D.N.Y. Dec. 17, 2003) (Peck, M.J.); *Maldonado v. Greiner,* 01 Civ. 799, 2003 WL 22435713 at *26-28 (S .D.N.Y. Oct. 28, 2003) (Peck, M.J.); *Besser v. Walsh,* 02 Civ. 6775, 2003 WL 22093477 at *32-34 (S.D.N.Y. Sept. 10, 2003) (Peck, M.J.). *report & rec. adopted,* 2003 WL 22681429 (S.D.N.Y. Nov. 13, 2003) (Kaplan, D.J.); *Guzman v. Fischer,* 02 Civ. 7448, 2003 WL 21744086 at *9-12 (S.D.N.Y. July 29, 2003) (Peck, M.J.); *Skinner v. Duncan,* 01 Civ. 6656, 2003 WL 21386032 at *33-35 (S.D .N.Y. June 17, 2003) (Peck, M.J.); *Quinones v. Miller,* 01 Civ. 10752, 2003 WL 21276429 at *18-19 (S.D.N.Y. June 3, 2003) (Peck, M.J .) (citing my earlier opinions on this issue); *Larrea v. Bennett,* 01 Civ. 5813, 2002 WL 1173564 at *16-19 (S.D.N.Y. May 31, 2002) (Peck, M.J.), *report & rec. adopted,* 2002 WL 1808211 (S.D.N.Y. Aug. 6, 2002) (Scheindlin, D.J.), *aff'd,* No. 02-2540, 368 F.3d 179 (table), 2004 WL 1094279 (2d Cir. May 18, 2004); *Fluellen v. Walker,* 97 Civ. 3189, 2000 WL 684275 at *11 (S.D.N.Y. May 25, 2000) (Peck, M.J.), *aff'd,* No. 01-2474, 41 Fed. Appx. 497, 2002 WL 1448474 (2d Cir. June 28, 2002), *cert. denied,* 123 S.Ct. 1787 (2003).

A. *The Strickland Standard*

***14** In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), the Supreme Court announced a two-part test to determine if counsel's assistance was ineffective: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. at 2064; *accord, e.g., Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 2535 (2003). This performance is to be judged by an objective standard of reasonableness. *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. at 2064.[23]

23 *Accord, e.g., Wiggins v. Smith,* 123 S.Ct. at 2535; *Bell v. Cone,* 535 U.S. 685, 695, 122 S.Ct. 1843, 1850 (2002).

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."
>
> *Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. at 2065 (citation omitted).[24]

24 *Accord, e.g., Bell v. Cone,* 535 U.S. at 698, 122 S.Ct. at 1852; *Aparicio v. Artuz,* 269 F.3d 78, 95 (2d Cir.2001); *Sellan v. Kuhlman,* 261 F.3d 303, 315 (2d Cir.2001).

Second, the defendant must show prejudice from counsel's performance. *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. at 2064. The "question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S.Ct. at 2068-69. Put another way, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.[25]

25 *See also, e.g., Wiggins v. Smith,* 123 S.Ct. at 2542; *Bell v. Cone,* 535 U.S. at 695, 122 S.Ct. at 1850; *Aparicio v. Artuz,* 269 F.3d at 95; *Sellan v. Kuhlman,* 261 F.3d at 315; *DeLuca v. Lord,* 77 F.3d 578, 584 (2d Cir.), *cert. denied,* 519 U.S. 824, 117 S.Ct. 83 (1996).

> "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. at 694, 104 S.Ct. at 2068; *accord, e.g., Wiggins v. Smith,* 123 S.Ct. at 2542. The phrase "reasonable probability," despite its language, should not be confused with "probable" or "more likely than not." *Strickler v. Greene,* 527 U.S. 263, 289-91, 119 S.Ct. 1936, 1952-53 (1999); *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 1565-66 (1995); *Nix v. Whiteside,* 475 U.S. 157, 175, 106 S.Ct. 988, 998 (1986) ("a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*"); *Strickland v. Washington,* 466 U.S. at 694, 104 S.Ct. at 2068 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). Rather, the phrase "reasonable probability" seems to describe a fairly low standard of probability, albeit somewhat more likely than a "reasonable possibility." *Strickler v. Greene,* 527 U.S. at 291, 119 S.Ct. at 1953; *cf. id.* at 297-301, 119 S.Ct. at 1955-58 (Souter, J., concurring & dissenting) (arguing that any difference between "reasonable probability" and "reasonable possibility" is "slight").

The Supreme Court has counseled that these principles "do not establish mechanical rules." *Strickland v. Washington,* 466 U.S. at 696, 104 S.Ct. at 2069. The focus of the inquiry should be on the fundamental fairness of the trial and whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown of the adversarial process. *Id.*

Any counsel errors must be considered in the "aggregate" rather than in isolation, as the Supreme Court has directed courts "to look at the 'totality of the evidence before the judge or jury.' " *Lindstadt v. Keane,* 239 F.3d 191, 199 (2d Cir.2001) (quoting *Strickland v. Washington,* 466 U.S. at 695-96, 104 S.Ct. at 2069); *accord, e.g., Rodriguez v. Hoke,* 928 F.2d 534, 538 (2d Cir.1991).

The Supreme Court also made clear that "there 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." *Strickland v. Washington,* 466 U.S. at 697, 104 S.Ct. at 2069. [26]

[26] *Accord, e.g., Smith v. Robbins,* 528 U.S. 259, 286 n. 14, 120 S.Ct. 746, 764 n. 14 (2000).

***15** In addition, the Supreme Court has counseled that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.... In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v. Washington,* 466 U.S. at 690-91, 104 S.Ct. at 2066. [27]

[27] *See also, e.g., Yarborough v. Gentry,* 540 U.S. 1, 124 S.Ct. 1, 5-6 (2003); *Engle v. Isaac,* 456 U.S. 107, 134, 102 S.Ct. 1558, 1575 (1982) ("We have long recognized ... that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim."); *Jackson v. Leonardo,* 162 F.3d 81, 85 (2d Cir.1998) ("In reviewing *Strickland* claims, courts are instructed to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and that counsel's conduct was not the result of error but derived instead from trial strategy. We are also instructed, when reviewing decisions by counsel, not to 'second-guess reasonable professional judgments and impose on ... counsel a duty to raise every "colorable" claim' on appeal.") (citations omitted); *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.) (a reviewing court "may not use hindsight to second-guess [counsel's] strategy choices"), *cert. denied,* 513 U.S. 820, 115 S.Ct. 81 (1994).

As the Second Circuit noted: "The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Lindstadt v. Keane,* 239 F.3d at 199.

B. *Strickland and Appellate Counsel*

The *Strickland* test applies to appellate as well as trial counsel. *See, e.g., Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 746, 764 (2000). [28] A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel acted objectively unreasonably in failing to raise a particular issue on appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that defendant's appeal would have been successful before the state's highest court. *E.g., Smith v. Robbins,* 528 U.S. at 285, 120 S.Ct. at 764; *Aparicio v. Artuz,* 269 F.3d at 95; *Mayo v. Henderson,* 13 F.3d at 533-34; *see also Larrea v. Bennett,* 01 Civ. 5813, 2002 WL 1173564 at *18 n. 30 (S.D.N.Y. May 31, 2002) (Peck, M.J.) (discussing the issue of whether a federal or state standard should apply), *report & rec. adopted,* 2002 WL 1808211 (S.D.N.Y. Aug. 6, 2002) (Scheindlin, D.J.), *aff'd,* No. 02-2540, 368 F.3d 179 (table), 2004 WL 1094269 (2d Cir. May 18, 2004).

[28] *Accord, e.g., Evitts v. Lucey,* 469 U.S. 387, 396-97, 105 S.Ct. 830, 836-37 (1985); *Frederick v. Warden, Lewisburg Corr. Facility,* 308 F.3d 192, 197 (2d Cir.2002), *cert. denied,* 537 U.S. 1146, 123 S.Ct. 946 (2003); *Aparicio v. Artuz,* 269 F.3d 78, 95 (2d Cir.2001); *Sellan v. Kuhlman,* 261 F.3d 303, 319 (2d Cir.2001); *McKee v. United States,* 167 F.3d 103, 106 (2d Cir.1999); *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.), *cert. denied,* 513 U.S. 520, 115 S.Ct. 81 (1994); *Claudio v. Scully,* 982 F.2d 798, 803 (2d Cir.1992), *cert. denied,* 508 U.S. 912, 113 S.Ct. 2347 (1993); *Abdurrahman v. Henderson,* 897 F.2d 71, 74 (2d Cir.1990).

Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins,* 528 U.S. at 288, 120 S.Ct. at 765 (citing *Jones v. Barnes,* 463 U.S. 745, 750-54, 103 S.Ct. 3308, 3312-14 (1983)). [29] Reviewing courts should not second guess the reasonable professional judgments of appellate counsel as to the most promising appeal issues. *Lugo v. Kuhlmann,* 68 F.Supp.2d 347, 371-72 (S.D.N.Y.1999) (Patterson, D.J. & Peck, M.J.). [30] Thus, a petitioner may establish constitutionally inadequate performance only by showing that appellate counsel "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo*

v. Henderson, 13 F.3d at 533; *see also, e.g., Jackson v. Leonardo,* 162 F.3d at 85.

29 *Accord, e.g., Sellan v. Kuhlman,* 261 F.3d at 317 ("This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy."); *Jackson v. Leonardo,* 162 F.3d 81, 85 (2d Cir.1998); *Mayo v. Henderson,* 13 F.3d at 533.

30 *Accord, e.g., Jones v. Barnes,* 463 U.S. at 754, 103 S.Ct. at 3314; *Tsirizotakis v. LeFevre,* 736 F.2d 57, 65 (2d Cir.), *cert. denied,* 469 U.S. 869, 105 S.Ct. 216 (1984).

C. *Strickland and the AEDPA Review Standard*

For purposes of this Court's AEDPA analysis, "the *Strickland* standard ... is the relevant 'clearly established Federal law, as determined by the Supreme Court of the United States." ' *Aparicio v. Artuz,* 269 F.3d 78, 95 & n. 8 (2d Cir.2001) (quoting 28 U.S.C. § 2254(d)(1)).[31] "For AEDPA purposes, a petitioner is not required to further demonstrate that his particular theory of ineffective assistance of counsel is also 'clearly established." ' *Aparicio v. Artuz,* 269 F.3d at 95 n. 8. "For [petitioner] to succeed, however, he must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly.... Rather, he must show that the [First Department] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone,* 535 U.S. at 698-99, 122 S.Ct. at 1852; *see also Yarborough v. Gentry,* 540 U.S. 1, 124 S.Ct. 1, 4 (2003).

31 *See also, e.g., Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 2535 (2003); *Bell v. Cone,* 535 U.S. 685, 698, 122 S.Ct. 1843, 1852 (2002); *Sellan v. Kuhlman,* 261 F.3d 303, 315 (2d Cir.2001).

III. *SMALLS' INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM IS DENIED*

***16** Smalls alleges a long list of trial counsel errors, many of which fall into the rubric of trial strategy, and the rest deficient performance. The Second Circuit has consistently stated that the court will not " 'second-guess matters of trial strategy simply because the chosen strategy has failed." ' *Lake v. Portuondo,* No. 00-2150, 14 Fed. Appx. 126, 128, 2001 WL 830583 at *1 (2d Cir. July 25, 2001), *cert. denied,* 535 U.S. 999, 122 S.Ct. 1565 (2002); *accord, e.g., Smith v. Keane,* No. 95-2480, 101 F.3d 1392 (table), 1996 WL 364539 at *3 (2d Cir. July 2, 1996), *cert. denied,* 519 U.S. 969, 117 S.Ct. 396 (1996); *United States v. DiTommaso,* 817 F.2d 201, 215 (2d Cir.1987); *Quinones v. Miller,* 01 Civ. 10752, 2003 WL 21276429 at *40 (S.D.N.Y. June 3, 2003) (Peck, M.J.). Rather, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and must presume that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington,* 466 U.S. 668, 689-90, 104 S.Ct. 2052, 2065-66 (1984); *see also, e.g., United States v. Luciano,* 158 F.3d 655, 660 (2d Cir.1998) ("[A]n appellate court on a cold record should not second-guess [counsel's trial conduct] decisions unless there is no strategic or tactical justification for the course taken."), *cert. denied,* 526 U.S. 1164, 119 S.Ct. 2059 (1999).

Smalls' claims concerning the decisions his trial counsel made regarding questioning, objections, summation, witnesses presented, and the numerous other alleged failures are all part of the particular trial strategy adopted by his counsel, and counsel cannot be faulted for pursuing a trial strategy even if hindsight shows it was unsuccessful. *See, e.g., Quinones v. Miller,* 2003 WL 21276429 at *40-42 (& cases cited therein).

This Court has carefully read the entire trial transcript in this case and cannot say that trial counsel's strategy and performance possessed shortcomings of a constitutional magnitude. Contrary to Smalls' assertion, the Court finds that trial counsel pursued a competent (albeit ultimately unsuccessful) trial strategy of highlighting the inconsistencies in the witnesses' testimony as he challenged the credibility of the evidence and suggested that his client was framed. Furthermore, even if Smalls could show deficient performance, his claim would fail under the second prong of the *Strickland* review test. In light of the overwhelming evidence, including DNA evidence, against Smalls, Smalls cannot show prejudice as a result of his trial counsel's performance. His counsel's trial strategy, implying that Smalls was framed, seemed to be the only one that had any chance of success in light of the DNA evidence. The Court will discuss some (but not all) of Smalls' specific ineffectiveness claims in greater detail.

A. *Trial Counsel's Performance During Cross-Examination and Investigation of the Case*

***17** Smalls alleges that his counsel's inept cross-examination of Sergeant West improperly opened the door to damaging testimony that his client was on parole (Ex. U: Pet. at 41), and his failure to cross-examine Detective Bonilla about the ownership of the confiscated sneakers was also an error (Pet. at 49).

Smalls' trial counsel attempted to show that the police had no basis to detain and arrest Smalls by questioning Sgt. West as to why Smalls was running from the police on the night of his arrest. (*E.g.,* Tr. 466-67.) One can hardly blame trial counsel for attempting to further his theory that his client was framed by showing that the police had no basis to stop him, even if that attempt backfired. *See, e.g., Bilzerian v. United States,* No. 96-2920, 125 F.3d 843 (table), 1997 WL 603470 at *2 (2d Cir. Sept. 30, 1997) ("Defense counsel's decisions were part of a reasonable trial strategy, that simply did not work. [On cross-examination, c]ounsel understandably tried to rebut damaging testimony, only to find their decision led to more harmful evidence. This decision does not fall below a level of reasonableness."), *cert. denied,* 527 U.S. 1021, 119 S.Ct. 2365 (1999); *Avila v. Butler,* No. 02-0739, 2003 WL 22939237 at *6 (N.D.Cal.2003) (Any error in counsel's performance was "not so serious as to rise to the level of a constitutional violation" when counsel asked an open-ended question that elicited testimony that the defendant was on parole. Moreover, no prejudice resulted because the jury was instructed not to consider the information on " 'parole as relating to the guilt or innocence of the defendant." '); *see also, e.g ., Dunham v. Travis,* 313 F.3d 724, 732 (2d Cir.2002) ("Decisions about 'whether to engage in crossexamination, and if so to what extent and in what manner, are ... strategic in nature' and generally will not support an ineffective assistance claim."); *United States v. Luciano,* 158 F.3d 655, 660 (2d Cir.1998) ("[T]he 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."), *cert. denied,* 526 U.S. 1164, 119 S.Ct. 2059 (1999); *United States v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir.1987) ("Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are similarly strategic in nature."), *cert. denied,* 484 U.S. 1061, 108 S.Ct. 1018 (1988); *Charles v. Foltz,* 741 F.2d 834, 840 (6th Cir.1984) (Counsel was not ineffective for eliciting "bad background" information that the defendant had been denied parole and escaped from prison.); *Quinones v. Miller,* 01 Civ. 10752, 2003 WL 21276429 at *42 (S.D.N.Y. June 3, 2003) (Peck, M.J.) ("One can hardly blame [trial counsel] for attempting to shake the detective's story, even if that attempt backfired.").

***18** Smalls claims that his trial counsel also erred in failing to further investigate and cross-examine Detective Bonilla as to whether the sneakers confiscated by Detective Bonilla belonged to another occupant of Smalls' home. (Pet. at 49.) Smalls asserts that the lack of such investigation "denied petitioner the opportunity to create reasonable doubt and build on the theory about the officers planting blood on the sneaker." (Pet. at 49.) He claims that his family, who lives with him, would have testified that he and his father shared shoes. (Pet. at 49.) Pointing the finger at Smalls' own father-who clearly could not have been the attacker since he was too old-was hardly a strategy likely to recommend or endear Small to the jury.

B. *Trial Counsel's Alleged Failure to Call Witnesses*

Smalls believes his trial counsel erred in not calling several witnesses. He asserts that his counsel should have called prior defense counsel Bridgette Richmond, the attorney present when Smalls was picked at the May 15, 1997 line-up. (Pet. at 36). Smalls points out that Richmond was present when S.S. viewed the line-up and identified Smalls as her attacker, and that Richmond "would have testified to the differences between the fillers and petitioner" and would have contradicted the testimony from Detective Bonilla regarding their similarities. (Pet. at 36.) However, in Richmond's memo describing the events of the line-up, Richmond stated that her objections to the fillers were "mostly that they had more facial hair and goatees and about the hair." (Pet. Ex. 11: Richmond 5/15/97 memo.) Richmond additionally noted that two fillers looked older than Smalls, and one looked younger. (*Id.*) Smalls believes he suffered prejudice because this testimony would have created a "reasonable doubt with respect to Detective Bonilla's testimony about the fairness of the line-up and to the remainder of his testimony." (Pet. at 36-37.)

Such testimony would not have shown unfairness in the line-up viewed by S.S. Indeed, Richmond testified at the suppression hearing, but the trial judge found the lineup to have been fair. The result was not likely to be different before the jury a trial. Moreover, as a matter of law, the

Second Circuit has held that "there is no requirement that ... in line-ups the accused must be surrounded by persons nearly identical in appearance." *United States v. Reid,* 517 F.2d 953, 965 n. 15 (2d Cir.1975); *accord, e.g., Ennis v. Walker,* 00 Civ. 2875, 2001 WL 409530 at *19 (S.D.N.Y. Apr. 6, 2001) (Peck, M.J.); *Roberson v. McGinnis,* 99 Civ. 9751, 2000 WL 378029 at *7 (S.D.N.Y. Apr. 11, 2000) (Peck, M.J.); *Roldan v. Artuz,* 78 F.Supp.2d 260, 271 (S.D.N.Y.2000) (Peck, M.J.). [32] " 'Police stations are not theatrical casting offices; a reasonable effort to harmonize the line-up is normally all that is required." ' *Gossett v. Henderson,* 87 Civ. 5878, 1991 WL 135601 at *2 (S.D.N.Y. July 18, 1991), *aff'd,* 978 F.2d 705 (2d Cir.1992), *cert. denied,* 510 U.S. 997, 114 S.Ct. 564 (1993). The cases in which lineups have been held to be suggestive are those where the witness has identified a certain feature of the perpetrator, and the lineup fillers do not have that feature (*e.g.,* if the victim said the perpetrator had a beard or mustache, and the fillers are clean shaven and defendant is not). *See, e.g., Ennis v. Walker,* 2001 WL 409530 at *21; *Roberson v. McGinnis,* 2000 WL 378029 at *8 (citing cases). Here, the victims had not described any specific feature of the perpetrator. Moreover, Smalls' trial counsel pursued a different strategy of attacking the credibility of the line-up identification by demonstrating a potentially more serious flaw, namely that S.S. had viewed a picture of the attacker in the newspaper before she made her line-up identification.

32 *See also, e.g., Taylor v. Kuhlmann,* 36 F.Supp.2d 534, 551 (E.D.N.Y.1999); *Byas v. Keane,* 97 Civ. 2789, 1999 WL 608787 at *14 (S.D.N.Y. Aug. 14, 1999); *Moreno v. Kelly,* 95 Civ. 1546, 1997 WL 109526 at *9 (S.D.N.Y. March 11, 1997); *Collins v. Scully,* 878 F.Supp. 452, 456 (E.D.N.Y.1995) ("Due process does not require that a criminal defendant be viewed in a lineup with other individuals nearly identical in appearance to himself."); *United States v. Padilla,* 94 CR 313, 1994 WL 681812 at *6 (S.D.N .Y. Dec. 5, 1994); *Tavarez v. LeFevre,* 649 F.Supp. 526, 530 (S.D .N.Y.1986).

***19** Next, Smalls claims his counsel should have called character witnesses to show Smalls' good character. (Pet. at 56.) Smalls contends that trial counsel should have called "petitioner's women friends to testify that he never engaged in any sexual deviant behavior nor was he ever violent towards them" and to discuss his education and participation in the military. (Pet. at 57.) Smalls speculates that this testimony would create a reasonable doubt in the jury's minds that he would commit the crimes. (Pet. at 56.) This is a baseless assertion.

"A trial counsel's 'decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial.' Because of this inherently tactical nature, the decision not to call a particular witness generally should not be disturbed." *United States v. DeJesus,* No. 01-1479, 57 Fed. Appx. 474, 478, 2003 WL 193736 at *3 (2d Cir. Jan. 28, 2003) (Counsel's decision not to call a character witness was grounded in strategy and not deficient, "even though [defendant] requested that she do so and provided her with contact information for potential witnesses ."), *cert. denied,* 538 U.S. 1047, 123 S.Ct. 2110 (2003); *see also, e.g., United States v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir.), *cert. denied,* 484 U.S. 958, 108 S.Ct. 357 (1987). [33] The decision not to call a character witness in order to deny the prosecution the opportunity to contradict that impression is part of trial strategy, not an error in it. *See, e.g., Montalvo v. Annetts,* 02 Civ. 1056, 2003 WL 22962504 at *26-27 (S.D.N.Y. Dec. 17, 2003) (Peck, M.J.) (counsel not ineffective for not calling a witness whose testimony was cumulative and may have exposed weaknesses in the defense's case.). As this Court has previously held, " '[t]he decision of whether to call or bypass a particular witness is a question of trial strategy which courts will practically never second-guess.... In the instant case, the testimony of any of these witnesses may have as likely exposed inconsistencies and weaknesses in defendant's case as have lent support to Petitioner's defense. Additionally, a defendant's conclusory allegations about the testimony of uncalled witnesses are insufficient to demonstrate prejudice." ' *Cromwell v. Keane,* 98 Civ. 0013, 2002 WL 929536 at *24 (S.D.N.Y. May 8, 2002) (Peck, M.J.) (quoting *Ozuru v. United States,* No. 95 CV 2241, 1997 WL 124212 at *4 (E.D.N.Y. Mar. 11, 1997), *aff'd,* 152 F.3d 920 (2d Cir.1998), *cert. denied,* 525 U.S. 1083, 119 S.Ct. 828 (1999)); *accord, e.g., Montalvo v. Annetts,* 2003 WL 22962504 at *27; *Skinner v. Duncan,* 2003 WL 21386032 at *40. Here, if counsel presented a character witness, the prosecution would have been able to present detailed evidence that Smalls was on parole for committing a similar crime while he was in the military. It was not unreasonable for Smalls' trial counsel to refrain from calling a character witness whose testimony would open the door to harmful attacks by the prosecution. *See, e.g., United States v. DeJesus,* 2003 WL 193736 at *3

(counsel properly made strategic decision not to call a character witness in order to prevent the prosecution from attacking defendant's character.); *Krutikov v. United States,* 00 CV 6103, 2004 WL 1555269 at *1 (E.D.N.Y. July 12, 2004) (counsel not ineffective for failing to call a character witness where petitioner fails to identify "how [the] testimony would have altered the outcome of the trial."); *see also, e.g ., Montalvo v. Annetts,* 2003 WL 22962504 at *26-27; *Skinner v.. Duncan,* 2003 WL 21386032 at *40.

33 *See, e.g., Rodriguez v. Senokowski,* 03 Civ. 3314, 2004 WL 503451 at *41-42 (S.D.N.Y. Mar. 15, 2004) (Peck, M.J.); *Gomez v. Duncan,* 02 Civ. 0846, 2004 WL 119360 at *31 (S.D.N.Y. Jan. 27, 2004) (Peck, M.J.); *Montalvo v. Annetts,* 02 Civ. 1056, 2003 WL 22962504 at *25 (S.D.N.Y. Dec. 17, 2003) (Peck, M.J.); *Skinner v. Duncan,* 01 Civ. 6656, 2003 WL 21386032 at *37 (S.D.N.Y. June 17, 2003) (Peck, M.J.); *see also, e.g., United States v. Eyman,* 313 F.3d 741, 743 (2d Cir.2002) ("A failure to call a witness for tactical reasons of trial strategy does not satisfy the standard for ineffective assistance of counsel."), *cert. denied,* 538 U.S. 1021, 123 S.Ct. 1949 (2003); *United States v. Luciano,* 158 F.3d 655, 660 (2d Cir.1998), *cert. denied,* 526 U.S. 1164, 119 S.Ct. 2059 (1999); *United States v. Schmidt,* 105 F.3d 82, 90 (2d Cir.), *cert. denied,* 522 U.S. 846, 118 S.Ct. 130 (1997); *Nieves v. Kelly,* 990 F.Supp. 255, 263-64 (S.D.N.Y.1997) (Cote, D.J. & Peck, M.J.); *Rodriguez v. Mitchell,* 92 Civ.2083, 1993 WL 229013 at *3, 5 (S.D.N.Y. June 24, 1993) ("Counsel's decision not to call a witness, if supported by valid tactical considerations, does not constitute ineffective assistance of counsel.").

***20** "Generally, the decision whether to pursue a particular defense is a tactical choice which does not rise to the level of a constitutional violation.... [T]he habeas court 'will not second-guess trial strategy simply because the chosen strategy has failed ...,' especially where the petitioner has failed to identify any specific evidence or testimony that would have helped his case if presented at trial." *Jones v. Hollins,* 884 F.Supp. 758, 765-66 (W.D.N.Y.1995) (citations omitted), *aff'd,* No. 95-2279, 89 F.3d 826 (table), 1995 WL 722215 (2d Cir. Nov. 30, 1995).[34]

34 *Accord, e.g., Rodriguez v. Senkowski,* 2004 WL 503451 at *41; *Gomez v. Duncan,* 2004 WL 119360 at *31; *Montalvo v. Annetts,* 2003 WL 22962504 at *26 (& cases cited therein); *Skinner v. Duncan,* 2003 WL 21386032 at *37.

In light of the extremely strong evidence against Smalls, including DNA evidence connecting him to one of three identical attacks, any deficiency by counsel still would not satisfy the second *Strickland* prong, of showing that Smalls was prejudiced.

Smalls' habeas claim that trial counsel was ineffective for his choice of witnesses is denied.

C. *Trial Counsel's Alleged Failure to Object to Improper Statements by the Prosecutor*

Smalls asserts that his trial counsel failed to object to the prosecutor's distortions of the record and improper statements that were "deliberate misrepresentations of the facts." (Ex. U: Pet. at 37.)

"Prosecutorial misconduct violates a defendant's due process rights only when it is of 'sufficient significance to result in the denial of the defendant's right to a fair trial." ' *Cromwell v. Keane,* 98 Civ. 0013, 2002 WL 929536 at *25 (S.D.N.Y. May 8, 2002) (Peck, M.J.) (quoting *Greer v. Miller,* 483 U.S. 756, 765, 107 S.Ct. 3102, 3109 (1987)); *accord, e.g., United States v. McCarthy,* 54 F.3d 51, 55 (2d Cir.), *cert. denied,* 516 U.S. 880, 116 S.Ct. 214 (1995); *Blissett v. LeFevre,* 924 F.2d 434, 440 (2d Cir.), *cert. denied,* 502 U.S. 852, 112 S.Ct. 158 (1991) .[35] Stated another way, "the law is settled that 'federal habeas relief is not available on the basis of improper prosecutorial statements at trial unless the errors, in context of the summation as a whole, were so fundamentally unfair as to deny petitioner a fair trial." ' *Tejada v. Senkowski,* 92 Civ. 3012, 1993 WL 213036 at *3 (S.D.N.Y. June 16, 1993), *aff'd mem.,* 23 F.3d 397 (2d Cir.), *cert. denied,* 513 U.S. 887, 115 S.Ct. 230 (1994).[36]

35 *See also, e.g., Peakes v. Spitzer,* 04 Civ. 1342, 2004 WL 1366056 at *15 (S.D.N.Y June 16, 2004) (Peck, M.J.); *Green v. Herbert,* 01 Civ. 11881, 2002 WL 1587133 at *17 (S.D.N.Y. July 18, 2002) (Peck, M.J.); *Brock v. Artuz,* 99 Civ.1903, 2000 WL 1611010 at *9 (S.D.N.Y. Oct. 27, 2000) (Peck, M.J.); *Cruz v. Greiner,* 98 Civ. 7939, 1999 WL 1043961 at *30 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.); *Lugo v. Kuhlmann,* 68 F.Supp.2d 347, 367 (S .D.N.Y.1999) (Patterson, D.J. & Peck, M.J.); *Readdon v. Senkowski,* 96 Civ. 4722, 1998 WL 720682 at *4 (S.D.N.Y.

Oct. 13, 1998); *Hurd v. Keane,* 97 Civ. 2991, 1997 WL 582825 at *4 (S.D.N.Y. Sept. 19, 1997); *Beverly v. Walker,* 899 F.Supp. 900, 911 (N.D.N.Y.1995), *aff'd,* 118 F.3d 900 (2d Cir.), *cert. denied,* 522 U.S. 883, 118 S.Ct. 211 (1997); *Washington v. Walker,* 89 Civ. 7841, 1994 WL 391947 at *3 (S.D.N.Y. July 28, 1994) ("Even where a prosecutor's remarks are improper, 'constitutional error occurs only when the prosecutorial remarks were so prejudicial that they rendered the trial in question fundamentally unfair." ') (quoting *Floyd v. Meachum,* 907 F.2d 347, 355 (2d Cir.1990) (quoting *Garofolo v. Coombe,* 804 F.2d 201, 206 (2d Cir.1986))).

36 *Accord, e.g., Peakes v. Spitzer,* 2004 WL 1366056 at *15; *Green v. Herbert,* 2002 WL 1587133 at *17; *Cromwell v. Keane,* 2002 WL 929536 at *25; *Brock v. Artuz,* 2000 WL 1611010 at *9; *Cruz v. Greiner,* 1999 WL 1043961 at *30; *Lugo v. Kuhlmann,* 68 F.Supp.2d at 367; *Franza v. Stinson,* 58 F.Supp.2d 124, 149 (S.D.N.Y.1999) (Kaplan, D.J. & Peck, M.J.); *see also, e.g., Donnelly v. DeChristoforo,* 416 U.S. 637, 647, 94 S.Ct. 1868, 1873 (1974); *Floyd v. Meachum,* 907 F.2d at 355 (quoting *Garofolo v. Coombe,* 804 F.2d at 205); *Edmonds v. McGinnis,* 11 F.Supp.2d 427, 437 (S.D.N.Y.1998); *Gaiter v. Lord,* 917 F.Supp. 145, 153 (E.D.N.Y.1996); *Jones v. Kuhlmann,* 93 Civ. 5963, 1995 WL 733649 at *4 (S.D.N.Y. Dec. 12, 1995).

To properly evaluate the prosecution's actions, the alleged misdeeds must be placed in context, and "[t]he severity of the misconduct, curative measures, and the certainty of conviction absent the misconduct are all relevant to the inquiry." *Blissett v. LeFevre,* 924 F.2d at 440; *accord, e.g., Greer v. Miller,* 483 U.S. at 766, 107 S.Ct. at 3109 ("it is important 'as an initial matter to place th[e] remar[k] in context" '); *United States v. McCarthy,* 54 F.3d 51, 55 (2d Cir.1995); *United States v. Friedman,* 909 F.2d 705, 709 (2d Cir.1990); *United States v. Biasucci,* 786 F.2d 504, 514 (2d Cir.), *cert. denied,* 479 U.S. 827, 107 S.Ct. 104 (1986).[37]

37 *See also, e.g., Peakes v. Spitzer,* 2004 WL 1366056 at *15; *Green v. Herbert,* 2002 WL 1587133 at *17; *Cromwell v. Keane,* 2002 WL 929536 at *25; *Brock v. Artuz,* 2000 WL 1611010 at *9; *Cruz v. Greiner,* 1999 WL 1043961 at *30; *Lugo v. Kuhlmann,* 68 F.Supp.2d at 367; *Hurd v. Keane,* 1997 WL 582825 at *4; *Beverly v. Walker,* 899 F.Supp. at 911.

***21** Here, however, Smalls is the one who has misinterpreted the trial record. The examples he claims are improper misrepresentations in fact accord with the evidence that was presented. The most questionable prosecutorial action the Court can find among those Smalls alleges is the prosecutor's reference to the defendant as a "hunter" in his opening statement. (Tr. 21, 22; Pet. at 37.) Other examples of alleged prosecutorial misconduct include the prosecutor's asking an officer what he "concluded" when the defendant appeared to be trying to remove his backpack as he looked around the street. (Tr. 507; Pet. at 37.) Smalls believes the prosecutor delivered an improper summation by misrepresenting the reasons why Johnson and K.W. did not provide a positive identification of the suspect from the line-up. (Pet. at 50; Tr. 827 .) Also, Smalls states that the prosecutor's summation improperly stated that I.M. saw her attacker with a backpack when she never stated that at trial. (Pet. at 37.) Yet, contrary to Smalls' belief, I.M. did testify at trial that her attacker wore a "knapsack." (I.M.: Tr. 213-216.) Smalls asserts his counsel should have objected to all of these statements, and his failure to object was error. (Pet. at 37.)

None of the comments cited by Smalls were improper, and all were "within 'the four corners of the evidence" ' presented at trial. *Quinones v. Miller,* 01 Civ. 10752, 2003 WL 21276429 at *57-58 (S .D.N.Y. June 3, 2003) (Peck, M.J.).

Furthermore, this Court finds that even if there was error in the People's summation, Smalls' trial counsel was not ineffective because any error was harmless in view of the brief and isolated nature of the comments, and the overwhelming evidence of Smalls' guilt including DNA evidence. *See, e.g., Rao v. Artuz,* No. 97-2703, 199 F.3d 1323 (table), 1999 WL 980947 at *2-3 (2d Cir. Oct. 22, 1999) ("strength of the evidence against the petitioner" was enough to "bar[ ] the conclusion that he suffered actual prejudice as a result of the prosecutor's remarks"); *Tankleff v. Senkowski,* 135 F.3d 235, 253 (2d Cir.1998) ("[S]everity of the prosecutor's misconduct ... was mitigated by the brevity and fleeting nature of the improper comments" and "the evidence was [not] so closely balanced that the prosecutor's comments were likely to have had a substantial effect on the jury"); *Herrera v. Lacy,* No. 95-2800, 112 F.3d 504 (table), 1996 WL 560760 at *2 (2d Cir. Oct. 3, 1996) ("While some improper statements were made ..., the misconduct was not so severe that it was not rendered harmless by the court's curative instruction and the substantial evidence of [petitioner's] guilt."); *Bentley v. Scully,* 41 F.3d 818, 824-25 (2d Cir.1994) (denying prosecutorial misconduct

claim where prosecution presented "compelling evidence" against petitioner and alleged misconduct was both brief and isolated), *cert. denied,* 516 U.S. 1152, 116 S.Ct. 1024 (1996).[38]

38 *See also, e.g., United States v. Rivera,* 971 F.2d 876, 885 (2d Cir.1992) (court's instructions to jury obviated any prosecutorial error); *Gonzalez v. Sullivan,* 934 F.2d 419, 424 (2d Cir.1991) (although prosecutor made improper statements during summation, no prejudice to defendant where trial court instructed jury that the summations were not evidence and case against defendant was strong); *Strouse v. Leonardo,* 928 F.2d 548, 557 (2d Cir.1991) (no violation where "cumulative effect of the prosecutor's alleged misconduct was not so severe as to amount to the denial of a fair trial [and] absent the alleged misconduct, ... overwhelming evidence" existed against petitioner); *Bradley v. Meachum,* 918 F.2d 338, 343 (2d Cir.1990) ("clear evidence of guilt demonstrates that [petitioner] was not prejudiced by the prosecutor's" misconduct), *cert. denied,* 501 U.S. 1221, 111 S.Ct. 2835 (1991); *United States v. Parker,* 903 F.2d 91, 98-99 (2d Cir.1990) (even where prosecutor acted improperly, no claim for misconduct where "transgression was isolated, the trial court took swift and clear steps to correct [improper conduct], and the evidence against the defendant was strong"); *United States v. Coffey,* 823 F.2d 25, 28 (2d Cir.1987) (no constitutional violation where alleged misconduct was isolated and not intentional, the trial court provided curative instructions and trial evidence demonstrated defendant's guilt); *United States v. Modica,* 663 F.2d 1173, 1181 (2d Cir.1981) (per curiam) ("the existence of substantial prejudice turns upon the strength of the government's case: if proof of guilt is strong, then the prejudicial effect of the [misconduct] tends to be deemed insubstantial ..."), *cert. denied,* 456 U.S. 989, 102 S.Ct. 2269 (1982); *Peakes v. Spitzer,* 2004 WL 1366056 at *19; *Cruz v. Greiner,* 1999 WL 1043961 at *31.

***22** Additionally, needless objections to the "hunter" description and the prosecutor's questioning of the police officer would only serve to highlight the statements for the jurors. Counsel may have reasonably chosen not to object in order to avoid highlighting the testimony, which the jury likely failed to notice (as it consisted of only a single, fleeting reference).[39] In any event, considering the strength of the evidence against Smalls, he cannot show prejudice from any of the trial counsel errors he alleges.

39 *See, e.g., United States v. Schake,* No. 02-1743, 57 Fed. Appx. 523, 526, 2003 WL 202439 at *2 (3d Cir. Jan. 29, 2003) (Affirming district court's finding "that counsel's failure to object to a single, brief question by the prosecutor ... was reasonable in light of counsel's fear that an objection would highlight the matter for the jury."); *United States v. Alsop,* No. 99-3983, 12 Fed. Appx. 253, 258, 2001 WL 391967 at *3 (6th Cir. Apr. 12, 2001) ("the prejudicial testimony was not elicited by the Government, was limited to a single reference ..., and passed without objection or request for a curative instruction. A curative instruction would have emphasized and may have undermined defense counsel's strategy to ignore the remark."), *cert. denied,* 534 U .S. 916, 122 S.Ct. 262 (2001); *Anderson v. Sternes,* 243 F.3d 1049, 1057-58 (7th Cir.) (Petitioner's "attorney may have strategically decided that it was better not to ask for a limiting instruction ... because such an instruction would highlight the evidence to the jury. Such a strategy is reasonable, especially given that the evidence ... was a minor portion of the government's case."), *cert. denied,* 534 U.S. 930, 122 S.Ct. 294 (2001); *Buehl v. Vaughn,* 166 F.3d 163, 176 (3d Cir.) (Agreeing with state court's conclusion that "[b]ecause the [objectionable] statements were fleeting, ... 'trial counsel may have wished to avoid emphasizing what might have gone relatively unnoticed by the jury." '), *cert. dismissed,* 527 U.S. 1050, 119 S.Ct. 2418 (1999); *United States v. Grunberger,* 431 F.2d 1062, 1069 (2d Cir.1970) ("it is understandable that a defense counsel may wish to avoid underscoring a prejudicial remark in the minds of the jury by drawing attention to it" through an objection); *Quinones v. Miller,* 2003 WL 21276429 at *50 n. 78; *United States v. Corcoran,* 855 F.Supp. 1359, 1371 (E.D.N.Y.1994) ("reasonable tactical decision" not to object to damaging testimony, as it "would merely serve to highlight the testimony"), *aff'd,* 100 F .3d 944 (2d Cir.), *cert. denied,* 517 U.S. 1228, 116 S.Ct. 1864 (1996); *Gatto v. Hoke,* 809 F.Supp. 1030, 1039 (E.D.N.Y.) ("counsel's failure to object to the prosecutor's summation represents his tactical decision to avoid underscoring the prosecutor's statements so as to draw the jury's attention to them"), *aff'd mem.,* 986 F.2d 500 (2d Cir.1992).

D. *Trial Counsel's Alleged Failure to Give a Competent Summation*

Smalls faults his counsel for delivering an "incompetent and incomplete" summation, and points out that his counsel even stated, "I may forget to raise certain

issues that are of importance in this case ..." (Defense Summation: Tr. 751; Pet. at 38.) Smalls has taken this statement out of context, as his trial counsel was actually instructing the jurors to scrutinize the credibility of all the evidence presented and discussed in the People's Summation. (Dkt. No. 13: State Br. at 51.) Smalls alleges that nearly every possible argument attacking the evidence should have been made in his counsel's summation. (Pet. at 38-40.) But a defense attorney is not required to rehash every fact or argument in his summation, and is presumed to make "strategic choices." *Strickland v. Washington,* 466 U.S. at 690-91, 104 S.Ct. at 2066. In fact, his trial counsel appropriately argued that Smalls' guilt had not been proven beyond a reasonable doubt, stressed that the jurors must consider the inconsistencies of the identification statements made by the victims, and argued that the police may have tampered with the DNA evidence. (Defense Summation: Tr. 753, 755-77; *see* pages 16, 36 above.)

The Court has read the entire trial transcript. Defense counsel conducted thorough cross examinations and presented a competent closing argument despite the overwhelming DNA evidence against his client. Trial counsel was not ineffective. *See, e.g., Billy-Eko v. United States,* 8 F.3d 111, 117 (2d Cir.1993) ("A reading of the record clearly shows that [petitioner's] trial counsel's performance was not objectively unreasonable, nor did it result in prejudice."), *abrogated on other grounds by Massaro v. United States,* 538 U.S. 500, 123 S.Ct. 1690 (2003); *Jeremiah v. Artuz,* 181 F.Supp.2d 194, 203 (E.D.N.Y.2002) (examining "counsel's overall performance" and finding no ineffective assistance where "[t]rial counsel ably presented petitioner's justification defense throughout the trial and attempted in cross-examination to develop grounds for questioning the testimony of prosecution witnesses that was harmful to petitioner's defense. Counsel also helped elicit petitioner's trial testimony in an intelligible fashion. His summation was an organized and coherent presentation of the defense position which focused on the justification defense. Notwithstanding the apparent strength of the prosecution's case, counsel forcefully urged the jury to find a reasonable doubt based on an evaluation of the evidence and gaps in the evidence.... [E]ven assuming that counsel committed an oversight or error in judgment ... petitioner was not deprived of his right to the effective assistance of counsel....").[40]

40 *See also, e.g., Walker v. McGinnis,* 99 Civ. 3490, 2000 WL 298916 at *7 (S.D.N.Y. Mar. 21, 2000) ("[A] thorough review of the trial transcript reveals that [petitioner]'s counsel was, in fact, competent, tenacious, and thorough throughout the proceeding."); *Harris v. Hollins,* 95 Civ. 4376, 1997 WL 633440 at *6 (S.D.N.Y. Oct. 14, 1997) ("Petitioner offers a laundry list of alleged errors made by defense counsel during trial, which he claims denied him his constitutional right to effective assistance of counsel.... Taken in its totality, petitioner's claim must fail because he has not demonstrated that counsel's conduct fell below that of a reasonable attorney, or that the jury would have found him not guilty but for counsel's ineffective performance. The record indicates that defense counsel aggressively pursued pretrial motions ... cross-examined witnesses, made objections and motions, and gave a comprehensive summation that tied together defense strategies in an effort to discredit the State's case."); *White v. Keane,* 90 Civ. 1214, 1991 WL 102505 at *6 (S.D.N.Y. June 6, 1991), *aff'd,* 969 F.2d 1381 (2d Cir.1992); *Sanchez v. Kuhlman,* 83 Civ. 4758, 1984 WL 795 at *4 (S.D.N.Y. Aug. 23, 1984) ("Careful review of the entire transcript demonstrates that petitioner's trial counsel was both zealous and competent.").

***23** This Court finds that the defense delivered a competent summation that did not fall below the objective level of reasonableness used to measure counsel's performance. In light of the overwhelming evidence against Smalls, and Smalls' vague and conclusory assertions as to trial counsel's alleged deficiencies, Smalls' claim of ineffective assistance is meritless and is denied.

E. *Smalls' Remaining Ineffective Trial Counsel Claims Fail Because They Are All Conclusory and Vague*

Smalls' remaining allegations of errors include that his counsel did not request time to review the *New York Times* article, failed to object to missing lineup photos, and performed no voir dire of the jury regarding the specific newspaper article. (Ex. U: Pet. at 42-45.) These claims are vague and conclusory, and, in any event, Smalls has not shown that he suffered prejudice as a result.

It is well established that conclusory allegations, such as these, are insufficient to meet the rigorous standard under *Strickland v. Washington. See, e.g., United States v. Vargas,* 920 F.2d 167, 170 (2d Cir.1990) (petitioner's affidavit making allegations in a "conclusory fashion"

failed to demonstrate that counsel's decision not to call a witness was unreasonable), *cert. denied,* 502 U.S. 826, 112 S.Ct. 93 (1991); *Angel v. Garvin,* 98 Civ. 5384, 2001 WL 327150 at *8 (S.D.N.Y. Apr. 3, 2001) (citing cases) ("A habeas petition may be denied 'where the allegations are ... vague, [or] conclusory ..."); *Slevin v. United States,* 98 Civ. 0904, 1999 WL 549010 at *5 (S.D.N.Y. July 28, 1999) (§ 2255 case; "Petitioner's conclusory allegations that counsel evinced 'a general lack of preparation' do not demonstrate that absent the alleged errors, the outcome of the trial would have been different. Petitioner has not elaborated on how counsel's alleged general lack of preparation prejudiced the outcome of his trial. Accordingly, such purported lack of preparation cannot be deemed ineffective assistance of counsel."), *aff'd,* 234 F.3d 1263 (2d Cir.2000); *Cromwell v. Keane,* 98 Civ. 0013, 2002 WL 929536 at *19 (S.D.N.Y. May 8, 2002) (Peck, M.J.).[41]

41 *See also, e.g., Muhammad v. Bennett,* 96 Civ. 8430, 1998 WL 214884 at *1 (S.D.N.Y. Apr. 29, 1998) ("petitioner's speculative claim about the testimony of an uncalled witness" is insufficient to show ineffective assistance of trial counsel); *Vasquez v. United States,* 96 Civ. 2104, 91 CR 153, 1997 WL 148812 at *1-2 (S.D.N.Y. Mar. 28, 1997) (§ 2225 case; "[P]etitioner's allegations with regard to alleged counsel errors in pre-trial preparation and investigation and trial advocacy are 'vague, conclusory, and unsupported by citation to the record, any affidavit, or any other source,' and, accordingly, ... '[t]he vague and unsubstantiated nature of the claims' defeated petitioner's claim of ineffective assistance of counsel...."); *Parnes v. United States,* 94 Civ. 6203, 91 CR 152, 91 CR 165, 1995 WL 758805 at *3 (S.D.N.Y. Dec. 21, 1995) (§ 2225 case; "[V]ague allegations do not permit the Court to conclude that the alleged errors of Petitioner's counsel fell below 'prevailing professional norms'.... Accordingly, the Court rejects Petitioner's claim that he received ineffective assistance of counsel."); *Hartley v. Senkowski,* No. CV-90-395, 1992 WL 58766 at *2 (E.D.N.Y. Mar. 18, 1992) ("In light of this demanding [*Strickland*] standard, petitioner's vague and conclusory allegations that counsel did not prepare for trial or object to errors carry very little weight."); *Matura v. United States,* 875 F.Supp. 235, 237-38 (S.D.N.Y.1995) (§ 2255 case; mere conclusory allegations that counsel was ineffective fails "to establish that his counsel's performance was deficient [and] .... fails to overcome the presumption [under *Strickland*] that counsel acted reasonably....").

Here, Smalls alleges that if his attorney had read the *Times* article in advance, he would have seen police officer quotes that contradicted evidence presented at trial. (Pet. at 42.) Specifically, he points to a quote from Lieutenant Carney, Commanding Officer of the Manhattan Special Victims Squad, stating that the victims "never got to look at him." (Pet. at 42; Pet. Ex. 15: *N.Y. Times* article.) Smalls claims that this statement should have been brought to the jurors' attention to undermine the eyewitness identification given by S.S., because if it had, there is a reasonable probability the result of the trial would be different. (Pet. at 42.) The Court disagrees.

Similar testimony was given by Detective Aponte, who stated that he recorded in his notes that S.S. did not see her attacker's face. (Aponte: Tr. 694.) This very evidence thus was before the jury, and they chose to believe S.S. "The failure to call cumulative or repetitive witnesses is neither ineffective nor prejudicial." *Skinner v. Duncan,* 2003 WL 21386032 at *38 (citing cases); *see, e.g., United States v. Luciano,* 158 F.3d at 660 ("The decision not to call a particular witness is typically a question of trial strategy that appellate courts are ill-suited to second guess." Where the witness defendant asserts counsel should have called "would have testified in a manner corroborative of another witness[,] counsel might well have regarded the testimony as unnecessarily cumulative."), *cert. denied,* 526 U.S. 1164, 119 S.Ct. 2059 (1999); *Montalvo v. Annetts,* 02 Civ. 1056, 2003 WL 22962504 at *26 (S.D.N.Y. Dec. 17, 2003) (Peck, M.J.) (rejecting claim that counsel was ineffective for failing to call alibi witness whose testimony would have been cumulative of photographs in evidence and was consistent with the prosecution's theory.).[42]

42 *See also, e.g., Cotto v. Lord,* 99 Civ. 4874, 2001 WL 21246 at *16 n. 6 (S.D.N.Y. Jan. 9, 2001) (rejecting claim that counsel was ineffective for failing to call additional family members where petitioner "made no showing as to which other family members should have been called, what their testimony would have been and why that testimony would not have been cumulative of what the petitioner and [other witness] could provide."), *aff'd,* No. 01-2056, 21 Fed. Appx. 89, 2001 WL 1412350 (2d Cir. Nov. 8, 2001); *White v. Keane,* 51 F.Supp.2d 495, 505 (S.D.N.Y.1999) (Court rejected petitioner's claim that counsel was ineffective for failing to call witnesses where their testimony was "speculative, repetitive, vague, or related solely to

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the issue of credibility of one of the People's many witnesses.") (record citations omitted); *Treppedi v. Scully,* 85 Civ. 7308, 1986 WL 11449 at *3 (S.D.N.Y. Oct. 9, 1986) ("Since the effect of the presentation of additional alibi witnesses would have been cumulative at best, the failure of counsel to call additional alibi witnesses cannot be considered an error that deprived the defendant of a fair trial."), *aff'd,* 847 F.2d 837 (2d Cir.1988).

***24** Smalls further alleges that his trial counsel erred in his failing to object that the missing photographs of the May 15, 1997 line-up were *Rosario* and *Brady* material. (Pet. at 44, 77.) Under *Brady v. Maryland* and its progeny, prosecutors must turn over exculpatory and impeachment evidence, whether or not requested by the defense, where the evidence is material either to guilt or to punishment. *See, e.g., Strickler v. Greene,* 527 U.S. 263, 280, 119 S.Ct. 1936, 1948 (1999); *United States v. Bagley,* 473 U.S. 667, 676, 682, 105 S.Ct. 3375, 3380, 3383-84 (1985); *United States v. Agurs,* 427 U.S. 97, 107, 96 S.Ct. 2392, 2399 (1976); *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963). [43]

43 *See also, e.g., United States v. Diaz,* 176 F.3d 52, 108 (2d Cir.), *cert. denied,* 528 U.S. 875, 120 S.Ct. 181 (1999); *Tankleff v. Senkowski,* 135 F.3d 235, 250 (2d Cir.1998); *Orena v. United States,* 956 F.Supp. 1071, 1090-92 (E.D.N.Y.1997) (Weinstein, D.J.).

"There are three components of a true *Brady* violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Strickler v. Greene,* 527 U.S. at 281-82, 119 S.Ct. at 1948. [44] Here, the Court need not decide whether the first two prongs were satisfied, since Smalls cannot show prejudice. Even if the defense were able to cast some doubt on S.S.'s identification of Smalls, the DNA evidence (combined with all victims' general description of their attacker, which matched Smalls, and the common modus operandi), was proof positive of Smalls' guilt.

44 *See also, e.g., Moore v. Illinois,* 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2568 (1972); *United States v. Payne,* 63 F.3d 1200, 1208 (2d Cir.1995), *cert. denied,* 516 U.S. 1165, 116 S.Ct. 1056 (1996); *Orena v. United States,* 956 F.Supp. at 1090.

Smalls' assertion that trial counsel was ineffective for not voir during the jury about the *Times* article and that the jurors might have learned from reading the article that he was on parole for a prior crime is speculative. Regardless of whether the jurors learned about his parole from the article, the same information concerning his parole status was presented at trial, as Smalls knows (because he faults his counsel for opening the door to it), and the jury was instructed to consider that evidence "sole[ly]" on the "issue of the defendant's actions," *i.e.,* running from the police, and not as evidence of his propensity to commit the present crimes. (*E.g.,* Tr. 468-69.) Thus, Smalls can show no prejudice since (1) the same information was in evidence at trial, (2) the evidence against him was strong, and (3) the trial judge gave a limiting instruction about his parole status, and a jury is presumed to follow the court's instructions. *See, e.g., Greer v. Miller,* 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence ..., unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions."); *Richardson v. Marsh,* 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987) ("juries are presumed to follow their instructions"). [45]

45 *See also, e.g., Shotwell Mfg. Co. v. United States,* 371 U.S. 341, 367, 83 S.Ct. 448, 463 (1962) (When a limiting instruction is clear, "[i]t must be presumed that the jury conscientiously observed it."); *United States v. Linwood,* 142 F .3d 418, 426 (7th Cir.) ("Juries may not be familiar with the hearsay rule, but the law assumes that they can and do follow the limiting instructions issued to them."), *cert. denied,* 525 U.S. 897, 119 S.Ct. 224 (1998); *Chalmers v. Mitchell,* 73 F.3d 1262, 1267 (2d Cir.) (the court "assume[s] that a jury applies the instructions it is given"), *cert. denied,* 519 U.S. 834, 117 S.Ct. 106 (1996); *United States v. Castano,* 999 F.2d 615, 618 (2d Cir.1993); *Del Pilar v. Phillips,* 03 Civ. 8636, 2004 WL 1627220 at *12 (S.D.N.Y. July 21, 2004) (Peck, M.J.); *Peakes v. Spitzer,* 04 Civ. 1342, 2004 WL 1366056 at *18 n. 29 (S.D.N.Y. June 16, 2004) (Peck, M.J.); *Cruz v. Greiner,* 98 Civ. 7939, 1999 WL 1043961 at *31 n. 26 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.) (citing cases).

F. *Trial Counsel's Aggregate Performance Does Not Amount to Deficient Performance Prejudicing Smalls*

***25** As noted above (*see* page 31 above), any counsel errors must be considered in the "aggregate" rather than in isolation, as the Supreme Court has directed courts "to

look at the 'totality of the evidence before the judge or jury." ' *Lindstadt v. Keane,* 239 F.3d 191, 199 (2d Cir.2001) (quoting *Strickland v. Washington,* 466 U.S. 668, 695-96, 104 S.Ct. 2052, 2069 (1984); *see* page 31 above.

Strickland, of course, teaches that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. at 2065. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." ' *Id.*

Even if Smalls' trial counsel's actions resulted from error rather than strategy, trial counsel's performance must still be accorded a certain degree of deference, as the Sixth Amendment does not guarantee "error-free, perfect representation," *Morris v. Garvin,* No. 98-CV-4661, 2000 WL 1692845 at *3 (E.D.N.Y. Oct. 10, 2000), but merely a "wide range of professionally competent assistance," *Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. at 2065. Smalls must show that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. at 2064; *see, e.g., Smith v. Robbins,* 528 U.S. 259, 284, 120 S.Ct. 746, 763 (2000) (" 'We address not what is prudent or appropriate, but only what is constitutionally compelled." ') (quoting *United States v. Cronic,* 466 U.S. 648, 665, n. 38, 104 S.Ct. 2039, 2050 n. 38 (1984)); *Burger v. Kemp,* 483 U.S. 776, 794, 107 S.Ct. 3114, 3126 (1987) (same); *United States v. Di Tommaso,* 817 F.2d 201, 216 (2d Cir.1987) (although, "[t]o put it charitably," trial counsel's performance did not "furnish[ ] a full model for aspiring advocates," it did not fall outside the "wide range of reasonable professional assistance"); *Wise v. Smith,* 735 F.2d 735, 739 (2d Cir.1984) (defendant "was not entitled to a perfect defense, and the cumulative effect of the errors and omissions that we might find do not amount to a denial of effective assistance of counsel"). [46]

[46] *See also, e.g., Castro-Poupart v. United States,* No. 91-1877, 976 F.2d 724 (table), 1992 WL 240655 at *2 (1st Cir. Sept. 30, 1992) ("Effective assistance is not necessarily error free assistance.); *Lancaster v. Newsome,* 880 F.2d 362, 375 (11th Cir.1989) ("petitioner was not entitled to error-free representation, only representation that fell within the range of competence demanded of attorneys in criminal cases"); *Quinones v. Miller,* 01 Civ. 10752, 2003 WL 21276429 at *63 (S.D.N.Y. June 3, 2003) (Peck, M.J.); *Larrea v. Bennett,* 01 Civ. 5813, 2002 WL 1173564 at *26 (S.D.N.Y. May 31, 2002) (Peck, M.J.), *report & rec. adopted,* 2002 WL 1808211 (S.D.N.Y. Aug. 6, 2000) (Scheindlin, D.J.); *Solomon v. Commissioner of Correctional Servs.,* 786 F.Supp. 218, 226 (E.D.N.Y.1992) ("Although petitioner's counsel undoubtedly made certain errors, this record indicates that viewed in the context of the entire record, he did a reasonable job.").

The Court, as noted above, has read the entire trial transcript. Clearly, trial counsel was no Clarence Darrow or Arthur Liman. But judged in context and without the benefit of hindsight, trial counsel's performance as a whole did not constitute ineffective assistance in violation of Smalls' Sixth Amendment rights. Moreover, applying the deferential AEDPA standard, this Court cannot say that the § 440 court and First Department's rejection of Smalls' ineffective counsel claims constituted an objectively unreasonable application of Supreme Court precedent. *See, e.g., Jones v.. Stinson,* 229 F.3d 112, 121 (2d Cir.2000) (although Second Circuit might have found error had question been presented on direct review, under deferential AEDPA standard the appellate division's ruling was held not objectively unreasonable).

***26** Even assuming *arguendo* that each of Smalls' complaints about trial counsel had merit (which they do not), he cannot establish prejudice. Smalls' counsel faced a nearly impossible task of trying to overcome overwhelming evidence that his client had committed a string of crimes. Smalls was identified in a line-up and in court by one victim (S.S.), and irrefutable DNA evidence proved that another victim's blood was on his sneaker. He was apprehended in the vicinity where all the attacks occurred on the night of an attempted fourth attack. Additionally, his unique modus operandi was sufficient to connect him to all the attacks.

Smalls' claim of ineffective assistance of trial counsel is denied in its entirety.

IV. *SMALLS' INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM IS DENIED*

Adding to his long list of claimed deficiencies of trial counsel, Smalls also alleges a long list of reasons why

he was denied effective assistance of appellate counsel. Smalls claims that his appellate counsel was ineffective for failing to raise: (1) a *Miranda* warning/*Huntley* claim (Ex. U: Pet. at 13-15); (2) a *Wade* Hearing/identification claim (Pet. at 15-20); (3) a judicial misconduct claim (Pet. at 20-26); (4) failing to submit a reply brief and give an oral argument (Pet. at 26); (5) ineffective trial counsel claims (Pet. at 28-61); and (6) a claim that his guilt was not proven beyond a reasonable doubt (Pet. at 82-88).

A. *Failing to Raise a Miranda Warning/Huntley Hearing Claim*

According to Smalls, the police who apprehended him should have given him *Miranda* warnings before asking him why he had been running, and his response about his parole status should have been excluded from evidence. (Ex. U: Pet. at 13.) Smalls alleges that his appellate counsel erred in failing to raise this claim on appeal. (Pet. at 13-15.)

Miranda warnings are not required for threshold-type questioning done in the line of routine police investigation of crimes or suspicious conduct occurring in the streets. *E.g., Fiorienza v. Sullivan,* 85 Civ. 0592, 1985 WL 6089 at *7 (S.D.N.Y. Sept. 3, 1985). In applying *Miranda,* the New York Court of Appeals has recognized that there is a distinction between "coercive interrogation" and "permissible street inquiry." *People v. Huffman,* 41 N.Y.2d 29, 32-34, 390 N.Y.S.2d 843, 845-47 (1976) (When at 4:30 a.m. a man ran away from officers and hid in bushes, it was acceptable for officer to ask, "What are you doing back here?" to clarify the nature of the situation rather than coerce a statement.). Here, when Smalls ran away from the officers and appeared to match the description of a suspect, it was permissible for the officers to clarify the situation through brief questions without the need for *Miranda* warnings. Additionally, the questioning of Smalls was not part of an interrogation designed to elicit incriminating responses, but merely vague questions designed to assess the danger of a suspicious situation.

***27** Even assuming *arguendo* that the pre-*Miranda* statements were a violation of Smalls' *Miranda* rights, and therefore inadmissible, any error in admitting the pre-*Miranda* statements was harmless error. *E.g., Parsad v. Greiner,* 337 F.3d 175, 185-86 (2d Cir.2003); *Maldonado v. Greiner,* 01 Civ. 0799, 2003 WL 22435713 at *22-23 (S.D.N.Y. Oct. 28, 2003) (Peck, M.J.); *Cruz v. Miller,* 98 Civ. 4311, 1999 WL 1144280 at *5-6 (S.D.N.Y. Dec. 2, 1999) (Jones, D.J. & Peck, M.J.), *aff'd,* 255 F.3d 77 (2d Cir.2001).

Miranda violations are subject to harmless error analysis. *See, e.g., Parsad v. Greiner,* 337 F.3d at 185 (error in admitting pre-*Miranda* statement "was harmless, as petitioner's post-*Miranda* statements, which we have held were properly admitted, were cumulative of his pre-*Miranda* statements."); *Tankleff v. Senkowski,* 135 F.3d 235, 245-46 (2d Cir.1998) (applying harmless error doctrine to *Miranda* violation); *Rollins v. Leonardo,* 938 F.2d 380, 382 (2d Cir.1991) (per curiam) (applying harmless error doctrine to *Miranda* violation), *cert. denied,* 502 U.S. 1062, 112 S.Ct. 944 (1992); *Cruz v. Miller,* 1999 WL 1144280 at *5.

In *Brecht v. Abrahamson,* the Supreme Court held that the appropriate harmless error standard to apply on habeas corpus review of trial errors, such as the admission of evidence, is whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict." ' 507 U.S. 619, 638, 113 S.Ct. 1710, 1722 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 1253 (1946)); *see also Parsad v. Greiner,* 337 F.3d at 185 n. 5 (finding *Miranda* error harmless whether *Brecht* or *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967), harmless error "standard of review applies to post-AEDPA cases," which is an open issue in the Second Circuit).

This Court cannot conclude that Smalls' pre-*Miranda* statements that he was on parole and was going home had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. at 638, 113 S.Ct. at 1722. Appealing the admission of Smalls' pre-*Miranda* statement would have been fruitless because the prosecution did not bring out the statement in their direct case. It was only brought out by the prosecutor after defense counsel had opened the door to the statement through cross-examination of Sergeant West. Moreover, even if the door had not been opened and admission was error, in light of the DNA evidence, the statements were not likely to influence the jury's verdict. This Court cannot say that appellate counsel erred in failing to raise the claim, nor that if he had the appeal would have been successful and, most importantly, cannot say that the First Department's decision was an unreasonable application of the *Strickland* standard.

B. *Failing to Raise a Fourth Amendment Claim*
***28** Smalls asserts that he was arrested without probable cause and that the property seized and line-up identifications obtained should have been suppressed as fruits of the unlawful arrest. (Dkt. No. 1: Pet. ¶ 12(B).) However, on direct appeal in his supplemental pro se brief, Smalls raised the search and seizure claim. (Ex. C: Smalls Pro Se Supp. 1st Dep't Br. at 2.) The First Department denied Smalls' search and seizure claim as "without merit." (*See* pages 17-18 above.) Accordingly, the Court finds that Smalls was in no way prejudiced by appellate counsel's decision to forego a fourth amendment claim. *See, e.g., Montalvo v. Annetts,* 02 Civ. 1056, 2003 WL 22962504 at *29 (S.D.N.Y. Dec. 17, 2003) (Peck, M.J.); *Bingham v. Duncan,* 01 Civ. 1371, 2003 WL 21360084 at *5 (S.D.N.Y. June 12, 2003) ("As to appellate counsel's failure to raise certain claims on direct appeal, petitioner cannot demonstrate the requisite prejudice. Petitioner's pro se supplemental brief presented all of the issues he wished to raise ..."); *Hayes v. Coombe,* 96 Civ. 865, 1996 WL 650728 at *6 (S.D.N.Y. Nov. 7, 1996) ("[P]etitioner has not shown that he was prejudiced by appellate counsel's omission. Petitioner raised [the omitted] claim in his own pro se brief to the Appellate Division, and the Appellate Division considered and rejected it."), *aff'd,* 142 F.3d 517 (2d Cir.1998), *cert. denied,* 525 U.S. 1108, 119 S.Ct. 879 (1999).

C. *Failing to Raise a Wade Hearing/ Identification Claim*
Smalls argues that his appellate counsel erred in failing to raise a *Wade* hearing / identification issue. (Ex. U: Pet. at 15.) He asserts that the line-up in which S.S. identified him was unduly suggestive. As discussed above (*see* pages 39-40), "there is no requirement that ... in line-ups the accused must be surrounded by persons nearly identical in appearance." *United States v. Reid,* 517 F.2d 953, 965 n. 15 (2d Cir.1975); *see* cases cited at page 39 & n. 32 above. As Justice Lebovitz found at the suppression hearing, the fact that Smalls had a mustache and the fillers had goatees, and Smalls' hair was a different length and texture, "were minor details." (Ex. A: Justice Lebovitz 5/15/1998 suppression hearing decision at 15.) Additionally, Justice Lebovitz found that the line-up expense report, the testimony of Detective Bonilla and the xerox copy of the lineup photo showing similar builds of all the men showed that the lineup was not unduly suggestive. (*Id.* at 14.) Smalls' appellate counsel correctly decided not to argue that the line-up was suggestive because he likely recognized, as this Court does, that the claim was meritless.

D. *Failing to Object to Judicial Misconduct*
Smalls alleges that his appellate counsel should have raised a judicial misconduct claim. (Ex. U: Pet. at 20.) Smalls refers to the objection his trial counsel made to the court's performance on a "number of occasions" that the court had "lost [its] impartiality" as the basis of his current claim. (Pet. at 20; Tr. 598.)

***29** The Second Circuit has repeatedly held that a trial court's hostility towards defense counsel will lead to reversal only if " 'the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." ' *United States v. Amiel,* 95 F.3d 135, 146 (2d Cir.1996) (quoting *United States v. Robinson,* 635 F.2d 981, 984 (2d Cir.1980)).[47] The Second Circuit has instructed that:

47 *Accord, e.g., United States v. Valenti,* 60 F.3d 941, 947 (2d Cir.1995); *United States v. Rosa,* 11 F.3d 315, 343 (2d Cir.1993), *cert. denied,* 511 U.S. 1042, 114 S.Ct. 1565 (1994); *United States v. Logan,* 998 F.2d 1025, 1029 (D.C.Cir.), *cert. denied,* 510 U.S. 1000, 114 S.Ct. 569 (1993); *United States v. Pisani,* 773 F.2d 397, 402 (2d Cir.1985); *Gumbs v. Kelly,* 97 Civ. 8755, 2000 WL 1172350 at *11 (S.D.N.Y. Aug. 18, 2000) (Peck, M.J.).

> The court's role is not to determine "whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid." The test is whether the jury was so impressed with the judge's partiality to the prosecution that it became a factor in determining the defendant's guilt, or whether "it appear[ed] clear to the jury that the court believe[d] the accused is guilty."
> *United States v. Amiel,* 95 F.3d at 146 (citations omitted); *accord, e.g., United States v. Valenti,* 60 F.3d at 946. District Courts apply these same standards on federal habeas review to claims of hostility lodged against state judges. *E.g., Salahuddin v. Strack,* No. 97-CV-5789, 1998 WL 812648 at *8 (E.D.N.Y. Aug. 12, 1998) ("habeas relief on the ground of judicial misconduct at the state trial level is warranted only if the federal court determines that

the alleged improprieties, taken in the context of the total trial, undermined fundamental fairness to the defendant"); *Jones v. Vacco,* 95 Civ. 10755, 1997 WL 278050 at *6 (S.D.N.Y. May 23, 1997) (using *Amiel* test in habeas case).

Smalls' claims of judicial misconduct do not rise to the level of impropriety necessary to undermine fairness in the trial. For instance, he cites the following colloquy when the prosecutor examined Detective Colon on direct:

> [A.D.A.] BASHFORD: Detective Colon, do you recall what the witness was wearing that night?
>
> DETECTIVE COLON: No, I don't.
>
> [A.D.A.] BASHFORD: Do you remember if he was carrying or holding anything?
>
> DETECTIVE COLON: No.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: His answer is no.

(Colon: Tr. 528-29.) Smalls argues that this interference demonstrated impartiality favoring the prosecution, even though the answer to the question, and the judge's repetition of it, was favorable to the defense. (Pet. at 22.) Like his other examples of alleged judicial misconduct, this has no validity. In fact, the judge merely repeated an answer that favored the defense, stressing that the prosecutor's witness could not remember whether Smalls was carrying a backpack.

Another example of alleged judicial misconduct cited by Smalls concerns the judge's comment during the discussion about the validity of DNA testing. When the prosecutor asked the DNA expert, Dr. Word, what was the likelihood of finding another person with the same genetic composition as I.M., the expert explained that it was about one in forty-one billion while the world's population at the time was only five and a half billion. (Word: Tr. 686-87.) The judge commented, "You would have some trouble doing that," and several people in the courtroom laughed. (Tr. 687.) Smalls believes that the remark clearly showed that the "trial court had definitely stepped outside his balanced role and become an advocate for the prosecution ." (Pet. at 22.) Since the math was obvious, the judge's making a joke does not render the trial fundamentally unfair. *See, e.g., Perez v. Hollins,* 02 Civ. 6120, 2004 WL 307271 at *11 (S.D.N.Y. Feb. 5, 2004) (trial court's actions in questioning witnesses, denigrating the defense, and making faces did not deny petitioner a fair trial); *see also, e.g., Gayle v. Scully,* 779 F.2d 802, 807-13 (2d Cir.1985) (Not constitutional error when judge continuously made sarcastic remarks, including, for example, telling the defense counsel, " 'Counselor, you must rise to your feet when you address the court ... This is not a real-estate closing." '), *cert. denied,* 479 U.S. 838, 107 S.Ct. 139 (1986); *Robinson v. Ricks,* 00 CV 4526, 2004 WL 1638171 at *16 (E.D.N.Y. July 22, 2004) (While the trial judge made certain unfortunate comments they may have shown his belief that the defendant was guilty, they were " 'neither significantly helpful to the prosecution,' nor 'devastating to the defense," ' and thus his conduct did not rise to the level of a constitutional violation.)

***30** According to Smalls, the judge also should have conducted a voir dire of the jury to determine whether any jurors had read the newspaper article discussing Smalls' prior conviction for "the same crime which he was on trial for." (Pet. at 24; Pet. Ex. 15: *N.Y. Times* article.) This overstates the article's contents. In any event, the juror's knowledge of the article is irrelevant because the jurors all agreed they could be impartial, and additionally, they were instructed by the court not to "consider anything that is outside of the evidence." (Charge: Tr. 832.) The jury is presumed to follow the court's instructions. *See, e.g., Del Pilar v.. Phillips,* 03 Civ. 8636, 2004 WL 1627220 at *12 (S.D.N.Y. July 21, 2004) (Peck, M.J.) (& cases cited therein); *see* cases cited at pages 54-55 above. Smalls was not prejudiced by the lack of a mid-trial voir dire on the old *New York Times* article, and any appeal on that point would have lacked merit.

Smalls further objects that the trial court engaged in judicial misconduct in "failing to give an expanded identification charge" (Pet. at 25), yet Smalls' trial counsel specifically stated that "[a]fter further review and consideration I do not want" an expanded identification charge. (Tr. 744.) Therefore, the court complied with the trial counsel's request to not deliver the charge. Smalls also asserts that the trial court erred in "charging the jury that they may consider evidence from another charge, when considering a different charge, solely on the issue of identification." (Pet. at 25.) However, such a charge was appropriate in this case where the People argued that the attacker's unique modus operandi was circumstantial proof of the attacker's identity as to all of the charged assaults. *See, e.g., Bryant v. Bennett,* 00 Civ. 5692, 2001

at *6 (S.D.N.Y. Mar. 2, 2001) (Peck, M.J.)[48] Here, the crimes were sufficiently similar to warrant the modus operandi identity jury charge, and the trial court properly instructed the jury that they were to use this information to establish identity, and not to commingle the evidence for the purposes of determining guilt. *"Modus operandi* evidence is admissible if it 'bear[s] a singular strong resemblance to the pattern of the offense charged." ' *United States v. Kieffer* No. 02-4246, 68 Fed. Appx. 726, 729, 2003 WL 21461656 at *3 (7th Cir. June 18, 2003).[49] There was no error in allowing the charges as to the four separate victims to be presented in a single trial where the perpetrator's modus operandi was the same (and there was no evidence from any uncharged crime). *See, e.g., United States v. Sanogo,* No. 99-1627, 208 F.3d 204 (table), 2000 WL 280320 at *1 (2d Cir. Mar. 14, 2000) (It is proper for a trial court to admit evidence of prior wrongs "if it helps to prove identity of the wrongdoer or the existence of a common scheme," especially where it helps to prove a " 'signature crime." ') (quoting *United States v. Mills,* 895 F.2d 897, 907 (2d Cir.1990)).

48 If the crimes are sufficiently "unique," a *modus operandi* charge, such as the one the trial court gave in this case, along with a limiting instruction that the jurors can consider the similarities of the crimes on the issue of identity alone, is proper. *People v. Beam,* 57 N.Y.2d 241, 251, 455 N.Y.S.2d 575, 580 (1982); *see also, e.g., People v. Rios,* 245 A.D.2d 470, 470, 666 N.Y.S.2d 467, 467 (2d Dep't 1997) ("since the defendant's identity was a primary issue at trial and the three robberies, all sharing the same distinctive modus operandi, were properly joined" the jury should be permitted to consider "evidence of guilt as to one robbery, as evidence of guilt as to the other robberies"), *appeal denied,* 91 N.Y.2d 944, 671 N.Y.S.2d 724 (table) (1998); *People v. Dockery,* 215 A.D.2d 497, 498, 626 N.Y.S.2d 525, 526 (2d Dep't) ("the foregoing facts show that the two cases were sufficiently alike to establish a *modus operandi* .... Accordingly, the court properly instructed the jury to consider the similarities between the two incidents on the issue of identity alone, and properly limited the potentially prejudicial effect of such instruction by so restricting the jury's use of the evidence."), *appeal denied,* 86 N.Y.2d 793, 632 N.Y.S.2d 506 (table) (1995); *accord People v. Nelson,* 233 A.D.2d 926, 926, 649 N.Y.S.2d 754, 755 (4th Dep't 1996) ("Proof of one of the robberies at the trial on another would be admissible within one or more of the categories established by *People v. Molineux* .... Evidence on each separate robbery is relevant to the others on the issues of identity and modus operandi.").

49 "A decision to admit other crimes evidence essentially combines the requirements of [Federal Rules of Evidence] Rules 404(b) and 403 into the following four-pronged test: Evidence of 'other crimes' must (1) be directed toward establishing something other than the defendant's propensity to commit the charged offense (here, the identity and *modus operandi* of the perpetrator), (2) show sufficient similarities in time and manner to establish relevance to the charged conduct, (3) be sufficient to support a jury finding that the defendant committed the similar act, and (4) have probative value that is not substantially outweighed by the danger of prejudice to the criminal defendant." *United States v. Rollins,* 301 F.3d 511, 519 (7th Cir.2002).

***31** Smalls claims that his counsel should have objected to the court's misconduct in allowing Dr. Word to testify as an expert witness even though her name was not on the laboratory report. (Pet. at 23.) The judge acted well within his role as gatekeeper in allowing Dr. Word to testify as an expert witness on DNA to explain its significance to the jury. *See, e.g., Daubert v. Merrill Dow Pharmaceuticals,* 509 U.S. 579, 590-91, 113 S. CT. 2786, 2795-96 (1993); *see also, e.g., Spencer v. Murray,* 5 F.3d 758, 763 (4th Cir.1993) (No error in admitting testimony from three DNA experts from the company who performed the tests, including those who performed the tests, and three "independent experts not connected with" the company that performed the tests.), *cert. denied,* 510 U.S. 1171, 114 S.Ct. 1208 (1994); *United States v. Jakobetz,* 955 F.2d 786, 800 (2d Cir.) ("DNA profiling evidence should be excluded only when the government cannot show this threshold level of reliability in its data," and "[r]arely should [ ] a factual determination [of the evidence's reliability] be excluded from jury consideration."), *cert. denied,* 506 U.S. 834, 113 S.Ct. 104 (1992).

Smalls' further objection that the court erred in "allowing the prosecution to argue in summation that the petitioner had the propensity to commit those crimes because he was on parole" is inaccurate. (Pet. at 25.) The court instructed the jury that statement about Smalls' parole status "may not be considered by [them] as any proof that the defendant has a propensity or disposition to commit crimes ... and may be considered ... solely as to the actions of the parties at the time the defendant was stopped by the police on October 14, 1996." (Jury Charge: Tr. 843.)

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Taken as a whole in the context of the entire trial, the trial judge's rulings and comments did not deprive Smalls of a fair trial, any appeal on this issue would have been meritless, and habeas relief is denied on this claim. *See, e.g., Gumbs v. Kelly,* 97 Civ. 8755, 2000 WL 1172350 at *12 (S.D.N.Y. Aug. 18, 2000) (Peck, M.J.) (petitioner was not denied a fair trial even though his counsel was reprimanded by judge during trial and "some of the court's comments would have been better left unsaid.").

E. *Failing to Submit a Reply Brief and Present an Oral Argument*

Smalls alleges that his appellate counsel erred in failing to submit a rebuttal brief and present an oral argument during Smalls' direct appeal. (Ex. U: Pet. at 26.) In letters to Smalls, his appellate counsel clearly explained the appeals process and his belief that oral argument would not be beneficial in the case. (Pet. Exs. 12-14: 11/23/01, 8/17/01, 10/23/00 letters.) Counsel stated:

> I will not argue your case, for several reasons. First of all, the Court will not permit me to argue the issues you have raised in your pro se brief. Second, some arguments are better presented to the Court in writing and that is true with the issues I have raised on your appeal.
>
> ***32** I am sorry that you feel that I do not care if the Court affirms your conviction. To the contrary, I am giving your appeal its best shot at success by *not* doing an oral argument.

(Pet. Ex. 13: 8/17/01 letter.) This clearly was a strategic decision that the Court may not second guess. Concerning a reply brief, appellate counsel advised Smalls "I did not file a rebuttal brief because there was no point in doing so." (Pet. Ex. 12: 11/23/01 letter.) Additionally, appellate counsel had advised Smalls that Smalls could raise any additional issues he wished by submitting a pro se supplemental brief, which Smalls did. (Pet. Ex. 14: 10/23/00 letter.)

Smalls' claim fails because he has not shown failure to submit a rebuttal brief and present an oral argument is deficient, nor that he has suffered prejudice as a result of counsel's conduct. He only makes the vague statement that he was denied "the all important last written word and maybe the last spoken word." (Pet. at 26.) Smalls has not demonstrated that a reply brief or oral argument would have changed the outcome of his appeal. *See, e.g., Vega v. United States,* 261 F.Supp.2d 175, 177 (E.D.N.Y.2003) (Ineffective assistance of appellate counsel claim denied where counsel submitted an appellate brief but neglected to request an oral argument, because petitioner failed to show that oral argument would have changed the results of his appeal.); *Phillips v. United States,* 97 Civ. 2571, 2001 WL 274092 at *5 (S.D.N.Y. Mar. 19, 2001) (discretionary decision of counsel not to present an oral argument is not objectively unreasonable nor did it prejudice petitioner). Accordingly, Smalls' claim regarding his lack of oral argument and rebuttal brief is denied.

F. *Failing to Raise Ineffective Assistance of Trial Counsel Claim*

Smalls alleges that his appellate counsel was ineffective for failing to assert ineffective assistance of his trial counsel on appeal. (Pet. at 28-61.)

There are two short answers to this claim. First, this Court has already found that trial counsel was not ineffective. (*See* Point II above.) Second, claims of ineffective trial counsel usually are brought not on direct appeal but on a collateral C.P.L. § 440 motion,[50] and counsel is appointed for the direct appeal but need not bring a collateral § 440 motion for a defendant. " 'The proper procedural vehicle under New York law for raising a claim of ineffective assistance of trial counsel is generally not a direct appeal but a motion to the trial court to vacate the judgement under New York Criminal Procedure Law Section 440.10. This is so because normally the appellate court has no basis upon which it would be able to consider the substance of such a claim until a record of the relevant facts has been made at the trial court level." ' *Hernandez v. Filion,* 03 Civ. 6989, 2004 WL 286107 at *17 n36 (S.D.N.Y. Feb. 13, 2004) (Peck, M.J.) (quoting *Walker v. Dalsheim,* 669 F.Supp. 68, 70 (S.D.N.Y.1987)), *report & rec. adopted,* 2004 WL 555722 (S.D.N.Y. Mar. 19, 2004).

50 *See, e.g., Guzman v. Fischer,* 02 Civ. 7448, 2003 WL 21744086 at *16 (S.D.N.Y. July 29, 2003) (Peck, M.J.) (Appointed appellate counsel is not required to bring a C.P.L. § 440 motion for petitioner.).

G. *Failing to Raise the Claim that the Prosecution Failed to Prove Guilt* Beyond a *Reasonable Doubt*

***33** Smalls asserts that his appellate counsel should have argued on appeal that his guilt was not proven beyond

a reasonable doubt due to discrepancies in testimony to support his claim. (Pet. at 82.) However, his appellate counsel did raise this claim on direct appeal, arguing that "the prosecution failed to prove appellant's guilt beyond a reasonable doubt" and "there was considerable evidence that appellant *was not* the perpetrator." (Ex. B: Smalls 1st Dep't Br. at 18-22.) The First Department denied the claim. Thus, counsel did raise the claim and was not ineffective. [51]

51 To the extent Smalls is raising the insufficient evidence claim as a separate and independent claim, it still lacks merit. Based on he evidence of the similar modus operandi for all four attacks, and the DNA evidence that blood on Smalls' sneakers had one of he victim's DNA, a reasonable jury certainly could have convicted Smalls. *See, e.g., Brown v. Fischer,* 03 Civ. 9818, 2004 WL 1171277 at *7-9 (S.D.N.Y. May 27, 2004) (Peck, M.J.) (& cases cited therein).

CONCLUSION

For the reasons discussed above, Smalls' habeas petition is *DENIED,* and a certificate of appealability is not issued.

SO ORDERED.

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

Carlos SAVINON, Petitioner,
v.
William MAZUCCA, Superintendent, Fishkill Correctional Facility, et al. Respondents.

No. 04CIV1589RMBGWG.
|
Oct. 12, 2005.

REPORT AND RECOMMENDATION

GORENSTEIN, Magistrate J.

***1** Carlos Savinon, currently an inmate at the Otisville Correctional Facility, brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following a jury trial in the New York State Supreme Court, New York County, Savinon was convicted of one count of Rape in the First Degree (N.Y. Penal Law ("N.Y.P.L.") § 130.35) and one count of Sexual Abuse in the First Degree (N.Y.P.L. § 130.65). Savinon was sentenced to concurrent, determinate terms of nine years on the rape count and five years on the sexual abuse count. For the reasons stated below, Savinon's petition should be denied.

I. *BACKGROUND*

On November 14, 2000, Savinon's first trial ended in a mistrial after defense counsel mentioned in his opening statement that the complainant had had three abortions. (*See* I Tr. 27-28, 38).[1] The new trial commenced the same day.

[1] The state court transcript in this matter has been filed in four volumes. *See* State Court Transcript, filed July 30, 2004 (Docket # 9). "I Tr." refers to volume one. "II Tr." refers to volume two. "Tr." refers to volumes three and four, which are consecutively paginated. "S." refers to the sentencing transcript, which is annexed to volume four.

A. *The Evidence Presented at Trial*

1. *The People's Case*

In the spring of 1997, Savinon met the complaining witness, Sandra Jiminian, at the home of one of Jiminian's friends, Adamilka Benitez do lo Santos ("Benitez"). (*See* Jiminian: Tr. 68-69). Jiminian testified that she entered the United States illegally from Santo Domingo at the end of 1989 or in 1990 when she was approximately 18 years old. (*See* Jiminian: Tr. 66, 192).

After being introduced, Savinon and Jiminian "started talking like friends," and he said he would call her the following day. (Jiminian: Tr. 69). Thereafter, Savinon called Jiminian and they would talk. (Jiminian: Tr. 70). Approximately one month later, Savinon and Jiminian went out to dinner. (Jiminian: Tr. 70). Following dinner, Jiminian and Savinon went to a hotel in New Jersey. (Jiminian: Tr. 72). Although Jiminian and Savinon did not have sex that night, they did have sex the following morning. (*See* Jiminian: Tr. 72-73). At that time, Jiminian did not know Savinon's last name or his address. (Jiminian: Tr. 73). Jiminian did have Savinon's beeper number, and she knew that he worked selling international phone calls. (Jiminian: Tr. 73-74).

Following the night at the hotel, Jiminian and Savinon would "go out" periodically. (Jiminian: Tr. 75). They had an "open" relationship where they met every few weeks or so after he would beep her. (Jiminian: Tr. 75, 213). Jiminian and Savinon had sex each time they saw each other, either in a hotel, in her apartment, or in a car. (*See* Jiminian: Tr. 76, 216, 218). Although Savinon used a condom the first time they had sex, he did not use one thereafter. (*See* Jiminian: Tr. 217). During this period, Savinon gave Jiminian a television and some money on a few occasions. (*See* Jiminian: Tr. 76-78). Jiminian testified that, prior to December 1998, there were never any problems in their relationship. (*See* Jiminian: Tr. 80).

On December 4, 1998, Jiminian was at home after a day at work cleaning houses. (Jiminian: Tr. 81-83).[2] At approximately 11:00 p.m., Savinon arrived in a Lexus and honked the horn. (Jiminian: Tr. 81-82). Luis Camacho, who is also called "Flaco," was driving the car. (Jiminian: Tr. 82). Jiminian had seen Flaco drive Savinon's car "many times." (Jiminian: Tr. 80). Although it appeared that Savinon and Flaco were friends, Jiminian had only seen Flaco "like four or five times" and came to know him through Savinon. (Jiminian: Tr. 79-80). Jiminian testified

that she and Flaco were "Hi, how are you" acquaintances, (*see* Jiminian: Tr. 79), and that she did not know his real name. (Jiminian: Tr. 80). Jiminian put on her shoes and went downstairs to greet Savinon. (Jiminian: Tr. 92). Once Jiminian came over to the car, Savinon asked Jiminian if she wanted to go out, and told her that she should wear "something sexy." (Jiminian: Tr. 92, 94). Jiminian then changed into a pair of gray pants, a strapless blouse, and boots. (Jiminian: Tr. 94).

2 At this point in her testimony, Jiminian described her arrest on narcotics and gun charges and her conviction on a charge of criminal possession of drug paraphernalia. (*See* Jiminian: Tr. 83-86, 90, 180).

***2** Jiminian, Flaco, and Savinon went to a place in Yonkers called Jomas Bar ("Jomas"). (Jiminian: Tr. 95). They arrived at Jomas at approximately 12:30 a.m. and were seated at a table. (*See* Jiminian: Tr. 129). Savinon pressed Jiminian to drink alcohol, and a glass of whiskey was placed in front of her, but she did not drink from it because she did not drink alcohol. (Jiminian: Tr. 130). Although they had never done so before, on "three or four" occasions that night Savinon gave Jiminian sips of alcohol from his mouth. (Jiminian: Tr. 131-32).[3] This occurred over a span of approximately 25 minutes. (Jiminian: Tr. 132). The alcohol was "very strong" and Jiminian would have a sip of club soda "very quickly" after Savinon would give her a drink. (Jiminian: Tr. 131-32).

3 Jiminian testified that she did not make a "big deal" of Savinon feeding her food from his mouth and that she did not ask him to give her liquor from his mouth. (Jiminian: Tr. 221). She also testified that she did not make overt displays of affection towards Savinon. (Jiminian: Tr. 221).

Savinon told Jiminian that she was going to dance in a competition being held at Jomas, and attempted to enter her in the contest, but she refused. (Jiminian: Tr. 132-33; *accord* Jiminian: Tr. 232). Savinon did not seem to have a problem with Jiminian's refusal to enter the competition and she thought the whole discussion was a joke. (Jiminian: Tr. 133-34).

At some point, Savinon left the table for approximately one hour. (Jiminian: Tr. 134). Jiminian was seated at the table with Flaco and she noticed Savinon "at the bar ... talking to a girl." (Jiminian: Tr. 135). Savinon and the girl, whom Jiminian did not know, were talking, drinking, and dancing at the bar for approximately 20 minutes. (Jiminian: Tr. 135). Jiminian saw this as being "fine" and it did not "do anything" to her. (Jiminian: Tr. 135). She also felt "ashamed," however, because she did not know where Flaco had gone and she was "alone at the table." (*See* Jiminian: Tr. 136, 234). When Flaco returned to the table, she told him that she did not " 'feel very good" ' and that she wanted to leave. (Jiminian: Tr. 136). Flaco said that they should wait for Savinon to return before leaving. (Jiminian: Tr. 137). Flaco told Jiminian that Savinon had the keys to the car. (Jiminian: Tr. 137). Jiminian went to Savinon, who was at the bar talking with the same girl, and told him that she wanted to leave. (Jiminian: Tr. 137-38). Savinon told Jiminian that she was " 'with" ' him, "grabbed" her by the arm, took her to the table and left her there with Flaco. (Jiminian: Tr. 138). Approximately 15 minutes later, Flaco noticed that Jiminian was not feeling well. (Jiminian: Tr. 138-39). Flaco told Jiminian that he did in fact have the keys, and so they went to the car to wait for Savinon. (Jiminian: Tr. 139-40).

Approximately 20 minutes later, Savinon exited the club. (Jiminian: Tr. 140-41). Jiminian was seated in the front passenger seat of the car and Flaco was in the driver's seat. (Jiminian: Tr. 140). Savinon got in the back seat of the car and told Flaco, "[L]et's go." (Jiminian: Tr. 141). As they were driving to the highway, Savinon asked Flaco, " 'And what's going on with Sandra? What kind of problem is she having?" ' (Jiminian: Tr. 141). Savinon then started talking to Jiminian and was touching her breasts over her blouse. (Jiminian: Tr. 141-43). Jiminian removed his hand on "four or five" occasions, telling him "not to touch [her]" and "to remove his hands." (Jiminian: Tr. 142). Savinon said to Jiminian, "Oh, you want to fight," and she told him that she wanted to be left alone. (Jiminian: Tr. 142) (internal quotation mark omitted). Savinon "removed" Jiminian's seat belt and continued touching her breasts, but she told him to leave her alone and that they were " 'going to have an accident" ' because " 'Flaco [was] driving." ' (Jiminian: Tr. 143). Savinon then "grabbed" Jiminian and "put [her] in the back" of the car. (Jiminian: Tr. 144). Savinon began touching her breasts over her clothing and kissing her on the mouth and neck. (Jiminian: Tr. 144-45). Savinon then laid Jiminian down in the back seat and they "were sort of wrestling" because Jiminian "didn't want him to touch [her]." (Jiminian: Tr. 145). Jiminian was taking her coat off and "helping to remove it" because she was

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"uncomfortable." (Jiminian: Tr. 238). Savinon continued touching and kissing her. (Jiminian: Tr. 145). Savinon said to Jiminian, " 'Oh, so you want to fight? Fight." ' (Jiminian: Tr. 145). Savinon began hitting Jiminian in the face with an open hand. (Jiminian: Tr. 145). He was hitting Jiminian "hard" and she "started to cry." (Jiminian: Tr. 145). She told him not to hit her in the face because she had not "been disrespectful to him that way." (Jiminian: Tr. 145). Savinon, however, continued kissing her and lowered her blouse and bra. (Jiminian: Tr. 145-46). Jiminian "was completely laying down on the back seat" and Savinon was "on top" of her. (Jiminian: Tr. 146). Jiminian was crying and "grabbing" Savinon's hand so he would stop hitting her in the face. (Jiminian: Tr. 146). Flaco continued driving and did not do anything during this time. (Jiminian: Tr. 146). Savinon pulled out his penis and said, " 'Look, hey, Flaco, what she's going to do to me." ' (Jiminian: Tr. 148). Jiminian told Savinon that she did not " 'want to do this." ' (Jiminian: Tr. 148). Savinon put his penis in Jiminian's mouth, (Jiminian: Tr. 148), and told her that he " 'want[ed] to stick it in [her]." ' (Jiminian: Tr. 148). Savinon started to unbutton Jiminian's pants, breaking the zipper and tearing them in the process. (Jiminian: Tr. 150-51). Savinon announced that he was " 'going to stick it to" ' Jiminian " 'in front of El Flaco." ' (Jiminian: Tr. 150). After pulling down her pants and panties, he put his penis into her vagina until he ejaculated. (Jiminian: Tr. 153).

***3** At some point, Savinon told Flaco to turn off the highway. (Jiminian: Tr. 153). They continued driving until they reached a park, which Jiminian subsequently learned was Fort Tryon Park. (Jiminian: Tr. 153-54). Savinon exited the car and told Flaco that he wanted him " 'to stick it in" ' Jiminian, but Flaco refused. (Jiminian: Tr. 155). Savinon gave Flaco a condom. (Jiminian: Tr. 155-56). Jiminian said to Flaco, " 'No, no, don't put your hand on me." ' (Jiminian: Tr. 156). Jiminian locked the door to the car, but Savinon unlocked it by reaching through the driver's side window. (Jiminian: Tr. 156). Savinon then said, " 'Flaco, come, the door is open. Get in and stick it to her." ' (Jiminian: Tr. 156). Jiminian "begged" Flaco not to listen to Savinon and not to touch her. (Jiminian: Tr. 156). Flaco entered the back seat of the car and told Jiminian that he was " 'going to make [Savinon] believe" ' that he put his penis in her. (Jiminian: Tr. 156-57). Jiminian told Flaco that she did not want him to do that because if Savninon saw Flaco's " 'pants down" ' Savinon would make Flaco " 'stick it to [her]." ' (Jiminian: Tr. 157).

Jiminian exited the car and noticed another car behind their car. (Jiminian: Tr. 157). Jiminian approached Savinon, who was in the company of another man. (Jiminian: Tr. 157). Savinon asked Jiminian, " 'Has El Flaco already stick it to you?" ' (Jiminian: Tr. 157). Savinon also asked Jiminian if she would do " 'whatever" ' he said, and she said that she would. (Jiminian: Tr. 157). Savinon told Jiminian to go to Flaco so that he could " 'stick it to [her]," 'and again she refused. (Jiminian: Tr. 157).

Savinon then told the man he was with, " 'You'll see now." ' (Jiminian: Tr. 157). Savinon put Jiminian on her knees and "got his penis out in front of the other guy." (Jiminian: Tr. 157). Savinon then put his penis in Jiminian's mouth and began "pushing" her head. (Jiminian: Tr. 158). Savinon also continued asking Jiminian if she "was going to El Flaco," and Jiminian told him that she would not "do what he was asking [her] to do with ... Flaco." (Jiminian: Tr. 163).

Jiminian "was going to go" to another car in the park "to ask for help." (Jiminian: Tr. 164). Savinon "yelled" at Jiminian, and she "went back to him" because she was "afraid." (Jiminian: Tr. 164). Jiminian told Savinon that she was going to ask for help if he did not leave her alone. (Jiminian: Tr. 164). Savinon responded, " 'Dare, dare. I will kill you." ' (Jiminian: Tr. 165). Savinon took Jiminian back to where the other man was and pulled down her pants and panties. (Jiminian: Tr. 164). He "opened" her vagina and said to the man, " 'Look at her pussy, look at her pussy." ' (Jiminian: Tr. 164-65). He also "opened" her "rear" and said, " 'Look at her bottom." ' (Jiminian: Tr. 165). At this point, Jiminian was telling the man to tell Savinon " 'to leave [her] alone, to let [her] go, not to hurt [her] anymore." ' (Savinon: Tr. 165).

***4** Following this incident, Savinon told Jiminian that she could leave and he told Flaco to take her home. (*See* Jiminian: Tr. 165-66). Flaco took Jiminian home and stayed with her until 5:30 a.m ., while Savinon remained behind with the other man. (Jiminian: Tr. 166-67). [4] At some point, Geiny Paulino saw Jiminian, with whom she shared an apartment. (*See* Jiminian: Tr. 167; Paulino: Tr. 51). Jiminian "was crying" and had bruises on the right side of her cheek near her mouth and in the "left shoulder area." (*See* Paulino: Tr. 53-54). Paulino did not see any other bruises or a cut lip or any bite marks. (Paulino: Tr.

59, 61). Jiminian's pants were broken in the zipper area. (Paulino: Tr. 54). Paulino spent one or two hours with Jiminian and during that time Jiminian "was crying a lot" and was acting "very crazy." (Paulino: Tr. 55). Jiminian did not call the police when she got home because she was "very afraid." (Jiminian: Tr. 171).

4 After December 4, 1998, Flaco tried to "have a friendship" with Jiminian "thinking that [she] might get him into trouble." (Jiminian: Tr. 224). In March 1999, Flaco and Jiminian went to Flaco's sister's house in the Bronx. (Jiminian: Tr. 225). Jiminian could not recall if she spoke with Flaco on other occasions in 1999. (Jiminian: Tr. 225).

That same day, Jiminian attended a confirmation class at her church but was unable to "pay very much attention because [she] was feeling very bad." (Jiminian: Tr. 171-72). Father Julio Orlando Torres taught the class. (Jiminian: Tr. 172). Father Torres noticed that Jiminian "was restless," "like on the verge of tears," and "unable to stay in class." (Torres: Tr. 283). Father Torres saw Jiminian sit down "for[ ] a few minutes" and then leave "abruptly." (Torres: Tr. 283). Father Torres and Jiminian left class and went into another room in the church. (Jiminian: Tr. 172; Torres: Tr. 283). In the other room, Jiminian "started crying." (Torres: Tr. 283-84). She did not, however, inform Father Torres that she had been sexually assaulted. (Torres: Tr. 283-84). After class, Jiminian and Father Torres went to Father Torres's office where she told him that "she had been raped." (Torres: Tr. 285). Jiminian took off her blouse and showed Father Torres the marks on her body, including bruises on her back, arms and legs, as well as a cut lip. (*See* Jiminian: Tr. 172; Torres: Tr. 285). Father Torres told Jiminian that she should contact the police and go to the hospital. (Torres: Tr. 285-86). Jiminian did not immediately contact the police or go to the hospital, however, because she was "very afraid." (Jiminian: Tr. 174).

On Sunday, December 6, 1998, Jiminian went to church, and the following day Father Torres accompanied her to the hospital. (*See* Jiminian: Tr. 174, 270; Torres: Tr. 287). The physical examination at the hospital revealed a bruise on her right foot and a small bite mark on her right arm. (*See* Sampson: Tr. 331-32). Jiminian was "very nervous" and unable to eat or sleep following the incident. (*See* Jiminian: Tr. 175). Jiminian told the personnel at the hospital that she was depressed because of what occurred on December 4th. (Jiminian: Tr. 175). Following this incident, Jiminian's depression is "double, stronger" than what it previously was. (*See* Jiminian: Tr. 199).

***5** Detective Frank Garrido came to interview Jiminian at the hospital. (Jiminian: Tr. 175; Garrido: Tr. 100). Jiminian was unable to provide the police with Savinon's last name or home address, but she did provide a pager number and did know Savinon's business address. (*See* Jiminian: Tr. 175-76; Garrido: Tr. 101).

On December 9, 1998, Detective Garrido arranged for Jiminian to contact Savinon from the Manhattan Special Victim Squad office in order to tape record a conversation between Jiminian and Savinon. (Jiminian: Tr. 178; Garrido: Tr. 101).[5] During the conversation, Jiminian asked Savinon "why he did those things to her, taking off her clothes and ripping her pants." Resp. Mem. at 10. Savinon replied by stating, " 'I know what I did." ' *Id.* After Jiminian said that "he had hit her," Savinon responded by saying, " 'Shhssh. Shut up." ' *Id.* (citation and footnote omitted). Jiminian stated that, " '[t]he only thing [she] want[ed] to know [was] why [he] did that to [her]," 'and Savinon responded by stating, " '[a]ll right already." ' *Id.* She asked why he had " 'pull[ed] [her] pants down in front of [his] friend' who was 'following behind [them] in the car," ' and he replied, " 'All right already, don't go on." ' *Id.* (citation omitted) (some alterations in original). Jiminian stated that "she had not been jealous and had been quiet and calm in the car until he 'started hitting [her] in the face" ' in front of Flaco, and Savinon responded, " 'Listen, listen, listen, listen." ' *Id.* at 10-11. When she started to describe "the way he 'stuck it in [her] in front of" ' Flaco, Savinon asked her what time she would be home and said that he wanted to know when she would arrive home so that he could call her at ten o'clock. *Id.* (alteration in original). Jiminian said Savinon "had to assure her ... that he was 'not going to do that stuff again,' and he replied, 'No, never." ' *Id.* at 11. Savinon suggested that they meet "downstairs at her house," but Jiminian said "that she could not trust him after 'what [he] did to [her] in that park in front of [his] friend and Flaco," ' and Savinon replied, " 'Look, ok. Let me say, wait, wait, definitely wait, just one thing ... I'll call at ten, we'll get together, yes or no?" ' *Id.* at 11-12 (citation omitted) (some alterations in original). Jiminian refused, stating, " 'Yeah, and then you kill me, just like you said you were going to do that night, that you'd kill me." ' *Id.* at 12. To this Savinon responded by stating, " 'Son of a bitch, you are a big lunatic." ' *Id.* Finally, Savinon said that "he was going

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to hang up" and, after Jiminian asked where he was, he said that he was "at his store at '179th & Amsterdam." ' *Id.*

5 The substance of this conversation is summarized in appellate briefs and respondents' submissions to this Court in opposition to the petition. *See* Memorandum of Law in Opposition to Petition for a Writ of Habeas Corpus, filed July 28, 2004 (Docket # 6) ("Resp.Mem."), at 9-12; Brief for Respondent, dated February 2002 (reproduced as Ex. B to Declaration in Opposition to Petition for a Writ of Habeas Corpus, filed July 28, 2004 (Docket # 7) ("Opp.Decl.")), at 14-16. The ten audiotapes containing this conversation were played for the jury at trial. Resp. Mem. at 10 n. 8. Respondents, however, are not in possession of the tapes or a transcript of the tapes. *Id.*

A week or two later, Jiminian subsequently visited Savinon's place of business while Detective Garrido and other police officers were stationed outside in a van. (*See* Jiminian: Tr. 176). Jiminian went inside and asked a man that was there where Savinon was, and the man told her that he did not know. (Jiminian: Tr. 176). The man laughed when she said that she did not believe him, and then he said to her, " 'You are the girl who was in Jomas." ' (Jiminian: Tr. 176-77). The man called Savinon and Jiminian spoke with him on the telephone. (Jiminian: Tr. 177). Savinon told Jiminian that he was " 'around the world," 'implying that he was out of the country. (*See* Jiminian: Tr. 177). Jiminian told Savinon that she was going to Puerto Rico to visit her brother, and Savinon told her to either "wait for him" or "come to where he was." (Jiminian: Tr. 265). In any event, Savinon told Jiminian that he would call her as soon as he was in New York. (Jiminian: Tr. 266). On March 2, 1999, Savinon paged Jiminian. (*See* Jiminian: Tr. 266). Savinon was arrested on March 3, 1999 inside 2402 Amsterdam Avenue. (Garrido: Tr. 103-04).

***6** The prosecution also called Dr. Barbara Sampson, a city Medical Examiner, as an expert witness in forensic pathology and wound interpretation. (*See* Sampson: Tr. 315-16, 321). Dr. Sampson testified that she was board certified in the areas of anatomical, clinical, and forensic pathology. (Sampson: Tr. 317). She described "pathology" as "the field of medicine that deals with the laboratory aspect of medicine." (Sampson: Tr. 317). She also said that pathology deals with "performing autopsies." (Sampson: Tr. 317). She testified that she performed "approximately 400 autopsies and ... observed at least ten times that many." (Sampson: Tr. 317).

In her direct testimony, Dr. Sampson testified concerning bruises and/or contusions, what causes bruises to appear on people, whether all human beings bruise alike, and the rate at which bruises disappear on people. (*See* Sampson: Tr. 318-20). Dr. Sampson stated that she reviewed Jiminian's hospital records in preparation for her testimony. (*See* Sampson: Tr. 324). Dr. Sampson testified that, based on the notations made on the medical records, she was unable to determine whether Jiminian had bruises on her face or head at the time of her examination. (*See* Sampson: Tr. 324-25). [6]

6 The parties stipulated that the hospital records reflected that Jiminian did not have any "masses or bruises to the face or head." (*See* Tr. 543).

Dr. Sampson also described, over defense counsel's objection, the cause of post traumatic stress disorder ("PTSD") and the "symptoms" somebody with PTSD would experience. (*See* Sampson: Tr. 326-27). Specifically, Dr. Sampson testified that PTSD "is a diagnosis that is made when someone has experienced a very traumatic life event," and that the symptoms include feeling "hopeless [ ]," replaying the traumatic event "over and over" in one's mind, and being in a state of "hyperarousal" where one is "very nervous all the time." (Sampson: Tr. 326-27). Dr. Sampson also explained that rape or sexual assault might trigger PTSD, and that there was no time limit that somebody could suffer from PTSD. (Sampson: Tr. 327). Dr. Sampson opined, again over defense counsel's objection, that Jiminian's symptoms, as described in the hospital records, were consistent with PTSD. (*See* Sampson: Tr. 327-28). On cross-examination, Dr. Sampson conceded that her job primarily involved examining "dead people." (*See* Sampson: Tr. 328). Dr. Sampson stated that, in her experience testifying in court, she primarily testified on behalf of the prosecution. (*See* Sampson: Tr. 329). Dr. Sampson confirmed that she was asked to review Jiminian's medical records prior to testifying. (*See* Sampson: Tr. 329). Dr. Sampson also testified that she worked in an emergency room only as part of her medical school rotations and that she had done so "only very briefly." (Sampson: Tr. 330-31). Dr. Sampson confirmed that she did not have any experience with the procedures in an emergency room for handling a rape case. (Sampson: Tr. 331). Dr. Sampson testified that she never called or spoke with the physician who signed

Jiminian's hospital records, and that she never attempted to contact her. (*See* Sampson: Tr. 330, 338).

2. *Savinon's Case*

***7** a. *Character Witnesses.* Savinon called four character witnesses. Julio Guridy, a bank officer and 25-year resident of Allentown, Pennsylvania, testified that he knew Savinon for approximately eight to ten years. (Guridy: Tr. 340-41). Guridy said that Savinon had a reputation for being "very peaceful" and "[n]on-violent." (Guridy: Tr. 342). Monica De La Cruz, who was Savinon's girlfriend at the time she testified, stated that she had known Savinon for five years, that he was "a very good man," and that he had a reputation for being a "[n]on-violent person." (De La Cruz: Tr. 547-48). Rafael Lara, who had known Savinon for forty years, testified that Savinon had a reputation for being "very peaceful" and that he was "[n]ot known as a violent man." (Lara: Tr. 579-80). Finally, David Rivas, who was a "very good friend" of Savinon's father, testified that Savinon had a reputation for not being "a violent type of person." (Rivas: Tr. 598, 600).

b. *Savinon's Testimony.* Savinon also took the stand on his own behalf and testified as follows:

Savinon was born in the Dominican Republic, and had lived in the United States for twenty years. (Savinon: Tr. 355-56). Until April 2000, Savinon was the co-owner of a telecommunications company called "Phone Card Supermarket" that was located at 2402 Amsterdam Avenue. (Savinon: Tr. 358). Savinon had four employees, and the business primarily involved selling phone cards in bulk. (Savinon: Tr. 359).

Savinon met Jiminian in March 1998 at a party at the home of Benitez, who was the girlfriend of one of Savinon's friends, Pedro Pablo Mestre. (*See* Savinon: Tr. 360-61; Benitez: Tr. 593; Mestre: 586). Savinon met Jiminian, and they talked at the party. (Savinon: Tr. 362-63). Jiminian told Savinon that she used to see him in the street and that she asked Benitez to introduce her to him. (*See* Savinon: Tr. 364). Savinon decided to leave, and Jiminian told him that she was going to give him her number for him to call her. (Jiminian: Tr. 364-65). Savinon said that, if she wanted, she could call him, and Jiminian agreed. (Savinon: Tr. 365).

Savinon and Jiminian met again two days later outside of Benitez's house. (*See* Savinon: Tr. 366). Savinon gave Jiminian $100 at that time so that she could go to the salon. (Savinon: Tr. 367). Savinon left and returned later that same day. (Savinon: Tr. 367). When he returned, Jiminian asked him to take her home, and he agreed. (Savinon: Tr. 367). After reaching her house, Jiminian went upstairs and returned after about 10 minutes. (Savinon: Tr. 368). Upon returning to the car, Jiminian said that she wanted to drive around. (Savinon: Tr. 368). Jiminian and Savinon went to Riverside Park and Savinon suggested that they "step out for a while." (*See* Savinon: Tr. 369). At the park, Jiminian and Savinon "grabbed each other" and "started kissing." (Savinon: Tr. 369, 490). Savinon then dropped Jiminian off and returned to Benitez's house. (Savinon: Tr. 369). The "girls" who were there told Savinon that Jiminian "was a little bit crazy," although he thought they were only joking. (Savinon: Tr. 369-70).

***8** Either the following day or the day after, Jiminian beeped Savinon, and he told her that he would see if after 10 p.m., when he got off work, he was able to pick her up. (Savinon: Tr. 370). Savinon picked Jiminian up in his car after 10 p.m. (Savinon: Tr. 370-71). They returned to the park, exited the car, and started "kissing" and touching "each other in the private parts." (*See* Savinon: Tr. 371). They returned to the car, Savinon lowered his zipper, and Jiminian performed oral sex on him at that time. (Savinon: Tr. 371). Savinon offered to take Jiminian " 'to a more comfortable place," ' but she refused. (Savinon: Tr. 372). Jiminian told Savinon that he had "a beautiful private part" and that "she liked it very much." (Savinon: Tr. 372).

Savinon and Jiminian then went to a hotel in New Jersey. (Savinon: Tr. 372). Upon arriving at the hotel, Jiminian performed oral sex on Savinon again, but she would not allow him to "penetrate her because [they] had just met very recently." (Savinon: Tr. 372). Although Savinon "tried to convince her" otherwise, he eventually told her that it was " '[n]o problem." ' (Savinon: Tr. 372). Savinon told her that he was going to sleep, but Jiminian "never stopped" talking and she "continued talking, speaking a lot of things." (Savinon: Tr. 373).

The following morning, after Jiminian asked Savinon if he was "mad," and he replied that he was not, she "grabbed" his "part" and began performing oral sex. (Savinon: Tr. 373). They then had sex at her request. (*See* Savinon: Tr. 373). Savinon did not use a condom and in fact

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never used one when he was with Jiminian. (Savinon: Tr. 376-77). Jiminian said that "she enjoyed it" and that "if she had known she would have done it" the previous night. (Savinon: Tr. 374). They then left the hotel and he dropped her off at her house. (Savinon: Tr. 374). That same evening, Jiminian called Savinon and told him that "she enjoyed it"; she inquired as to when they would "get together again." (Savinon: Tr. 377). That same day, Savinon spoke to Benitez and told her that Jiminian was " 'okay" ' but that she " 'talk[ed] too much." ' (Savinon: Tr. 377-78). Benitez responded by saying, " 'I told you she's a little bit crazy, you know." ' (Savinon: Tr. 378).

Then, Savinon left New York City "for a couple of weeks." (Savinon: Tr. 378). Upon returning, Savinon met Jiminian outside Benitez's house and they drove to Fort Tryon Park and had sex. (Savinon: Tr. 379). Thereafter, Jiminian used to call Savinon to see if he "had time to pass by." (Savinon: Tr. 381). He used to tell her that he was "very busy," and she would respond by saying that they "didn't need too much time; that [they] can have a quickie." (Savinon: Tr. 381). Savinon subsequently "went to look for" Jiminian, and then they "went to the same park" and had sex. (Savinon: Tr. 381). Each time Savinon saw Jiminian he gave her money. (Savinon: Tr. 383). He also gave her a television. (Savinon: Tr. 383-84).

***9** Savinon testified that their relationship continued in this manner for the next eight months. (Savinon: Tr. 384). They would meet for dates three or four times a month and sometimes more often than that. (*See* Savinon: Tr. 422-23). Savinon testified that, while at restaurants, Jiminian would "always" be "touching [him] in [his] private parts." (Savinon: Tr. 385). When they would go to restaurants, Jiminian would ask Savinon to feed her food and liquor from his mouth and he would do so, although he didn't like doing it. (Savinon: Tr. 385, 396, 451). Jiminian would often refer to Savinon's "private part" as "hers" (Savinon: Tr. 388), and she "had some uncontrollable desire to have oral sex with [him]." (Savinon: Tr. 442). Savinon testified that on one occasion they had oral sex in a moving vehicle with other people in the car, and that he was unable to refuse because she was "very insistent" and "very dominant with" him, asking him "who ... the owner of [his] private part" was. (*See* Savinon: Tr. 386, 438, 441).[7] Later that same night they went to the Bronx and had sex in a car on the roof of a public parking lot. (Savinon: Tr. 386). While having sex that night, she "penetrated a finger" in his anus, telling him that he "had to become a man." (Savinon: Tr. 386-387). She then pulled the finger out and put it in her mouth. (Jiminian: Tr. 387). Jiminian subsequently called Savinon while he was at work and told one of his friends about what she had done. (*See* Savinon: Tr. 387-88, 508). On another occasion they were out to dinner at a restaurant when she "continuously" touched him in his "private part" despite his telling her to "relax." (Savinon: Tr. 388-89). That night they had sex in the office of the restaurant. (Savinon: Tr. 389). Jiminian would often talk about their sex life with others and, "if she felt comfortable," would tell people that she "liked" Savinon's "private parts." (Savinon: Tr. 508-09).[8]

7 During her cross-examination, Jiminian had denied ever performing voluntary oral sex with Savinon. (*See* Jiminian: Tr. 211-12).

8 Mestre testified to an incident during the summer of 1998 when he left a restaurant, Victor's Café, with Savinon and Jiminian. (Mestre: Tr. 587). Mestre left the restaurant in a car separate from Savinon and Jiminian. (Mestre: Tr. 587). While stopped at a light, Jiminian gestured to Mestre, and when he looked over he saw Jiminian holding Savinon's penis "with her two hands." (Mestre: Tr. 587). She was "making signs" to Mestre as to say, " 'Look, look what I'm doing." ' (Mestre: Tr. 587). He then saw her bend over, and at that time the light turned green. (Mestre: Tr. 587-88).

On December 4, 1998, after closing his office at approximately 10 p.m., Savinon left to go to Jomas Bar, where he was to judge a dance contest. (Savinon: Tr. 389-91). Savinon did not call Jiminian to go on a date that evening. (*See* Savinon: Tr. 389). Flaco told Savinon that he wanted to go with him, and Flaco drove to the event. (Savinon: Tr. 390-92).

On the way to the bar, Savinon saw Jiminian outside her house speaking to a person who was in a jeep. (Savinon: Tr. 392). Savinon told Flaco to stop the car, and Savinon and Jiminian began talking. (*See* Savinon: Tr. 392-93). He "gave her $100, and ... told her that [he] would call her tomorrow." (Savinon: Tr. 393). Jiminian insisted on going with them, however, and convinced Savinon to let her do so. (Savinon: Tr. 393). Jiminian changed her clothes, put on a "very sexy ... little blouse," and then got into the car. (*See* Savinon: Tr. 393). On the way to the bar, Jiminian told Savinon "not to worry" if he found another woman because she was "liberal." (Savinon: Tr. 395).

***10** Savinon, Flaco, and Jiminian arrived together at Jomas around 11:30 p.m. (Savinon: Tr. 394). They went to a table and ordered a bottle of Johnnie Walker. (Savinon: Tr. 394). While sitting at the table, Jiminian "started to touch" him; in response, Savinon "got up" and was "patient" with her. (Savinon: Tr. 395). Jiminian indicated to Savinon that she wanted to participate in a dance contest with Flaco, and they filled out the application. (Savinon: Tr. 395-96). She did not, however, participate in the contest because "she felt that everybody was looking at her." (Savinon: Tr. 396, 398). By this time, Jiminian had taken liquor from Savinon's mouth, which was her idea and a reason "why sometimes people didn't enjoy being with her." (Savinon: Tr. 396).

Savinon judged the contest and returned to the table following the competition. (Savinon: Tr. 396-98). Then, he danced with Jiminian, and after dancing, he went to the bar to talk to a television reporter whom he knew and the reporter's girlfriend. (*See* Savinon: Tr. 397-99). Savinon was not flirting with the man's girlfriend. (Savinon: Tr. 399).

Jiminian approached Savinon at the bar and asked him for the car keys, which Savinon did not have. (Savinon: Tr. 399-400). As the two walked towards Flaco to see if he had the keys, Jiminian told Savinon that she was leaving. (Savinon: Tr. 400). Savinon told her that she should not leave because she was with a "gentleman" and that she should sit down and relax. (Savinon: Tr. 400). Jiminian then accused Savinon of kissing the girl he was talking to at the bar. (Savinon: Tr. 400). She also told Savinon that "everybody was looking at her." (Savinon: Tr. 400). Savinon responded by saying that the girl at the bar was his friend's girlfriend. (Savinon: Tr. 400). Savinon also whispered in Jiminian's ear, and when they got back to the table, he hugged and kissed her "many times"-all of which seemed to relax her. (Savinon: Tr. 400, 402).

Then, Savinon told Jiminian that he had to go talk to people at the bar. (Savinon: Tr. 403). Jiminian told Savinon that she wanted a kiss and a drink, so he "gave" her two drinks. (Savinon: Tr. 403). Savinon returned to the bar and saw Jiminian looking at him while he was talking to other people. (*See* Savinon: Tr. 403). Flaco approached Savinon and told him that Jiminian "was impossible" and that she was threatening to "jump" on the other girl. (Savinon: Tr. 403). Savinon returned to Jiminian, hugged her, and told her to wait in the car with Flaco, which she did. (Savinon: Tr. 404).

When Savinon got to the car, Jiminian and Flaco were talking to one another. (Savinon: Tr. 404-05). Jiminian told Savinon "not to touch her" because she said that he had "touch[ed] the other girl" and that he was " 'going to get together with her" ' later on. (Savinon: Tr. 405). Jiminian started crying "without any control" and she told Savinon that he had "put her in the middle of a shameful situation." (Savinon: Tr. 405). She "continued speaking, speaking," and Savinon invited her to come to the back seat, which she did. (Savinon: Tr. 405-06). Savinon told Jiminian that he would not see the other woman, but she insisted that he would and that he was "with" that woman. (Savinon: Tr. 406).

***11** Savinon then told Flaco to take Jiminian home. (Savinon: Tr. 406). At that point, "she exploded," saying that he was "going with" the other woman. (Savinon: Tr. 406). Savinon remained "quiet" during this time. (*See* Savinon: Tr. 406). After "[s]he calmed down a little bit," she said that if he was "not going with the other girl" that they should have a "quickie." (Savinon: Tr. 406). He told her that he had to go to a restaurant, the "Quinto," and she continued to insist that he was "going with" the other girl. (Savinon: Tr. 406). Savinon again denied that he was going with the other girl, and she responded by saying, " '[w]ell, let's have a quickie then." ' (Savinon: Tr. 406). After "a lot" of discussion, Savinon agreed and they went to the park (Savinon: Tr. 407)-presumably, Fort Tryon Park. Upon arriving at the park, Savinon told Flaco to get out of the car because he was "going to have a talk with her to relax her," and Flaco left. (Savinon: Tr. 407). Savinon "stayed with" Jiminian there "for a while, [a] good while," and they had sex in the car. (*See* Savinon: Tr. 407). Savinon told Jiminian that he had to go, and she kept insisting that he "was going to the other girl." (Savinon: Tr. 407). At that point, Savinon was "getting to the end of [his] patience," so he told her, "Yes, ... I am going to the other girl," and then he exited the car. (Savinon: Tr. 407). When he got out of the car, she came up behind him, hugged him, and told him that what he did to her was "embarrassing," that "everybody who was there [was] looking at her," that he "did it on purpose to her," and that he "was with the other girl." (Savinon: Tr. 407). Savinon hugged her, told her that he "pleased" her, that he did not "feel like having sex again," and that he would not "get

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with that girl.” (Savinon: Tr. 407). Jiminian, however, just “continued talking.” (Savinon: Tr. 407).

Flaco re-entered the car, and Jiminian continued “speaking, talking, talking.” (Savinon: Tr. 408). Jiminian told Savinon that her pants and zipper got torn, and he told her that was because she was “too anxious.” (Savinon: Tr. 408). Jiminian got into the front seat of the car, Savinon got in the back seat, and they left. (Savinon Tr. 408). Jiminian “continued talking” and Flaco looked at Savinon as if to say, “ ‘I told you, ... don't hang out with her.” ’ (Savinon: Tr. 408). At 181st Street, Savinon told Flaco to stop the car, and Savinon told Jiminian not to call him anymore. (Savinon: Tr. 408). Jiminian was “very anxious,” so Savinon asked Flaco to take her home. (Savinon: Tr. 408). Savinon exited the car, and then Flaco and Jiminian left. (Savinon: Tr. 408). Savinon went to the “Quinto” by taxi, and Flaco arrived there later on. (*See* Savinon: Tr. 408).

Savinon heard from Jiminian the following day when she contacted him by telephone. (Savinon: Tr. 409). She told him that he “went [with] the other girl anyway,” that he would “pay for it,” and that he had to get her a bottle of champagne because “there was a bottle of champagne at the bar.” (Savinon: Tr. 409). Savinon “wasn't paying attention, and she continued talking.” (Savinon: Tr. 409). Savinon then repeatedly said to her, “When you become a person again, you call me. Otherwise, please don't call me.” (Savinon: Tr. 410).

***12** With respect to the tape-recorded conversation of December 9, 1998, Savinon testified that he “wasn't paying attention” to what Jiminian was saying. (*See* Savinon: Tr. 411). He testified that “[o]n some occasions she said certain things that got [him] confused,” but that when she did so he “didn't answer.” (Savinon: Tr. 411). Savinon also testified that during certain portions of the conversation, he was talking to someone else in his office. (Savinon: Tr. 12). During the conversation he was saying “Yes, yes, um-umm, okay,” because there were “people with [him] in the office that [he] was taking care of.” (Savinon: Tr. 414). During the conversation he repeatedly told her to call or meet him at ten o'clock because “it was difficult for [him] to get on the phone in a personal way and leave the office” before that time. (Savinon: Tr. 410).

After Jiminian did not show up to meet him on the night of December 9th, Savinon tried calling her on several occasions and beeped her, but she did not call back. (*See* Savinon: Tr. 414-15). On December 19th, Savinon left for the Dominican Republic because his mother was undergoing a medical procedure. (*See* Savinon: Tr. 415-16). He spoke to Jiminian while he was away. (*See* Savinon: Tr. 416-17). Then, he attempted to contact Jiminian on the day that he returned to New York by beeping her and calling her, but she did not answer. (Savinon: Tr. 418). He was arrested the following day. (Savinon: Tr. 418).

3. *The People's Rebuttal Case*

Jiminian was recalled as a rebuttal witness. (*See* Jiminian: Tr. 607). She testified that she never had sexual intercourse or oral sex in Riverside Park with Savinon. (*See* Jiminian: Tr. 607). Jiminian testified that she in fact had never even been to Riverside Park. (Jiminian: Tr. 607). She never had sex with Savinon in Fort Tryon Park before December 4, 1998, and had never visited that park with him before. (Jiminian: Tr. 608). When she went to the hotel with Savinon she did not have oral sex with him, either on the way there or at the hotel. (Jiminian: Tr. 608). Nor did she ever have oral sex with him while others were in a car with them. (Jiminian: Tr. 608-09). She did have sex with Savinon in the office of a restaurant, but it was his idea. (Jiminian: Tr. 609). She never inserted her finger in Savinon's anus and then put her finger in her mouth. (Jiminian: Tr. 609-10). Nor did she ever hold Savinon's penis in her hands while Mestre was watching. (Jiminian: Tr. 611).

B. *The Missing Witness Charge*

There was testimony during trial concerning the relationship between Flaco and Savinon. Savinon testified that, although Flaco did not work for him, he was an independent salesperson for Savinon's phone card business. (*See* Savinon: Tr. 390). Flaco would also answer the phone on occasion at Savinon's business. (Savinon: Tr. 454). Savinon also described Flaco as his “client” for a period of less than a year, and that prior to that he used to see him “sporadically.” (Savinon: Tr. 454). Savinon also testified, however, that he and Flaco were friends who had known each other “for a long time.” (Savinon: Tr. 455, 457). Savinon stated that he and Flaco did not really see each other socially (*see* Savinon: Tr. 455, 457), but he also testified that he had extended credit to Flaco in the past, and had also loaned him his Lexus on occasion to visit clients. (*See* Savinon: Tr. 391, 454, 456). Savinon did not

know Flaco's address and only knew how to reach him through his beeper. (Savinon: Tr. 456).

***13** In an attempt to find Flaco for the purposes of his case, Savinon continuously beeped him and talked to a girl who knew him. (Savinon: Tr. 460-61). Flaco eventually returned one of Savinon's "beeps" and Savinon "explained to him what was going on." (Savinon: Tr. 462). On a Sunday during the trial, Savinon spoke to Flaco "at the attorney's office." (Savinon: Tr. 462-63). At this meeting between Savinon, Flaco, and Savinon's attorney, Savinon requested that Flaco come to court to testify. (Savinon: Tr. 537). Flaco declined, however, because he had "legal problems" and "had been deported" because "he was illegal here." (Savinon: Tr. 537). Flaco was not served with a subpoena at this meeting. (Savinon: Tr. 539).

At the charge conference, the court stated that it would not deliver a missing witness charge for either side "[u]nless specifically requested" to do so. (Tr. 552). The prosecution subsequently requested that the court issue a missing witness charge with respect to Flaco. (Tr. 555). Defense counsel opposed this motion, arguing that Flaco was "equally available" to both parties. (Tr. 555).

The court granted the prosecution's request for the charge, stating that Flaco's testimony was "material," and that he was both "available" to Savinon and within his "control." (Tr. 574-76).[9] The court, therefore, delivered the following instruction to the jury:

9 After the court granted the prosecution's request, defense counsel sought to "make a record," stating that "Flaco indicated he would not come to court under any circumstances" and that, at a sidebar conference, defense counsel had asked the prosecutor to give Flaco "safe passage" and she did not reply. (Tr. 576). Defense counsel went on to state that, if the prosecutor were to "guarantee[ ] that [Flaco] will not be arrested for this or any other crime that she becomes aware of, then I will be glad to see if I can produce him." (Tr. 576).

Now, as you know, there is also evidence in this case that another person was present at the time of the alleged incident in the car at Fort Tryon Park, namely, Luis Camacho, who's also been referred to during trial as "Flaco," whose testimony, if he had been called as a witness by the defendant, possibly could have been of material help and assistance to you, the jury, in deciding the case.

You may not, under the law, speculate or guess as to what or how Flaco would have testified if he were called; however, from the failure of the defendant to call Flaco, the law permits, but does not require, you to infer, if you believe it proper to do so, that if Flaco would have been called by the defendant to testify, his testimony would not have supported the testimony of the defendant.

You may so infer only if you are satisfied that Flaco was under the control of the defendant and was available to be called by the defendant if he had wished to do so.

In that regard, however, you may consider the explanation offered during the trial by the defendant for the failure to call Flaco.

If that explanation satisfies you that the witness was not under the control of the defendant, or was unavailable to be called as a witness by the defense, or in considering all the other evidence in the case you do not find that the witness was under the defendant's control or available to the defendant, you may not draw any inference adverse to the defendant for the failure to call Flaco.

(Tr. 697-99). __

C. *Verdict and Sentencing*

***14** Savinon was convicted by a jury of one count of Rape in the First Degree under N.Y.P.L § 130.35(1), and one count of Sexual Abuse in the First Degree under N.Y.P.L. § 130.65(1). (Tr. 750). He was acquitted of Sodomy in the First Degree. (Tr. 750). On May 11, 2001, he was sentenced to concurrent, determinate terms of nine years on the rape count and five years on the sexual abuse count. (S.19-20).

D. *Savinon's Direct Appeal*

In September 2001, Savinon, through new counsel, appealed his conviction to the Appellate Division, First Department, raising the following grounds for relief: (1) "the trial court's granting of a missing witness charge was reversible error"; (2) "[p]rosecutorial misconduct warrants the setting aside of the verdict and the granting of a new trial"; (3) "[t]he court improperly permitted the People to call Sandra Jiminian in rebuttal, improperly permitted

expert opinion and unduly limited defense evidence"; (4) "[t]he trial court erred in refusing to conduct a more thorough inquiry as to the qualifications of juror # 6 and in not discharging said juror"; (5) "[t]he trial court erred in granting the People's request for a mistrial"; and (6) "[t]he trial court improperly denied" a post-trial motion "pursuant to [the] C.P.L. without a hearing." Brief for Defendant-Appellant, dated September 17, 2001 (reproduced as Ex. A to Opp. Decl.) ("Pet.App.Div.Br."), at 29, 38, 46, 50, 53, 58. In addition, Savinon argued that he "was denied effective assistance of counsel" because (1) his trial counsel's opening statement resulted in a mistrial due to his failure to make an adequate proffer concerning Jiminian's three prior abortions; (2) his trial counsel failed to secure Flaco's testimony either through a subpoena or a material witness order; and (3) his trial counsel failed to object to the qualifications and testimony of the prosecution's expert witness, Dr. Sampson. *Id.* at 55-57.

In a decision dated April 30, 2002, the Appellate Division unanimously affirmed Savinon's conviction. *People v. Savinon,* 293 A.D.2d 413, 413 (1st Dep't 2002). With respect to the missing witness instruction, the Appellate Division held that the trial court "properly granted the People's request for [the] missing witness charge with regard to defendant's failure to call his close friend and business associate who was present during the incident" in light of record evidence "establish[ing] that defense counsel had interviewed the witness during the trial." *Id.* According to the court, "[t]he charge was warranted since the witness had material, non-cumulative knowledge and was available and within defendant's 'control' for purposes of a missing witness charge." *Id.* (citation omitted).

The court also rejected Savinon's ineffective assistance of counsel claims, concluding that "defendant has failed to present an adequate record ... since his complaints require an amplification of the record to ascertain the reasons for defense counsel's strategic decisions." *Id.* at 414. In any event, the court stated, "to the extent the present record permits review, we find that defendant received meaningful representation." *Id.* (citation omitted).

***15** The Appellate Division also concluded that the trial court did not err in inquiring as to the qualifications of a juror and in refusing to discharge that juror, and that the trial court properly limited the testimony of a defense witness as well as "improper" attempts by counsel to impeach the victim. *See id.* at 413-414. Finally, the court found that Savinon's remaining claims were "unpreserved" for review and stated that, even if it were to review those claims, it "would find no basis for reversal." *Id.*

On October 15, 2002, the Honorable George Bundy Smith of the New York State Court of Appeals granted Savinon leave to appeal to that court. *People v. Savinon,* 98 N.Y.2d 772 (2002). In his brief to the Court of Appeals, Savinon raised the same claims set forth in his brief to the Appellate Division with the exception of his claims that the trial court erred in granting the prosecution's request for a mistrial and in denying his post-trial motion. *See* Brief for Defendant-Appellant (reproduced as Ex. E to Opp. Decl.) ("Pet.Ct.App.Br."), at 30, 40, 48, 52, 55.

On June 5, 2003, the Court of Appeals affirmed the order of the Appellate Division. *People v. Savinon,* 100 N.Y.2d 192, 192 (2003). The court stated that the question presented by Savinon's appeal was "whether the trial court improperly granted the People's request for an adverse inference instruction after defendant failed to produce his friend and former employee, the only witness to the crimes charged." *Id.* at 194. The court stated that because "Camacho was a key witness," and since "his testimony would have been material and noncumulative," whether the trial court's adverse inference instruction was proper turned on whether he was within defendant's "control" and whether he was "available" to the defendant. *Id.* at 197. On the question of "availability," the court noted that "Camacho's disinclination [to testify] ... was due to his alleged fear of deportation." *Id.* at 199-200. The court went on to state as follows:

> Defendant was on trial for uncommonly heinous crimes. He testified that complainant's accusation was a lie. If (as defendant swore) his version was true, his friend Camacho was the only person in the world who could rescue him from the prospect of a lengthy prison term. Under these circumstances one would expect an accused to go to Herculean lengths to get Camacho before the jury. Surely those efforts would include a subpoena if not a material witness order. Counsel's

> statement that Camacho would not appear was thus insufficient.... Given Camacho's meeting with defendant and counsel during trial, the court did not abuse its discretion in concluding that Camacho could have been produced if defendant earnestly wanted him and was prepared to take appropriate measures to bring him in.... Here, counsel's failure to subpoena Camacho, having just met with him, justified the trial court's determination that the defense did not rebut the People's prima facie showing of the witness's availability.

***16** *Id.* On the question of "control," the court stated as follows:

> Here, although their relationship purportedly came to an end shortly after the episode, defendant and Camacho had been friends and business associates. Indeed, under either side's version of the alleged crime, defendant was so bonded with Camacho as to have had sex with complainant with Camacho nearby. The closeness of this relationship, even if it had not remained current, was enough to substantiate the prosecution's request for a missing witness instruction.

Id. at 201 (citation omitted). In reaching this conclusion, the court rejected Savinon's argument that Camacho was not in his "control" in light of Camacho's supposed relationship with Jiminian, stating:

> Camacho drove the complainant home and stayed with her for a few hours. He also visited her and once went to her sister's house. Complainant testified that she had no contact with Camacho for over a year before trial, did not know his whereabouts and did not even know his last name; she knew him only as "Flaco." In all, it did not begin to approach the level of friendship that Camacho had with defendant. In any event, as instructed by the trial court, the jury was free to decide for itself whether to apply what the court correctly described as a permissive adverse inference.

Id. The Court of Appeals, therefore, concluded that "the trial court did not abuse its discretion in determining that both the availability and favorability elements were met, and giving the missing witness instruction." *Id.* Finally, the court determined that Savinon's "challenges to several of the prosecutor's statements during summation [were] unpreserved" and that "[h]is remaining contentions [were] without merit." *Id.*

E. *Savinon's N.Y.Crim. Proc. Law § 440.10 Motions*

1. *September 2002 Motion*

Following the adjudication of his appeal by the Appellate Division, Savinon moved *pro se* to vacate the judgment of conviction pursuant to N.Y.Crim. Proc. Law ("CPL") § 440.10[1][h] ("September 2002 § 440.10 Motion") on the ground of ineffective assistance of trial counsel. *See* Notice of Motion, dated September 6, 2002 (reproduced as Ex. H to Opp. Decl.) ("Sept.2002 Notice of Motion"). Specifically, Savinon argued that his trial counsel was ineffective for: (1) delivering an opening statement that resulted in a mistrial, failing to obtain all *Rosario* materials, not adequately researching New York's rape shield law, and not seeking a pretrial evidentiary hearing; (2) failing to secure Camacho's testimony through a subpoena or material witness order; and (3) failing to object to Dr. Sampson's qualifications and testimony and failing to call an expert to rebut Dr. Sampson's testimony. Affidavit in Support of Motion to Vacate the Judgment (reproduced as Ex. H to Opp. Decl.) ("440.10 Aff. I"), [10] at 13, 15, 19.

10 The Court has penciled in page numbers to the 440.10 Aff. I for ease of reference.

On November 15, 2002, Justice Gregory Carro of the New York County Supreme Court denied Savinon's motion. *See* Decision and Order, dated November 15, 2002 (reproduced as Ex. J to Opp. Decl.) ("440.10 Decision I"), at 7. As an initial matter, the court noted that Savinon's ineffective assistance of counsel claim was

"properly raised" in a CPL § 440.10 motion since it was "based at least in part on material facts that do not appear on the record." *Id.* at 3. The court concluded, however, that Savinon's motion papers were deficient because they did not "include an affirmation from trial counsel explaining the strategy behind his decisions, or any explanation as to why the affidavits are missing." *Id.* at 4 (citation omitted). The court also went on to state that, "after reviewing the trial transcript objectively," Savinon's claims must fail because defense counsel's decisions about which he complained "had a strategic or other legitimate purpose that a reasonably competent attorney might have pursued." *Id.*

***17** Specifically, the court found that defense counsel's statements concerning Jiminian's prior abortions was nothing more than a "calculated risk that his remark would plant the seeds of [a] defense in the jurors' minds" that it was the abortions, and not the alleged rape, that caused her to be depressed. *Id.* at 5. The court found that, "by connecting the evidence to the witness' state of mind," trial counsel, "astutely, albeit unsuccessfully, sought to avoid the restrictions imposed by the rape shield law" while "at the same time suggest[ing] to the jury that the complaining witness had had many sexual encounters, thereby furthering the defense position that she was sexually aggressive and that she might have been raped by someone other than the defendant." *Id.* at 4. With respect to the expert evidence issue, the court found that trial counsel had in fact set forth several objections to Dr. Sampson's testimony concerning PTSD. *See id.* at 5. The court also concluded that trial counsel may have strategically elected to forego objecting to Dr. Sampson's qualifications to render an opinion on PTSD, and instead challenged her qualifications on cross-examination. *See id.*

Finally, the court also rejected Savinon's claim that trial counsel was ineffective for failing to obtain Camacho's testimony. *See id.* at 5-6. In rejecting Savinon's arguments on this score, the court stated as follows:

> Underlying the defendant's contention that trial counsel was ineffective for failing to subpoena Luis Camacho is the premise that Mr. Camacho would have given exculpatory testimony. However, even though the defendant alleges that trial counsel interviewed Mr. Camacho before trial, he has not submitted an affidavit from either individual showing how Mr. Camacho would have benefitted him if he had been called as a witness. The defendant's hearsay allegations are insufficient to create an issue as to this nonrecord fact. The defendant's conclusory allegations that Mr. Camacho's testimony was exculpatory, unsupported by evidentiary facts, are not sufficient to rebut the presumption that trial counsel acted in a competent manner. It is not disputed that counsel interviewed Mr. Camacho. His decision not to use all available procedures to secure the witness must be viewed as a strategic legal decision not to pursue a witness whose testimony he viewed as weak.

Id. at 5-6 (citations omitted). In addition, the court found that because "Camacho had a prior criminal conviction, had entered the country illegally, and was subject to deportation," his testimony, even had it favored the defense, would have been "seriously undermined." *Id.* at 6.

Savinon did not seek leave to appeal the denial of this motion to the Appellate Division.

2. *The Original Petition and the September 2004 § 440.10 Motion*

On February 25, 2004, Savinon, now represented by counsel, filed the instant petition for writ of habeas corpus in this court. *See* Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (reproduced as Ex. K to Opp. Decl.). In his original petition, Savinon contended that: (1) the trial court erroneously granted the prosecution's request for a missing witness charge, thereby depriving him of due process and a fair trial, *id.* at 5; and (2) his trial counsel was ineffective, *id.* Respondents submitted papers in opposition. *See* Opp. Decl.; Resp. Mem. In a reply memorandum, Savinon attached an affidavit from Camacho, in which Camacho averred that Savinon did not rape Jiminian and that the District Attorney prevented him from testifying on Savinon's behalf. Supplemental Affirmation in Opposition to Petition for a Writ of Habeas Corpus, filed March 15, 2005 (Docket # 17)

("Supp.Aff."), ¶ 2; *see* Camacho Affidavit (reproduced as Ex. A to Supp. Aff.) ("Camacho Aff.").

***18** By letter dated August 18, 2004, Savinon requested that his petition be stayed so that he could exhaust a newly discovered evidence claim based upon Camacho's affidavit. *See* Letter from Lawrence F. Ruggiero to the Honorable Gabriel W. Gorenstein, dated August 18, 2004 (reproduced as Ex. B to Supp. Aff.). By order dated August 20, 2004, this Court stayed the petition and placed the case on the suspense docket. Order, filed August 23, 2004 (Docket # 12).

On September 30, 2004, Savinon moved in the New York Supreme Court to vacate his conviction pursuant to CPL § 440.10 ("September 2004 § 440.10 Motion"). *See* Notice of Motion, dated September 30, 2004 (reproduced as Ex. D to Supp. Aff.) ("Sept.2004 Notice of Motion"). Annexed as Exhibit B to Savinon's submissions in support of the motion was the same affidavit that had been submitted as part of the reply brief in federal court. *See* Camacho Aff.

In the affidavit, Camacho avers that "investigators from the District Attorney [sic] Office" came to see him during the investigation of this case and that he told them that "nothing happened" in the car on December 4, 1998, between Savinon and Jiminian. *Id.* ¶¶ I-II. Camacho explains that, during the ride, "Jiminian was very angry because Savinon was talking with other lady [sic] at the bar," that she was yelling at Savinon, and that Savinon attempted to calm her down by talking to her. *See id.* ¶¶ II-III. Camacho also avers that "[t]here was no rape in the car in [sic] any moment" and that Savinon did not order him to have sex with Jiminian. *Id.* ¶ IV; *accord id.* ¶ VIII. Camacho asserts that, after he disclosed this information to the investigators, they informed him that he would be called to testify on Savinon's behalf, and he indicated that he was willing to do so "because no rape took place." *Id.* ¶ V. Camacho avers that he then had the following exchange with the investigators:

> [T]he investigators told me I better think twice about being a witness for Savinon. They told me they would make ... lots of trouble for me, and have me deported out of this country. They told me how easy [sic] they could set me up with a drug arrest and send me to prison. They remind [sic] me that this conversation was private and confidential and no[t] to tell Savinon or anyone else about it and be nice with us if you want to stay in this country with your family and you should get lost until this trial be [sic] over.

Id. ¶ VI. Camacho states that he "couldn't help Savinon or be a witness for him because [he] was in fear of being deported or arrest[ed] by the investigators from [the] District Attorney [sic] office." *Id.* ¶ VII. In support of the motion, Savinon's counsel averred that, "[u]pon information and belief, Mr. Camacho would now be willing to testify on behalf of Mr. Savinon at an evidentiary hearing on this motion to assert the claims stated in the affidavit." Affirmation, dated September 30, 2004 (reproduced as Ex. D to Supp. Aff.) ("440.10 Aff. II"), ¶ 11.

***19** In an affirmation submitted in support of the motion, counsel argued that Savinon sought to vacate his conviction "on the grounds of improper and prejudicial conduct not appearing in the record, namely intimidation by state agents of a witness favorable to the defense, newly discovered evidence establishing the defendant's actual innocence, and ineffective assistance of trial counsel in violation of the New York State and Federal Constitutions." *Id.* ¶ 1. The affirmation stated that "newly discovered evidence"-that is, the Camacho affidavit-altered the "underpinnings" of the court's denial of the September 2002 § 440.10 motion, because the presentation of this evidence "would have resulted in a vacatur of the judgment." *Id.* ¶ 35. Counsel averred that the affidavit established that Camacho "would ... have provided favorable testimony for the defense; testimony that would have completely exonerated Mr. Savinon." *Id.* Counsel also argued that Savinon's trial counsel violated his Sixth Amendment right to effective assistance of counsel by "failing to subpoena ... Camacho or to request a material witness order which would have forced Camacho to appear in court and explain his unwillingness to testify." *Id.* ¶ 35; *accord id.* ¶¶ 37, 39. Finally, the affirmation argued that "an evidentiary hearing should be held pursuant to C.P.L. § 440.10(1)(f) because ... Camacho's affidavit reveals that he was intimidated by agents for the prosecution's office." *Id.* ¶ 41. The State opposed the motion, arguing that nobody from the District Attorney's Office ever interviewed or contacted Camacho and that trial counsel was not ineffective. *See*

Affirmation in Response to Defendant's C.P.L. § 440.10 Motion (reproduced as Ex. E to Supp. Aff.) ("Sept.2004 § 440.10 Opp."), at 3.

On November 9, 2004, Justice Carro denied the motion. *See* Decision and Order, dated November 9, 2004 (reproduced as Ex. F to Supp. Aff.) ("440.10 Decision II"), at 6. The court rejected Savinon's "newly discovered evidence" claim, noting that although the affidavit "on its face is exculpatory," it did not require that the conviction be vacated. *See id.* at 3-4. In so doing, the court stated that

> [a]lthough Camacho avers in his affidavit that no rape occurred, he also states unequivocally that 'nothing happened,' only talk, on the trip home. The only logical inference to be drawn from these allegations is that during the ride to Manhattan he observed no sexual intercourse. Therefore, Camacho's testimony would have contradicted the defendant's testimony on a point crucial to the defense, and raised a sharp issue as to the defendant's credibility in addition to the clear credibility issue already presented by the complainant's testimony.

See id. at 4.[11]

11 Camacho's statement that "nothing happened ... on the trip home" does not on its face contradict Savinon's testimony. This is because Savinon himself testified that nothing sexual occurred during the ride to Manhattan (Savinon: Tr. 405-07). Nonetheless, Camacho's affidavit states that he simply "drove [Jiminian] to her house" that night, Camacho Aff. ¶ IV, and makes no mention at all that the car stopped in Fort Tryon park (or any other park). Nor does it state that Savinon told Camacho to leave the car or that Camacho left Savinon and Jiminian alone for time period sufficient for them to have sex-all of which Savinon had testified to at trial (Savinon: Tr. 407-09). Thus, based on the version of events given in Camacho's affidavit, it is a reasonable inference that Camacho's affidavit was inconsistent with Savinon's testimony.

The court also rejected the "newly discovered evidence" claim on the ground that Savinon was unable to establish, as he was required to do under CPL § 440.10(1)(g), "that the new evidence was discovered since the entry of the judgment of conviction and that it could not have been produced by the defendant at the trial even with due diligence." *Id.* at 5. The court reasoned that Savinon was unable to satisfy this standard given Camacho's meeting with Savinon and counsel during trial, as well as Savinon's own argument-made in support of the ineffective assistance of counsel claim-that trial counsel "was aware during trial that Camacho would exculpate the defendant yet incompetently failed to subpoena him." *Id.*

***20** The court rejected the ineffective assistance of counsel claim because the Camacho affidavit, insofar as it was "at odds with the entire theory of the defense," showed that "trial counsel had a strategic and legitimate reason for not pursuing the witness." *Id* .

The court also denied Savinon's request for a hearing. *See id.* at 5-6. The court did so in light of the prosecutor's denial "that an investigator from her office ever interviewed Camacho," and because "the affidavit itself raises questions about the truth of Camacho's allegation, such as why he waited until May ... 2004, three years after the defendant was convicted, to come forward, and why he is now not afraid of deportation." *Id.* at 6. The court also concluded that, even assuming the intimidation alleged by Camacho occurred, Savinon's request for a hearing must be rejected because he was unable to "demonstrate that [he] suffered actual prejudice" from Camacho's failure to testify, as he was required to do under the applicable law. *See id.* at 5-6.

On January 18, 2005, the Appellate Division, First Department, denied Savinon's application for leave to appeal the decision denying the motion. Certificate Denying Leave, dated January 4, 2005 (reproduced as Ex. G to Supp. Aff.) ("Leave Cert.").

F. *Savinon's Amended Habeas Petition and Subsequent Submissions*

On February 2, 2005, Savinon submitted an amended petition and supporting papers. *See* Declaration in Support of Amended Petition, filed February 2, 2005 (Docket # 14) ("Am. Petition Decl."); Declaration of Exhaustion of State Remedies, filed February 2, 2005

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(Docket # 13). In the amended petition, Savinon claims he is entitled to habeas relief because his right to effective assistance of counsel under the Sixth Amendment was violated due to: (1) trial counsel's failure to competently handle the missing witness issue, which included "failing to subpoena ... Camacho or to request a material witness order which would have forced Camacho to appear in court and explain his unwillingness to testify," Am. Petition Decl. ¶¶ 32, 38-39; (2) trial counsel's reference to Jiminian's three prior abortions in his opening statement in the prior proceeding resulting in a mistrial, *see id.* ¶¶ 41-48; (3) trial counsel's failure to competently challenge the qualifications and testimony of the People's expert witness, *see id.* ¶¶ 49-54; and (4) trial counsel's failure to call an expert witness to rebut the testimony of Dr. Sampson regarding PTSD, *see id.* ¶¶ 55-57. Savinon also claims he is entitled to relief on the ground that the trial court's "rendering of a missing witness charge violated [his] due process right to a fair trial under the Fourteenth Amendment." *Id.* ¶¶ 62-64. In addition, Savinon argues that he is entitled to habeas relief because the state courts denied his second CPL § 440.10 motion "without a hearing" where Camacho could "explain himself," *id.* ¶ 30, and, in any event, "[t]his Court should ... hold an evidentiary hearing at which trial counsel and Camacho can testify," *id.* ¶ 58; *accord id.* ¶ 61.

***21** After Savinon's amended petition and supporting papers were submitted, the case was removed from the suspense docket. Order, filed February 4, 2005 (Docket # 15). Respondents thereafter filed their papers in opposition to the amended petition on March 15, 2005. *See* Supp. Aff.

By Order dated June 24, 2005, this Court requested that Savinon's trial counsel, Barry E. Schulman, submit an affidavit addressing Savinon's ineffective assistance of counsel claim. Order, dated June 24, 2005 (Docket # 18) ("June 24 Order"), at 1. Specifically, the Court requested that Schulman's affidavit include "a discussion of his reasons for choosing not to subpoena Camacho or request[ing] a material witness warrant and any information he may have had regarding the alleged intimidation by investigators from the District Attorney's Office." *Id.* at 1-2 (citation and internal quotation marks omitted). On July 14, 2005, Schulman submitted an affidavit addressing these issues. *See* Affidavit of Trial Counsel Regarding Petition for Writ of Habeas Corpus, 28 U.S.C. Section 2254, filed July 14, 2005 (Docket # 19) ("Schulman Aff.").

The June 24 Order also granted the parties leave to respond to Schulman's affidavit through supplemental submissions. *See* June 24 Order at 2. Savinon's counsel submitted a declaration dated July 22, 2005, responding to Schulman's affidavit. *See* Declaration, filed July 24, 2005 (Docket # 20) ("Ruggiero Decl."). The respondents submitted a supplemental declaration in opposition dated August 2, 2005. *See* Supplemental Declaration in Opposition to Petition for a Writ of Habeas Corpus, filed August 2, 2005 (Docket # 21) ("Supp.Decl.").

II. *APPLICABLE LEGAL PRINCIPLES*

A. *Law Governing Petitions for Habeas Corpus Under 28 U.S.C. § 2254*

A petition for a writ of habeas corpus may not be granted with respect to any claim that has been "adjudicated on the merits" in the state courts unless the state court's adjudication: "(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).

For a claim to be adjudicated "on the merits" within the meaning of 28 U.S.C. § 2254(d), it must "finally resolv[e] the parties' claims ... with res judicata effect," and it must be "based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman,* 261 F.3d 303, 311 (2d Cir.2001) (internal quotation marks and citations omitted). As long as "there is nothing in its decision to indicate that the claims were decided on anything but substantive grounds," a state court decision will be considered to be "adjudicated on the merits" even if it fails to mention the federal claim and no relevant federal case law is cited. *See Aparicio v. Artuz,* 269 F.3d 78, 94 (2d Cir.2001) (internal quotation marks omitted); *accord Rosa v. McCray,* 396 F.3d 210, 220 (2d Cir.2005) ("This standard of review applies whenever the state court has adjudicated the federal claim on the merits, regardless of whether the court has alluded to federal law in its decision."). Moreover, a state court's determination of a factual issue is "presumed to be

correct" and that presumption may be rebutted only "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

***22** In *Williams v. Taylor,* the Supreme Court held that a state court decision is " 'contrary to" ' clearly established federal law only "if the state court applies a rule that contradicts the governing law set forth" in Supreme Court precedent or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives" at a different result. 529 U.S. 362, 405-06 (2000). *Williams* also held that habeas relief is available under the " 'unreasonable application" ' clause only "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A federal court may not grant relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the state court's application must have been "objectively unreasonable." *Id.* at 409.

In addition, under 28 U.S.C. § 2254(a), federal habeas review is available for a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Errors of state law are not subject to federal habeas review. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). To be entitled to habeas relief a petitioner must demonstrate that the conviction resulted from a state court decision that violated federal law. *See, e.g., id.* at 68.

B. *Exhaustion*

Before a federal court may consider the merits of a habeas claim, a petitioner is first required to exhaust his available state court remedies. *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 ... the applicant has exhausted the remedies available in the courts of the State."); *accord Daye v. Attorney Gen. of New York,* 696 F.2d 186, 190-91 (2d Cir.1982) (en banc), *cert. denied,* 464 U.S. 1048 (1984). To exhaust a habeas claim, a petitioner is required to have presented that claim to each level of the state courts. *See, e.g., Baldwin v. Reese,* 541 U.S. 27, 29 (2004); *see also O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999) (a habeas petitioner must invoke "one complete round of the State's established appellate review process"). The petitioner must also have fairly presented the federal nature of his claim to the state courts. *See Baldwin,* 541 U.S. at 29; *Duncan v. Henry,* 513 U.S. 364, 365 (1995) (per curiam); *Picard v. Connor,* 404 U.S. 270, 275-276 (1971); *Daye,* 696 F.2d at 191. The exhaustion requirement is "grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson,* 501 U.S. 722, 731 (1991).

C. *Law Governing Ineffective Assistance of Counsel Claims*

***23** To show ineffective assistance of counsel, a petitioner must satisfy both prongs of the two-part test articulated in *Strickland v. Washington,* 466 U.S. 668 (1984). The *Strickland* test has been characterized as "rigorous" and "highly demanding." *Pavel v. Hollins,* 261 F.3d 210, 216 (2d Cir.2001) (internal quotation marks and citations omitted). To meet *Strickland,* a petitioner must show (1) "that counsel's representation fell below an objective standard of reasonableness"; and (2) "that there is 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; *accord Pham v. United States,* 317 F.3d 178, 182 (2d Cir.2003); *see also Massaro v. United States,* 538 U.S. 500, 505 (2003) ("[A] defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial.").

In evaluating the first prong-whether counsel's performance fell below an objective standard of reasonableness-" '[j]udicial scrutiny ... must be highly deferential" ' and the petitioner must overcome the " 'presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ' *Bell v. Cone,* 535 U.S. 685, 698 (2002) (quoting *Strickland,* 466 U.S. at 689); *see also Dunham v. Travis,* 313 F.3d 724, 730 (2d Cir.2002) (affording counsel a presumption of competence). In assessing whether an attorney's conduct was constitutionally deficient, "[t]he court must ... determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690; *accord Pavel,* 261 F.3d at 216. Concerning the second prong-whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

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have been different-a court "requires some objective evidence other than defendant's assertions to establish prejudice." *Pham,* 317 F.3d at 182 (citing *United States v. Gordon,* 156 F.3d 376, 380-81 (2d Cir.1998) (per curiam)). "A 'reasonable probability' in this context is one that 'undermine[s] confidence in the outcome." ' *Pavel,* 261 F.3d at 216 (quoting *Strickland,* 466 U.S. at 694) (alteration in original).

III. *ANALYSIS*

A. *Ineffective Assistance of Counsel Claims*

As noted, Savinon sets forth four different bases for his contention that trial counsel was ineffective. *See* Am. Petition Decl. ¶¶ 32-39, 41-48, 49-54, 55-57. Each of Savinon's contentions is addressed in turn.

1. *Failure to Obtain Camacho's Testimony*

In the September 2004 § 440.10 motion, Savinon argued that his right to effective assistance of counsel was violated due to the failure of trial counsel "to subpoena ... Camacho or to request a material witness order which would have forced [him] to appear in court and explain his unwillingness to testify." 440.10 Aff. II ¶¶ 35, 37, 39. After this motion was denied by Justice Carro, *see* 440.10 Decision II at 5-6, the Appellate Division denied Savinon's application for leave to appeal. *See* Leave Cert. Savinon then raised this identical claim in his amended petition. *See* Am. Petition Decl. ¶¶ 32, 38-39. [12]

[12] Respondent argued in response to the initial petition that the ineffective assistance of counsel claim had not been exhausted because it was not presented to the state courts "in federal constitutional terms." Resp. Mem. at 23. The argument was raised in federal constitutional terms in the September 2004 § 440.10 motion, however, *see* 440.10 Aff. II ¶¶ 1, 39, and respondent does not now argue otherwise. *See generally* Supp. Aff.

***24** In his decision rejecting this claim, Justice Carro found that because Camacho averred in his affidavit that " 'nothing happened,' only talk" on the trip home, "the only logical inference to be drawn from these allegations is that during the ride to Manhattan [Camacho] observed no sexual intercourse." 440.10 Decision II at 4. The court stated that such testimony from Camacho would have directly contradicted Savinon's testimony that he and Jiminian engaged in sexual intercourse in the back of Savinon's automobile at Jiminian's insistence as proof of his commitment to her. *Id.* at 3-4. As a result, because "Camacho's testimony would have contradicted the defendant's testimony on a point crucial to the defense, and raised a sharp issue as to the defendant's credibility in addition to the clear credibility issue already presented by the complainant's testimony," the court concluded that "trial counsel had a strategic and legitimate reason for not pursuing the witness." *Id.* at 4-5.

In his affidavit, Camacho has averred that he told investigators "[t]here was no rape in the car in [sic] any moment," that "no rape took place," and that "nothing happened" in the car on December 4, 1998, between Savinon and Jiminian. Camacho Aff. ¶¶ I-II, IV-V, VIII. Camacho also averred that, after informing investigators from the District Attorney's Office that there was no rape, they told him he "better think twice about being a witness for Savinon," and that "they would make ... lots of trouble for [him], and have [him] deported" if he were to testify for Savinon. *Id.* ¶ VI. Camacho contends, therefore, that he "couldn't help Savinon or be a witness for him because [he] was in fear of being deported or arrest[ed] by the investigators from [the] District Attorney [sic] office." *Id.* ¶ VII.

Based upon Camacho's affidavit, Savinon now argues that defense counsel was ineffective for failing "to call a witness who would have established [his] actual innocence of the[ ] charges." Am. Petition Decl. ¶ 32. Savinon contends that trial counsel was ineffective in failing to subpoena Camacho and in not requesting a material witness order "which would have forced Camacho to appear in court and explain his unwillingness to testify"; defense counsel's failure to do so "exposed [him] to a devastating missing witness charge." *Id.; accord id.* ¶ 38. Savinon argues, therefore, that counsel's "dereliction of duty was so fundamental and so prejudicial to the defense that standing alone ... it constitutes ineffective assistance under federal constitutional standards." *Id.* ¶ 32.

It is well-settled that the "decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." *United States v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir.1987); *accord United States v. Eisen,* 974 F.2d 246, 265 (2d Cir.1992), *cert. denied,* 507 U.S. 1029 (1993). Thus, the "failure to call a witness for tactical reasons of trial strategy does not

satisfy the standard for ineffective assistance of counsel." *United States v. Eyman,* 313 F.3d 741, 743 (2d Cir.2002) (per curiam) (citations omitted), *cert. denied,* 538 U.S. 1021 (2003); *accord Nersesian,* 824 F.2d at 1321 (the decision not to call witnesses "fall[s] squarely within the ambit of trial strategy, and, if reasonably made, will not constitute a basis for an ineffective assistance claim").

***25** While the choice whether or not to call a particular witness is a strategic choice that is "virtually unchallengeable," counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary ." *Strickland,* 466 U.S. at 690-91. Thus, although "counsel's decision as to 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. Best,* 219 F.3d 192, 201 (2d Cir.2000) (internal quotation marks and citations omitted), *cert. denied,* 532 U.S. 1007 (2001), an attorney's failure to present available exculpatory evidence may be deficient " 'unless some cogent tactical or other consideration justified it." ' *Pavel,* 261 F.3d at 220 (quoting *Griffin v. Warden,* 970 F.2d 1355, 1358 (4th Cir.1992)); *accord Eze v. Senkowski,* 321 F.3d 110, 133 (2d Cir.2003).

As it turns out, Schulman's reason for not calling Camacho was not the reason offered by Justice Carro: that is, a concern that Camacho's testimony would contradict the defense's theory of the case. Instead, Schulman states in his affidavit that he and Savinon "made extensive efforts to obtain an interview with Luis Camacho," but that they were unable to locate him during trial preparation despite their "repeated efforts." Schulman Aff. ¶ 9. According to Schulman, "in the middle of trial" he scheduled a meeting with Savinon "on a Sunday at his office to continue the trial preparation." *Id.* ¶ 10. At that meeting, Savinon "[u]nexpectedly" showed up "in the company of Luis Camacho." *Id.* Schulman thereafter "asked ... Savinon to leave the room so he could meet with ... Camacho privately." *Id.*

During the course of the meeting Camacho appeared "agitated and upset." *Id.* ¶ 11. Camacho informed Schulman "that he would only come to court if the prosecutor would grant him safe passage from deportation and 'other charges." ' *Id.* When Schulman asked Camacho what he meant by that, Camacho responded by stating that "at some point he had met with police or investigators on the case and that they were 'bad people." ' *Id.* Despite "entreaties" by Schulman, "Camacho refused to give further details." *Id.* Camacho stated "that he would call the next evening to see if [Schulman] could obtain safe passage for him." *Id.* ¶ 12. At that point, Camacho again made clear that "without safe passage ... he would not come to court." *Id.* Camacho then "abruptly left the office." *Id.* At the meeting, Camacho confirmed "that there had been no forcible sexual conduct or rape in the car." *Id.* ¶ 11.

Schulman "believes that he learned during the investigation of the case" that Camacho had previously been deported following a drug conviction, and that it was possible that Camacho's appearance in court "would have ... exposed [him] to a sentence of up to 20 years in prison" based upon his illegal reentry to this country. *Id.* ¶ 16. Thus, Schulman avers that "Camacho made clear that he believed he would receive substantial jail time if [he] appeared in court ... without some form of legal protection." *Id.*

***26** According to Schulman, "[e]ven if [he] had been inclined to issue a subpoena" during his meeting with Camacho, "there would ha[ve] been no opportunity to prepare one." *Id.* ¶ 13. Schulman states that "[i]t was difficult enough to conduct an interview without Camacho running away," and because he "was not expecting Camacho that day," there was "no support staff to obtain the proper form nor complete the same." *Id.* In any event, Schulman avers that obtaining a subpoena would have been a "meaningless exercise" since Camacho's illegal reentry after deportation "could have resulted in a substantial jail sentence and deportation." *Id.* ¶ 15.

Schulman also avers that it is "ludicrous to suggest that [he] could have obtained a material witness warrant under the circumstances." *Id.* ¶ 14. According to Schulman, a "material witness order would result in the appointment or retention of a defense lawyer," and any "effective lawyer" would have recommended to Camacho that he "assert[ ] ... his fifth amendment right to silence" in order to avoid prosecution and deportation. *Id.* Thus, Schulman states that he did not subpoena Camacho or obtain a material witness order because he believed that Camacho would have invoked his Fifth Amendment rights and refused to testify in light of the fact that he faced both a

substantial jail sentence and deportation based upon his illegal reentry to this country. *See* Schulman Aff. ¶¶ 14-16.

Savinon was given an opportunity to respond to Schulman's affidavit. He did not submit any further information from Camacho, however, on any of the matters raised by Schulman-including whether in fact he would have testified in this matter had he been served with a subpoena or had he been arrested on a material witness warrant.

Savinon is unable to make out a claim of ineffective assistance of counsel because, in the absence of any evidence that Camacho actually would have testified had he been subpoenaed or arrested on a warrant, Savinon cannot prove any prejudice. To succeed on his claim, Savinon must show that there is "a reasonable probability" that the result of his trial "would have been different" had Camacho been served with a subpoena or material witness warrant. *Strickland,* 466 U.S. at 694. Savinon has not made that showing here. In the context of an uncalled witness, courts have held that, "[t]o affirmatively prove prejudice, a petitioner ordinarily must show not only that the testimony of uncalled witnesses would have been favorable, *but also that those witnesses would have testified at trial." Lawrence v. Armontrout,* 900 F.2d 127, 130 (8th Cir.1990) (emphasis added) (citing *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir.1985)); *accord Evans v. Cockrell,* 285 F.3d 370, 377 (5th Cir.2002); *Stewart v. Nix,* 31 F.3d 741, 744 (8th Cir.1994); *Croney v. Scully,* 1988 WL 69766, at *2 (E.D.N.Y. June 13, 1988); *see also Boyd v. Estelle,* 661 F.2d 388, 390 (5th Cir.1981) (denying ineffective assistance claim where petitioner did not offer "any facts to support his allegation that [the witness] would have testified at all even if called"). Not only does Camacho's affidavit fail to state that he would have testified at trial had he been called upon to do so, it actually states the precise opposite. He avers: "I couldn't help Savinon or be a witness for him because I was in fear of being deported or arrest[ed] by the investigators from [the] District Attorney [sic] office." Camacho Aff. ¶ VII. This statement is in accord with Schulman's own affidavit, which recounts that Camacho told him that "he would only come to the court if the prosecutor would grant him safe passage from deportation and 'other charges." ' Schulman Aff. ¶ 11. Obviously, there is no reason to believe that the prosecutor would have granted him such "safe passage." Thus, in the absence of evidence that Camacho would have been willing to testify, Savinon cannot prove that he was prejudiced by Schulman's failure to issue a subpoena or a material witness warrant.

***27** Savinon also argues that "trial counsel was ineffective under the *Strickland* ... test because he failed to seek a remedy from the trial judge for the state's intimidation of a critical witness for the defense." Am. Petition ¶ 21; *accord* Ruggiero Decl. ¶ 9. Savinon contends that if investigators "had threatened Camacho that they would deport him if he testified for Savinon, it was trial counsel's obligation to get to the bottom of such witness intimidation, and to subpoena the investigators to court as well." Ruggiero Decl. ¶ 8. Savinon claims that the Second Circuit's decision in *Hemstreet v. Greiner,* 367 F.3d 135 (2d Cir.2004), *vacated,* 378 F.3d 265 (2d Cir.2004) supports his contentions on this issue. *See* Am. Petition ¶ 21; Ruggiero Decl. ¶ 9. In *Hemstreet,* the petitioner's counsel learned that detectives had visited a witness's family and informed them that they were in for "a lot of trouble" if the witness testified, but took no action other than informing the court of the allegation. 367 F.3d at 137. The court found that trial counsel's "failure to seek relief for the [detective's] intimidation of ... a crucial defense witness ... was so deficient and prejudicial as to deprive [petitioner] of a fair trial under *Strickland." Id.* at 138, 140; *but see Hemstreet II,* 378 F.3d at 269 (vacating the earlier decision after the witness testified she lied in her earlier affidavit that detectives intimidated her).

Hemstreet is irrelevant for several reasons. First, Schulman has pointed to a tactical reason that supports his decision not to present Camacho's potentially exculpatory testimony: namely, that Camacho would have invoked his rights under the Fifth Amendment and refused to testify, thus making a subpoena futile. *See* Schulman Aff. ¶¶ 14-16. Second, and more significantly, there is no evidence in the record establishing that Schulman was aware of the intimidation now being alleged by Camacho. Camacho informed Schulman at their meeting only that "at some point he had met with police or investigators on the case, and that they were 'bad people." ' Schulman Aff. ¶ 11. Camacho was unwilling to disclose any further information at that time, *id.,* and Savinon, who apparently has access to Camacho now, has offered nothing to this Court from Camacho suggesting otherwise. Thus, the record reflects that the first time Camacho disclosed the circumstances surrounding the alleged intimidation was May 2004, nearly three years after Savinon was sentenced. *See* Camacho Aff. ¶¶ VI-VII.

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Obviously, Schulman cannot be faulted for failing to seek a remedy from the court for alleged conduct on the part of investigators that he was entirely unaware of at the time of trial. [13]

13 In addition, unlike *Hemstreet,* respondent here has pointed to specific information in the record that rebuts Camacho's assertions concerning the alleged intimidation. *See* Supp. Aff. ¶ 14. Detective Garrido testified at trial that he never interviewed Camacho. (Tr. 109). Indeed, papers submitted in opposition to the September 2004 § 440.10 motion state that Detective Garrido was the "only law enforcement personnel" to work on this case and that he never had a conversation with Camacho either in person or by telephone. *See* Sept. 2004 § 440.10 Opp. at 3. Moreover, contrary to Camacho's averment that "investigators from [the] District Attorney [sic] office" interviewed him, *see* Camacho Aff. ¶ I, respondents have indicated in their opposition papers submitted in state court that "[n]o 'investigators' were ever used from the District Attorney's Office in connection with this case." Sept.2004 § 440.10 Opp. at 3. Furthermore, respondents assert that, because Jiminian was Detective Garrido's sole "source of information" concerning Camacho, Detective Garrido had limited information concerning Camacho's identity, and the information he did have "provided no leads." *Id.*

While Savinon argues that Schulman had an obligation "to find out what transpired between Camacho and the investigators before allowing this key exculpating witness to go by the wayside," Schulman Aff. ¶ 9, Camacho's mere statement to Schulman that the investigators were "bad people" was insufficient to trigger this duty-particularly given that Camacho departed from Schulman's office so abruptly. In addition, there was a logical explanation for Camacho's reluctance to testify that had nothing to do with any purported misconduct by the prosecution: namely, that Camacho was an illegal alien and faced imprisonment if his presence in the country was made known to law enforcement personnel. *Cf. Wiggins v. Smith,* 539 U.S. 510, 527 (2003) (in determining the "reasonableness of an attorney's investigation" the court must consider whether the information known by counsel "would lead a reasonable attorney to investigate further"); *accord Gersten v. Senkowski,* 299 F.Supp.2d 84, 100 (E.D.N.Y.2004); *see also Wilson v. Henry,* 1998 WL 227150, at *6 (N.D.Cal. Apr. 27, 1998) ("Because counsel's decisions are to be accorded a great deal of deference, and because petitioner has not adequately demonstrated that the facts ... should have triggered counsel's duty to investigate, counsel was not ineffective when he determined that investigation into the circumstances and surroundings of the shooting would be fruitless.").

2. *Ineffectiveness Claims Relating to Jiminian's Prior Abortions*

***28** On direct appeal, Savinon argued that trial counsel was ineffective for failing to make a written proffer to the trial court concerning the evidence pertaining to Jiminian's three prior abortions, and then mentioning this fact in his opening statement, thereby "result[ing] in a mistrial and depriv[ing] th [e] defendant of the jury he chose." Pet.App. Div. Br. at 55. Savinon also argued on direct appeal that trial counsel was ineffective for not seeking "permission" from the trial court to cross-examine Jiminian concerning her prior abortions "after the People introduced evidence of her depression and the reason therefor." *See id.* at 55-56. The Appellate Division, in affirming Savinon's conviction, stated that Savinon "failed to present an adequate record" with respect to the ineffective assistance claim, but nevertheless found that "to the extent the present record permits review, we find that defendant received meaningful representation." *Savinon,* 293 A.D.2d at 414. Savinon then raised these same claims in his brief to the Court of Appeals, *see* Pet. Ct.App. Br. at 55-56, which found the claims to be "without merit." *Savinon,* 100 N.Y.2d at 201.

In the September 2002 § 440.10 motion, Savinon argued that trial counsel was ineffective for, *inter alia,* delivering an opening statement referring to Jiminian's "prior sexual relationships" and her having had "three abortions," statements which ultimately resulted in a mistrial. 440.10 Aff. I at 13-15. Although Justice Carro found this claim was "properly raised" in a CPL § 440.10 motion, he rejected it. 440.10 Decision I at 3. Savinon did not seek leave to appeal Justice Carro's decision denying the motion.

In his amended petition, Savinon again contends that trial counsel was ineffective because he caused a mistrial by referring to Jiminian's three prior abortions in his opening statement during the first proceeding, *see* Am. Petition Decl. ¶¶ 41-48, and because he failed to cross-examine Jiminian concerning her three prior abortions. *See id.* ¶¶ 45-48. Respondents now argue that these claims are

unexhausted because they were not presented to the state courts "in federal constitutional terms." Resp. Mem. at 23. Rather than determine whether the state courts were alerted to the federal constitutional nature of these claims, this Court will exercise its option to deny these claims on the merits. *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.").

a. *Reference to Abortions Resulting in a Mistrial.* Counsel's reference to Jiminian's three prior abortions in his opening statement does not entitle Savinon to relief for two reasons.

First, Savinon has failed to overcome the " 'presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ' *Bell,* 535 U.S. at 698 (quoting *Strickland,* 466 U.S. at 689). During the first proceeding, defense counsel argued in favor of permitting the reference to Jiminian's abortions by connecting the prior abortions to Jiminian's state of mind. (*See* I Tr. 33-34, 42). At the time that the court granted the prosecution's request for a mistrial, the court's ruling was not that all testimony pertaining to Jiminian's "prior sexual conduct" was irrelevant, but rather, that such testimony could only be presented after a formal proffer to the court. (*See* I Tr. 39); *see also* N.Y. C.P.L. § 60.42 ("Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense ... unless such evidence ... (5) is determined by the court after an offer of proof by the accused outside the hearing of the jury ... to be relevant and admissible in the interests of justice."). Defense counsel explained that he referred to the abortions in his opening statement, even though he did not make a formal proffer to the court, since he thought that the prosecutor "opened the door" on this issue by referring to Jiminian's depression in her opening statement. (*See* I Tr. 33, 42); *see also* *People v. Jovanovic,* 263 A.D.2d 182, 197 (1st Dep't 1999) (stating that the "interests of justice" exception to the rape-shield law "was included in order to give courts discretion to admit what was otherwise excludable under the statute ... where it is determined that the evidence is relevant") (citation omitted).

***29** In fact, Savinon claimed on appeal that, under CPL § 60.42(5), the trial court erred in granting the prosecution's request for a mistrial because counsel's reference to the abortions was offered to explain proposed testimony concerning Jiminian's depression. *See* Pet.App. Div. Br. at 53-54. Savinon's argument on this point, therefore, amounts to nothing more than a complaint that defense counsel's strategy proved to be unsuccessful. That fact, however, does not entitle Savinon to habeas relief. *See* *Henry v. Poole,* 409 F.3d 48, 58 (2d Cir.2005) (in applying the *Strickland* standard, "courts should not confuse true ineffectiveness with losing trial tactics or unsuccessful attempts to advance the best possible defense"); *Lopez v. Greiner,* 323 F.Supp.2d 456, 480 (S.D.N.Y.2004) (trial counsel not ineffective where "the record as a whole" demonstrates that counsel "pursued a coherent, if ultimately unsuccessful, defense strategy"); *Johnson v. United States,* 307 F.Supp.2d 380, 391 (D.Conn.2003) ("[A]cts or omissions of counsel that might be considered 'sound trial strategy' do not constitute ineffective assistance, even if they turn out to be unsuccessful.") (quoting *Best,* 219 F.3d at 201).

Second, Savinon fails to establish the second prong of the *Strickland* test. Savinon has articulated no prejudice that he suffered as a result of his attorney's alleged error other than to assert that he was not tried by "the jury of his choice." Am. Petition Decl. ¶ 44. But Savinon in fact *was* tried by a "jury he chose": namely, the jury in his second trial. Savinon's reliance on case law relating to double jeopardy claims, *see* Am. Petition Decl. ¶ 44 (citing *Illinois v. Sommerville,* 410 U.S. 458 (1973); *Wade v. Hunter,* 336 U.S. 684, 689 (1949)), is irrelevant. Savinon has no double jeopardy claim. He cannot meet the second prong of the *Strickland* test because he cannot demonstrate that there is "a reasonable probability" that the result of his trial "would have been different" had he been tried by the first jury rather than by the second jury. *Strickland,* 466 U.S. at 694.

b. *Failure to Cross-Examine Jiminian Concerning her Prior Abortions.* Savinon argues that, because the trial court's decision to declare a mistrial "did not completely close the door to the use of the abortions in cross-examining the complainant," counsel was ineffective because he "apparently did not investigate this issue and did not cross-examine the complainant on this subject." Am. Petition Decl. ¶ 45. Savinon contends that trial counsel was ineffective because he "failed to properly set the ground work for cross-examination of the complaining witness [concerning her prior abortions] with the permission of the court and within the confines of the

law.” *Id.* ¶ 48. According to Savinon, had trial counsel “complied with the procedural requirements of the rape shield law” he would have been able to use this evidence in cross-examining Jiminian in order to show a side of her character that was far different from the “religious and pious person” depicted by the prosecutor. *See id.* ¶¶ 46-47.

***30** It is well-settled that decisions “whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature.” *Nersesian,* 824 F.2d at 1321; *accord Eze,* 321 F.3d at 127 (“ ‘The conduct of examination and cross-examination is entrusted to the judgment of the lawyer.” ’) (quoting *United States v. Luciano,* 158 F.3d 655, 660 (2d Cir.1998)). The Supreme Court has held that, “[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry,* 540 U.S. 1, 5 (2003) (citing *Strickland,* 466 U.S. at 690). “That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court ‘may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic move.” ’ *Id.* at 5-6 (quoting *Massaro,* 538 U.S. at 505).

Here, Savinon is unable to overcome this presumption. Savinon testified extensively concerning Jiminian's sexual aggressiveness. This testimony, at a minimum, assisted the jury in determining the veracity and reliability of the state's evidence concerning Jiminian's character. Defense counsel's decision to discredit testimony presented in the state's case concerning Jiminian's character through Savinon's testimony-rather than through impeaching her on the issue of her prior abortions-is the type of strategic decision that “fell within the wide range of acceptable professional assistance.” *Dunham,* 313 F.3d at 732. In any event, the record indicates that counsel cross-examined Jiminian on a number of issues that related to her character. For example, Jiminian was cross-examined extensively concerning the facts and circumstances surrounding her prior conviction on narcotics and drug charges. (*See* Jiminian: Tr. 180-92). Counsel also elicited testimony from Jiminian concerning her status in this country as an illegal immigrant (Jiminian: Tr. 192), her bouts with depression, her attempts to commit suicide (*see* Jiminian: Tr. 197-201), and the casual nature of her sexual relationship with Savinon (*see* Jiminian: Tr. 212-13, 216-219). Indeed, a decision to raise Jiminian's prior abortions might have risked appearing callous to a jury and would have been of minimal probative value. *See Eze,* 321 F.3d at 132 (petitioner's contention that trial counsel ineffectively cross-examined a witness rejected in light of the “significant deference we accord a trial counsel's decision how to conduct cross-examination and our refusal to use perfect hindsight to criticize unsuccessful trial strategies” where trial counsel cross-examined the witness on matters that served to undermine her testimony) (citing cases); *Eisen,* 974 F.2d at 265 (no ineffective assistance based on failure to adequately impeach government witnesses where defense counsel vigorously cross-examined witnesses and could have reasonably concluded that further questioning on relatively unimportant matters would confuse or fatigue the jury).

3. *Failure to Challenge Qualifications and Testimony of the Prosecution's Expert*

***31** On direct appeal, Savinon argued that trial counsel was ineffective for failing “to object to the qualifications of Dr. Sampson as an expert and to object to testimony given by Dr. Sampson .” Pet.App. Div. Br. at 57. The Appellate Division rejected this claim, finding that an adequate record to review the issue did not exist and that, to the extent the record did permit review, Savinon was not denied effective assistance of counsel. *Savinon,* 293 A.D .2d at 414. Savinon then raised the identical issue before the Court of Appeals, *see* Pet. Ct.App. Br. at 57, and that court rejected the claim as “without merit.” *Savinon,* 100 N.Y.2d at 201.

In the September 2002 § 440.10 motion, Savinon raised the identical issue. *See* 440.10 Aff. I at 19-20. Although Justice Carro found that the issue was “properly raised” in a § 440.10 motion, the claim was ultimately rejected by the court. 440.10 Decision I at 3. As noted, Savinon did not seek leave to appeal the decision denying the September 2002 § 440.10 motion.

In his amended petition, Savinon again contends that trial counsel was ineffective for failing to competently challenge the qualifications and testimony of Dr. Sampson. *See* Am. Petition Decl. ¶¶ 49-54. Respondents now argue that this claim is unexhausted because Savinon did not present it to the state courts on direct appeal in “federal constitutional terms.” *See* Resp. Mem. at 23; *accord id.* at 34. It is not necessary to reach the question of whether the federal nature of this claim was presented

to the state courts, however, because this claim must be denied on the merits. *See* 28 U.S.C. § 2254(b)(2).

Savinon argues that trial counsel's failure to object to Dr. Sampson's qualifications constituted ineffective assistance because “she was never qualified as a psychiatric witness equipped to testify about PSTD [sic].” Am. Petition Decl. ¶ 54. Savinon asserts that Dr. Sampson was not qualified to give an opinion on PTSD because she “had never been qualified as a psychiatric expert, had never examined the complainant, and had not even called or consulted with the complainant's treating physician from Columbia Presbyterian Hospital.” *Id.* ¶ 49. Because Dr. Sampson was only qualified as an “expert in forensic pathology and wound interpretation,” *id.* ¶ 50 (quoting (Tr. 321)), Savinon contends that trial counsel was ineffective for not moving to preclude Dr. Sampson's testimony concerning PTSD, and that it was error to allow her to testify that the symptoms mentioned in Jiminian's testimony were consistent with PTSD. *Id.* ¶¶ 50, 53.

At the time that the prosecutor asked that Dr. Sampson be qualified as an expert, the court asked defense counsel if he had any objection, and counsel responded by stating that he would reserve any objections for cross-examination. (Tr. 321). Defense counsel did object when Dr. Sampson began addressing what a person with PTSD would “feel,” and the objection was overruled. (Tr. 326). Counsel also objected when the prosecutor asked Dr. Sampson, based upon her review of the medical records, what her opinion was “with respect to whether the symptoms described [in the records] are consistent with [PTSD].” (Tr. 327-28). This objection was overruled by the court and Dr. Sampson was permitted to opine that she “believe[d] that the symptoms that are described are consistent with [PTSD].” (Tr. 328).

***32** Thus, contrary to Savinon's assertions, counsel did in fact object to Dr. Sampson's testimony concerning PTSD, specifically her opinion that the symptoms described in Jiminian's medical records were “consistent” with PTSD. (Tr. 327-28). The fact that these objections were overruled and Dr. Sampson was permitted to testify concerning this subject does not establish that counsel was ineffective. *See, e.g., Smalls v. McGinnis,* 2004 WL 1774578, at *16 (S.D.N.Y. Aug. 10, 2004) (rejecting petitioner's claim of ineffective assistance “concerning the decisions his trial counsel made regarding,” *inter alia,* objections at trial, because that was “part of the particular trial strategy adopted by his counsel, and counsel cannot be faulted for pursuing a trial strategy even if hindsight shows it was unsuccessful”) (citation omitted).

Furthermore, after counsel made objections to Dr. Sampson's direct testimony, the record indicates that counsel elicited on cross examination of Dr. Sampson several important points helpful to Savinon that demonstrated the limits of Dr. Sampson's knowledge, expertise, and experience. For example, counsel attempted to call into question Dr. Sampson's qualifications by eliciting her testimony that her job as a Medical Examiner primarily involved examining “dead people,” (Sampson: Tr. 328), and that she had virtually no experience with emergency room procedures dealing with a rape victim. (*See* Sampson: Tr. 331). Furthermore, counsel pointed out that the sole basis for Dr. Sampson's testimony was her review of Jiminian's medical records. (*See* Sampson: Tr. 329-338). Counsel also elicited from Dr. Sampson that she failed to even attempt to contact Jiminian's examining physician at Columbia Presbyterian. (Sampson: Tr. 338).

While Savinon contends that counsel should have moved to strike or preclude Dr. Sampson's testimony, *see* Am. Petition Decl. ¶ 53 & n. 4, Savinon points to no basis on which a meritorious motion could have been made to preclude this testimony. First, he provides no expert affidavit to this Court that would permit a finding that anything testified to by Dr. Sampson was inaccurate. Moreover, he provides no citation to New York law suggesting that a physician needs to be qualified in a particular specialty in order to testify regarding any aspect of that specialty. Indeed, it appears New York law is to the contrary. *See Julien v. Physician's Hosp.,* 231 A.D.2d 678, 680 (2nd Dep't 1996) (“a physician need not be a specialist in a particular field in order to be considered a medical expert”) (quoting *Humphrey v. Jewish Hosp. & Med. Ctr.,* 172 A.D .2d 494, 567 (2nd Dep't 1991)); *see also Fuller v. Preis,* 35 N.Y.2d 425, 431 (1974) (“That the neurologist did not practice the closely related specialty of psychiatry was no bar to his testifying as a medical expert.”) (citing *People v. Rice,* 159 N .Y. 400, 410 (1899); Richardson, Evidence [10th ed.], § 368); *accord Darby v. Cohen,* 421 N.Y.S.2d 337, 338 (N.Y.Sup.Ct.1979) (interpreting *Fuller* to stand for the proposition that “a physician licensed to practice medicine may be qualified as an expert in any branch of medicine despite the fact that he is not a specialist in that branch and the fact that he was not a

specialist should only go to the weight of his testimony and not to its admissibility.").

4. *Failure to Call Expert Witness in Rebuttal*

***33** In the September 2002 § 440.10 motion, Savinon argued that trial counsel was ineffective for failing "to secure independent medical testimony" to rebut Dr. Sampson's medical opinion. 440.10 Aff. I at 20. Justice Carro denied this motion, *see* 440.10 Decision I at 7, and Savinon failed to appeal Justice Carro's decision. Savinon did not raise this claim on direct appeal. Savinon raised a claim identical to that raised in his September 2002 § 440.10 motion in his amended petition. *See* Am. Petition Decl. ¶¶ 55-57. As with Savinon's other claims of ineffective assistance, respondents argue that this claim is unexhausted. *See* Resp. Mem. at 23; *accord id.* at 34. Regardless of whether or not this claim is exhausted, however, it must be denied on the merits. *See* 28 U.S.C. § 2254(b)(2).

Courts have held that "the decision whether or not to call an expert witness generally falls within the wide sphere of strategic choices for which counsel will not be second-guessed on habeas review." *Stapleton v. Greiner,* 2000 WL 1207259, at *16 (E.D.N.Y. July 10, 2000) (citing *United States v. Kirsch,* 54 F.3d 1062, 1072 (2d Cir.), *cert. denied,* 516 U.S. 927 (1995)); *accord James v. United States,* 2002 WL 1023146, at *16 (S.D.N.Y. May 20, 2002) (Report and Recommendation), *adopted by* Order, filed August 20, 2002, in 97 Cr. 185(LAK) (S.D.N.Y.); *see also Murden v. Artuz,* 253 F.Supp.2d 376, 389 (E.D.N.Y.2001) ("[I]n general, whether or not to hire an expert is the type of strategic choice by counsel that may not be second-guessed on habeas corpus review."). Nevertheless, "[w]here counsel fails to make a reasonable investigation that is reasonably necessary to the defense, a court must conclude that the decision not to call an expert cannot have been based on strategic considerations and will thus be subject to review under *Strickland*' s prejudice prong." *Benjamin v. Greiner,* 296 F.Supp.2d 321, 330 (E.D.N.Y.2003) (citing cases); *accord Ciaprazi v. Senkowski,* 2003 WL 23199520, at *5 (E.D.N.Y. Dec. 5, 2003).

In his amended petition, Savinon argues that trial counsel was ineffective for "failing to call an expert witness to challenge the testimony of Doctor Sampson about PTSD." Am. Petition Decl. ¶ 55. Savinon contends that Dr. Sampson's testimony "could have been challenged by a truly qualified psychiatric witness on behalf of the defense" and that it was "inexcusable not to call a psychiatric expert witness on behalf of the defense to explain to the jury the multiple and complex roots of PTSD." *Id.* ¶ 56. This claim must be rejected, however, as it rests only on speculation. Savinon has provided no affidavit or other basis on which to conclude that there existed a witness who could have offered relevant and probative evidence contrary to the testimony offered by Dr. Sampson. Thus, the decision of trial counsel not to call an expert "cannot be considered objectively unreasonable" given that Savinon "has only presented his vague hope that another expert might have reached a different result than the government expert." *Leaks v. United States,* 841 F.Supp. 536, 545 (S.D.N.Y.1994) (footnote omitted), *aff'd,* 47 F.3d 1157, *cert. denied,* 516 U.S. 926 (1995). *see also United States v. Morales,* 1 F.Supp.2d 389, 393 (S.D.N.Y.1998) (rejecting claim that counsel was ineffective where defendant "made no showing" that trial counsel's decision not to call "unidentified ... witnesses was unreasonable in light of the circumstances of th[e] case"). For the same reasons, Savinon is also unable to satisfy the prejudice prong of the *Strickland* test since he has neither alleged nor presented objective evidence to support a finding that a defense expert would have provided testimony different from that offered by Dr. Sampson. *See James,* 2002 WL 1023146, at *16 (rejecting petitioner's claim that trial counsel was ineffective in failing to obtain expert testimony where petitioner "provided no reason to believe that an ... expert hired by the defense would have offered any exculpatory testimony or indeed any testimony that differed from the Government expert"); *Murden,* 253 F.Supp.2d at 389 (petitioner failed to show prejudice based on attorney's decision not to hire an expert where the petitioner did not "come forward with affidavits or other admissible evidence showing that there is an expert witness who would have testified" concerning issues that would have raised a reasonable doubt as to petitioner's guilt); *Leaks,* 841 F.Supp. at 545 (rejecting petitioner's claim that trial counsel was ineffective for failing to call a handwriting expert because his argument was "purely speculative").

B. *Error in Missing Witness Charge to the Jury*

***34** Savinon contends that he is entitled to relief on the ground that the trial court's "rendering of a missing witness charge violated [his] due process right to a fair trial under the Fourteenth Amendment." Am. Petition Decl. ¶¶ 62-64. Respondents argue that Savinon failed

to exhaust this claim in state court because, "[a]lthough petitioner argued in his Appellate Division brief that the trial court erroneously delivered a missing witness charge," this claim was not presented to the state courts in "federal constitutional terms." Resp. Mem. at 23, 26. This Court need not address whether this claim was exhausted in the state courts because it fails on the merits. *See* 28 U.S.C. § 2254(b)(2).

Here, both the Appellate Division and the Court of Appeals denied on the merits Savinon's claim concerning the missing witness instruction. *See Savinon,* 293 A.D.2d at 413; *Savinon,* 100 N.Y.2d at 199-201. Accordingly, the deferential § 2254(d) standard applies.

"The adequacy of a jury charge is ordinarily a matter of state law." *Hoover v. Senkowski,* 2003 WL 21313726, at *9 (E.D.N.Y. May 24, 2003). " 'In order to obtain a writ of habeas corpus in federal court on the ground of error in a state court's instructions to the jury on matters of state law, the petitioner must show not only that the instruction misstated state law but also that the error violated a right guaranteed to him by federal law." ' *Davis v. Strack,* 270 F.3d 111, 123 (2d Cir.2001) (quoting *Casillas v. Scully,* 769 F.2d 60, 63 (2d Cir.1985)). "Where an error in a jury instruction is alleged, 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." *Id.* (quoting *Cupp v. Naughten,* 414 U.S. 141, 146 (1973) (internal quotations omitted). In other words, to warrant habeas relief, the petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp,* 414 U.S. at 147.

Savinon argues that he is entitled to habeas relief because, when "[p]resented with the evidence before it, the trial court at most should have rendered an even-handed 'uncalled witness' charge, and should have barred the prosecutor from making any reference to a missing witness in her summation." Am. Petition Decl. ¶ 64 (citing cases). According to Savinon, it becomes clear that his right to Due Process under the Fourteenth Amendment was violated when the trial court's missing witness charge is "considered in conjunction with the prosecutor's summation comments" on that issue. *See id.*

In this instance, the trial court instructed the jury that the law permitted jurors to "infer," if it was "proper to do so," that if Camacho would have testified on Savinon's behalf his testimony "would not have supported the testimony of the defendant." (Tr. 698). The court specifically instructed the jury that it could not make this inference unless it was "satisfied that Flaco was under the control of the defendant and was available to be called by the defendant." (Tr. 698). The court also instructed the jury that it could "consider the explanation offered during the trial by the defendant for the failure to call Flaco" in making this determination. (Tr. 698). In considering Savinon's explanation for why Flaco failed to testify, the trial court made clear that the jury was obligated not to draw a negative inference if Savinon's testimony or "all the other evidence in the case" satisfied the jury that Flaco was not under his control or "was unavailable to be called as a witness" by Savinon. (Tr. 698-699).

***35** Initially, the Court must determine whether the challenged instruction created a mandatory presumption or only authorized a permissive inference. In *Francis v. Franklin,* 471 U.S. 307, 314 (1985), the Supreme Court explained the distinction between mandatory presumptions and permissive inferences by stating:

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

accord United States v. Gotchis, 803 F.2d 74, 80 (2d Cir.1986); *see also County Court of Ulster County, N.Y. v. Allen,* 442 U.S. 140, 157 (1979) (stating that a permissive inference "allows-but does not require-the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant") (citing *Barnes v. United States,* 412 U.S. 837, 840 n. 3 (1973)).

Here, the missing witness instruction at issue did not "require" the jury to make any specific findings. Rather, by stating that the jury was "permitted" to infer certain facts if it found it "proper to do so," (*see* Tr. 698),

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the court simply allowed the jury to draw an inference after considering the circumstances surrounding Savinon's efforts to obtain Camacho's testimony.

The Supreme Court has stated that "[a] permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Francis,* 471 U.S. at 314-15 (citing *Ulster County,* 442 U.S. at 157-63); *see also Government of Virgin Islands v. Parrilla,* 7 F.3d 1097, 1101 (3d Cir.1993) (an as-applied challenge to a permissive inference can succeed "if there is no rational way the trier of fact could have made the connection permitted by the inference") (citing *Ulster County,* 442 U.S. at 157); *Hill v. Maloney,* 927 F.2d 646, 649 (1st Cir.1990) ("The use of a permissive presumption is constitutional so long as there is a 'rational connection' between the predicate and presumed facts.") (citing cases). In fact, the Second Circuit has specifically held that

> there is no deprivation of a defendant's constitutional rights by permitting the jury to draw an adverse inference against him for his failure to call an available material witness. Such an instruction neither violates the defendant's right to have the prosecution bear the burden of proof as to all elements of the crime, nor rests on an unreasonable conclusion from the facts.

United States v. Caccia, 122 F.3d 136, 140 (2d Cir.1997) (citing *Francis,* 471 U.S. at 314); *see also Niziolek v.. Ashe,* 694 F.2d 282, 292 (1st Cir.1982) (stating that the trial court's use of a missing witness instruction did not "implicate any constitutional rights of petitioner" where the "inference mentioned in the instruction was wholly permissive"); *Martinez v. Spencer,* 195 F.Supp.2d 284, 308 (D.Mass.2002) ("The use of a missing witness instruction does not implicate any constitutional rights of a petitioner or shift the burden of proof.") (citing cases).

***36** Here, the dispute centers on whether Camacho was within the "control" of or "available" to Savinon. On the issue of control, Savinon testified that he and Camacho were friends who had known each other "for a long time." (Savinon: Tr. 455, 457). He also testified that he had extended credit to Camacho in the past and had also loaned him his Lexus on occasion to visit clients. (*See* Savinon: Tr. 391, 454, 456). Jiminian too had testified that she had seen Camacho drive Savinon's car "many times," and that Savinon and Camacho "looked like" they were friends. (Jiminian: Tr. 80).

On the issue of availability, the evidence before the jury was that Savinon, after making some significant efforts, had been able to make contact with Camacho. (Savinon: Tr. 462). In fact, Savinon arranged for Camacho to come to defense counsel's office on a Sunday in the middle of trial. (Savinon: Tr. 462-63). While Savinon testified that Camacho was not served with a subpoena at this meeting, (Savinon: Tr. 539), these facts nonetheless would be sufficient to justify a jury's conclusion that Camacho was "available" as a witness.

Of course, there were additional facts in the record before the jury suggesting a lack of control and availability. Specifically, Savinon testified to the jury that Camacho told him that he "didn't want to come" to court because he had "legal problems," "had been deported," and "was illegal here." (Savinon: Tr. 537). The question thus becomes whether this additional testimony renders the conclusion that Camacho was available and under Savinon's control to be lacking in "reason and common sense." *Francis,* 471 U.S. at 315.

While it is a close question, this Court cannot say that the New York courts' decision that the instruction was proper represented an unreasonable application of Supreme Court law. The instruction explicitly left to the jury the question of determining whether Camacho was available to Savinon and under his control. Certainly, Jiminian's testimony coupled with Savinon's testimony regarding their relationship, and the fact that Camacho had come to Savinon's attorney's office, would be sufficient for "reason and common sense" to justify a jury's conclusion that Camacho was available to Savinon and under his control. While there was contradictory testimony from Savinon, the jury might well have chosen to discredit his testimony-particularly given that they had obviously discredited central elements of Savinon's testimony.

Looking at the matter in hindsight, of course, we now have much stronger corroboration of Camacho's lack of availability and Savinon's lack of control-in particular through Camacho's affidavit. But this evidence was not before the jury or the trial court. Judging the federal

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constitutional issue on the basis of "the proven facts before the jury," *Francis,* 471 U.S. at 315, "reason and common sense" would permit a finding of availability and control. In any event, the state court decisions rejecting this claim did not involve an "unreasonable application of ... clearly established Federal law ... as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). [14]

14 Savinon also raises the fact that the prosecutor discussed the missing witness issue in summation. Am. Petition Decl. ¶¶ 62 & n .5, 64; (*see* Tr. 677-78). While defense counsel argued to the jury that Savinon was powerless to produce Camacho to testify, (Tr. 637-38), the prosecutor argued defendant could have gotten a "warrant for this guy's arrest," and consequently, the jury could "infer" Camacho's "testimony would be damaging to defendant." (Tr. 677-78). Once it is determined that the missing witness instruction was proper, however, there is no great significance to the prosecution's argument. The trial court instructed the jury that it was "not bound to accept the arguments of the respective attorneys." (Tr. 686). It also instructed the jury on more than one occasion that "regardless of what counsel on either side of the case may have said about the facts," it was the jurors' "own recollection, understanding, and evaluation of the facts presented by the evidence at ... trial that controls." (Tr. 685; *accord* Tr. 621-22). To the extent that Savinon is making a *sub silentio* argument that the prosecution engaged in burden-shifting, that argument must be rejected. The prosecutor's comments do not suggest as much, and the trial court told the jury, directly after the prosecutor made the relevant summation comments and defendant's objection thereto, that the judge would instruct the jury on Camacho's absence from the trial. *See* Tr. 678. Furthermore, the trial court's later instructions-that defendant was presumed innocent and the burden of proof was on the prosecutor-tempered "any risk that the missing witness charge" or the prosecutor's comments in summation could be "misunderstood by the jury" as indicating that Savinon had an obligation to produce Camacho as a witness. *See Caccia,* 122 F.3d at 140.

C. *Savinon's Claims Regarding the Denial of a Hearing*

1. *Failure to Hold Hearings on § 440.10 Motions*

***37** Savinon claims that the trial court erred in denying his § 440.10 motions "without a hearing at which Camacho could have explained himself." Am. Petition Decl. ¶ 30. According to Savinon, the state court's decision not to order a hearing entitles him to habeas relief "because Camacho's affidavit establishes that no rape occurred and that [he] is innocent of the [ ] charges." *Id.* Savinon contends, therefore, that the § 440.10 court deprived him of "a fair hearing to explore his Sixth Amendment and Due Process claims." *Id.* ¶ 31. Savinon also apparently contends that he is entitled to relief because the § 440.10 court did not obtain an affidavit from Schulman "explaining" Schulman's actions and instead speculated "that Schulman did not call Camacho because he thought he would contradict or undermine Savinon's testimony." Ruggiero Decl. ¶ 15. Savinon, however, offers no explanation of why he did not seek an affidavit from Schulman.

"[P]rocedural errors in state post-conviction proceedings are not cognizable on federal habeas review." *Guzman v. Couture,* 2003 WL 165746, at *13 (S.D.N.Y. Jan. 22, 2003). "All the circuits that have considered the issue, except one, have held that federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings." *Id.* (quoting *Franza v. Stinson,* 58 F.Supp.2d 124, 151 (S.D.N.Y.1999)) (internal quotations omitted) (collecting cases); *accord Jones v. Duncan,* 162 F.Supp.2d 204, 217-18 & n. 21 (S.D.N.Y.2001) (collecting cases). The only Circuit that appears to hold to the contrary is the First Circuit. *See Dickerson v. Walsh,* 750 F .2d 150, 152-54 (1st Cir.1984) (holding that "petitioner's claim is the proper subject of a habeas corpus petition" where the petitioner argued that the state's post-conviction review procedure violated his right to equal protection). Although the Second Circuit has not explicitly addressed this issue, district courts in this Circuit have repeatedly followed the majority rule. *See Guzman,* 2003 WL 165746, at *14 (rejecting petitioner's assertion that "the failure to hold a hearing on his CPL §§ 440.10 and 330.30 newly discovered evidence motions violated due process" since such a claim "is not cognizable on federal habeas review") (citing *Jones,* 162 F.Supp.2d at 217-18); *Calderon v. Keane,* 2002 WL 1205745, at *6 (S.D.N.Y. Feb. 21, 2002) (Report and Recommendation) ("Claims that focus only on the state's post-conviction remedy and not on the conviction which is the basis for [petitioner's] incarceration are not cognizable on habeas review ."), *adopted by* 2003 WL 22097504 (S.D.N.Y. Sep. 9, 2003), *aff'd,* 115 Fed.Appx. 455 (2d Cir.2004); *Diaz v. Greiner,* 110 F.Supp.2d 225, 236 (S.D.N.Y.2000) ("Petitioner's unsupported assertion that the trial court denied his (third) CPL § 440.10

motion without a hearing violated due process is not cognizable on federal habeas review."); *see also Sparman v. Edwards,* 26 F.Supp.2d 450, 468 n. 13 (E.D.N.Y.1997) ("[T]he weight of authority holds that in habeas corpus proceedings federal courts do not have jurisdiction to review state court denials of motions for a new trial.") (citing cases), *aff'd,* 154 F.3d 51 (2d Cir.1997).

***38** This Court is in agreement with the majority position. Therefore, Savinon's claim that he is entitled to habeas relief because of the § 440.10 court's failure to hold a hearing or request an affidavit from Schulman is not cognizable on federal habeas review and must be rejected.

2. *Whether Savinon is Entitled to a Hearing in this Court*
Savinon contends that "[t]his Court should ... hold an evidentiary hearing at which trial counsel and Camacho can testify" because of the state court's failure to do so. Am. Petition Decl. ¶¶ 31, 58. In papers submitted before the Schulman affidavit was received, Savinon contended that "[t]his case is plainly one that calls for counsel's further explanation because, on the record as it now exists, counsel has failed to explain his omissions, and the record does not sufficiently demonstrate that they were defensible as part of a legitimate trial strategy." *Id.* ¶ 61; *accord id.* ¶ 16. Respondents oppose the request for a hearing. *See* Resp. Mem. at 46-47; Supp. Aff. ¶ 16; Supp. Decl. ¶ 15.

Rule 8(a) of the Rules Governing § 2254 Cases ("Rule 8") provides:

> If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), in 1996, "federal district courts enjoyed broad discretion in determining when to hold evidentiary hearings in habeas corpus proceedings." *Ruine v. Walsh,* 2005 WL 1668855, at *2 (S.D.N.Y. July 14, 2005) (citing *Jones v. Vacco,* 126 F.3d 408, 417 n. 2 (2d Cir.1997)); *accord Pagan v. Keane,* 984 F.2d 61, 64 (2d Cir.1993) (noting that district courts had the "power to hold a hearing even though one was not required" and listing factors relevant to making this discretionary determination); *see also Townsend v. Sain,* 372 U.S. 293, 318 (1963) (stating that "[i]n every case" the district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim"), *overruled in part by, Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992). In recent years, however, "the Supreme Court and Congress have severely limited the situations in which a habeas court is required or even permitted to hold an evidentiary hearing to consider factual claims by a habeas petitioner." *Nieblas v. Smith,* 204 F.3d 29, 31 (2d Cir.1999) (citations omitted); *accord Ruine,* 2005 WL 1668855, at *2.

The relevant standard under the AEDPA for determining whether a habeas petitioner is entitled to an evidentiary hearing is prescribed by 28 U.S.C. § 2254(e)(2). Under § 2254(e)(2), a district court is prohibited from holding an evidentiary hearing where the petitioner "failed to develop the factual basis of a claim in State Court proceedings" unless certain strict requirements are met. The Supreme Court has made clear, however, that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams,* 529 U.S. at 432. Because Savinon requested evidentiary hearings in both his September 2002 and September 2004 § 440.10 motions, *see* Sept. 2002 Notice of Motion; Sept.2004 Notice of Motion, the Court will assume, *arguendo,* that Savinon showed the diligence required by the statute. Thus, the bar of § 2254(e)(2) is not at issue. *See, e .g., Channer v. Brooks,* 320 F.3d 188, 199 (2d Cir.2003) ("where a petitioner has been diligent in developing his claim," the restrictions in § 2254(e)(2) on the ability to obtain an evidentiary hearing "simply do not apply").

***39** That does not mean, however, that Savinon is "entitled to an evidentiary hearing-only that he may be." *McDonald v. Johnson,* 139 F.3d 1056, 1060 (5th Cir.1998); *accord Fullwood v. Lee,* 290 F.3d 663, 681 (4th Cir.2002); *accord Bowling v. Parker,* 344 F.3d 487, 512 (6th Cir.2003). In other words, " § 2254(e)(2) specifies the situations where evidentiary hearings are *allowed,* not where they are *required." McDonald,* 139 F.3d at 1060 (emphasis in

original); *see also Ruine,* 2005 WL 1668855, at *3 ("[A] petitioner whose claim is not precluded by 28 U.S.C. § 2254(e)(2) is not presumptively entitled to an evidentiary hearing.") (citing *McDonald,* 139 F.3d at 1060).

If a petitioner can clear the "initial hurdle" presented by § 2254(e)(2), "he must still persuade the district court" that he is entitled to an evidentiary hearing. *McDonald,* 139 F.3d at 1060. Where, as here, § 2254(e)(2) does not apply, " 'it is ... necessary to evaluate the request for an evidentiary hearing under pre-AEDPA standards." ' *Davis v. Lambert,* 388 F.3d 1052, 1061 (7th Cir.2004) (citing cases); *accord Miller v. Champion,* 161 F.3d 1249, 1253 (10th Cir.1998) ("If ... the applicant has not failed to develop the facts in state court, [we] may proceed to consider whether a hearing is appropriate ... or required under [pre-AEDPA standards]."). Under this standard, the decision whether to hold a hearing "is committed to the district court's discretion pursuant to Rule 8." *McDonald,* 139 F.3d at 1060; *accord Ruine,* 2005 WL 1668855, at *3 (the question of "whether that petitioner ought to be afforded an evidentiary hearing remains an issue committed to the district court's sound discretion") (citing *Nieblas,* 204 F.3d at 32). Indeed, the court can "utilize any of the habeas rules designed to supplement the record without the necessity of conducting a full-blown evidentiary hearing." *Valverde v. Stinson,* 224 F.3d 129, 135 (2d Cir.2000)) (citations and internal quotation marks omitted); *accord Blackledge v. Allison,* 431 U.S. 63, 81-82 (1977) (district courts "may employ a variety of measures in an effort to avoid the need for an evidentiary hearing," including authorizing discovery or permitting the parties to expand the record).

Here, there is no need to hold an evidentiary hearing. Savinon has submitted an affidavit from Camacho. The Court has requested and obtained an affidavit from Schulman. Savinon outlines no additional areas of testimony that are needed for an evidentiary hearing. In any event, he states that the "affidavits will ... suffice" to adjudicate this habeas proceeding. *See* Ruggiero Decl. ¶ 16 (citations omitted). Because the affidavits before this Court provide a sufficient basis to adjudicate Savinon's petition, an evidentiary hearing is unnecessary. *See, e.g., McDonald,* 139 F.3d at 1060 (evidentiary hearing unnecessary where "the court had before it affidavits from the two central parties-[petitioner] and his trial counsel" and it was "uncertain what additional evidence could have been introduced"); *Richardson v. LeBlanc,* 171 F.Supp.2d 626, 629 (E.D.La.2001) ("Where ... a district court has before it sufficient facts to make an informed decision regarding the merits of a claim, there is no abuse of discretion in refusing to grant an evidentiary hearing. Such pertains even in a case where no factual findings were explicitly made by any state court.") (citing cases); *see also Sawyer v. Hofbauer,* 299 F.3d 605, 610-11 (6th Cir.2002) (petitioner entitled to a hearing under § 2254(e)(2) only if he demonstrates, *inter alia,* that "relevant facts are in dispute") (citation and internal quotation marks omitted); *Becton v. Barnett,* 920 F.2d 1190, 1192 (4th Cir.1990) (under pre-AEDPA standards court must hold evidentiary hearing where "material facts are in dispute"); *Ruine,* 2005 WL 1668855, at *5 ("Regardless of whether [petitioner's] request for an evidentiary hearing is evaluated under 28 U.S.C. § 2254(e)(2) or under the pre-AEDPA standards, ... he has not established that a hearing is appropriate here as he has not established any material facts in dispute as to which trial counsel would testify.") (citing cases).

Conclusion

***40** For the foregoing reasons, Savinon's petition should be denied.

PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from service of this Report and Recommendation to file any objections. *See also* Fed.R.Civ.P. 6(a), (e). Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with copies sent to the Hon. Richard M. Berman, 40 Centre Street, New York, New York 10007, and to the undersigned at 40 Centre Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Berman. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. *See Thomas v. Arn,* 474 U.S. 140 (1985).

All Citations

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

Richard HOLLAND, Petitioner,
v.
M. ALLARD, Superintendent, Respondent.

No. 04–CV–3521(DRH)(MLO).
|
Oct. 26, 2005.

Attorneys and Law Firms

Richard Holland, Hudson Correctional Facility, Hudson, New York, for the Petitioner, pro se.

Rosalind C. Gray, Suffolk County District Attorney's Office, Riverhead, New York, for the Respondent.

MEMORANDUM OF DECISION AND ORDER

HURLEY, J.

***1** Richard Holland ("Petitioner") petitions for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, from his March 19, 2001 conviction of Robbery in the Second Degree. For the reasons stated below, the petition is denied.

FACTUAL BACKGROUND

On June 16, 2000, Suffolk County Police Officer Kevin Finnegan and his partner, Tom Bosco, responded to a radio transmission reporting a robbery at an Amoco Gas Station in Wyandanch, New York. (Jan. 25, 2001 Tr. ("Tr.") at 14–15.) Upon their arrival at the gas station, the officers met the alleged victim, Peter McCardle ("McCardle"). (*Id.* at 16.) After interviewing McCardle, the officers learned that he was the victim of a robbery by two black males, one of whom could not be identified; the other was wearing a long-sleeved black shirt with black jeans. (*Id.* at 15–17.)

The officers placed McCardle in their patrol car and canvassed the neighborhood for suspects. (*Id.* at 17, 26.) Over the course of ten minutes, McCardle was shown approximately six individuals meeting the suspect's general description. (*Id.* at 17–18.) McCardle indicated that none of these individuals was involved in the robbery. (*Id.* at 18.)

Minutes later, the officers received a radio transmission from Suffolk County Police, Community Oriented Police Enforcement Unit officers ("COPE Officers") stating that they had detained a potential suspect meeting McCardle's description. (*Id.* at 18–19.) The officers were then directed to a slightly wooded area behind a restaurant, just north of the gas station, where people "hang out and use drugs and drink." (*Id.* at 19.) Upon their arrival, and upon seeing Petitioner standing uncuffed with the COPE officers, McCardle, without hesitation, stated "that's him, that's the guy that threw me to the ground." (*Id.* 20, 30.) The officers placed Petitioner under arrest and transported him to the First Precinct. (*Id.* at 20–21.) During transport, Petitioner was informed, as per his inquiry, that he was arrested for his alleged participation in a robbery. (*Id.* at 41.) Immediately thereafter, and not in response to any questioning by the officers, Petitioner allegedly came forward with a battery of spontaneous incriminating statements. (*Id.* at 41–42.)

PROCEDURAL BACKGROUND

On January 25, 2001, Petitioner appeared before the County Court, Suffolk County (Corso, J.) for the purpose of hearings to determine the admissibility of the police identification procedures pursuant to *People v. Wade* and the voluntariness of Petitioner's statements under *People v. Huntley.* By Order dated January 29, 2001, the court found the identification proper and the statements by Petitioner voluntary and therefore admissible and the matter was adjourned for trial.

On March 19, 2001, Petitioner was found guilty after trial of one count of Robbery in the Second Degree in violation of section 160.10 of the New York Penal Law. On April 24, 2001, the County Court sentenced Petitioner to seven years incarceration. On April 24, 2001, Petitioner filed a notice of appeal from his judgment of conviction.

***2** By Order to Show Cause dated October 12, 2001, Petitioner, proceeding pro se, sought to vacate the judgment of conviction pursuant to N.Y.Crim. Proc. Law § 440 alleging that: (1) he was denied the right to counsel; and (2) he was denied an opportunity to testify before the Grand Jury. By Order dated December 31, 2001, the County Court, Suffolk County (Weber, J.) denied his motion with leave to renew on the grounds that his Grand Jury claim was time barred and the remainder of his claims were "incomprehensible." Petitioner did not appeal the court's decision.

On March 1, 2002, Petitioner filed a second motion to vacate the judgment of conviction pursuant to N.Y.Crim. Proc. Law § 440. He claimed: (1) fraud and misrepresentation; (2) denial of counsel; (3) exclusion of an exculpatory witness's testimony; (4) ineffective assistance of counsel; and (5) the identification procedure was improper. He also challenged the credibility of trial witnesses, the quality of the evidence adduced at trial, and the conduct of the prosecutor. By Order dated April 22, 2002, the County Court, Suffolk County (Weber, J.) denied the motion finding that "[e]ach claim has absolutely no merit."

Petitioner filed his third motion to vacate his conviction and sentence pursuant to N.Y.Crim. Proc. Law §§ 440.10 and 440.20 on October 23, 2003. By Order dated December 8, 2003, the County Court, Suffolk County (Weber, J.) denied Petitioner's motion, finding it "unintelligible." On March 19, 2004, the Appellate Division, Second Department denied Petitioner's request for leave to appeal this decision. On May 3, 2004, Petitioner's application for a certificate for leave to appeal the December 8, 2003 decision was denied by the New York Court of Appeals.

Petitioner's direct appeal was perfected on February 28, 2003. Petitioner's appellate counsel raised four issues: (1) whether proof of guilt was established beyond a reasonable doubt; (2) allegedly improper identification procedure; (3) undue severity of sentence; and (4) allegedly improper denial of two of defense counsel's challenges regarding potential jurors for cause. On April 21, 2003, Petitioner sought and was granted permission to file a pro se supplemental brief. As best as the Court can decipher from Petitioner's papers, he raised a number of additional grounds for appeal: (1) his alibi witness was omitted; (2) the trial court did not have jurisdiction due to an allegedly defective indictment; (3) ineffective assistance of counsel; (4) statement allegedly made by Petitioner to the police was "concocted" and should not have been introduced into evidence; (5) the trial court improperly excluded the testimony of a witness; (6) his allegation of false arrest was never investigated; (7) the trial court allegedly admitted evidence improperly and excluded evidence favorable to the defense; (8) deficient jury instructions; and (9) the verdict was against the weight of the evidence.

***3** On February 2, 2004, the Appellate Division, Second Department affirmed the judgment of conviction. The court held, inter alia, that the evidence adduced at trial was legally sufficient to establish Petitioner's guilt of robbery in the second degree beyond a reasonable doubt, the verdict was not against the weight of the evidence, the sentence imposed was not excessive, and that all of Petitioner's "remaining contentions, including those raised in his supplemental pro se brief, are without merit." *People v. Holland,* 770 N.Y.S.2d 872, 872–73 (2d Dep't 2004). Petitioner's application for leave to appeal to the New York Court of Appeals was denied on April 2, 2004.

Petitioner also filed an application for a writ of error coram nobis alleging ineffective assistance of appellate counsel. By Order dated June 7, 2004, the Appellate Division, Second Department denied his application finding that Petitioner had "failed to establish that he was denied the effective assistance of appellate counsel." *People v. Holland,* 777 N.Y.S.2d 916, 917 (2d Dep't 2004). On August 4, 2004, the New York Court of Appeals denied Petitioner's application for leave to appeal this decision. *People v. Holland,* 3 N.Y.3d 675 (2004).

On August 12, 2004, Petitioner filed the instant petition seeking to vacate his sentence pursuant to 28 U.S.C. § 2254. Petitioner lists four grounds in support of his argument that his New York State conviction was obtained in violation of the United States Constitution: (1) "Suggestive I.D. procedure violated Wade and identified the wrong man, [M]iranda, Brady"; (2) "Deprived of Right to counsel, Grand Jury testimony and appearance, no preliminary hearing at crucial stage"; (3) "Defective Indictment w/out counsel or the elements of the crime"; and (4) "Deprived of Right to a fair trial [and] ineffective assistance of counsel." (Petition at 6–10.) Although Petitioner later attempted to add exhibits to his petition, he was instructed by this Court's Pro Se Office on September 10, 2004 that he could not simply add

documents to his petition but rather had to amend his petition pursuant to Federal Rule of Civil Procedure 15(c), which Petitioner neglected to do.

DISCUSSION

I. Claims that are Procedurally Barred

A. Alleged Denial of a Preliminary Hearing

It is well settled that a federal court may not grant the habeas petition of a state prisoner unless "the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). To fulfill the exhaustion requirement, a petitioner must have presented "the substance of the same federal constitutional claim[s] that he now urges upon the federal courts to the highest court of the pertinent state." *Aparicio v. Artuz,* 269 F.3d 78, 89–90 (2d Cir.2001) (internal quotation marks and citations omitted). "When a claim has never been presented to a state court, a federal court may theoretically find that there is an 'absence of available State corrective process' under § 2254(b)(1)(B)(I) 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. In such a case the habeas court theoretically has the power to deem the claim exhausted." *Id.* at 90. Federal review of such claims may only be had where the petitioner can demonstrate cause for the default and prejudice, or demonstrate that failure to consider the claim will result in a miscarriage of justice. *Id.* (citing *Coleman v.. Thompson,* 501 U.S. 722, 748–50 (1991))

***4** Here, Petitioner's claim that he was denied a preliminary hearing during the indictment stage was not raised during the course of his state court proceedings. Petitioner was entitled to one appeal to the Appellate Division and one request for leave to appeal to the New York Court of Appeals, both of which he pursued long ago. Pursuant to N.Y.Crim. Proc. Law § 440.10(2)(c), Petitioner's failure to raise this issue on direct appeal would now preclude him from raising this issue on collateral attack. *See* Aparicio, 269 F.3d at 91 (noting that § 440.10(2)(c) does not permit collateral attacks on a conviction where the defendant unjustifiably failed to raise the issue on direct appeal). Thus the Court may deem this claim exhausted but procedurally barred. *Id.* at 90. In order for the Court to review this issue, Petitioner would have to show "cause for the default and actual prejudice" or a "fundamental miscarriage of justice" as explained above. *Coleman,* 501 U.S. at 750 (1991). As cause for the default, Petitioner argues that his appellate attorney failed to raise the issue on appeal.

"Ineffective assistance of appellate counsel, if established, can constitute 'cause' excusing the procedural default, *see Edwards v. Carpenter,* 529 U.S. 446, 451 (2000), but '[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial." ' *Jeremiah v. Artuz,* 181 F.Supp.2d 194, 200 (E.D.N.Y.2002) (quoting *Murray v. Carrier,* 477 U.S. 478, 492 (1986)); *see also Aparicio,* 269 F.3d at 91–92. Thus, the Court must find that appellate counsel was constitutionally ineffective in order to review Petitioner's claim on the merits. *See Edwards,* 529 U.S. at 451–52.

Here, the Court finds that appellate counsel was not ineffective for failing to raise the alleged absence of a preliminary hearing on direct appeal as there is nothing in the record to suggest that this claim has any merit. Presumably, Petitioner is referring to section 180.10 of the New York Criminal Procedure Law which provides that a "defendant has a right to a prompt hearing upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury, but he may waive such right." N .Y.Crim. Proc. Law § 180.10(2). The practice commentaries to section 180.10 provide that even though a defendant "has the right to a prompt hearing, ... that "right" is illusory, as the People can (and frequently do) avoid the hearing by presenting the charge to a grand jury. Indictment by a grand jury terminates the proceedings in the local criminal court—including the "right" to a hearing—and there is no remedy thereafter for deprivation of a hearing." *Id.* 1993 Practice Commentaries (citing, inter alia, N.Y.Crim. Proc. Law § 180.80(2) and *People v. Hodge,* 53 N.Y.2d 313, 319 (1981)). Here, Petitioner was arrested on June 16, 2000 and indicted by the Grand Jury on June 21, 2000. Accordingly, the indictment mooted his right to a hearing and state law afforded Petitioner no remedy for the absence thereof. Therefore, Petitioner cannot legitimately argue that his appellate counsel was ineffective in failing to raise this ground and thus cannot establish cause for procedurally defaulting on this claim. *Cf. John v. People of State of*

N. Y., No. 91 Civ. 7634, 1992 WL 261282, at *1 (S.D.N.Y. Sept. 29, 1992) ("[T]here is no federal constitutional requirement for a preliminary hearing as a prerequisite to a valid conviction at trial ."). Nor has Petitioner shown that a fundamental miscarriage of justice will occur if the Court does not review his claim. Accordingly, Petitioner's claim regarding "no preliminary hearing at crucial stage" is dismissed.

B. Alleged Denial of the Right
to Testify Before the Grand Jury

***5** Petitioner raised this claim, i.e., that he was deprived of the right to testify before the Grand Jury, on his first motion to vacate the judgment of conviction in October 2001. The county court denied his motion with leave to renew and ruled that his Grand Jury claim was time barred. Petitioner did not appeal this decision nor did he raise this argument in his later motions to set aside the conviction or on direct appeal. Pursuant to N.Y.Crim. Proc. Law § 190.50(c), a motion to set aside an indictment on the ground that a defendant was not permitted to testify before the Grand Jury must be made within five days after the defendant has been arraigned or it is waived. As the County Court found, because Petitioner did not make his motion within the statutorily required time, his claim is now barred. Therefore, this claim is procedurally barred as Petitioner cannot now raise it in the state courts.

Moreover, Petitioner cannot establish "cause for the default and actual prejudice" or a "fundamental miscarriage of justice." *Coleman,* 501 U.S. at 750 (1991). The record reveals that Petitioner was served with a grand jury notice that informed him of his right to testify but that he choose not to do so. In any event, any deficiencies in the Grand Jury proceedings were rendered harmless by Petitioner's conviction at trial by a jury assessing Petitioner's guilt under a heightened standard of proof and thus would not entitle Petitioner to habeas relief. *See Lopez v. Riley,* 865 F.2d 30, 32 (2d Cir.1989) (finding grand jury claims not cognizable under 28 U.S.C. § 2254). Accordingly, this claim is dismissed.

II. Claims that are Dismissed on the Merits

A. Standard of Law

Under the provisions of Section 2254(d), a habeas corpus application must be denied unless the state court's adjudication of the claim either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "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)(1), (2).

A decision is "contrary to" established Federal law if it either "applies a rule that contradicts the governing law set forth in" a Supreme Court case, or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [their] precedent." *Penry v. Johnson,* 532 U.S. 782, 792 (2001) (citing *Williams v. Taylor,* 529 U.S. 362 (2000)). A decision is an "unreasonable application of" clearly established Supreme Court precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case ." *Id.*

B. Suggestive Identification Procedure

Petitioner claims that he was subjected to an unduly suggestive identification procedure and that he was denied the right to an attorney during this procedure. The Second Department found that "[a]lthough the victim was aware that he would be looking at a potential suspect, the showup was conducted in close geographical and temporal proximity to the crime, and it was not unduly suggestive." *People v. Holland,* 770 N.Y.S.2d at 873 (citations omitted).

***6** As an initial matter, to the extent Petitioner is claiming that he had a right to counsel at the time McCardle identified him, or that his absence of counsel violated *United States v. Wade,* [1] his claim must be dismissed as "it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois,* 406 U.S. 682, 688 (1972). Here, the victim identified Petitioner prior to his arrest and thus no right to counsel was implicated. *Cf. id.* at 690 (finding that police station show-up that took place after petitioner's arrest but before he had been indicted or otherwise formally charged with any criminal offense was not a "criminal prosecution" at which petitioner had constitutional right to be represented by counsel).

1 In *United States v. Wade,* the Supreme Court held that a post-indictment lineup is a "critical stage" in a defendant's prosecution, thus entitling the defendant to the presence of counsel. 388 U.S. 218, 237 (1967).

Next, Petitioner argues that his Constitutional rights were violated when the state court failed to suppress McCardle's "show-up" identification of Petitioner. A "show-up" or the practice of showing suspects to a victim solely for the purpose of identification and not as part of a line-up, has been widely condemned. *See Brisco v. Phillips,* 376 F.Supp.2d 306, 312 (E.D . N.Y.2005) (citations omitted). The Supreme Court has held that an identification procedure is suggestive when it "in effect ... says to the witness *'This* is the man." ' *Foster v. California,* 394 U.S. 440, 443 (1969). "However, 'even a suggestive out-of-court identification will be admissible if, when viewed in the totality of the circumstances, it possesses sufficient indicia of reliability." ' *United States v. Mohammed,* 27 F.3d 815, 821 (2d Cir.1994) (quoting *United States v. Simmons,* 923 F.2d 934, 950 (2d Cir.1991)).

In assessing the reliability of identification testimony, courts examine the following factors:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. (quoting *Neil v. Biggers,* 409 U.S. 188, 199 (1972)). These factors are assessed " 'in light of the totality of the circumstances." ' *Id.* (quoting *United States v. Concepcion,* 983 F.2d 369, 378 (2d Cir.1992)). " 'A good or poor rating with respect to any one of the[ ] factors will generally not be dispositive." ' *Id.* (quoting *Concepcion,* 983 F.2d at 377).

Here, the testimony given at the suppression hearing shows that McCardle was able to view Petitioner during the robbery and was able to give a description of what he was wearing. When McCardle identified Petitioner, after having already rejected approximately six other individuals meeting the suspect's general description, Petitioner was wearing a long-sleeved black shirt and black pants, as McCardle initially indicated. Given the fact that McCardle saw Petitioner during the robbery, was able to give an accurate detailed description of him, and had no hesitancy in identifying him with absolute certainty about twenty minutes after the incident, there is no basis for this Court to conclude that the state court's decision that the show-up was proper was based on an unreasonable determination of the facts or an unreasonable application of clearly established federal law. Accordingly, habeas corpus relief on this claim is denied.

C. Defective Indictment

***7** Petitioner argues that the indictment was dismissed on June 22, 2004 and that there was no superceding indictment; therefore, the state trial court was deprived of jurisdiction. (Petition at 9.) Petitioner was convicted and sentenced in 2001. Petitioner does not suggest that the indictment dismissed in 2004 is the same one that formed the basis of his 2001 conviction. Accordingly, based on the information furnished, Petitioner's argument has no merit.

Petitioner also claims that the indictment was defective. Generally, a claim that a state indictment was insufficient is not subject to habeas relief unless the indictment falls below basic constitutional standards. *MacKenzie v. Portuondo,* 208 F.Supp.2d 302, 303 (E.D.N.Y.2002). "An indictment is sufficient when it charges a crime [1] with sufficient precision to inform the defendant of the charges he must meet and [2] with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *Devonish v. Keane,* 19 F.3d 107, 108 (2d Cir.1994) (citation and internal quotation marks omitted).

Here, the indictment clearly passes constitutional muster as it specified the time and place the alleged crime occurred and set forth the essential elements of the crime of Robbery in the Second Degree as defined by the New York Penal Law. Accordingly, Petitioner was adequately informed of the crime charged and this claim is dismissed.

D. Denial of Right to Counsel at Initial Arraignment

Petitioner also asserts that he was denied the right to counsel at his arraignment. Petitioner was arrested on June 16, 2000. The next day, he was arraigned on the felony complaint and pled not guilty. He appeared

without counsel. On June 20, 2000, Petitioner returned to state court, again without counsel. On June 21, 2000, the case was presented to the Grand Jury which returned a true bill for Robbery in the Second Degree. On June 22, 2000, Petitioner was held for arraignment on the indictment. Thereafter, on June 27, 2000, Petitioner's assigned counsel made an appearance on the record and Petitioner was arraigned on the indictment. He entered a plea of not guilty.

Petitioner's argument that he was deprived of the right to counsel during his June 17, 2000 arraignment is without merit as the initial arraignment was not a critical stage in the proceedings against him which would have warranted counsel and Petitioner fails to show that he was otherwise prejudiced. *See U.S. ex rel. Guber v.. Koson,* 273 F.Supp. 998, 1001 (S.D.N.Y.1967) ("Arraignment is not such a crucial juncture of the proceeding in New York.") (citing N.Y.Code Crim. Proc. §§ 296 to 312–h)); *U.S. ex rel. Elksnis v. Gilligan,* 256 F.Supp. 244, 246 n. 2 (S.D.N.Y.1966) (same); *see also U.S. ex rel. John Hussey v. Fay,* 220 F.Supp. 562, 563 (S.D.N.Y.1963) ("Under New York law, a defendant suffers no such prejudice, for whatever counsel could have done upon arraignment on defendant's behalf, counsel were free to do thereafter. There is nothing in New York law which in any way prevents counsel's later taking advantage of every opportunity or defense which was originally available to a defendant upon his initial arraignment."). Accordingly, this claim is dismissed.

E. Ineffective Assistance of Counsel

***8** Petitioner's final argument is that his trial counsel provided ineffective assistance because he failed to present a witness, "Bonnie Wells" ("Wells"), who allegedly would have provided Petitioner with an alibi. Specifically, Petitioner contends that although he asked his attorney to interview Wells, no "pre trial investigation" was done. (Petition at 10.)

In order to prevail on an ineffective assistance of counsel claim, a petitioner must first show that his counsel performed deficiently and that deficiency caused actual prejudice to his defense. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). A petitioner may prove the deficiency prong by establishing that his attorney's conduct fell "outside the wide range of professionally competent assistance." *Id.* at 690. The Court must, however, "indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* at 689.

A petitioner can establish prejudice by showing a "reasonable probability" exists that, but for the deficiency, "the result of the proceeding would have been different." *Id.* at 694. In this regard, the Second Circuit generally "requires some objective evidence other than defendant's assertions." *Pham v. United States,* 317 F.3d 178, 182 (2d Cir.2003).

Here, the Court need not consider the issue of deficient representation because Petitioner has not shown that he was prejudiced by counsel's failure to interview Wells. *See Strickland,* 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed."). Petitioner cannot demonstrate prejudice because he has not produced any evidence or even alleged that Wells would have testified at trial. "Courts have viewed claims of ineffective assistance of counsel skeptically when the only evidence of the import of a missing witness' testimony is from the [petitioner]," *Croney v. Scully,* No. CV–86–4335, 1988 WL 69766, at *2 (E.D.N.Y. June 13, 1988) (citation omitted), *aff'd,* 880 F.2d 1318 (2d Cir.1989), and thus have refused to entertain claims of ineffective assistance for failure to interview a witness where the petitioner fails to demonstrate that the witness would have testified at trial. *See, e.g., McCarthy v. U.S.,* No. 02 CV 9082, 2004 WL 136371, at *17 (S.D.N.Y. Jan. 23, 2004) (collecting cases), *Report and Recommendation Adopted By,* 2004 WL 1535577 (S .D.N.Y. July 9, 2004); *Croney,* 1988 WL 69766, at *2. In the instant case, Petitioner has not produced any evidence, such as an affidavit from Wells, showing that Wells would have testified at trial to what Petitioner claims she would have. Moreover, he has not produced evidence that Wells would have testified at all. Thus, Petitioner has failed to demonstrate that his counsel's failure to interview Wells prejudiced him. Accordingly, habeas relief is denied on this ground.

***9** Finally, the Court notes that under his claim of ineffective assistance of counsel, Petitioner adds "Prosecutorial misconduct of A.[D].A. Telling victim about bandages on fingers, at trial, that he didn't see?" (Petition at 11.) Examination of the record reveals that McCardle specifically recalled Petitioner's bandaged fingers as Petitioner "wagged" a finger at him, warning him not to call the police and that Petitioner's fingers were

bandaged at the time of arrest. Apparently, Petitioner is alleging that the prosecutor told McCardle that Petitioner's fingers were bandaged at the time of his arrest. Petitioner's bare allegations, absent any factual basis, are insufficient to support a claim of prosecutorial misconduct. Accordingly, this claim is dismissed.

CONCLUSION

For the foregoing reasons, the petition is denied. The Clerk of the Court is directed to close this case.

SO ORDERED.

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

Carlos SAVINON, Petitioner,
v.
William MAZUCCA, Superintendent, Fishkill Correctional Facility, et al. Respondents.

No. 04 Civ. 1589(RMB)(GW.
|
Sept. 18, 2006.

DECISION AND ORDER

BERMAN, J.

I. Background

***1** On or about February 25, 2004, Carlos Savinon ("Savinon" or "Petitioner") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition") alleging that during his jury trial in New York Supreme Court, New York County, he was "denied his Sixth Amendment right to the effective assistance of counsel" and "the rendering of a missing witness charge violated [his] due process right to a fair trial under the Fourteenth Amendment." (Petition at 9, 24.) Petitioner filed an amended petition ("Amended Petition") on or about February 2, 2005, adding allegedly evidence provided by an eyewitness as "a new facet of petitioner's originally asserted Sixth Amendment and Due Process claims," and stating that "an evidentiary hearing should therefore be granted" to evaluate the new evidence. (Amended Petition at 1, 25.)

Following a jury trial before the Honorable Harold Beeler, New York Supreme Court, New York County, on May 11, 2001, Petitioner was convicted of one count of rape in the first degree and one count of sexual abuse in the first degree. (Amended Petition at 2.) Petitioner, who is incarcerated at the Sullivan Correctional Facility, was sentenced to concurrent terms of nine years for first-degree rape and five years for first-degree sexual abuse. (Amended Petition at 2.)

The New York Supreme Court, Appellate Division, First Department affirmed Petitioner's conviction on April 30, 2002. *People v. Savinon,* 293 A.D.2d 413, 413-14 (1st Dep't 2002) ("the court properly granted the People's request for a missing witness charge," and "defendant received meaningful representation"). The New York Court of Appeals granted Petitioner leave to appeal on October 15, 2002 and, on June 5, 2003, the Court of Appeals affirmed the decision of the Appellate Division. *People v. Savinon,* 98 N.Y.2d 772 (2002); *People v. Savinon,* 100 N.Y.2d 192, 194 (2003) ("[w]e conclude that the court's [missing witness] instruction was proper, and therefore affirm defendant's conviction").

On or about September 6, 2002, Petitioner moved *pro se* to vacate the judgment of the trial court. (Amended Petition at 2.) On November 15, 2002, the Honorable Gregory Carro, New York Supreme Court, New York County denied Petitioner's motion. (Amended Petition at 2-3; Decision and Order by Judge Gregory Carro, dated Nov. 15, 2002, at 4 ("defense counsel's decision[s] ... had a strategic or other legitimate purpose that a reasonable competent attorney might have pursued").)

On or about September 30, 2004, Petitioner moved a second time to vacate the judgment of the trial court. (Amended Petition at 2.) On November 9, 2004, the Honorable Gregory Carro, New York Supreme Court, New York County denied Petitioner's second motion to vacate judgment and, on January 18, 2005, the Honorable Richard Andrias, New York Supreme Court, Appellate Division, First Department denied leave to appeal. (Petitioner's Declaration of Exhaustion of State Remedies, dated Feb. 1, 2005.)

***2** On October 12, 2005, United States Magistrate Judge Gabriel W. Gorenstein, to whom this matter had been referred, issued a thorough and thoughtful Report and Recommendation ("Report") recommending that the Court deny the Amended Petition. Judge Gorenstein found that the missing witness charge "explicitly left to the jury the question of determining whether [the missing witness] was available to Savinon and under his control," and "on the basis of 'proven facts before the jury,' ... 'reason and common sense' would permit a finding of availability and control." (Report at 66-67 (quoting *Francis v. Franklin,* 471 U.S. 307, 314 (1985)).) Judge Gorenstein also found that Petitioner "is unable to make out a claim of ineffective assistance of counsel"

because, among other things, Petitioner did not show " 'a reasonable probability' that the result of his trial 'would have been different." ' (Report at 47 (quoting *Strickland v. Washington,* 466 U.S. 668, 694 (1984)).) Also, Judge Gorenstein determined that no evidentiary hearing is necessary to consider the alleged new evidence because "the affidavits before this Court provide a sufficient basis to adjudicate Savinon's petition." (Report at 72 (citing *Blackledge v. Allison,* 431 U.S. 63, 81-82 (1977) ("the district judge (or a magistrate to whom the case may be referred) may employ a variety of measures in an effort to avoid the need for an evidentiary hearing"); *Valverde v. Stinson,* 224 F.3d 129, 135 (2d Cir.2000) ("the district court, in its discretion, may ... supplement the record without the necessity of conducting a full-blown evidentiary hearing")).)

By letter dated October 18, 2005, Respondents urged the Court "to adopt the report and recommendation.... This case presents no basis for habeas corpus relief." (Letter to the Court from Respondents, dated Oct. 18, 2005, ¶ 1.) Petitioner submitted timely objections to the Report ("Objections") on November 7, 2005, asserting that Magistrate Judge Gorenstein erred, (1) "in failing to find that trial counsel's performance fell below objective standards of competent representation"; (2) "in concluding that Petitioner has not made a showing of prejudice" as a result of trial counsel's actions; (3) "in finding that the missing witness charge did not deprive Petitioner of due process of law"; and (4) "in finding that an evidentiary hearing should not be held in this court." (Objections at 1, 5, 8, 10.)

For the reasons stated below, the Report is adopted in its entirety and the Petition is dismissed.

II. Standard of Review

The Court "shall make a de novo determination of those portions of the report or specified findings or recommendations to which an objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b); *Grassia v. Scully,* 892 F.2d 16, 19 (2d Cir.1989); *DeLuca v. Lord,* 858 F.Supp. 1330, 1345 (S.D.N.Y.1994). As to any portions of a magistrate judge's report to which no objections have been made, the district judge may adopt all findings that are not clearly erroneous. *See Thomas v. Arn,* 474 U.S. 140, 149 (1985).

III. Analysis

***3** The facts as set forth in the Report are incorporated herein by reference unless otherwise noted. The Court has conducted a *de novo* review of, among other things, the Petition, the Amended Petition, the Report, Petitioner's Objections, the record, and applicable legal authorities, and concludes that the determinations and recommendations made by Magistrate Judge Gorenstein are supported by the record and the law in all material respects. *See Pizarro v. Bartlett,* 776 F.Supp. 815, 817 (S.D.N.Y.1991). Petitioner raises substantially the same arguments that were brought before Judge Gorenstein and does not provide a basis for departing from the Report's conclusions and recommendations. [1]

[1] As to any portion of the Report to which no objections have been made, the Court concludes that the Report is not clearly erroneous. *See Pizarro,* 776 F.Supp. at 817. Any of Petitioner's Objections not specifically addressed in this Order have been considered *de novo* and rejected.

(1) Trial Counsel's Representation

Magistrate Judge Gorenstein properly addressed Petitioner's ineffective assistance claims in the Report, noting that "judicial scrutiny of a counsel's performance must be highly deferential." (Report at 41 (citing *Bell v. Cone,* 535 U.S. 685, 698 (2002)).) Judge Gorenstein correctly determined that the actions of Petitioner's trial counsel were reasonable given, *inter alia,* the difficulty in finding the missing witness and the witness's expressed unwillingness to testify at the time of the trial. (Report at 46-47.) *See Strickland v. Washington,* 466 U.S. at 691 ("[t]he court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance").

(2) Prejudice

Even assuming, arguendo, that trial counsel's actions fell below the level of acceptable assistance, Petitioner has not provided sufficient evidence to show prejudice. *See Pham v. United States,* 317 F.3d 178, 182 (2d Cir.2003) ("our precedent requires some objective evidence other than defendant's assertions to establish prejudice"). Judge Gorenstein concluded correctly that it was doubtful "whether in fact [the missing witness] would have

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testified in this matter had he been served with a subpoena or had he been arrested on a material witness warrant." (Report at 47.) Without evidence that the witness would have testified, Petitioner cannot show " 'a reasonable probability' that the result of his trial 'would have been different," ' and so cannot prove that he was prejudiced by trial counsel's assistance. (Report at 47 (quoting *Strickland,* 446 U.S. at 691).) *See Aparicio v. Artuz,* 269 F.3d 78, 95 (2d Cir.2001) ("[a] reasonable probability is one sufficient to undermine confidence in the outcome of the trial").

(3) Missing Witness Charge

The United States Court of Appeals for the Second Circuit has held that "there is no deprivation of a defendant's constitutional rights by permitting the jury to draw an adverse inference against him for failure to call an available material witness." *United States v. Caccia,* 122 F.3d 136, 140 (2d Cir.1997). The charge here "explicitly left to the jury" the issue of whether the missing witness was available to Petitioner. (Report at 66.) Judge Gorenstein appropriately concluded that the facts presented to the jury "would be sufficient for 'reason and common sense' to justify [the] jury's conclusion." (Report at 66.)

(4) Evidentiary Hearing

***4** On June 27, 2005, Magistrate Judge Gorenstein directed Petitioner's trial counsel "to submit an affidavit addressing ... Savinon's ineffective assistance claim." (Order issued by Magistrate Judge Gorenstein, dated June 24, 2005, ¶ 2.) In his affidavit, dated July 12, 2006, trial counsel explains that "counsel and petitioner made extensive efforts to obtain an interview" with the missing witness. (Affidavit of Trial Counsel Regarding Petition for Writ of Habeas Corpus, 28 U.S.C. Section 2254 ("Trial Counsel Affidavit"), dated July 12, 2006, ¶ 9.) However, the witness only spoke with counsel on one occasion, and said "that he would only come to court if the prosecutor would grant him safe passage from deportation and 'other charges," ' which the prosecutor was unwilling to do. (Trial Counsel Affidavit ¶ 11.) Trial Counsel states that due to the witness's illegal immigration status and the risk of deportation, "a subpoena would have been a meaningless exercise." (Trial Counsel Affidavit ¶ 15.)

Magistrate Judge Gorenstein correctly determined that an evidentiary hearing was unnecessary because "the affidavits before this Court provide a sufficient basis to adjudicate Savinon's petition." (Report at 72.) *See Chang v. United States,* 250 F.3d 79, 86 (2d Cir.2001) (finding it "within the district court's discretion to choose a middle road that avoided the delay, the needless expenditure of judicial resources, the burden on trial counsel and the government ... that would have resulted from a full testimonial hearing").

IV. Certificate of Appealability

Because Petitioner has not made a "substantial showing of the denial of a constitutional right," the Court will not grant a certificate of appealability. 28 U.S.C. § 2253(c)(2); *see Lucidore v. N.Y. State Div. of Parole,* 209 F.3d 107, 112 (2d Cir.2000).

V. Conclusion and Order

For the foregoing reasons, the Court adopts the report in its entirety and the Petition is dismissed. The Clerk of the Court is respectfully requested to close this case.

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

Antonio SIERRA, Petitioner,
v.
John BURGE, Superintendent, Respondent.

No. 06 Civ. 14432(DC).
|
Nov. 30, 2007.

Attorneys and Law Firms

Antonio Sierra, Elmira, NY, pro se.

Andrew M. Cuomo, Attorney General of the State of New York, by: Jodi Danzig, Esq., Alyson J. Gill, Esq., Assistant Attorneys General, New York, NY.

MEMORANDUM DECISION

CHIN, District Judge.

***1** *Pro se* petitioner Antonio Sierra petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. After a jury trial in the New York State Supreme Court, New York County, petitioner was convicted on April 18, 2002 on one count of attempted assault in the first degree, New York Penal Law ("P.L.") § 110.00/120.10(1), and one count of assault in the second degree, P.L. § 120.05(2). Petitioner was sentenced as a second felony offender to concurrent terms of imprisonment of ten years and six years, respectively.

Petitioner seeks habeas relief on the following grounds: (1) denial of his due process right to a fair trial because the trial court erred in admitting evidence of prior "bad acts," and (2) prosecutorial misconduct in violation of his rights to a fair trial. For the reasons that follow, the petition is denied.

BACKGROUND

A. *The Facts*

This habeas petition arises from petitioner's conviction for the assault on February 16, 2001 of Lydia Rodriguez ("Rodriguez"). The following is a summary of the facts adduced at trial.

1. *Petitioner's Relationship With Rodriguez*

Petitioner and Rodriguez became friends approximately a year prior to the assault and were never romantically involved with each other. (T1 16-17). At trial, Rodriguez testified that petitioner was in a relationship with a girl "too young for him" and that her concern about that relationship prompted her to introduce petitioner to a woman known as "Green Eyes." (T1 18, 20-21).[1] Petitioner then ended his relationship with the young girl and began a relationship with Green Eyes and later stated to Rodriguez that he intended to marry Green Eyes. (T1 30).

1 T1 refers to the proceedings on March 25, 2002 in Volume 1 of 2 of the Trial Transcript.

2. *The Assault*

On or around February 16, 2001, Rodriguez visited petitioner at his home, where they drank and talked. (T1 23, 28). After some period, petitioner began crying, told Rodriguez that Green Eyes had robbed him, and became very distraught. (T1 32, 119). Petitioner forcibly prevented Rodriguez from leaving the apartment, locked the door, and removed her clothes. (T1 32, 33). Petitioner then proceeded to punch and kick Rodriguez, beat her with a metal rod, and stabbed her in the thigh with the rod. (T1 133-35). Afterwards, petitioner placed duct tape over the wound on Rodriguez's thigh and told her to leave the apartment. (T1 33-40, 133-35). Rodriguez took some of her clothes and left the apartment. (T1 33-40, 133-35).

3. *The Arrest and Post-Miranda Statement*

When Rodriguez reached her apartment, she told her brother that petitioner had beaten her. (T1 40). Rodriguez's brother called the police, and the police took Rodriguez to the hospital. (T1 41, 42). At the hospital, Rodriguez gave a description of petitioner and his address to Detective Edward Connolly ("Connolly"), who went to petitioner's home at 338 West 17th Street with two other officers. (T1 145, 146).

When police knocked on petitioner's door, the lights were off and petitioner did not answer even though Connolly observed petitioner moving around inside the apartment. After Connolly's attempts to gain access to the building were unsuccessful, he waited until petitioner emerged, wearing blood-stained clothes and with a cut finger wrapped in duct tape. (T1 146, 151-54). Petitioner told the police that he had just come down from the fifth floor, although Connolly had just observed him inside the apartment. The police placed petitioner under arrest. (T1 153). Later, a warranted search of petitioner's apartment by the police produced a blood-stained roll of duct tape and blood splatters on the television and floor. (T2 187).

***2** After petitioner received his *Miranda* warnings, he told the police that he had not been with a woman that night, that he cut his finger on a saw earlier that day, and that the stains on his pants were from polyurethane. (T1 161-63).

B. *Procedural History*

1. *The Indictment*

Petitioner was indicted in the Supreme Court, New York County, on one count of attempted assault in the first degree and one count of assault in the second degree.

2. *The Admissibility of Prior Bad Acts Under Molineux*

On March 20, 2002, a *Sandoval*[2] hearing was held regarding the petitioner's prior criminal history and uncharged bad acts. (H1 61).[3] The court ruled that the uncharged bad acts would be more properly dealt with under *Molineux*[4] instead of *Sandoval* because the evidence was relevant to test the defendant's credibility in "a general way." (H1 62). The prosecutor moved *in limine* to elicit testimony from Rodriguez about an alleged relationship between the petitioner and a thirteen-year-old girl to demonstrate that the "inextricably interwoven" testimony explained the motive and provided background information for petitioner's attack on Rodriguez. (H2 4-14). The prosecutor argued that the testimony was necessary to establish the chain of events that led to the assault of Rodriguez and to counter petitioner's theory that Rodriguez was involved in Green Eyes's robbery, which motivated petitioner's assault of Rodriguez. (H2 4-14). Defense counsel objected to any references to those prior bad acts on the ground that they were highly inflammatory, unrelated to motive, dealt with uncharged crimes, and would be extremely prejudicial. (H2 12-15).

2 *People v. Sandoval,* 34 N.Y.2d 371 (1974), sets forth a rule delineating the boundaries of admissible evidence of defendant's prior criminal acts during cross examination, if he chooses to testify, due to the risk of undue prejudice to defendant as a result of immaterial or unnecessary reference to his previous misconduct.

3 H1 refers to the transcript of the *Molineux* hearing on March 20, 2002 in Volume 1 of 2 of the trial transcript. H2 refers to the proceedings on March 21, 2002 in Volume 1 of 2 of the trial transcript.

4 *People v. Molineux,* 168 N.Y. 264 (1901), sets forth the rule that evidence of prior crimes or bad acts is admissible to prove a specific crime if it tends to establish motive, intent, absence of mistake or accident, a common scheme or plan between the commission of two or more crimes, or the identity of the person charged with the commission of the crime.

The trial court suggested that to avoid any "undue prejudice," the prosecutor could avoid references to the thirteen-year-old by referring to "somebody much too young for him." (H2 17). Defense counsel objected to the language "much too young," arguing that its implication would be overly prejudicial. (H2 20). The prosecutor suggested that she could restrict her description of the girl to "too young." (H2 20). The court ruled that to avoid undue prejudice to petitioner, the prosecutor should lead Rodriguez's testimony around references to the girl's age and use the words "too young" to refer to the age of the girl. (VD 12).[5]

5 VD refers to the Voir Dire proceedings on March 22, 2002 in the Trial Transcript volume 1 of 2.

3. *The Trial*

On March 25, 2002, petitioner proceeded to a trial by jury before the Honorable Daniel Fitzgerald.

a. *The Prosecution Establishes a "Chain of Events" Leading to the Assault*

At trial, Rodriguez testified that petitioner was in a relationship with a girl "too young for him" and stated that her concern about that relationship prompted her to introduce petitioner to a woman known as "Green

Eyes," which led petitioner to end his relationship with the "girl." (T1 18, 20-21). According to Rodriguez, petitioner began a relationship with Green Eyes, no longer wanted Rodriguez around his apartment, and called the cops on her in two instances. (T2.22). Rodriguez said that on February 16, 2001, she went to visit petitioner at his apartment where they began drinking. (T1 28). During their conversation, petitioner suddenly became upset, saying that Green Eyes had robbed him. (T1 23-32).

b. *The Post-Arrest Statement*

***3** Shortly after the assault, the police found petitioner with bloodstained pants and a cut covered with duct tape; the victim's wound was also covered with duct tape when she arrived at the hospital for treatment. The police's observations of petitioner's conduct after the assault also provided support for the finding of his guilt. A warranted search of petitioner's apartment by the police produced a blood-stained roll of duct tape and blood splatters on the television and floor. (T2 187).

Connolly testified that Officer Juap Xhunga read petitioner his *Miranda* warnings in Spanish; petitioner responded "yes" to each admonition; and then petitioner signed the *Miranda* Card. (T1 156-57). Connolly stated that petitioner agreed to provide an oral statement after receiving his *Miranda* warnings. (T1 158). As Xhunga translated the questions into Spanish, Connolly asked petitioner about the events in his apartment. (T1 162). Connolly testified that petitioner stated that he was not with a female that night; the cut on his hand was from a saw; the stains on his pants were polyurethane, not blood; and he had just come down from the fifth floor. (T1 162). When told that he was under arrest for assault, petitioner said that he had not assaulted anyone. (T2 213) . [6]

6 T2 refers to proceedings on March 26, 2002 and the summation on April 01, 2002.

c. *Petitioner's Summation*

Petitioner did not testify, but his post-arrest statement had been introduced through Connolly. Although petitioner did not mention to the police in the statement that he had been robbed by Green Eyes, his defense counsel, during his summation, offered the theory that Rodriguez was involved in the robbery by Green Eyes and that the robbery precipitated petitioner's assault of Rodriguez. (T2 410).

d. *The Prosecutor's Summation*

During her summation, the prosecutor, referring to the defense counsel's allegations of Rodriguez's involvement in robbing the petitioner, stated that "while every defendant has a right to remain silent, once he chooses to speak you can closely listen to what he said and failed to say." (T2 428). The prosecutor pointed out that no report was made of any theft during petitioner's post-*Miranda* statement, and that no evidence of theft existed. (T2 428).

Defense counsel requested a curative instruction, arguing that the prosecutor was referring to petitioner's failure to testify. (T2 437). The court responded that the prosecutor's comments were permissible under *People v. Savage,* 50 N.Y.2d 673 (1980), which held that a defendant who, after being given his *Miranda* warnings and having elected to waive his right to silence by making a voluntary post-arrest statement, may be cross-examined on his omission from that statement of exculpatory elements that he later introduces at trial. (T2 438). Further, the court opined that the prosecutor was referring to the contradictions between petitioner's post-*Miranda* statement and his defense counsel's summation regarding Rodriguez's involvement in the robbery. (T2 438). The record does not reflect that a curative instruction was given.

d. *The Verdict*

***4** On April 18, 2002, the jury convicted petitioner on one count of attempted assault in the first degree and one count of assault in the second degree.

e. *Sentencing*

The court sentenced petitioner as a second felony offender to concurrent terms of ten years and six years of imprisonment.

4. *The Appeals*

Petitioner appealed his conviction to the Appellate Division, First Department, on the grounds that the trial court violated his due process right to a fair trial and that the prosecutor violated his constitutional and common law rights to a fair trial. The First Department concluded that the trial court properly exercised its discretion in admitting testimony regarding defendant's relationship with a girl "too young for him," the evidence was relevant

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to explain the chain of events, and the probative value outweighed the prejudicial effect. The First Department also found that the record did not support petitioner's claim that the prosecutor's comments in summation were in response to petitioner's assertion of his right to remain silent. Finally, the First Department determined that petitioner made a voluntary post-arrest statement and did not decline to answer questions, and that the prosecutor's comments were responsive to defense counsel's cross-examination and summation. On September 20, 2005, the First Department affirmed. *People v. Sierra,* 803 N.Y.S.2d 1 (1st Dep't 2005)

By counsel's letter dated October 20, 2005, petitioner sought leave to appeal the First Department's decision to the Court of Appeals, asserting that the trial court's *Molineux* ruling was erroneous and that the prosecutor's summation was prejudicial. The Court of Appeals denied petitioner's application for leave to appeal on October 31, 2005, finding no issue of law to be reviewed. *People v. Sierra,* 5 N.Y.3d 856 (2005). Proceeding *pro se,* petitioner filed the instant § 2254 petition on December 13, 2006.

DISCUSSION

Petitioner raises two claims in his habeas petition: first, that his due process rights to a fair trial were violated by an erroneous evidentiary ruling when the trial court admitted evidence of petitioner's prior bad acts, and second, that the prosecutor, in her summation, violated his constitutional and common law rights by commenting on his omission of facts [7] from his voluntary post-*Miranda* statement. I address each claim in turn.

7 Petitioner claims that the prosecutor commented at trial on petitioner's post-*Miranda* "silence." As petitioner did not remain silent, and voluntarily spoke, his actions are more accurately described as an "omission" rather than "silence."

A. *Standard of Review*

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") placed a restriction "on the power of the federal courts to grant writs of habeas corpus to state prisoners." *Williams v. Taylor,* 529 U.S. 362, 399 (2000). AEDPA sets forth new standards for review that make it more difficult for a habeas petitioner to obtain federal relief from a state conviction. It provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to any judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits unless the adjudication of the claim-
>
> ***5** (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)(1), (2).

The statute has been interpreted to require a petitioner to show not only that clearly established federal law was erroneously or incorrectly applied, but also that the application was unreasonable. *See Williams,* 529 U.S. at 411. As the Second Circuit has explained, "a state court decision is 'contrary to' Supreme Court precedent only if it either 'arrives at a conclusion opposite that reached by [the Supreme Court] on a question of law' or 'confronts facts that are materially indistinguishable from a relevant Supreme Court precedent' and arrives at [the opposite result]." *Lainfiesta v. Artuz,* 253 F.3d 151, 155 (2d Cir.2001) (quoting *Williams,* 529 U.S. at 405).

AEDPA also specifies the applicable standard for federal review of state-court factual findings. A petitioner must demonstrate that a 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(e)(1). The petitioner has the burden to rebut this presumption "by clear and convincing evidence." *Id.*

B. *Evidence of Petitioner's Prior Bad Acts*

1. *Applicable Law*

Federal courts, generally, cannot consider challenges to a state court's evidentiary rulings. *See Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions ."); *see also Roberts v. Scully,* 875 F.Supp. 182, 189 (S.D.N.Y.1993) ("[R]ulings by the state trial court on evidentiary questions are a matter of state law and pose no constitutional

issue."), *aff'd,* 71 F.3d 406 (2d Cir.1995). Even where a petitioner describes an evidentiary error as unduly prejudicial, it must be recognized that "not all erroneous admissions of [unduly prejudicial] evidence are errors of constitutional dimension." *Dunnigan v. Keane,* 137 F.3d 117, 125 (2d Cir.1998).

A decision to admit evidence of a criminal defendant's uncharged crimes or bad acts under *Molineux* constitutes an evidentiary ruling based on state law. *See, e.g., 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). For the admission of evidence by a state trial court to constitute a ground for habeas relief, a petitioner "must demonstrate that the alleged evidentiary error violated an identifiable constitutional right, and, in doing so, a petitioner bears a heavy burden because evidentiary errors generally do not rise to constitutional magnitude." *Copes v. Shriver,* No. 97-2284, 1997 WL 659096, at *3 (S.D.N.Y. Oct. 22, 1997) (citation omitted). For an evidentiary error to rise to the level of a constitutional violation, the petitioner has to show that the alleged error was so prejudicial that it deprived him of a "fundamentally fair trial." *Rosario v. Kuhlman,* 839 F.2d 918, 925 (2d Cir.1988) (citation omitted). For an "erroneous admission of ... unfairly prejudicial evidence to amount to a denial of due process, the item must have been sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it." *Dunnigan,* 137 F.3d at 125 (citation omitted). In assessing materiality, the court must view the evidence "objectively in light of the entire record before the jury." *Collins v. Scully,* 755 F.2d 16, 19 (2d Cir.1985).

2. *Application*

***6** Petitioner argues that: the trial court's *Molineux* evidentiary ruling was incorrect, the ruling subjected him to unreasonable prejudice, the prejudicial effect outweighed any probative value, petitioner's trial was fundamentally unfair, and the First Department misapplied the "chain of events" exception. These arguments are rejected as the trial court's evidentiary ruling was not erroneous and the evidence did not deprive petitioner of a fundamentally fair trial.

a. *Trial Court's Evidentiary Ruling Was Not Erroneous*

First, petitioner's challenge to the admission of the evidence of the prior bad act fails because the trial court's decision was not erroneous. In New York, evidence of prior crimes or bad acts is admissible if relevant to prove something other than the defendant's bad character or criminal propensity. *Allaway v. McGinnis,* 301 F.Supp.2d 297, 300 (S.D.N.Y.2004) (citing *People v. Till,* 87 N.Y.2d 835 (1995)). I agree with the First Department's conclusion that the trial court's decision to admit the testimony was proper because the testimony regarding the prior bad acts was relevant to explain the chain of events that led to, and motivated, petitioner's assault on Rodriguez. *See Till,* 87 N.Y.2d at 837 (holding that testimony of prior bad acts may be admitted into evidence, after a finding by the court that the probative value outweighs any undue prejudice caused by its admission, when "needed as background material" or to "complete the narrative of the episode" that established a motive for and provided the jury with a thorough appreciation for the interwoven events leading up to the defendant's criminal conduct) (citation omitted).

Even assuming that the testimony was admitted in error, the error was harmless because the probative effect of the evidence outweighed any harm or prejudicial effect. *See People v. Alvino,* 71 N.Y.2d 233, 241 (1987) (holding that the admissibility of evidence of prior crimes "turns on the discretionary balancing of the probative value and the need for the evidence against the potential for delay, surprise and prejudice").

b. *Petitioner Was Not Deprived of A Fair Trial*

Second, even assuming the trial court erred in admitting evidence of petitioner's relationship with a girl "too young for him," the error did not rise to the level of a constitutional violation and petitioner's trial was not fundamentally unfair. Errors of state law that rise to the level of a constitutional violation may be corrected by a habeas court, but even an error of constitutional dimension will merit habeas corpus relief only if it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993) (quotation omitted); *see Gutierrez v. McGinnis,* 389 F.3d 300, 305 (2d Cir.2004). Petitioner does not show that the alleged error was unduly prejudicial, as evidenced by its pervasiveness or materiality, to deprive him of a fundamentally fair trial.

***7** The admission of two references to a girl that was "too young for him" was not a pervasive error.

(T2 20). The trial court took sufficient precautions to avoid any undue prejudice to petitioner by limiting the language to the words "too young fo him." (T1 20-21). Further, the trial court suggested that the prosecutor lead Rodriguez through her testimony to avoid any inadvertent references to the girl's age. (T1 20-21). *See United States ex rel. Gonzalez v. DeTella,* 918 F.Supp. 1214 (D.Ill.1996) (finding an error in admission of evidence, but the error was not so bad as to deny due process). Hence, the jury never heard that this was a thirteen-year old girl.

Even assuming there was error, it was harmless, for there was extensive evidence of petitioner's guilt. The evidence before the jury included Rodriguez's testimony, the physical evidence, and the police officers' testimony. Rodriguez had a long-standing relationship with petitioner, knew where he lived, and clearly identified him to the police. The record does not reflect any significant doubt as to the credibility of the officers or the victim. *See Malicoat v. Mullin,* 426 F.3d 1241 (10th Cir.2005) (holding that the evidentiary errors and prosecutorial misconduct did not affect the jury's decision).

After considering all the evidence; on the record, I conclude that the evidential error (assuming it was an error) was not sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it.

C. *Prosecutorial Misconduct During Summation*

1. *Procedural Issues*

Petitioner raises a second basis for habeas relief, that the prosecutor improperly commented on his omission of facts from his voluntary post-*Miranda* statement. Respondent argues, however, that petitioner's second claim was not preserved for appeal and is procedurally barred by C.P.L. § 470.05(2), which requires a party to preserve an issue for appellate review by making a contemporaneous objection. I agree with the First Department's conclusion that the second claim was procedurally barred because defense counsel failed to contemporaneously object at trial. *See People v. Cona,* 49 N.Y.2d 26, 33 (1979) (holding that generally a question of law must be created by a timely, sufficiently specific protest in the trial court); *see also People v. Gray,* 86 N.Y.2d 10 (1995) (affirming three defendants' convictions of drug-related crimes because they failed to preserve the issue of proof of their knowledge of the weight of the drugs with a specific objection at the trial court level); *Coleman v. Thompson,* 501 U.S. 722, 750 (1991) (holding a procedurally defaulted state law claim is barred unless "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").

***8** Here, defense counsel merely requested a curative instruction on the ground that the prosecutor improperly commented on petitioner's failure to testify. The trial court's decision not to grant a curative instruction was proper, as the prosecutor's comments were not in reference to petitioner's failure to testify.

2. *The Merits*

The prosecutor's comments referred to petitioner's omission of facts-that Green Eyes robbed him-from his voluntary post-*Miranda* statement to the police. The discrepancy between petitioner's post-*Miranda* statement and his lawyer's summation opened the door for the prosecutor to comment on petitioner's failure to mention the robbery to the police, even though he did not testify.

Even assuming that petitioner's second claim is not procedurally barred, the prosecutor's comments did not rise to a level of a constitutional violation because the comments were not improper. Moreover, the alleged misconduct was not sufficiently severe to unfairly prejudice petitioner and deprive him of a fair trial.

a. *Applicable Law*

Although petitioner frames his second claim for relief as a general violation of his constitutional and common law rights, it is more accurately addressed as a prosecutorial misconduct claim under *Floyd v. Meachum,* 907 F.2d 347, 353 (2d Cir.1990). The standard of review for a habeas claim based on prosecutorial misconduct is whether the prosecutor engaged in "egregious misconduct ... amount[ing] to a denial of constitutional due process." *Meachum,* 907 F.2d at 353 (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 647-48 (1974)). A reviewing court must determine whether the prosecutor's remarks were "so prejudicial that they rendered the trial in question fundamentally unfair." *Id.* (quoting *Garofolo v. Coomb,* 804 F.2d 201, 206 (2d Cir.1986)). When the purported misconduct consists of comments during summation, the

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relevant question for a reviewing court is whether "the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainright,* 477 U.S. 168, 181 (1986). Improper remarks in summation "must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." *United States v. Young,* 470 U.S. 1, 12 (1985). Mere impropriety of the comments will not meet this standard; the prosecutor's remarks must be "so prejudicial that they render the trial in question fundamentally unfair." *Floyd v.. Meachum,* 907 F.2d at 355. To determine whether a prosecutor's summation caused "substantial prejudice," the Second Circuit has established a three-factor test: (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 355.

b. *Application*

In applying the law to the facts, I first consider, as a threshold issue, whether the prosecutor's comments were improper. Next, I consider whether the comments were substantially prejudicial as to deprive petitioner of a fundamentally fair trial.

i. *Prosecutor's Comment Was Proper*

***9** The prosecutor commented during her summation that "while every defendant has a right to remain silent, once he chooses to speak you can closely listen to what he said and failed to say." (T2 428). Defense counsel failed to contemporaneously object to the prosecutor's comments, which tends to support the conclusion that the comments were not sufficiently prejudicial to warrant an objection. The statement, when viewed within the context of the trial, was not improper. The comments clearly referred to petitioner's omission of facts from the post-*Miranda* statement given voluntarily to the police.

At trial however, defense counsel argued that the prosecutor's comments referred to petitioner's post-*Miranda* silence. Defense counsel further argued that the trial court should apply the *Conyers* rule to the prosecutor's comments during summation. *People v. Conyers,* 52 N.Y.2d 454, 457 (1981) (holding that because of potential for prejudice, use of evidence of defendant's pre-trial silence "for impeachment purposes cannot be justified in the absence of unusual circumstances").

The trial court properly applied the rule from *People v. Savage,* 50 N.Y.2d 673 (1980), which held that a defendant who, after being given his *Miranda* warnings and having elected to waive his right to silence by making a voluntary post-arrest statement, may be cross-examined on his omission from that statement of exculpatory elements that he later introduces at trial. Accordingly, the prosecutor's comments did not violate petitioner's right to a fundamentally fair trial.

ii. *Prosecutor's Comment Did Not Cause Substantial Prejudice*

Even assuming that the prosecutor's comments were improper, they did not rise to a level of a constitutional violation that would result in substantial prejudice to the petitioner under the three-factor test set forth in *Floyd:* the comments were not severe, curative instructions were not necessary, and petitioner's conviction was certain in the absence of the comment.

a. *Severity of the Misconduct*

First, I turn to the severity of the misconduct, the first prong of the three-factor test under *Floyd.* Petitioner's claim of prosecutorial misconduct fails the severity prong because the prosecutor's comments in summation were not severe. The prosecutor made a single and brief reference to an omission of facts by petitioner from his voluntary statement to the police. The prosecutor's comments were limited to her summation only. The prosecutor's reference called for the jury to look at what petitioner said and what he failed to say; the single reference was innocuous and could not have unfairly prejudiced petitioner. *See Portuondo v. Agard,* 529 U.S. 61 (2000) (holding that the prosecutor's comments that accused had an opportunity to hear all other witnesses before testifying and tailored his testimony accordingly did not to violate the accused's constitutional rights); *see also Lundgren v. Mitchell,* 440 F.3d 754 (6th Cir.2006) (holding that prosecutor's repeated comments on petitioner's election to make unsworn statement without testifying "was harmless beyond reasonable doubt"); *Chase v. Berbary,* 404 F.Supp.2d 457 (W.D.N.Y.2005) (holding prosecutor's repeated inflammatory statements during summation did not substantially prejudice defendant's right to fair trial).

b. *Measures Adopted to Cure the Misconduct*

***10** Second, I turn to the measures adopted to cure the misconduct, the second prong of the three-factor test under *Floyd.* Curative instructions were not warranted at trial as defense counsel failed to contemporaneously object to the prosecutor's comments at trial and defense counsel misstated the law applicable to the facts at issue. At trial, defense counsel stated "I have one application" and requested "some curative instructions" because petitioner did not testify. The court responded that the prosecutor was not referring to his lack of testimony but was referring to petitioner's post-arrest statement after he was given his *Miranda* rights. Defense counsel made no further requests and responded to the court "the record will speak for itself." *See People v. Malave,* 700 N.Y.S.2d 827 (1st Dep't 2000) (holding that defendant's claims of prosecutorial misconduct were not preserved for review, since he failed to object and made only unelaborated objections or failed to request further relief); *see also Morgan v. Senkowski,* No. 97-2217, 2003 WL 22170600, at *7 (E.D.N.Y. Aug. 18, 2003) (holding that no misconduct was found where "all of the [prosecutor's] challenged remarks were fairly based on the evidence or fair response to arguments in the defense summation").

c. *Certainty of Conviction Absent the Improper Statements*

Finally, I turn to the certainty of conviction, the last element of the three-prong test. Petitioner's claim of prosecutorial misconduct fails the third prong because, in the absence of the prosecutor's comments, the trial would still have resulted in a conviction due to the overwhelming weight of the evidence presented at trial.

In the absence of the comments by the prosecutor, it is clear that a sufficient basis for the conviction existed in the record. Rodriguez had a long-standing relationship with petitioner, knew where he lived, and clearly identified him to the police. Shortly after the assault, the police found petitioner with bloodstained pants and a cut covered with duct tape; the victim's wound was also covered with duct tape when she arrived at the hospital for treatment. The police's observations of petitioner's conduct after the assault also provided support for the finding of his guilt.

Petitioner argues that the prosecutor's comments unfairly prejudiced petitioner and rendered his trial fundamentally unfair. These arguments are rejected as the petitioner failed to demonstrate that the prosecutor's comments unfairly prejudiced him and that his trial was fundamentally unfair.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is denied. Because petitioner has not made a substantial showing of the denial of a constitutional right, I decline to issue a certificate of appealability. *See* 28 U.S.C. § 2254 (as amended by AEDPA). I certify pursuant to 28 U.S.C. § 1915(a)(3) that any appeal taken from this decision would not be in good faith. The Clerk of the Court is directed to enter judgment accordingly and to close this case.

***11** SO ORDERED.

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

Bernabe ENCARNACION, Petitioner,
v.
Michael McGINNIS, Superintendent of Southport Correctional Facility, Respondent.

No. 01-cv-0586 (GLS-VEB).
|
March 24, 2008.

Attorneys and Law Firms

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Hon. Andrew M. Cuomo, New York Attorney General, Ashlyn H. Dannelly, Esq., Maria Moran, Esq., of Counsel, New York, NY, for the Respondent.

DECISION AND ORDER

GARY L. SHARPE, District Judge.

***1** On April 20, 2001, Bernabe Encarnacion, proceeding *pro se,* filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his New York State conviction and sentence for murder in the second degree and promoting prison contraband in the first degree. (Dkt. No. 1.) On October 26, 2007, Magistrate Judge Victor Bianchini issued a Report and Recommendation ("R & R") recommending that the petition be denied. (Dkt. No. 58.)[1] Pending are Encarnacion's written objections ("Objections") to the R & R. (Dkt. No. 61.) Encarnacion's Objections are lengthy, detailed, and specific. Accordingly, the court has reviewed the R & R *de novo. See Almonte v. New York State Div. of Parole,* No. 04-cv-484, 2006 WL 149049, at *3 (N.D.N.Y. Jan. 18, 2006) ("The district court must review *de novo* those portions of the Magistrate Judge's findings and recommendations that have been properly preserved by compliance with the specificity requirement."). Upon careful consideration of Encarnacion's arguments, the relevant parts of the record, and the applicable law, the court adopts the R & R in its entirety.

1 The Clerk is directed to append the R & R to this decision, and familiarity therewith is presumed.

Because the court agrees with Judge Bianchini's thorough treatment of Encarnacion's petition, and because, upon careful review, the Objections do not call into question the merits of the R & R, it is unnecessary for the court to embark upon a detailed discussion of Encarnacion's claims. *See Shah v. Helen Hayes Hosp.,* 252 Fed. Appx. 364, 366 (2d Cir. Oct. 29, 2007) ("Where a district court has stated that it has considered a party's objections to a magistrate judge's R & R, we have rejected the argument that the mere brevity of the district court's order granting summary judgment based upon that report and recommendation demonstrates the absence of a *de novo* review.") (summary order). It suffices to say that the court adopts Judge Bianchini's reasoning as its own. Accordingly, Encarnacion's petition is denied, as is his motion to amend/correct his petition. Furthermore, because the court finds that Encarnacion has not made a "substantial showing of the denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c)(2), the court declines to issue a certificate of appealability.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Encarnacion's application for habeas corpus relief is DENIED and his petition is DISMISSED; and it is further

ORDERED that Encarnacion's motion to amend/correct his petition is DENIED; and it is further

ORDERED that Magistrate Judge Bianchini's October 26, 2007 Report and Recommendation is adopted in its entirety; and it is further

ORDERED that because Encarnacion has failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability will not be issued; and it is further

ORDERED that the Clerk provide copies of this Decision and Order to the parties.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

VICTOR E. BIANCHINI, United States Magistrate Judge.

I. INTRODUCTION

***2** Petitioner Bernabe Encarnacion, acting *pro se,* commenced this action seeking habeas corpus relief under 28 U.S.C. § 2254. Petitioner is an inmate at the Southport Correctional Facility. In 1998, he was convicted in a New York State court of Murder in the Second Degree and Promoting Prison Contraband in the First Degree and was sentenced to a term of imprisonment. Petitioner contends that his conviction was imposed in violation of his constitutional rights and should therefore be vacated.

This matter was referred to the undersigned by the Honorable Norman A. Mordue, Chief United States District Judge, for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(A) and (B). (Docket No. 48).

II. BACKGROUND

A. Facts

The following factual summary is derived from the state court records.

On August 10, 1996, Daniel Roberts, an inmate in the Auburn Correctional Facility, was fatally injured during a prison yard fight with Petitioner, who was serving a twenty-five year to life sentence after being convicted of Criminal Sale of a Controlled Substance in the First Degree in 1990. (T[1] at 60-61, 94, 264; S[2] at 5-6). The fight was witnessed by several other inmates and corrections officers. There was no dispute regarding the fact that Petitioner was the only person fighting with the victim, who died from severe stab wounds shortly after the conclusion of the fight.

1 References preceded by "T" are to the transcript pages of Petitioner's trial proceedings.

2 References preceded by "S" are to the transcript pages of Petitioner's sentencing proceedings.

A Cayuga County Grand Jury returned Indictment Number 97-078, charging Petitioner with Murder in the Second Degree, in violation of New York Penal Law ("NYPL") § 125.25(1);[3] and Promoting Prison Contraband in the First Degree, in violation of NYPL § 205.25(2).

3 Unless otherwise indicated, all references to the N.Y.P.L. are to McKinney 1998.

B. State Trial Court Proceedings

The Honorable Robert A. Contiguglia, Cayuga County Court Judge, presided over Petitioner's trial proceedings. Petitioner was represented at trial by Douglas Bates, Esq. The trial commenced on February 9, 1998. On February 17, 1998 the jury found Petitioner guilty of both the murder and promoting prison contraband charges. (T at 565).

On March 31, 1998, Petitioner was sentenced as a second felony offender to an indeterminate term of twenty-five (25) years to life in prison for his murder conviction and three and half (3½) to seven (7) years for the prison contraband conviction. (S at 6-7). Petitioner's sentences were to run concurrently to each other and to run consecutively to the sentence he was presently serving. (*Id.*)

C. State Appellate Proceedings

Petitioner, represented by James Leone, Esq., appealed his conviction to the Appellate Division, Fourth Department, of the New York State Supreme Court. On appeal, Petitioner asserted the following two points: (1) that the conviction was against the weight of the evidence, and (2) that he was denied a fair trial because of prejudicial comments made by the prosecutor. Petitioner also submitted a *pro se* supplemental brief asserting two additional claims: (3) that the prosecutor used false statements and evidence to secure his conviction, and (4) that he was denied effective assistance of trial counsel.

***3** In a decision issued on February 16, 2000, the Appellate Division, Fourth Department, affirmed Petitioner's conviction. *People v. Encarnacion,* 269 A.D.2d 779, 703 N.Y.S.2d 412 (4th Dep't 2000). Petitioner's application for leave to appeal to the Court of Appeals was denied on March 28, 2000. *People v. Encarnacion,* 94 N.Y.2d 918 (2000). Petitioner sought leave to renew his appeal from both the Appellate Division and the Court of Appeals. His applications were denied on November 13, 2000 and December 21, 2000 respectively.

Thereafter, on December 8, 2000, Petitioner filed a petition with the Appellate Division, Fourth Department for a writ of error *coram nobis,* claiming ineffective assistance of appellate counsel. The Fourth Department denied this petition on February 7, 2001. *People v. Encarnacion,* 280 A.D.2d 1011.

In February of 2001, Petitioner filed a motion to vacate judgment pursuant to C.P.L. § 440.10 and § 440.30. Petitioner alleged that he uncovered new evidence and asked for DNA testing of the blood on his and the victim's clothing. On March 13, 2001, Judge Contiguglia denied his motion. Petitioner appealed that denial to the Fourth Department. The Fourth Department denied that motion on July 25, 2001.

D. Federal Habeas Corpus Proceedings

Petitioner, proceeding *pro se,* commenced this action on April 20, 2001, by filing a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Docket No. 1). Petitioner asserted five grounds in support of his Petition: (1) insufficiency of the evidence; (2) prosecutorial misconduct related to closing argument; (3) violation of due process rights; (4) ineffective assistance of trial counsel; and (5) ineffective assistance of appellate counsel. (Docket No. 1).

On September 30, 2002, Petitioner attempted to amend his petition in a court filing, however, the attempt was denied due to Petitioner's failure to attach a proposed amended petition to the motion. (Docket No. 14). Petitioner then made three (3) additional attempts to amend his petition, which were again denied because he failed to attach a proposed amended petition. (Docket Nos. 15, 16, 19).

Thereafter, Petitioner made a motion to stay his habeas proceedings while he pursued a writ of error *coram nobis* in the state courts. This motion was granted and these proceedings were stayed from September of 2004 through December of 2004. (Docket Nos. 22, 27).

Thereafter, Petitioner made three (3) formal motions to amend his petition on June 17, 2005, January 5, 2006, and May 17, 2006. (Docket Nos. 29, 33, 38). On each of those three occasions, Petitioner's motion to amend was denied by the Honorable George H. Lowe, United States Magistrate Judge, due to Petitioner's failure to attach a proposed amended petition. (Docket Nos. 32, 37, 42). Presently before this Court is Petitioner's fourth motion to amend his petition.[4] For the first time, Petitioner has included a proposed amended petition. (Docket No. 53). Respondent submitted his opposition to Petitioner's proposed amended petition on September 10, 2007. (Docket No. 54). Thereafter, Petitioner filed his reply to Respondent's opposition on October 11, 2007. (Docket No. 57).

4 As discussed above, the pending motion represents Petitioner's eighth attempt to amend his Petition.

***4** For the reasons that follow, the Court recommends that the original Petition for habeas relief and Petitioner's Motion to Amend/Correct the Petition be DENIED.

III. DISCUSSION

A. Federal Habeas Corpus Standard

Federal habeas corpus review of a state court conviction is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, federal courts must give substantial deference to a state court determination that has adjudicated a federal constitutional claim "on the merits." 28 U.S.C. § 2254(d); *Sellan v. Kuhlman,* 261 F.3d 303, 309-10 (2d Cir.2001). The Second Circuit has stated that an "adjudication on the merits" is a "substantive, rather than a procedural, resolution of a federal claim." *Sellan,* 261 F.3d at 313 (quotation omitted). The Second Circuit has also held that even a one-word denial of a petitioner's claim is sufficient to constitute an "adjudication on the merits" for purposes of AEDPA. *Id.* at 312-313.

Specifically, AEDPA requires that where a state court has adjudicated the merits of a Petitioner's federal claim, habeas corpus relief may not be granted unless the state court's adjudication:

> (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).

While both AEDPA and its predecessor statute recognize that a presumption of correctness shall apply to state court findings of fact, *Whitaker v. Meachum,* 123 F.3d 714, 715 n. 1 (2d Cir.1997), AEDPA also requires a Petitioner to rebut that presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *LanFranco v. Murray,* 313 F.3d 112, 117 (2d Cir.2002). A presumption of correctness applies to findings by both state trial and appellate courts. *Galarza v. Keane,* 252 F.3d 630, 635 (2d Cir.2001); *Whitaker,* 123 F.3d at 715 n. 1.

In *Williams v. Taylor,* 529 U.S. 362, 413 (2000), the Supreme Court defined the phrases "contrary to" and "unreasonable application of" clearly established federal law. A state court decision is "contrary to clearly established federal law ... if the state court arrives at 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 Court] has on a set of materially indistinguishable facts." *Id.*

A state court decision involves "an unreasonable application of" Supreme Court case law if it "identifies the correct governing legal principle from [the Court's] decisions but unreasonably applies that principle to the particular facts of [a] prisoner's case." *Id.*

Under this standard, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. In order to grant the writ there must be "some increment of incorrectness beyond error," although "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." *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir.2000) (internal quotation marks omitted).

B. Petitioner's Claims in Support of Original Petition

***5** As set forth above, Petitioner asserts five (5) claims in support of his original petition for habeas corpus relief. Each of the five claims will be addressed in turn.

1. Sufficiency of the Evidence

Petitioner challenges the constitutional sufficiency of the evidence against him.[5] A habeas petitioner challenging the sufficiency of the evidence bears "a very heavy burden." *Ponnapula v. Spitzer,* 297 F.3d 172, 179 (2d Cir.2002) (quotation marks omitted); *Einaugler v. Supreme Court of New York,* 109 F.3d 836, 840 (2d Cir.1997) (quotation marks omitted).

5 Petitioner also references the fact that the jury's verdict was allegedly against the weight of the evidence. Although this Court will discuss and analyze the sufficiency of the evidence claim, Petitioner's weight of the evidence claim is not cognizable on federal habeas review and must be dismissed. *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); *Garrett v. Perlman,* 438 F.Supp.2d 467, 470 (S.D.N.Y.2006) (same); *Douglas v. Portuondo,* 232 F.Supp.2d 106, 116 (S.D.N.Y.2002) (same); *Garbez v. Greiner,* No. 01 Civ. 9865, 2002 WL 1760960, at *8 (S.D.N.Y. July 30, 2002).

A habeas challenge to the sufficiency of the evidence "does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' " *Jackson v. Virginia,* 443 U.S. 307, 318-19, 99 S.Ct. 2781 (1979) (quoting *Woodby v. INS,* 385 U.S. 276, 282, 87 S.Ct. 483, 17 L.Ed .2d 362 (1966)). Rather, "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." *Id.* (emphasis in original).

Thus, a habeas court must uphold a conviction unless, upon the record evidence adduced at trial, no rational trier of fact could have found that the prosecution established the defendant's guilt beyond a reasonable doubt. *See id.; accord Ponnapula,* 297 F.3d at 179 ("[W]e review the evidence in the light most favorable to the State and [hold that] the applicant is entitled to habeas corpus relief only if no rational trier of fact could find proof of guilt beyond a reasonable doubt based on the evidence adduced at trial.").

In the present case, Petitioner argues that there was no blood or fingerprint evidence to support his conviction. As noted above, Petitioner's conviction was for Murder

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in the Second Degree and Promoting Prison Contraband in the First Degree. The legal sufficiency of the evidence supporting each count will be addressed in turn.

a. Murder

The jury convicted Petitioner of Murder in the Second Degree. The Appellate Division rejected Petitioner's contention that the verdict with respect to this charge was against the weight of the evidence. *Encarnacion,* 269 A.D.2d at 779.

Under the New York Penal Law, "[a] person is guilty of murder in the second degree when with intent to cause the death of another person, he causes the death of such person or of a third person." N.Y.P.L. § 125.25(1). At trial, the prosecution presented testimony from corrections officers who observed Petitioner fighting with the victim, and Petitioner admitted that he alone was the person fighting with the victim. (T at 439, 447, 449, 60-61, 94, 150-151, 160). There was also testimony from a corrections officer who observed an ice-pick type weapon fly from behind the inmates and land on the ground. (T at 64, 84-85). The medical testimony established that the victim died from stab wounds. (T at 264). It was further established that the rounded ice-pick type weapon recovered was consistent with the weapon that caused the victim's stab wounds. (T at 264-265). The medical testimony also revealed that a great deal of force was necessary to cause the victim's injuries. (T at 266).

***6** With respect to Petitioner's argument that there was no blood from the victim found on his clothing or on the weapon, the medical evidence established that because of the specific nature of the injury, there may not have been any blood on the instrument or on the perpetrator. [6] (T at 267-268). Moreover, the medical evidence established that the victim would have been unable to function with such a wound for more than thirty seconds to a minute. (T at 269).

6 According to the medical testimony, because the skin is very elastic, when a weapon divides the skin, the elasticity will hold the skin close to the weapon. Therefore, when the weapon is withdrawn, "[t]here may be some wipeage" of the blood or other material off of the weapon. (T at 267).

Based upon the medical testimony, standing alone, any rational trier of fact could have concluded that the stabbing occurred during the fight and that Petitioner, as the lone person fighting with the victim, intentionally caused the victim's death. Additionally, the force used to cause the victim's injuries indicates the intent to cause those injuries.

Petitioner's assertions that the lack of blood or fingerprint evidence establishes the insufficiency of the evidence to support the verdict are unavailing. *See Padro v. Strack,* 169 F.Supp.2d 177, 180 (S.D.N.Y.2001) (finding that evidence was sufficient to support conviction even though forensic evidence was "inconclusive" as to petitioner's indentity).

In sum, viewing the evidence in the light most favorable to the prosecution, Petitioner has failed to establish that no rational trier of fact could have found him guilty beyond a reasonable doubt. *Ponnapula,* 297 F.3d at 179; *see also Maldonado v. Scully,* 86 F.3d 32, 35 (2d Cir.1996) (dismissing habeas claim because "assessments of the weight of the evidence or the credibility of witnesses are for the jury and not grounds for reversal on appeal; stating that it must defer to the jury's assessments of both of these issues).

b. Promoting Prison Contraband

Petitioner was also convicted of Promoting Prison Contraband in the First Degree. The prison contraband referred to in this charge was the ice pick type weapon used in the murder. Under the New York Penal Law, "[a] person is guilty of promoting prison contraband in the first degree when ... [b]eing a person confined in a detention facility, he knowingly and unlawfully makes, obtains or possesses any dangerous contraband." N.Y.P.L. § 205.25(2).

As set forth above, the prosecution established through medical evidence that the victim died from stab wounds. (T at 264). Petitioner admitted that he was the only person fighting with the victim. (T at 439, 447, 449). Further, a corrections officer testified to observing an ice-pick type weapon, which was later recovered, fly from the area of the fight. (T at 64, 84-85). After the fight, the victim collapsed and died, apparently of wounds inflicted by the ice-pick. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that Petitioner was the individual who wielded (and thus possessed) that weapon and that the weapon was dangerous. *Ponnapula,* 297 F.3d at 179.

For the foregoing reasons, this Court finds that Petitioner is not entitled to relief based upon his sufficiency of the evidence claim and it should be DISMISSED.

2. Prosecutorial Misconduct

***7** In his second claim for relief, Petitioner alleges that the prosecution made an improper statement during summation. Specifically, Petitioner objects to the following statement made by the prosecutor: "[t]ell this Defendant with your verdict that this is not acceptable; that he did not have the right to be Daniel Roberts' judge, jury, or executioner." (T at 501). Respondent argues that this claim is procedurally defaulted.

a. Procedural Bar

When addressing this claim on direct appeal, the Appellate Division Fourth Department found that this was "not preserved for [their] review (*see,* CPL 470.05[2]), and [they] decline[d] to exercise [their] power to review that contention as a matter of discretion in the interest of justice (*see,* CPL 470.15[6][a])." The Appellate Division's ruling in this regard was based upon section 470.05(2) of the New York Criminal Procedure Law, which is commonly known as the "contemporaneous objection" rule.

"Where the highest state court that rendered a judgment in the case 'clearly and expressly states that its judgment rests on a state procedural bar,' such procedural default constitutes independent and adequate state grounds to deny habeas relief." *Corney v. Henri,* 05-CV-338, 2007 WL 1388118, at *5 (N.D.N.Y. May 9, 2007) (quoting *Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)); *see also Glenn v. Bartlett,* 98 F.3d 721, 724 (2d Cir.1996); *Levine v. Commissioner of Corr. Servs.,* 44 F.3d 121, 126 (2d Cir.1995). In such cases, a federal court is generally barred from reviewing the petitioner's claims.

The Second Circuit has held that New York's contemporaneous objection rule is an "adequate and independent" state ground for procedural default in cases where defense counsel has failed to object. *See Velasquez v. Leonardo,* 898 F.2d 7, 9 (2d Cir.1990) (violation of New York's contemporaneous objection rule is an adequate and independent state ground); *Garcia v. Lewis,* 188 F.3d 71, 79 (2d Cir.1999); *Murray v. Carrier,* 477 U.S. at 485-92, 106 S.Ct. 2639.

A petitioner may obtain habeas review of an otherwise procedurally defaulted claim only if he can show "cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice." *Id.,* 489 U.S. at 262, 109 S.Ct. 1038 (internal citations omitted); *accord,* e.g., *Fama v. Commissioner of Corr. Servs.,* 235 F.3d 804, 809 (2d Cir.2000). In order to show a "fundamental miscarriage of justice," *Harris,* 489 U.S. at 262, 109 S.Ct. 1038, a petitioner must demonstrate "actual innocence." *Calderon v. Thompson,* 523 U.S. 538, 559, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998); *accord Washington v. James,* 996 F.2d 1442, 1447 (2d Cir.1993), cert. denied, 510 U.S. 1078, 114 S.Ct. 895, 127 L.Ed.2d 87 (1994).

It is undisputed that Petitioner's trial counsel did not object to this statement. As such, due to the fact that there was no contemporaneous objection made to the statement in question, the prosecutorial misconduct claim is procedurally barred.

***8** Having found that the state has clearly and expressly stated that its judgment rested on an adequate and independent state procedural bar, namely, the contemporaneous objection rule, this Court is precluded from reviewing the claim unless the petitioner demonstrates both cause for the procedural default and resulting prejudice, or alternatively, that a fundamental miscarriage of justice would occur absent federal court review. *St. Helen v. Senkowski,* 374 F.3d 181, 184 (2d Cir.2004) ("In the case of procedural default ... [federal courts] may reach the merits of the claim 'only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent.' ") (quoting *Bousley v. United States,* 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998))

Petitioner suggests that the procedural bar should be excused based upon ineffective assistance of counsel. Specifically, Petitioner argues that his trial counsel failed to object to the statement in question because he was angry with Petitioner for a physical altercation that occurred during the summation.[7] However, a review of the transcript reveals that even after this altercation, Attorney Bates continued to vigorously represent Petitioner. Mr. Bates even spoke in defense of his client's actions to the trial court, suggesting that a language barrier was the cause of the altercation. (T at 476).

7 During Petitioner's trial counsel's closing statement, Petitioner stood up, picked up a chair, walked towards his attorney and struck him with the chair. Petitioner was wrestled to the ground and subdued. His attorney was not seriously injured and thereafter continued on with the closing statement. (T at 470).

Therefore, Petitioner has not alleged any facts that would constitute cause for default. In addition, for the reasons discussed below, Petitioner has not demonstrated that he has suffered " 'actual prejudice' resulting from the alleged error" of his counsel in failing to object to the statement in question. *Bousley v. United States,* 523 U.S. 614, 630, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (quoting *United States v. Frady,* 456 U.S. 152, 167-168, 102 S.Ct. 1584, 1594-1595, 71 L.Ed.2d 816 (1982)).

Finally, Petitioner has not come forward with any "new evidence" to support a claim that he is "actually innocent" of the charges on which he was convicted, as required to establish that denial of the claim as procedurally barred would result in a fundamental miscarriage of justice. *See Schlup v. Delo,* 513 U.S. at 327, 115 S.Ct. 851. Accordingly, the procedural default bars federal review of Petitioner's claims challenging the prosecutor's summation comment and it should be DISMISSED.

b. Merits of Prosecutorial Misconduct Claim

Even assuming *arguendo* that Petitioner's claim is not procedurally barred or that the procedural bar could be excused, the claim itself is without merit.

The habeas court's scope of review as to claims of prosecutorial misconduct is quite limited. "[P]rosecutorial misconduct cannot give rise to a constitutional claim unless the prosecutor's acts constitute 'egregious misconduct.' " *Miranda v. Bennett,* 322 F .3d 171, 180 (2d Cir.2003); *see also Floyd v. Meachum,* 907 F.2d 347, 353 (2d Cir.1990) ("The appropriate standard of review for a claim of prosecutorial misconduct on a writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power.") (internal quotation marks and citations omitted); *accord Tankleff v. Senkowski,* 135 F.3d 235, 252 (2d Cir.1998).

***9** The Supreme Court accordingly has instructed federal habeas courts reviewing claims of prosecutorial misconduct brought by state petitioners to distinguish between "ordinary trial error of a prosecutor and that sort of egregious misconduct ... amount[ing] to a denial of constitutional due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 647-48, 94 S.Ct. 1868 (1974) (citations omitted); *accord Floyd,* 907 F.2d at 353.

Donnelly' s standard requires the federal habeas court to ask whether " 'the prosecutorial remarks were so prejudicial that they rendered the trial in question fundamentally unfair.' " *Floyd,* 907 F.2d at 353 (quoting *Garofolo v. Coomb,* 804 F.2d 201, 206 (2d Cir.1986)) (citing *Donnelly,* 416 U.S. at 645 and, inter alia, *United States v. Modica,* 663 F.2d 1173 (2d Cir.1981), cert. denied, 456 U.S. 989 (1982)); *see also Garofolo,* 804 F .2d at 206 (noting that harmless error doctrine may be applicable to prosecutorial misconduct involving statements to the jury) (citing *United States v. Hasting,* 461 U.S. 499, 510-12 (1983)).

Given the narrow scope of habeas review of prosecutorial misconduct claims, a habeas petitioner must show "that he suffered actual prejudice because the prosecutor's comments had a substantial and injurious effect or influence in determining the jury's verdict." *Tankleff v. Senkowski,* 135 F.3d 235, 252 (2d Cir.1998) (quoting *Bentley v. Scully,* 41 F.3d 818, 823 (2d Cir.1994) (internal quotation marks and citation omitted in original)).

In making the determination of whether a defendant has suffered "actual prejudice" as a result of the prosecutorial misconduct, the Second Circuit has examined " 'the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements.' " *Tankleff,* 135 F.3d at 252 (quoting *Floyd,* 907 F.2d at 355 (quoting *United States v. Modica,* 663 F.2d at 1181) (internal quotation marks omitted); citing *United States v. Parker,* 903 F.2d 91, 98 (2d Cir.1990)).

As set forth above, Petitioner asserts that the prosecutor's statement: "[t]ell this Defendant with your verdict that this is not acceptable; that he did not have the right to be Daniel Roberts' judge, jury, or executioner" was misconduct depriving him of a fair trial. (T at 501). [8]

8 Petitioner also makes brief mention that "the prosecutor told the jury that the blood found on Petitioner's clothing is deceased [sic] blood (T.P. 500)." However, a review of the transcript reveals

> that the prosecutor actually said: "... the Defendant didn't have a single cut, stab wound or injury and yet he had blood on his jacket, his pants and his boots." (T at 500). In stating this, the prosecutor did not misstate evidence and therefore this is not even arguable prosecutorial misconduct.

"Statements made by prosecutors in their summation, even if seemingly improper, do not necessarily exceed 'the broad range of rhetorical comments allowed in closing arguments.' " *Jones v. Keane,* 250 F.Supp.2d 217, 237 (W.D.N.Y.2002) (quoting *Harper v. Kelly,* 704 F.Supp. 375, 379 (S.D.N.Y.1989), *rev'd on other grounds,* 916 F.2d 54 (2d Cir1990) and citing *Donnelly,* 416 U.S. at 646-47 (isolated passages of a prosecutor's argument, even if imperfect, do not suggest that a jury will be so profoundly affected so as to affect the fundamental fairness of a trial)).

Although the statement was question was perhaps intemperate, considering the evidence as a whole, the statement in question fell within "broad range of rhetorical comments allowed in closing arguments." *Jones,* 250 F.Supp. at 237.

***10** Moreover, even if this Court assumes that the prosecutor's statement was improper, Petitioner has failed to show resulting prejudice from the brief and isolated remark. *See United States v.. Mitchell,* 328 F.3d 77, 84 (2d Cir.2003) (prosecutor's comments, even if improper, were "not prejudicial in view of the fact that they were brief and isolated and in light of the substantial evidence of guilt adduced by the government").

Indeed, the certainty of Petitioner's conviction absent the prosecutor's statements precludes any argument of actual prejudice. As set forth above, based on the overwhelming evidence of Petitioner's guilt, any rational trier of fact would have found Petitioner guilty of the crimes charged. *See Collins v. Artus,* 496 F.Supp.2d 305, 319 (S.D.N.Y.2007) (petitioner was not entitled to relief even though summation statements were improper, due to overwhelming evidence of guilt).

Accordingly, assuming for purposes of argument that Petitioner's prosecutorial misconduct claim was not procedurally barred, it is without merit and should be DISMISSED.

3. Presentation of False Evidence

In Petitioner's third ground for habeas relief, Petitioner claims that the trial court deprived him of his right to a fair trial by allowing the prosecution to use false evidence to secure his conviction.

Specifically, Petitioner argues that the prosecutor's assertion that an ice-pick type weapon was the murder weapon was false because no blood was found on the weapon. (Docket No. 1 at 6). Petitioner also asserts, without factual support, that "[t]he people [sic] witnesses [sic] most [sic] of them testified falsely." (Docket No. 1 at 6).

However, this claim lacks a sufficient factual basis to warrant habeas relief. As the Appellate Division noted, "[t]he record contains no evidence that the prosecutor knowingly introduced false testimony." *Encarnacion,* 269 A.D.2d at 780. In fact, the medical testimony specifically discussed the lack of blood evidence found on the recovered weapon and the reasons for the absence thereof. *See* FN. 6. The medical evidence further established consistencies between the ice-pick's dimensions and the victim's fatal wounds. (T at 264-269).

Additionally, Petitioner's unsupported allegation of perjury is insufficient as a matter of law. *Anekwe v. Phillips,* 05-CV-2184, 2007 WL 1592973, at *6 (E.D.N.Y. May 31, 2007) (habeas petitioner has initial "burden of demonstrating, by a preponderance of evidence, that the witness committed perjury, and, in determining whether perjury occurred, a court must 'weigh all the evidence of perjury before it.' " (quoting *Ortega v. Duncan,* 333 F.3d 102, 106-07 (2d Cir.2003)).

Accordingly, Petitioner's argument with respect to this claim is based on conclusory assertions for which habeas relief cannot be granted and the claim should therefore be DISMISSED.

4. Ineffective Assistance of Trial Counsel

Petitioner's fourth claim alleges that his trial counsel was unconstitutionally ineffective. Petitioner asserts that his trial counsel was ineffective for failing to: (a) have DNA tests performed on clothing worn by Petitioner and the victim; (b) object to the prosecutor's alleged prejudicial remarks in closing; (c) object to the admission of Petitioner's clothing into evidence; (d) properly use a peremptory challenge with respect to particular jurors; (e) offer testimony and properly interview certain witnesses;

(e) explore potentially exculpatory evidence; and (f) secure a blood sample of Petitioner for DNA tests. (Docket No. 1 at 6).

***11** To prevail on a claim of ineffective assistance of counsel within the framework established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984), a habeas petitioner must satisfy a two-part test. First, the petitioner must demonstrate that counsel's performance was so deficient that counsel was not functioning as "counsel" within the meaning of the Sixth Amendment to the Constitution. *Id.* at 688. In other words, a petitioner must show that his attorney's performance "fell below an objective standard of reasonableness." *Id.*

Second, the petitioner must show that counsel's deficient performance prejudiced him. *Id.* at 694. To establish the "prejudice" prong of the *Strickland* test, a petitioner must show that a "reasonable probability" exists that, but for counsel's error, the outcome of the trial would have been different. *Id.* at 694. The issue of prejudice need not be addressed, however, if a petitioner is unable to demonstrate first that his counsel's performance was inadequate. "[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." *Id.* at 697.

On direct appeal, the Appellate Division denied Petitioner's ineffective assistance of counsel claim, finding that Petitioner "received meaningful representation." 703 N.Y.S.2d at 412. For the following reasons, this Court finds that Petitioner has failed to demonstrate that the Appellate Division's decision in this regard was contrary 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.

a. DNA Testing

With respect to the decision not to perform DNA testing on the blood-stained clothing, given the evidence presented at trial, counsel could reasonably have believed that such testing would have revealed evidence adverse to Petitioner. For example, Petitioner has never presented any plausible argument that the victim sustained his fatal injuries at the hands of another. As such, counsel's strategic choice not to obtain DNA testing does not constitute ineffective assistance of counsel. *See Sturdivant v. Barkley,* No. 04-CV-5659, 2007 WL 2126093, at *7 (E.D.N.Y. July 24, 2007) (finding that "defense counsel's strategic decision not to seek DNA testing on the bags of cocaine was both reasonable and proper given that it was likely that the testing would have revealed adverse evidence"); *cf. also Johnson v. People of State of New York,* 02-CV-3752, 2003 WL 23198785, at *15 (E.D.N.Y. Nov. 5, 2003) ("The record is devoid of any request by defense counsel for additional forensic testing or claim of prejudice on the ground that no further examinations were done. Strategically this position made sense since it was likely that testing would have revealed adverse evidence.").

b. Lack of Objection to Summation Statement

***12** With respect to the lack of an objection to the prosecutor's "judge, jury, executioner" comment during summation, it is likely that such an objection would have been overruled, for the reasons set forth above with respect to Petitioner's prosecutorial misconduct claim. Specifically, although the rhetoric expressed in the statement may have been somewhat excessive, the trial court likely would have concluded that it fell within "broad range of rhetorical comments allowed in closing arguments." *Jones,* 250 F.Supp. at 237. In any event, as noted above, the lack of an objection was not prejudicial as the prosecutor's remark was brief and isolated and the evidence against Petitioner was strong. *See United States v. Mitchell,* 328 F.3d 77, 84 (2d Cir.2003) (holding that strong evidence of guilt is sufficient to outweigh arguable prejudice arising from prosecutor's brief and isolated remarks).

c. Admission of Petitioner's Clothing

Petitioner also suggests that defense counsel should have objected to the admission into evidence of Petitioner's bloody clothing. Specifically, Petitioner claims that the clothing should not have been admitted without DNA testing to determine the source of the blood. However, for the reasons stated above, counsel's decision not to insist on DNA testing was a reasonable strategic choice, given the likelihood that the testing would have produced incriminating evidence. Moreover, Petitioner fails to articulate any basis upon which his trial counsel could have raised a successful objection to the admission of the clothing into evidence.

d. Jury Selection

Petitioner further contends that trial counsel should have used peremptory challenges to strike two jurors. Although Petitioner alleges that two of the jurors made statements during *voir dire* that, if true, would arguably have indicated possible bias, Petitioner does not provide an evidentiary record to support his claims regarding the jurors' statements.[9]

9 It appears, based upon the record provided to this Court, that the jury selection proceedings were never reduced to a written transcript.

In any event, the decision not to seek the removal of the potential jurors through the exercise of a peremptory challenge is generally a strategic choice on counsel's part, which does not rise to the level of constitutional error. *Tolliver v. Greiner,* No. 02-CV-570, 2005 WL 2179298, at *6 (N.D.N.Y. Sep. 8, 2005) (citing *Doleo v. Reynolds,* No. 00-CV-7927, 2002 WL 922260, at *4 (S.D.N.Y. May 7, 2002) ("Strategies as to the exercise of peremptories are matters of counsel's intuition, and do not rise to the level of constitutional error."); *Romero v. Lynaugh,* 884 F.2d 871, 878 (5th Cir.1989) ("The selection of a jury is inevitably a call upon experience and intuition.... Written records give us only shadows for measuring the quality of such efforts.").

In sum, as a matter of both state and federal law regarding the evaluation of claims of ineffective assistance of trial counsel, special deference is owed to the reasonable strategic decisions made by counsel. *People v. Benevento,* 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (N.Y.1998) ("[A] reviewing court must avoid confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis. Rather, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings.... To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice.") (internal citations, quotations and quotation marks omitted); *Strickland v. Washington,* 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (holding that the strategic choices of trial counsel "are virtually unchallengable" in habeas corpus proceedings). In the present case, this Court finds that Petitioner's unsupported allegations do not meet this difficult standard. Moreover, as discussed above, given the strong evidence of guilt, any arguable error was not prejudicial to Petitioner.

e. Failure to Offer Testimony and Interview Witnesses

***13** Petitioner asserts that defense counsel failed to investigate certain, unspecified "exculpatory leads" and did not properly investigate or interview potential defense witnesses. However, Petitioner does not identify many of the potential witnesses nor state with particularity how the testimony or evidence in question would have been exculpatory.

"Such undetailed and unsubstantiated assertions that counsel failed to conduct a proper investigation have consistently been held insufficient to satisfy either *Strickland* prong." *Polanco v. United States,* Nos. 99 Civ. 5739(CSH), 94 CR. 453(CSH), 2000 WL 1072303, at *10 (S.D.N.Y. Aug. 3, 2000) (citing, *inter alia, Matura v. United States,* 875 F.Supp. 235, 237 (S.D.N.Y.1995) ("Petitioner's bald assertion that counsel should have conducted a more thorough pretrial investigation fails to overcome the presumption that counsel acted reasonably."); *Lamberti v. United States,* No. 95 Civ. 1557, 1998 WL 118172, *2 (S.D.N.Y. Mar. 13, 1998) (rejecting Sixth Amendment claim based on failure to investigate or communicate with petitioner as "vague and conclusory. [The allegations] do not identify counsel's asserted failings with any specificity or show how any different conduct might have changed the result. Such allegations cannot sustain a petition for habeas corpus."); *United States v. Vargas,* 871 F.Supp. 623, 624 (S.D.N .Y.1994) (rejecting ineffective assistance claim based on failure to investigate and failure to call character witnesses where there was "no evidence that avenues suggested by the client which might have altered the outcome were ignored" and petitioner "fail[ed] to identify what persuasive character witnesses would have been involved, or to show that counsel was unwise in not opening up such witnesses to cross-examination"); *Madarikan v. United States,* No. 95 Civ.2052, 1997 WL 597085, at *1 (E.D.N.Y. Sept. 24, 1997) (denying ineffective assistance claim based on failure to investigate or interview witnesses where petitioner's allegations of ineffective assistance were "conclusory, and g[a]ve no indication as to what exculpatory evidence may have been revealed by an investigation"); *United States v. Schaflander,* 743 F.2d 714, 721 (9th Cir.1984) (denying as

merely "conclusory" ineffective assistance claim based on counsel's failure to interview witnesses where the claim was unsupported by affidavits or statements from any witness or counsel)). This claim of ineffective assistance is simply too vague and conclusory to state a proper ground for habeas relief and, as such, must be dismissed.

f. Blood Sample

In his final claim of ineffective assistance of trial counsel, Petitioner asserts that his attorney should have obtained blood from Petitioner and tested the same to determine the source of the blood on Petitioner's clothing. This claim is without merit for the reasons discussed above with respect to DNA testing, namely, that counsel may reasonably have believed that any such testing was more likely to be incriminating than exculpatory.

***14** For the foregoing reasons, Petitioner's ineffective assistance of counsel claim should be DENIED.

5. Ineffective Assistance of Appellate Counsel

In his fifth claim for relief, Petitioner alleges that he was denied the effective assistance of appellate counsel. In support of this claim, Petitioner contends that his appellate counsel improperly failed to (a) raise an ineffective assistance of trial counsel claim on direct appeal and (b) raise a claim based upon the alleged destruction of the actual murder weapon by the prosecution prior to trial.

As noted above, to prevail on an ineffective assistance of counsel claim, Petitioner must satisfy the two-part test set forth in *Strickland.* 466 U.S. 668. First, Petitioner must demonstrate that his "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. Second, he must show that counsel's deficient performance prejudiced his defense. *Id.* at 692.

To demonstrate prejudice, Petitioner must prove that, but for counsel's errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* at 694. Failure to satisfy either requirement of *Strickland*' s test is fatal to a claim of ineffective assistance. *See id.* at 696. ("[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.").

Although *Strickland*' s two-pronged test was originally formulated to judge trial counsel's performance, it applies in the context of evaluating the effectiveness of appellate counsel's representation as well. *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.1994). To establish that appellate counsel failed to render effective assistance, a petitioner must do more than simply demonstrate that counsel omitted a non-frivolous argument, because appellate counsel is not required to raise all potentially colorable arguments. *Id.* (citing *Jones v. Barnes,* 463 U.S. 745, 754 (1983)).

Failure to raise an argument on appeal constitutes ineffective assistance only when the omitted issue is clearly stronger and more significant than those presented. *See id.* (citing *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir.1986)).

To establish the requisite level of prejudice resulting from appellate counsel's shortcomings, a petitioner must establish that there is a reasonable probability that the omitted "claim would have been successful before the [state's highest court]." *Id.* (quoting *Claudio v. Scully,* 982 F.2d 798, 803-05 (2d Cir.1992)); *see also People v. La Hoz,* 131 A.D.2d 154, 158 (App.Div. 1st Dept.1987) ("The burden lies with those raising the issue to rebut the presumption that counsel has been effective. The mere existence of an unraised issue will not suffice. A defendant must show that had the issue been raised a greater likelihood would exist that the judgment would have been reversed, or at least, modified. The right of appeal only guarantees review, not reversal."), *appeal dism'd* 70 N.Y.2d 1005 (N.Y.1988).

a. Failure to Raise Ineffective Assistance of Trial Counsel Claim

***15** With respect to appellate counsel's decision not to raise an ineffective assistance of trial counsel claim on direct appeal, this decision was a reasonable strategic choice, which is not subject to habeas review. For the reasons set forth above, Petitioner's claim of ineffective assistance of counsel lacked merit and Petitioner has not established a reasonable probability that the claim would have been successful. *See Mayo v. Henderson,* 13 F.3d 528, 534 (2d Cir.1994) ("To establish prejudice in the appellate context, a petitioner must demonstrate that 'there was a "reasonable probability" that [his] claim would have been successful ....' ") (alteration in original) (quoting *Claudio v. Scully,* 982 F.2d at 803); *see also Bolender v. Singletary,* 16 F.3d 1547, 1573 (11th Cir.1994) ("[T]he

failure to raise nonmeritorious issues does not constitute ineffective assistance.").

Indeed, Petitioner raised the issue of alleged ineffective assistance of trial counsel in his *pro se* supplemental brief to the Appellate Division. The court's rejection of that claim on direct appeal provides further validation for appellate counsel's decision not to raise the claim in the first instance. *See Brunson v. Tracy,* 378 F.Supp.2d 100, 113 (E.D.N.Y.2005) ("Appellate counsel's decision was therefore simply not ineffective, but prudent, as the raising of this frivolous argument may well have distracted from other, more meritorious issues urged by appellate counsel."). Moreover, the fact that the Appellate Division reviewed and rejected the ineffective assistance of trial counsel demonstrates that Petitioner was not prejudiced by appellate counsel's decision not to raise the claim in the brief that he prepared.

b. Alleged Evidence of Destruction of "Murder Weapon"

The ice pick like weapon was not destroyed by the prosecution and was available at trial. Rather, Petitioner alleges that the victim was actually killed by a small packet of marijuana that was found inside of his mouth while he was being treated for his injuries. (T at 155-56). Petitioner asserts that appellate counsel should have raised the issue of whether the marijuana packet, which was the "real" murder weapon had been destroyed by the prosecution. However, Petitioner's claim is without evidentiary support and is contradicted by the expert medical testimony, which established that the victim died from multiple stab wounds. (T at 264). As such, appellate counsel's decision not to raise this non-meritorious claim did not constitute ineffective assistance of appellate counsel.

Accordingly, Petitioner's ineffective assistance of appellate counsel claim should be DENIED.

C. Petitioner's Motion to Amend/Correct Petition

Also before this Court is Petitioner's most recent Motion to Amend/Correct his Petition, which was filed on August 20, 2007 (Docket No. 53). Petitioner's proposed Amended Petition asserts the same five claims advanced in the original Petition.

***16** In addition, Petitioner asserts the following new grounds in support of his ineffective assistance of counsel claim: (a) trial counsel failed to establish an attorney-client relationship by visiting Petitioner and (b) counsel improperly failed to move for dismissal of the indictment based upon the prosecution's failure to provide defendant with notice of his right to testify before the grand jury.

Petitioner also asserts new grounds in support of his ineffective assistance of appellate counsel claim: (c) appellate counsel did not raise *Brady* and *Rosario* violations by the prosecution and (d) appellate counsel should have appealed the trial court's denial of the defense's motion for a mistrial following the altercation between Petitioner and his trial attorney.

By statute, a writ of habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. Rule 15 of the Federal Rules of Civil Procedure governs motions to amend petitions for habeas corpus. *See Littlejohn v. Artuz,* 271 F.3d 360, 363 (2d Cir.2001); *Ching v. United States,* 298 F.3d 174, 180-81 (2d Cir.2002).

In the present case, because the one-year statute of limitations has long expired, any additional claims that Petitioner wishes to add will be time-barred unless they relate back to the original petition for purposes of Rule 15(c) of the Federal Rules of Civil Procedure. *See Ching,* 298 F.3d at 181 (2d Cir.2002) (stating that Fed.R.Civ.P. 15(c) governs the timeliness of a motion to amend submitted after § 2244(d)(1)'s statute of limitations has expired).

Rule 15(c) provides that an amendment of a pleading relates back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed.R.Civ.P. 15(c). The "relation back" principle of Rule 15(c) applies to petitions for habeas corpus. *Fama v. Commissioner of Corr. Servs.,* 235 F.3d 804, 815-16 (2d Cir.2000).

"So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *Mayle v. Felix,* 545 U.S. 644, 125 S.Ct. 2562, 2574, 162 L.Ed.2d 582 (2005). However, if the proposed amended habeas petition "asserts a new ground for relief supported by facts that differ in both time and type from those the original

pleading set forth" relation back is not appropriate. *Id.* at 648.

This Court finds that the additional grounds raised in Petitioner's proposed Amended Petition do not relate back for purposes of Rule 15(c). While the new grounds arise generally from alleged errors committed with respect to Petitioner's trial and direct appeal, the U.S. Supreme Court has rejected the argument that for purposes of relation back analysis, "the trial itself is the 'transaction' or 'occurrence' that counts" in determining whether a common core of operative facts exists. *Mayle,* 125 S.Ct at 2572-73.

***17** The "essential predicate[s]" of the new grounds rely upon distinct events and circumstances (*e.g.* alleged failure to visit, *Brady* and *Rosario* issues, failure to seek dismissal of indictment, failure to appeal denial of mistrial motion) that were not the subject of claims raised in the original Petition.

As such, relation back must be rejected because "nothing on the face of the original petition would have given Respondent fair notice of a prospective ineffective assistance claim" based upon the new grounds set forth in the proposed Amended Petition. *See Porter v. Greiner,* No. CV 00-6047, 2005 WL 3344828, at *10 (E.D.N.Y. Nov. 18, 2005); *see also Perez v. Greiner,* No. 00Civ.5505, 2004 WL 2937795, at * 3 (S.D.N.Y. Dec. 17, 2004) (holding that "because there is nothing in Perez's original habeas corpus petition which gives the respondent fair notice of the newly alleged claims [i.e., ineffective assistance of appellate counsel], it does not appear that those claims relate back to the original petition."); *Brown v. Donelly,* 258 F.Supp.2d 178, 183-84 (E.D.N .Y.2003) (finding that petitioner's ineffective assistance of counsel claims did not relate back to claims in original petition); *Brown v. United States,* No. 02 Civ. 9305, 2003 WL 22047879, at *3 (S.D.N .Y.Aug.29, 2003) ("I find it hardly likely ... that respondent had fair notice" of one form of alleged ineffectiveness based on original claim of ineffectiveness); *Escobar v. Senkowski,* No.02Civ.8066, 2004 WL 1698626, at *3 n. 3 (S.D.N.Y. July 28, 2004) ("There is nothing in the Petition that gives Respondent fair notice of the ineffective assistance of counsel claims now asserted, and therefore, it is doubted that the assertion of these new claims would relate back to the filing of the original Petition.").

Accordingly, this Court finds that Petitioner's Motion to Amend/Correct his Petition is DENIED.

IV. CONCLUSION

For the reasons stated above, the Court recommends Bernabe Encarnacion's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied and that the Petition be dismissed. Additionally, Petitioner's Motion to Amend/Correct his Petition is DENIED. Because Petitioner has failed to make a substantial showing of a denial of a constitutional right, I recommend that a certificate of appealability not issue. *See* 28 U.S.C. § 2253(c) (2) (1996).

V. ORDERS

Pursuant to 28 USC § 636(b)(1), it is hereby ordered that this Report & Recommendation be filed with the Clerk of the Court and that the Clerk shall send a copy of the Report & Recommendation to all parties. Additionally, it is hereby ordered that Petitioner's Motion to Amend/Correct his Petition is DENIED.

ANY OBJECTIONS to this Report & Recommendation must be filed with the Clerk of this Court within ten(10) days after receipt of a copy of this Report & Recommendation in accordance with 28 U.S.C. § 636(b)(1), Rules 6(a), 6(e) and 72(b) of the Federal Rules of Civil Procedure, as well as NDNY Local Rule 72.1(c).

***18 FAILURE TO FILE OBJECTIONS TO THIS REPORT & RECOMMENDATION WITHIN THE SPECIFIED TIME, OR TO REQUEST AN EXTENSION OF TIME TO FILE OBJECTIONS, WAIVES THE RIGHT TO APPEAL ANY SUBSEQUENT ORDER BY THE DISTRICT COURT ADOPTING THE RECOMMENDATIONS CONTAINED HEREIN.** *Thomas v. Arn,* 474 U.S. 140 (1985); *F.D.I.C. v. Hillcrest Associates,* 66 F.3d 566 (2d. Cir.1995); *Wesolak v. Canadair Ltd .,* 838 F.2d 55 (2d Cir.1988); *see also* 28 U.S.C. § 636(b)(1), Rules 6(a), 6(e) and 72(b) of the Federal Rules of Civil Procedure, and NDNY Local Rule 72.1(c).

Please also note that the District Court, on de novo review, will ordinarily refuse to consider arguments, case law and/

or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance. *See Patterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Electric Co.,* 840 F.2d 985 (1st Cir.1988).

SO ORDERED.

All Citations

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

William J. WISE, Petitioner,
v.
SUPERINTENDENT OF ATTICA CORRECTIONAL FACILITY, Respondent.

No. 08–CV–6312 (MAT).
|
Oct. 7, 2010.

Attorneys and Law Firms

William J. Wise, Attica, NY, pro se.

Paul B. Lyons, Office of New York State Attorney General, New York, NY, for Respondent.

ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** *Pro se* petitioner William J. Wise ("petitioner") has filed a timely petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction in Livingston County Supreme Court of Manslaughter in the First Degree (N.Y. Penal L. § 120.25(1)) following a bench trial before Justice Raymond E. Cornelius. Petitioner was sentenced as a second felony offender to a determinate term of imprisonment of twenty-five years with five years of post-release supervision.

II. Factual Background and Procedural History

A. Trial and Verdict

1. The Prosecution's Case

On the night of January 21, 2006 Amy Sayle ("Sayle" or "the victim") attended a party at the Powers Inn Club in Dansville, New York, with petitioner, whom she had dated. According to a patron who was at the Club that night, petitioner watched Sayle's "every move" as she played pool with other men. Sayle then left the club with petitioner. She was not seen alive again, except by the petitioner. T. 105, 108–09. [1]

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

The following Monday when Sayle did not show up for work, her co-workers contacted the Livingston County Sheriff's Department. T. 128, 130. When police arrived at Sayle's house at approximately 1:00pm, they found petitioner inside the home, drunk and asleep on Sayle's first-floor sofa. T. 126–30. Petitioner told Sheriff's Deputy Michael Yencer ("Yencer") that he had taken Sayle to work earlier that morning, at approximately 7:45am. When Yencer informed petitioner that Sayle had not reported to work, petitioner then stated that he actually dropped her off at a gas station near her place of employment. T. 130. Yencer observed that petitioner's breath smelled of alcohol and his speech was slurred. T. 131.

Yencer then requested to go upstairs to see if Sayle had possible returned home while petitioner was asleep. Petitioner reluctantly gave him permission. T. 132–33. As Yencer approached the upstairs bedroom, he smelled the odor of a decomposing body. He then found Sayle's naked body, lying face down under a comforter on the bedroom floor. T. 133, 142, 162, 183–84. Also in the room were various "sex toys," including a cord and a riding crop. T. 197. Petitioner told Yencer that he and Sayle had a party on Saturday night. T. 134.

Soon thereafter, petitioner was interviewed by the Livingston County Sheriff's Department, telling the investigator that he and Sayle were friends, and had known each other for about two years. T. 150–51. Initially, petitioner said that he arrived at Sayle's house at 7:30am Monday morning and drove Sayle to the gas station near her workplace. T. 151. After dropping Sayle off, petitioner went out drinking for a few hours, and arrived back at her house around 11 or 11:30am. T. 152–53, 158. The vice president of the Powers Club Inn confirmed that petitioner arrived back at the Club around 10:00am on Monday, January 23, and had several vodka drinks. Petitioner told her that he had been drinking all weekend, and that he "had something to do Saturday," that he had

done it, and that he could not tell her what it was and that she should not ask. T. 290–300.

***2** Petitioner explained to the investigator that he and Sayle had gone to a party on Saturday night at the Powers Inn Club, after which he dropped Sayle off at her house. Petitioner returned to the club, went to a friend's house afterward, and did not return to Sayle's house until 2 or 2:30am when he went to sleep on her couch. T. 151–153–54. Petitioner then changed his story, telling the investigator that he had, in fact, stayed at Sayle's house since Saturday before the party, but that he had not spoken to her on Sunday because they were arguing on Saturday night. T. 153–54. He also acknowledged that he "stays with [Sayle] and sleeps with her on the weekends." T. 154.

Sayle was pronounced dead at 4:25pm on Monday, January 23, 2006. The coroner believed that she had been dead for at least 24 hours. T. 159–67. The following day an autopsy was performed, which indicated that Sayle had sustained numerous injuries, including contusions around her eyes, inside her mouth, and on her right arm, as well as ligature marks and contusions on both wrists, bruising on both thighs, abrasions on the left knee, and what appeared to be bite marks on her breasts. T. 48, 78. According to the coroner, those injuries occurred prior to her death, with the actual cause of death being asphyxiation. He noted that the hemorrhages on the eyes and face indicated pressure or force applied against the mouth. T. 48, 80–92, 99–100.

At petitioner's trial, a forensic biologist testified that DNA consistent with petitioner's DNA had been found on nail clippings from the victim's left hand and also in the form of saliva on petitioner's breasts. There was however, additional DNA from an unknown male in the right hand nail clippings and on the victim's breasts. T. 220, 241–44, 254–55, 258–60.

On October 24, 2006, while petitioner was being booked at Livingston County Jail, Sheriff's Deputy Andrew Eichhorn observed "fresh" red marks "that appeared to be scratches" on petitioner's right hip. T. 318–21.

While incarcerated, petitioner made statements to fellow inmates at the jail. Timothy Lotz ("Lotz") inquired of petitioner how the victim had died, to which petitioner responded by holding a hand over his mouth. Lotz asked petitioner whether that meant she died by suffocation or asphyxiation and petitioner responded by saying "yes." Petitioner also told Lotz that when he discovered Sayle's body, he covered her up with a blanket because she was naked. He also told Lotz that he did not call 911 because he was nervous. T. 331–34.

Testimony was also admitted from another inmate, William Clark ("Clark"), who had served for 23 years as a police officer but was being held for a sex offense against a family member. While both men were incarcerated at the jail, Clark assisted petitioner, who could not read or write, by reading legal documents to him and explaining the terms contained therein. Clark mentioned that bite marks had been found on the breasts of the victim, and petitioner acknowledged that they belonged to him. In regard to the reports concerning the DNA analysis, Clark informed petitioner that petitioner's DNA and another man's DNA had been found under Sayle' s fingernails. Clark testified that petitioner was not surprised by the presence of his own DNA, but was surprised that another individual's DNA had been found. Petitioner then stated that he thought he knew to whom it belonged, a man at the club that he had seen with Sayle. T. 339–345.

***3** Sayle's close friend and co-worker Thressa Brado ("Brado") testified that Sayle wanted to end her relationship with petitioner around October of 2005. Sayle told Brado that she had begun to fear petitioner because he was "extremely jealous" and "would accuse her of sleeping with other men." T. 118–21. One week before the murder, Sayle told Brado that she was going to end the relationship that week, and wanted to move to North Carolina. Sayle, however, was "afraid of how [petitioner] would handle it," and wanted to get a restraining order. T. 121–23. However, Brado confirmed that Sayle picked up petitioner in her vehicle the Friday before her death. T. 123–24.

Similarly, another co-worker, Lisa Parker ("Parker") confirmed that Sayle wanted to end the relationship with petitioner, who was "very jealous" and suspicious of other men. T. 111–13, 115. According to Parker, sometime after Christmas of 2005, Sayle had tried to end her relationship with the petitioner, but he continued to call her several times a day. T. 115–16. He would also "come around" frequently, which caused Sayle to become afraid. T. 116.

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In November of 2005, Sayle told her sister, Jane Williams, that she wanted to end the relationship with petitioner, but was having difficulty doing so because she felt sorry for him. T. 31, 36. Nonetheless, Sayle continued to see petitioner socially. T. 275, 278–280. Sayle later told her sister that she had broken up with petitioner after New Year's, but petitioner still continued to call her "all the time," and Sayle was "afraid he might show up" unexpectedly at her home. T. 32–33, 40.

Finally, the prosecution also called two of petitioner's former girlfriends to testify. Nancy Rookey, who had lived with petitioner for about six years, testified that petitioner was prone to jealousy, and would often "fly off the handle" and "get in your face." She also testified that petitioner never physically abused her during their relationship. T. 359–61. Bernice Law ("Law") dated petitioner for less than a year. After they broke up, she told petitioner that she "just wanted to be friends." On one occasion after their breakup, however, she recounted that petitioner had forced himself on her, and while she struggled to free herself, petitioner "start[ed] to choke" her, placing his hands over her throat and mouth. Law ultimately gave in to petitioner's sexual demands, knowing that she "couldn't win." Other than that incident, Law testified that their sexual relations had always been consensual and non-violent. T. 365–68.

At the close of the prosecution's case, defense counsel moved for a trial order of dismissal based on a claim of legally insufficient evidence as to intent and the cause of death. The trial court reserved decision. T. 369–74.

2. The Defense

The defense called two witnesses at trial. The first, a forensic pathologist, testified that while he agreed with the factual findings of the coroner, he believed that the most probable cause of death was an "acute coronary event," given that the victim was a heavy smoker, had high blood pressure, an enlarged heart, a family history of coronary artery disease, and had 80 to 85% blockage of her coronary arteries. T. 383–92, 420. He concluded that while suffocation was a possible cause of death, it was his opinion that it was a "very unlikely one." T. 392–93.

***4** The second witness called was Joanne Clark, a woman who had dated petitioner and lived with him from 1996 to 2003. She testified that petitioner was not jealous or possessive, and had never hurt her. T. 434–35.

Following the defense's evidence, petitioner renewed his motion for a trial order of dismissal. The court reserved decision. T. 439–40.

3. Verdict and Sentence

Although neither the prosecution nor petitioner requested consideration of lesser-included offenses, the court stated that it would consider the following charges: first- and second-degree manslaughter, and criminally negligent homicide. Following summations, the court adjourned the matter until August 9, 2006, when it returned its verdict. A 19–page written decision was issued in which the court found petitioner not guilty of second-degree murder and guilty of the lesser-included offense of first-degree manslaughter. *See* Resp't Exhibits ("Ex.") A at 5–23. The court concluded that, while there was compelling circumstantial evidence that petitioner engaged in a "physical, violent sexual, or attempted sexual encounter" with the victim, during which he caused her death by asphyxiation, there was reasonable doubt as to whether petitioner "formed an intent to cause death." Ex. A at 22.

Petitioner was then sentenced as a second felony offender to a determinate term of 25 years in prison followed by five years of post-release supervision. S. 26.

B. Direct Appeal

Petitioner appealed his conviction to the Appellate Division, Fourth Department, raising four points: (1) the trial court erred by admitting the hearsay testimony of the victim's sister and two of her former friends and co-workers; (2) the trial court erred by admitting the testimony of two of petitioner's former girlfriends; (3) trial counsel was ineffective for failing to establish that the victim was not with petitioner the night of the murder and for failing to conduct a *Cardona* hearing; and (4) the evidence was insufficient and the verdict was against the weight of the evidence. Ex. B. The Appellate Division unanimously affirmed the judgement of conviction. *People v. Wise,* 46 A.D.3d 1397, 847 N.Y.S.2d 802 (4th Dept.2007), *lv. denied,* 10 N.Y.3d 872, 860 N.Y.S.2d 499, 890 N.E.2d 262 (2008); Ex. E, H.

C. Petition for Habeas Corpus

On February 5, 2009, petitioner filed an amended petition stating four grounds for habeas relief, incorporating

his brief on direct appeal (Dkt.# 12). *See* Amended Petition dated 2/5/2009 ("Am.Pet."). Shortly thereafter, he filed an additional document that set forth four claims, substantially similar to those raised to the Appellate Division and the New York Court of Appeals (Dkt.# 14). *See* Second Amended Petition dated 2/26/2009 ("2d Am. Pet."). Liberally construed, both documents, can be read to allege the following four grounds for habeas relief: (1) petitioner was denied a fair trial when the court admitted the hearsay statements of Sayle's sister and two friends; (2) the testimony of petitioner's ex-girlfriends was prejudicial, depriving petitioner of a fair trial; (3) his trial counsel was constitutionally ineffective; and (4) the evidence was legally insufficient and the verdict was against the weight of the evidence.

***5** 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).

B. Merits of the Petition

1. Claims One and Two: Evidentiary Issues

a. Hearsay Testimony of the Victim's Sister and Friends

Petitioner claims that the hearsay statements and testimony of the victim's sister and her friends/co-workers was so prejudicial that it deprived petitioner the right to a fair trial. *See* 2d Am. Pet. at 1; Ex. B at 11–20. Specifically, petitioner alleges that the statements of Sayle, indicating that she had broken up with petitioner and feared for her safety because of his jealous tendencies, should not have been admitted. *Id.* The Appellate Division rejected this contention on the merits, "[e]vidence of the victim's state of mind is highly probative of, inter alia, defendant's motive, as long as it can be shown that defendant was aware of the same, and here, the People established that defendant was aware of the victim's state of mind." *Wise,* 46 A.D.3d at 1398, 847 N.Y.S.2d 802 (internal quotation and citation omitted).

It is well-settled that a state court's evidentiary rulings, even if erroneous under state law, do not generally present constitutional issues cognizable on federal habeas review. *See Crane v. Kentucky,* 476 U.S. 683, 689, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). To warrant habeas review of a state court's erroneous evidentiary ruling, a petitioner must show that the error was "so pervasive as to have denied [petitioner] a fundamentally fair trial." *Collins v. Scully,* 755 F.2d 16, 18 (2d Cir.1985).

Petitioner has failed to demonstrate an error of state law, much less a violation of constitutional magnitude. "The general rule in New York that an out-of-court statement is admissible if it is not admitted for the truth of the matter stated, but for another purpose." *Soto v. Greiner,* 02 Civ. 2129, 2002 WL 1678641 at *10 (S.D.N.Y. July 24, 2002) (citing New York case law). Where, as here, a hearsay statement that is probative of the victim's state of mind as it relates to the state of her relationship, may be admissible as probative of the defendant's motive for killing her. *People v. Rose,* 41 A.D.3d 742, 840 N.Y.S.2d 363 (2nd Dept.2007); *see also People v. Bierenbaum,* 301 A.D.2d 119, 748 N.Y.S.2d 563 (1st Dept.2002) (in a circumstantial murder case involving domestic violence, the trial court properly allowed several prosecution witnesses to testify about the victim's verbal statements to them describing defendant's threatening remarks and otherwise negative behavior, including a prior choking incident, in order to explain the state of the parties' marriage and state of mind); *People v. Williams,* 29 A.D.3d 1217, 815 N.Y.S.2d 330 (3rd Dept.2006) (holding that the trial court did not abuse its discretion in permitting evidence of defendant's prior abusive, controlling and threatening behavior toward victim as it provided necessary background information as to their relationship and also bore on motive and intent).

***6** Similarly, Sayle's statements to her sisters and friends regarding her intent to break up with petitioner were also admissible as evidence of her future intent. "The

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state of mind of the victim is only relevant if it can be shown that defendant was aware of same. Only under such circumstances would proof of the victim's mental processes and, in particular, her plan to forsake defendant ... assist in establishing a motive for the killing." *People v. Wlasiuk,* 32 A.D.3d 674, 821 N.Y.S.2d 285 (3rd Dept.2006); *see also People v. Kimes,* 37 A.D.3d 1, 831 N.Y.S.2d 1 (1st Dept.2006). The trial court thus properly concluded that the testimony at issue established that Sayle "intended to terminate the relationship with [petitioner] and also reported that he was jealous of her." Ex. A at 19. In any event, in the context of a bench trial, "the factfinder knows the purpose for which evidence is admitted and is presumed to rest his verdict on the proper inferences drawn from such evidence." *United States v. Duran–Colon,* 252 Fed.Appx. 420, 426 (2d Cir.2007); *accord Harris v. Rivera,* 454 U.S. 339, 346, 102 S.Ct. 460, 70 L.Ed.2d 530 (per curiam) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.")

Accordingly, because the admission of the hearsay statements was not erroneous under state law, petitioner has not alleged a constitutional violation. *See Green v. Herbert,* No. 01CIV.11881, 2002 WL 1587133, at *12 (S.D.N.Y. Jul.18, 2002) ("The first step in this analysis 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.") (citing *Brooks v. Artuz,* 97 Civ. 3300, 2000 WL 1532918 at *6, 9 (S.D.N.Y. Oct.17, 2000) (petitioner did not demonstrate an error under state evidentiary law, "much less" an error of constitutional magnitude); *Jones v. Stinson,* 94 F.Supp.2d 370, 391–92 (E.D.N.Y.) (once the habeas court has found that the state court ruling was not erroneous under state law, there is no need to apply a constitutional analysis), *rev'd on other grounds,* 229 F.3d 112 (2d Cir.2000)). This claim, therefore, must be dismissed.

b. Evidence of Prior Bad Acts

Petitioner next contends that the testimony of his two former girlfriends was irrelevant, "more prejudicial than probative," and denied petitioner of due process and a fair trial.2d Am. Pet. at 2; Ex B. at 21–27. The testimony involved the alleged prior bad acts of petitioner, including attempted asphyxiation and forcible sexual intercourse. The Appellate Division held that the testimony was "probative of defendant's identity, motive and intent and was therefore properly admitted in evidence. In any event, any error with respect to the admission of that testimony is harmless because, in a nonjury trial, the court is presumed to be capable of disregarding any improper or unduly prejudicial aspect of the evidence." *Wise,* 46 A.D.3d at1399 (citations omitted).

***7** Because the United States Supreme Court has declined to determine whether use of uncharged crimes would violate due process, the Appellate Division's rejection of petitioner's argument cannot be considered an unreasonable application of clearly established Supreme Court precedent. *See Jones v. Conway,* 442 F.Supp.2d 113 (S.D.N.Y.2006) (citing *Estelle v. McGuire,* 502 U.S. 62, n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Moreover, "[a] decision to admit evidence of a criminal defendant's uncharged crimes or bad acts under *Molineux* [2] constitutes an evidentiary ruling based on state law." *Sierra v. Burge,* 06 Civ. 14432, 2007 WL 4218926, *5 (S.D.N.Y. Nov.30, 2007). As such, state court *Molineux* rulings are generally not cognizable on habeas review. *See Roldan v. Artuz,* 78 F.Supp.2d at 276 (S.D.N.Y.2000). As stated above, "[i]n 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 at 18. Petitioner's claim falls short of establishing an error under state law, and he thus cannot establish that his constitutional rights were violated by the trial court's evidentiary ruling.

2 *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286 (1901) ((prosecution may present evidence of a defendant's prior uncharged criminal or immoral acts for limited purposes, including to prove motive, identity, and intent).

Under New York law, evidence that a defendant committed similar uncharged crimes is generally excluded "because it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his past." *People v. Alvino,* 71 N.Y.2d 233, 241–42, 525 N.Y.S.2d 7, 519 N.E.2d 808 (1987). The trial court may admit such evidence, however, "if it helps to establish some element of the crime under consideration or is relevant because of some recognized exception to the general rule." *Id.* "[E]vidence of uncharged crimes may be relevant to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant.

The list, of course, is not exhaustive." *Id.* The evidence will be allowed so long as its probative value outweighs the potential for prejudice to the defendant. *Id.* at 242, 525 N.Y.S.2d 7, 519 N.E.2d 808, see also *United States v. Sappe,* 898 F.2d 878, 880 (2d Cir.1990).

Here, the trial court found that the testimony from Law and Rookey established that: (1) the petitioner's "prior relationship with several women was marked by jealousy;" and (2) "[o]ne such prior relationship culminated in forcibly compelling the woman to engage in sexual relations after [petitioner] had placed his hand on her neck and other hand over her mouth." Ex. A at 19. Similar evidence is commonly found relevant and admissible under state law so long as it is admitted to show, as here, identity, motive, and intent. *See People v. Doyle,* 48 A.D.3d 961, 852 N.Y.S.2d 433 (3d Dept.2008) (in murder case, trial court properly admitted evidence "concerning specific instances of defendant's threatening and controlling behavior toward the victim, as well as his threatening and assaultive behavior toward two former girlfriends which resulted in convictions"); *see also Walker v. Phillips,* No. 03 Civ. 1210(TPG) 2008 WL 3833255, *4 (S.D.N.Y. Aug.15, 2008) (holding that "the state court admitted [evidence of prior stabbings by petitioner] for lawful reasons, rather than for the improper purpose of showing propensity.").

***8** "[I]n light of the broad discretion afforded trial courts in making evidentiary rulings on relevance and probative value," petitioner has simply failed to establish that the trial court's ruling was erroneous, let alone that the Appellate Division's affirmance was contrary to, or an unreasonable application of Supreme Court precedent. *Ojar v. Greene,* No. 07–CV–3674 (JG), 2008 WL 428014, *8 (E.D.N.Y. Feb.15, 2008). Accordingly, this claim is dismissed.

2. Claim Three: Ineffective Assistance of Trial Counsel

Petitioner next avers that he was denied the effective assistance of counsel because his attorney failed to prove that the victim was not with petitioner on the night of January 21, 2003, and also failed to request a *Cardona*[3] hearing.2d Am. Pet. at 3; Ex. B. at 28–32. The Fourth Department rejected this contention on the merits:

> The record establishes that defense counsel addressed all pretrial matters in a proper manner and presented a cogent defense that the victim died of natural causes. The victim was found deceased in her home and, although the medical examiner testified that the victim died of asphyxia, defense counsel presented countervailing expert testimony indicating that the victim had actually died of severe coronary artery disease caused by a lifetime of heavy smoking and obesity, that she had a family history significant for heart disease, and that none of her injuries caused her death. Viewing the evidence, the law, and the circumstances of the case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation.
>
> *Wise,* 46 A.D.3d at 1399, 847 N.Y.S.2d 802 (citation omitted).

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

[3] A *Cardona* hearing is held to determine whether an inmate informant who testifies that a confession was made by a defendant while in jail was an agent of the government; where the informer "works independently of the prosecution, provides information on his own initiative, and the government's role is limited to the passive receipt of such information, the informer is not, as a matter of law" an agent of the government. *People v. Cardona,* 41 N.Y.2d 333, 335, 392 N.Y.S.2d 606, 360 N.E.2d 1306(1977); *see also Massiah v. United States,* 377 U.S. 201, 203–04, 84 S.Ct. 1199, 12 L.Ed.2d 246(1964).

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.

***9** First, petitioner's bare allegation that counsel "failed to prove that the decedent was not with the petitioner on Saturday night," *see* 2d Am. Pet. at 3, is entirely conclusory and thus cannot support a claim of ineffective assistance of trial counsel. He does not set forth any facts to that explain someone "other than the petitioner had the opportunity" to cause the victim's death, nor does he discuss where such evidence would have come from. Absent some indication of what particular evidence counsel failed to offer, this claim is too vague to form a basis for habeas relief. *See McPherson v. Greiner,* No. 02 Civ.2726 DLC AJP, 2003 WL 22405449, *25 (S.D.N.Y.Oct.23, 2003) ("[Petitioner]'s claims that trial counsel was ineffective for failing to investigate are conclusory and give no indication as to what exculpatory evidence a proper investigation would have revealed, or how such evidence would have benefitted [petitioner]'s case."); *Vasquez v. United States,* No. 96 CIV. 2104(PKL), 1996 WL 694439, at *7 (S.D.N.Y.Dec.3, 1996) (dismissing ineffective assistance claim where petitioner's "allegations [we]re vague, conclusory, and unsupported by citation to the record, any affidavit, or any other source; finding that "[t]he vague and unsubstantiated nature of the claims do not permit the Court to conclude that the charged errors reflect performance falling below an objective standard of reasonableness or that but for the errors the result would have been different.").

Petitioner's argument that his attorney erred in failing to seek a *Cardona* hearing with respect to four jailhouse informants is equally without merit. *See* 2d Am. Pet. at 3; Ex. B at 28–32.[4] "The mere fact that certain pretrial motions were not made does not, by itself, indicate ineffective assistance of counsel." *Morgan v. Ercole,* No. CV–06–3716 (CBA), 2009 WL 3805309, *5 (E.D.N.Y. Nov.12, 2009) (citing *People of State of New York v. Torrence,* 135 A.D.2d 1075, 523 N.Y.S.2d 265 (4th Dept.1987)); *see, e.g., LiPuma v. Comm., Dept. of Corr.,* 560 F.2d 84, 93 (2d Cir.), *cert. denied,* 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977) ("defense counsel is not required automatically to file a suppression motion in every case involving evidence or statements obtained after a search; rather, counsel must use 'professional discretion in deciding whether there are sufficient grounds' for such a motion."); *see also People v. Garcia,* 75 N.Y.2d 973, 975, 556 N.Y.S.2d 505, 555 N.E.2d 902 (1990). Rather, "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent upon the defendant to demonstrate the absence of strategic or legitimate explanations for counsel's failure to request a particular hearing. Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing a hearing." *Mohamed v. Portuondo,* No. 97–CV–3735(JBW), 2004 WL 884072, *9 (E.D.N.Y. March 11, 2004).

4 Although four inmates testified, the trial court disregarded the testimony of two of those inmates as not credible. Ex. A at 11–12 n. 1, 18 n. 2.

Here, petitioner has not attempted to show how the two inmate witnesses (Clark and Lotz) were acting as agents of the state, or that a *Cardona* hearing would have revealed such evidence. There is nothing in the record to suggest that either inmate was approached by law enforcement before the conversations occurred. Accordingly, he cannot establish that counsel's performance was deficient for failing to request a *Cardona* hearing, and this claim must therefore be dismissed. *See Ferrara v. Keane,* 806 F.Supp. 472, 477 (S.D.N.Y.1992) (denying ineffective assistance of counsel claim where petitioner failed to show that "the *Massiah–Cardona* hearing would have succeeded in revealing [the witness] as an agent of the state"); *accord, McCrone v. Brown,* No. 07–cv–00077–JKS, 2008 WL 724234, *6 (N.D.N.Y. March 17, 2008) ("There was no basis for a *Cardona* hearing ... consequently, counsel's performance could hardly be termed deficient for failing to request one.").

3. Claim Four: Sufficiency and Weight of the Evidence

***10** Petitioner claims that the verdict was against the weight of the evidence and was also based on insufficient evidence because the prosecution failed to establish that petitioner "intended to cause the decedent serious physical injury and caused her death." 2d Am. Pet. at 4–7; Ex. B at 33–43. The Appellate Division rejected both claims on the merits:

> Contrary to the further contention of defendant, the evidence is legally sufficient to establish the element of intent to cause serious physical injury to the victim.

> That intent may be inferred from defendant's conduct, the surrounding circumstances, and the medical evidence. Here, the medical evidence indicated that defendant and the victim engaged in a struggle prior to her death that resulted in blunt force injuries to parts of her body and injuries to her eyes and mouth. The victim also suffered injuries indicating that pressure had been applied to her mouth that led to her asphyxia. Additionally, we reject defendant's contention that the verdict is against the weight of the evidence, particularly in view of the statement of defendant that he drove the victim to work on the same day that her decomposing body was found, and the additional extensive circumstantial evidence presented by the People.

Wise, 46 A.D.3d at 1399–1400, 847 N.Y.S.2d 802 (internal quotations and citations omitted).

On the outset, challenges to the weight of the evidence supporting a conviction, unlike challenges to the sufficiency of the evidence, are not cognizable on federal habeas review. *Maldonado v. Scully,* 86 F.3d 32, 35 (2d Cir.1996). A claim that a verdict was against the weight of the evidence derives from N.Y.Crim. Proc. L. § 470.15(5), which permits an appellate court in New York to reserve 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. L. § 470.15(5). Thus, the "weight of the evidence" argument is a pure state law claim grounded in the criminal procedure statute, whereas a legal sufficiency claim is based on federal due process principles. *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 (1987). Since a weight of the evidence claim is purely a matter of state law, it is not cognizable on habeas review. *See* U.S.C. § 2254(a); *Estelle v. McGuire,* 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

In addition, petitioner's sufficiency of the evidence claim fails on the merits. A petitioner challenging the sufficiency of the evidence of his guilt in a habeas corpus proceeding "bears a very heavy burden." *Fama v. Comm. 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, 319 560, 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). Stated another way, the reviewing court must determine "whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt ... view[ing] the evidence in the light most favorable to the government, and constru[ing] all permissible inferences in its favor." *United States v. Carson,* 702 F.2d 351, 361 (2d Cir.1983) (internal citations omitted), *cert. denied sub nom. Mont v. United States,* 462 U.S. 1108, 103 S.Ct. 2456, 77 L.Ed.2d 1335 (1983). 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).

***11** The New York Penal Law provides that a person commits first-degree manslaughter when, "[w]ith intent to cause serious physical injury to another person, he causes the death of such person...." N.Y. Penal L. § 125.20(1). "Serious physical injury" is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ." N.Y. Penal L. § 10.00(10).

Viewing the evidence in the light most favorable to the prosecution, and drawing all permissible inferences in its favor, a rational finder of fact could have found the elements of first-degree manslaughter had been established beyond a reasonable doubt. The evidence presented at trial can be summarized as follows: (1) petitioner's prior relationships with women were marked

by jealousy, and that petitioner had forced a former girlfriend to engage in sexual relations after he placed his hand on her neck and his hand over her mouth; (2) petitioner made over forty phone calls to Sayle at her residence and her place of employment in the weeks preceding her death; (3) petitioner and Sayle had argued on Saturday evening, January 21, 2006; (4) petitioner was observed by other bar patrons closely watching Sayle playing pool with other men on Saturday, January 21, 2006 at the Powers Inn Club; (5) Sayle was last seen alive leaving the Powers Club Inn on Saturday, January 21, 2006, with petitioner; (6) she died of asphyxiation sometime thereafter, no later than January 22, 2006, and the asphyxiation was intentional; (7) Sayle had multiple injuries about her face and body, caused by external force and not accidental in nature; (8) Sayle's body was unclothed at the time of her death; petitioner admitted covering her body with a comforter; (9) her body contained DNA from petitioner and an unknown male, and petitioner was "not surprised" by the presence of his DNA; (10) petitioner admitted that bite marks on Sayle's breasts belonged to him; (11) a fresh scratch was observed on petitioner's hip the morning of January 24, 2006, when he was being booked at the Livingston County Jail; (12) among other inconsistencies in petitioner's story, he falsely told Sheriff's Deputies that he had taken Sayle to work the morning of January 23, however Sayle was already deceased on the morning of January 23, 2006; and (13) petitioner returned to the Powers Inn Club on the morning of January 23 and told another patron that he had "something to do" on Saturday evening, he did it, and could not tell her what it was and not to ask about it.

Here, the record demonstrates that there was sufficient evidence to support petitioner's conviction. The fact that the trial judge, sitting as the fact-finder in this case, rejected petitioner's alternative theory that the victim suffered a fatal heart attack that caused her to fall, does not render the evidence insufficient. *See Santos v. Zon,* 206 F.Supp.2d 585, 589–90 (S.D.N.Y.2002). Accordingly, the Appellate Division's rejection of petitioner's legally insufficiency claim was not contrary to, or based on an unreasonable application of *Jackson v. Virginia.* This claim is therefore denied.

IV. Conclusion

***12** For the reasons stated above, William J. Wise'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.

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

Jonathan A. HENDRIE, Petitioner,
v.
Gary GREENE, Superintendent, Respondent.

Civ. No. 906-CV-370 (TJM/RFT).
|
March 3, 2010.

Attorneys and Law Firms

Jonathan A. Hendrie, Comstock, NY, pro se.

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

DECISION & ORDER

THOMAS J. McAVOY, Senior District Judge.

***1** *Pro se* Petitioner Johnathan A. Hendrie brings this Petition for a Writ of *Habeas Corpus,* pursuant to 28 U.S.C. § 2254, asserting that his imprisonment is in violation of the United States Constitution. Specifically, Hendrie alleges constitutional violations based upon: (1) the denial of his motion to suppress; (2) prosecutorial misconduct; (3) denial of a "charge-down" of the lesser-included offenses under the First-Degree Murder count; (4) an improper sentence; and (5) denial of his motion to vacate the conviction. Dkt. No. 1, Pet. at pp. 5-6.

For the reasons that follow, the Petition is **DENIED.**

I. BACKGROUND

A. Procedural History

On February 5, 1998, Petitioner Johnathan A. Hendrie was convicted by a Clinton County Court jury of one count of Murder in the First Degree (N.Y. PENAL LAW § 125.27), one count of Murder in the Second Degree (N.Y. PENAL LAW § 125.25), one count of Burglary in the First Degree (N.Y. PENAL LAW § 140.30), one count of Kidnapping in the Second Degree (N.Y. PENAL LAW § 135.20), two counts of Criminal Use of a Firearm in the First Degree (N.Y. PENAL LAW § 265.09), one count of Criminal Possession of a Weapon in the Second Degree (N.Y. PENAL LAW § 265.03), one count of Making a Punishable False Written Statement (N.Y. PENAL LAW § 215.50), one count of Menacing in the Second Degree (N.Y. PENAL LAW § 120.14(1)), and one count of Criminal Mischief in the Fourth Degree (N.Y. PENAL LAW § 145.00). *People v. Hendrie,* 24 A.D.3d 871, 805 N.Y.S.2d 464 (N.Y.App. Div.3d Dep't 2005).[1]

[1] For reasons unknown to the Court, the State Court Records do not include a transcript of the pronouncement of the jury's verdict at trial. *See generally* State Court Records.

The Honorable Kevin K. Ryan, Clinton County Judge, sentenced Petitioner to the following terms of imprisonment, all of which were set to run concurrently: twenty-five (25) years to life for First Degree Murder; twenty-five (25) years to life for Second Degree Murder; twelve-and-a-half (12 ½) to twenty-five (25) years for First Degree Burglary; five (5) years for Criminal Use of a Firearm in the First Degree; seven-and-a-half (7 ½) to fifteen (15) years for Criminal Possession of a Weapon in the Second Degree; three-and-a-half (3 ½) to seven (7) years for Criminal Possession of a Weapon in the Third Degree; and one (1) year for each of his misdemeanor convictions (Making a Punishable False Written Statement, Menacing in the Second Degree, and Criminal Mischief in the Fourth Degree). R., Sentencing Tr., dated Feb. 5, 1998, at pp. 14-16, 805 N.Y.S.2d 464. In addition to those concurrent sentences, Petitioner was assessed consecutive sentences of an indeterminate term of five (5) to ten (10) years of incarceration for Second Degree Kidnapping and a determinate term of five (5) years of incarceration for Criminal Use of a Firearm in the First Degree. *Id.* at p. 17, 805 N.Y.S.2d 464. Thus, Petitioner was sentenced to a cumulative prison sentence of thirty-five (35) years to life. *Id.* at p. 18, 805 N.Y.S.2d 464.

On September 14, 2000, Petitioner filed a motion to vacate the judgment of conviction, pursuant to N.Y. CRIM. PROC. L. § 440.10, on the ground that newly discovered

evidence undermined the conviction. R., Pet'r § 440 Mot., dated Sept. 14, 2000. The trial court denied Petitioner's § 440 motion in all respects. R., Decision/Order on § 440 Mot., dated Aug. 14, 2001. Thereafter, Petitioner appealed his conviction as well as the trial court's denial of his § 440 motion to the New York State Supreme Court, Appellate Division, Third Department, which modified his conviction by reversing his conviction for Criminal Use of a Firearm in the First Degree and vacating the five (5) year consecutive sentence attached to that conviction. *People v. Hendrie,* 805 N.Y.S.2d at 470-71. The Appellate Division affirmed Petitioner's other convictions as well as the trial court's denial of his § 440 motion. *Id.* Petitioner's application for leave to appeal that decision was denied. *People v. Hendrie,* 6 N.Y.3d 776, 811 N.Y.S.2d 343, 844 N.E.2d 798 (2006).

***2** Petitioner filed the instant *Habeas* Petition on March 23, 2006. Dkt. No. 1, Pet.

B. Summary of the Evidence Presented at Trial

Petitioner and Helen LaPorte lived together "on and off" shortly after they met in the early 1990s until February 1996, when they moved into an apartment at 87 Blackman Corners Road, located in Mooers Forks, New York. R., Trial Tr., dated Nov. 17-24, 1997, at pp. 578-84. In July 1996, they had an argument and LaPorte moved into her ex-husband's house along with her three children for three days. *Id.* at p. 587. During that time, LaPorte obtained an order of protection against Petitioner and, upon her return to the apartment, Petitioner moved out. *Id.* at pp. 588 & 591. However, LaPorte testified that Petitioner continued to harass her by constantly calling and threatening her on the phone. LaPorte reported the calls to the police, who twice arrested Petitioner. *Id.* at pp. 591-92.

Two different witnesses testified that after Petitioner and LaPorte broke up, Petitioner told them he was contemplating committing violent acts. Petitioner's friend Russell Macey testified that Petitioner said he was going to "do Helen in and he was going to take and do her boyfriend in and then that he was going to take and do himself in." *Id.* at p. 516. Likewise, Petitioner's brother-in-law, Michael Burnell, testified that Petitioner told him he wanted to reconcile with LaPorte and that if he had a gun he would kill LaPorte, her family, and himself. *Id.* at p. 719.

On December 21, 1996, Petitioner called LaPorte and told her he wanted to bring a Christmas present over to her children. *Id.* at p. 598. After conferring with her boyfriend, Robert Lamberton (a/k/a "Timmy"), LaPorte agreed to allow Petitioner to pull into her driveway to drop off the gift, which he indicated was heavy. *Id.* at p. 600. Thereafter, Petitioner parked in the driveway and approached the front doorway with a wrapped box in hand, where LaPorte awaited him. *Id.* at pp. 606-07. When LaPorte went to take the box, Petitioner reached through the wrapping, pulled out a shotgun, pointed it at LaPorte, and forced her back into the house. *Id.* at pp. 607-08.

While Lamberton maintained his position at the kitchen table, Petitioner and LaPorte began to argue and push each other. *Id.* at p. 609. Petitioner produced a piece of rope and ordered LaPorte to tie up Lamberton, an order LaPorte refused. *Id.* Petitioner and LaPorte continued to yell and struggle with each other, and at one point Petitioner told Lamberton, "You will never fucking love her as much as I do." *Id.* at p. 610. At some point shortly thereafter, Petitioner shot Lamberton, prompting LaPorte to "attack" Petitioner, who pushed her out of the way and left the room, apparently in search of Lamberton, who was no longer in the kitchen. *Id.* at pp. 612-13. At that point, LaPorte answered a telephone call from her son's friend and immediately instructed him to tell his mother to call the police. *Id.* at p. 613. After Petitioner left the room, he ran from the house and smashed the telephone box with the gun, disabling the phone connection. *Id.* at pp. 1350-51 & 1381-82.

***3** Then, LaPorte went upstairs and tried unsuccessfully to open the bathroom door, which was blocked by Lamberton, who was laying against it. *Id.* at p. 613. LaPorte testified that Petitioner approached her from behind and pulled her down the stairs, telling her she was going to go with him. *Id.* at p. 614. Petitioner forced LaPorte into his car and drove her to a wooded area. *Id.* at pp. 615-16. Petitioner told LaPorte he wanted her to stay the night with him in the woods and read letters he had written. *Id.* at p. 617. After LaPorte read his letter, Petitioner allowed her to leave in his car; LaPorte drove to her sister's home and they called the police. *Id.* at p. 621.

Around eight o'clock p.m., New York State Trooper Scott Leidner responded to a domestic assault call at 87 Blackman Corners Road and, after waiting for backup,

entered the house and found blood and a body in the upstairs bathroom. *Id.* at pp. 839-41 & 846-47. Thereafter, investigators encountered Petitioner behind his sister's trailer home. Investigator Jonathan Denny arrested him and advised him of his *Miranda* rights. *Id.* at p. 1016. At some point either before or after his rights were read to him, Petitioner, who was crying, said that he was sorry and didn't mean to kill anybody. *Id.* at pp. 1017-18. Petitioner was subsequently interviewed at the Plattsburgh State Police barracks, where he confessed to bringing a loaded, sawed-off shotgun to LaPorte's home and that he "threw the gun up and it went off," striking Lamberton. *Id.* at p. 1073. After concluding the interview, investigators typed Petitioner's statement and read it aloud with him. Petitioner asked the investigator to make three changes to the statement, initialed each page, and signed it. *Id.* at pp. 1084-85. Petitioner also drew a map of the wooded area where he took LaPorte and described to Investigator Richard Sypek where he left the shotgun, which was recovered in the early morning hours of December 22, 1996. *Id.* at pp. 759 & 788.

Dr. Barbara Wolf performed an autopsy of Lamberton's body, determining the cause of death to be internal bleeding caused by shotgun wounds. *Id.* at p. 1157. However, Dr. Wolf also testified that Lamberton sustained a blunt impact wound to the back of his head which was consistent with being struck with the barrel of a shotgun, and that substantial bleeding in the area of the wound indicated Lamberton received the blow prior to his death. *Id.* at p. 1177.

Petitioner took the stand in his own defense. He testified that after he entered LaPorte's home, he and LaPorte fought each other and "were pulling [back and forth] on the gun and the gun went off." *Id.* at pp. 1348-49. Petitioner also stated that at the time the gun went off, he did not know Lamberton's location and never threatened to shoot him. *Id.* at p. 1350. Petitioner stated that after the shot was fired, he did not look for Lamberton and never went upstairs. *Id.* at pp. 1350-52.

***4** Psychologist Dr. Sally Summerell testified on Petitioner's behalf, asserting that she evaluated Petitioner for Social Security benefits in 1992, and at that time determined his IQ to be within the range of "mild retardation." *Id.* at pp. 1037-38. Summerell opined that it "is very unlikely" Petitioner would have understood the *Miranda* warnings, and that she doubted his ability to create and carry out a "realistic" plan. *Id.* at pp. 1039 & 1052-56.

II. DISCUSSION

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), a federal court may not grant habeas relief to a state prisoner on a claim unless the state court adjudicated the merits of the claim and such adjudication either

> 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* *Hawkins v. Costello,* 460 F.3d 238, 242 (2d Cir.2006); *DeBerry v. Portuondo,* 403 F.3d 57, 66 (2d Cir.2005); *Miranda v. Bennett,* 322 F.3d 171, 177-78 (2d Cir.2003); *Boyette v. Lefevre,* 246 F.3d 76, 88 (2d Cir.2001).

The petitioner bears the burden of proving by a preponderance of the evidence that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Jones v. Vacco,* 126 F.3d 408, 415 (2d Cir.1997); *Rivera v. New York,* 2003 WL 22234697, at *3 (S.D.N.Y. Aug.28, 2003). The AEDPA also requires that "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* *DeBerry v. Portuondo,* 403 F.3d at 66; *Boyette v. LeFevre,* 246 F.3d at 88 (quoting § 2254(e)(1)) (internal quotations omitted).

The Second Circuit has provided additional guidance concerning application of this test, noting that:

> [u]nder AEDPA, we ask three questions to determine whether a federal court may grant habeas

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> 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) (citing *Williams* and *Francis S. v. Stone,* 221 F.3d 100, 108-09 (2d Cir.2000)).

B. Denial of Motion to Suppress Post-Arrest Statements

Petitioner asserts the trial court erroneously denied his motion to suppress his post-arrest statements to police because he was not "mentally competent to waive his" *Miranda* rights. Pet. at p. 5. Under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before a suspect may properly be subjected to custodial interrogation, he must be informed that he has the right to remain silent, that any statement he makes may be used in evidence against him, and that he has the right to have counsel present. 384 U.S. at 467-72; *see also Dickerson v. United States,* 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (citing *Miranda*). Generally, statements obtained in violation of *Miranda* must be suppressed. *See Dickerson v. United States,* 530 U.S. at 443-44 ("[U]nwarned statements may not be used as evidence in the prosecution's case in chief."). However, the rights *Miranda* seeks to protect may be waived if the waiver is knowing, voluntary, and intelligent; "the question of waiver must be determined on the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *North Carolina v. Butler,* 441 U.S. 369, 374-75, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979) (internal quotation marks and citations omitted).

***5** The Honorable Patrick R. McGill, Clinton County Court Judge, addressed the admissibility of Petitioner's post-arrest statements during a pre-trial *Huntley* hearing held on October 6, 1997. R., Huntley Hr'g Tr., dated Oct. 6, 1997; *see People v. Huntley,* 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965) (adopting a procedure for providing a separate hearing about the voluntariness of a confession to be offered in evidence against a defendant at his or her trial). Under the AEDPA, a state court's factual findings at a suppression hearing are presumed to be correct, and the petitioner has the burden of overcoming that presumption by clear and convincing evidence. *See Campbell v. Greene,* 440 F.Supp.2d 125, 141 (N.D.N.Y.2006) (McCurn, S.J.); *James v. Walker,* 2003 WL 22952861, at *2 & 6 (E.D.N.Y. Aug.28, 2003), *aff'd,* 116 Fed. Appx. 295, 297 (2d Cir.2004) (unpublished opinion). Notwithstanding the deference accorded to factual determinations, "legal questions, such as whether a defendant has effectively waived his federal constitutional rights in a proceeding, are governed by federal standards." *Oyague v. Artuz,* 393 F.3d 99, 104 (2d Cir.2004) (citing *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). Petitioner bears the burden of establishing that his rights were violated. *Whitaker v. Meachum,* 123 F.3d 714, 716 (2d Cir.1997).

Judge McGill made the following findings of fact at the *Huntley* hearing: Investigators Jon Denny and Richard Sypek drove to the residence of Mary Fleury, Petitioner's ex-girlfriend, at about two a.m. on December 22, 2006. R., Huntley Decision/Order at p. 2, 255 N.Y.S.2d 838, 204 N.E.2d 179. Investigator Denny apprehended Petitioner after encountering him behind Fleury's trailer home, during which time Petitioner "was crying and repeatedly stating that he was sorry and that he had not intended to kill anyone." *Id.* at pp. 2-3, 255 N.Y.S.2d 838, 204 N.E.2d 179. Denny summoned Investigator Sypek, who went to obtain handcuffs from the car, during which time Denny read Petitioner his *Miranda* rights. *Id.* at p. 3. On the way to the police barracks, Sypek read Petitioner his *Miranda* rights a second time and Petitioner, "who was upset, but lucid, stated that he understood his rights and agreed to speak with Investigator Sypek when they arrived at the police station." *Id.* At the police station, Petitioner was taken to an office where he was interviewed. *Id.* Petitioner was readily cooperative and forthcoming during the questioning, which lasted approximately two hours. *Id.* at p. 5. An investigator typed a statement based on Petitioner's oral admissions, which was read aloud to Petitioner as he read along, and then Petitioner initialed each page of the document and signed it. *Id.* at p. 5. After Petitioner signed the statement, it was read back to him a final time, during which reading Petitioner requested certain changes be made to its wording. *Id.* at p. 6.

The trial court gave little weight to the testimony of Dr. Sally Summerell, who testified that Petitioner did not have the mental capacity to understand the meaning of the *Miranda* warnings, because her opinion was based on only one interview with him, "[s]he was not given access to his records," and she was falsely told by Petitioner's mother that he could not read. *Id.* at p. 4. The trial court found that Petitioner could read, albeit slowly and with some difficulty, and that he "had written several suicide notes which his mother brought to the police station the night of the interview." *Id.* at p. 5.

***6** Based on the above findings of fact, the trial court arrived at the legal conclusion that Petitioner's statements were voluntary and that he had voluntarily waived his constitutional right against self-incrimination. *Id.* at pp. 6-7. The Appellate Division affirmed such ruling, holding that notwithstanding evidence that Petitioner's IQ placed him at the low end of the mild mental retardation range, "[s]ubnormal intelligence, in and of itself, does not require suppression of statements where it is established that a defendant had the ability to understand the basic concepts of the right to remain silent, the right to the assistance of counsel and the fact that any statement could be used against him or her." *People v. Hendrie,* 805 N.Y.S.2d at 468. The Appellate Division went on to state that "the record lacks any indicia that defendant failed to sufficiently comprehend the warnings undisputedly given to him by the State Police." *Id.*

The fact of a defendant's low intelligence does not, *ipso facto,* create an invalid waiver. *See Toste v. Lopes,* 861 F.2d 782, 783 (2d Cir.1988) ("A waiver of the right to remain silent is not invalid merely because a defendant is of limited mental capacity."). Rather, the pertinent question is to what extent a defendant's mental capacities inhibit a knowing, voluntary, and intelligent waiver. *Id.* (noting that petitioner's psychological disorder did not indicate an inability to "comprehend sufficiently the rights set forth in *Miranda"*); *see also Maldonado v. Greiner,* 2003 WL 22435712, *34 (S.D.N.Y. Oct. 28, 2003) ("Despite [petitioner's] alleged low intelligence, he was able to understand the *Miranda* rights when they were given to him.").

In this case, Petitioner has failed to produce clear and convincing evidence rebutting the trial court's factual determination that he had the mental capacity to understand the *Miranda* warnings. The trial court found the testimony of Dr. Summerell not credible because her evaluation was based on a single interview, conducted six years earlier, during which Petitioner's mother answered most of the questions, and because she did not have access to his school records at the time of that 1992 interview. R., Huntley Decision/Order at p. 4. There is no basis to question the trial court's credibility assessment. Furthermore, the testimony showed that Petitioner was twice read his *Miranda* rights prior to his interview, and that during his interview, though upset, he answered the questions in a forthright manner and "elaborate [d] as to the details" in his answers. R., Huntley Hr'g Tr. at pp. 40 & 79. Finally, although Petitioner contends he is "functionally illiterate," the testimony at trial revealed that he was able to write several suicide notes and letters to family, friends, and Helen LaPorte, that he was able to follow his confession statement as it was read back to him, and that he offered corrections to the content of the statement after it was read back to him a second time. R., Trial Tr. at pp. 619, 1061-63, 1339-43, & 1354. Thus, the Appellate Division's decision that Petitioner made a knowing, intelligent, and voluntary waiver of his *Miranda* rights was not an erroneous application of federal law.

***7** For those reasons, the Petition is **denied** on this ground.

C. Prosecutorial Misconduct

Petitioner contends that a comment made by the prosecution during summations improperly shifted the burden of proof, violating his right to a fair trial. Pet. at p. 5. During summation, the prosecutor attempted to explain why the jury should believe the testimony of Helen LaPorte, not Petitioner, framing the ultimate issue as follows: "If you believe Helen, [Petitioner] is guilty of all these crimes. *They have not suggested any reason not to believe Helen about those details."* Trial Tr. at p. 1556. Petitioner's trial attorney did not immediately object to the comment, but rather, in a motion for mistrial which preceded the jury charge, made a general accusation that the prosecution improperly shifted the burden of proof. *Id.* at pp. 1583-86. On direct appeal, Petitioner took specific issue with the prosecutor's statement italicized above, so the Court assumes that comment is the basis for his present constitutional claim. The Appellate Division found the prosecutor's comment improper, but held that

"in view of the County Court's instructions to the jury concerning the burden of proof," the "brief, isolated comment" did not deny him his "right to a fair trial." *People v. Hendrie,* 805 N.Y.S.2d at 468.

For *habeas* relief to be granted based on a claim of prosecutorial misconduct, the alleged misconduct must have "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)). In considering such claims, courts focus on "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Since a defendant's right to a fair trial is clearly established, *see Williams v. Walker,* 2001 WL 1252105, at *2 (E.D.N.Y. Oct. 31, 2001); *Porter v. Kelly,* 2000 WL 1804545, at *4 (E.D.N.Y. Dec.5, 2000); *Concepcion v. Portuondo,* 1999 WL 604951, at *4 (S.D.N.Y. Aug.10, 1999), Hendrie may prevail on this ground for relief only if he demonstrates that the Appellate Division's adjudication of his claim alleging prosecutorial misconduct is either contrary to, or involved an unreasonable application of, Supreme Court precedent.

When, as here, a prosecutorial misconduct claim is predicated upon statements made at summation, *habeas* relief is available only if Petitioner "suffered actual prejudice because the prosecutor's comments during summation had a substantial and injurious effect or influence in determining the jury's verdict." *Tankleff v. Senkowski,* 135 F.3d 235, 252 (2d Cir.1998) (quoting *Bentley v. Scully,* 41 F.3d 818, 824 (2d Cir.1994)). To determine whether a prosecutor's conduct caused substantial prejudice, a *habeas* court should consider: (1) the severity of the misconduct; (2) the measures adopted by the trial court to cure the misconduct; and (3) the certainty of conviction absent the prosecutor's remarks. *See Williams v. Duncan,* 2007 WL 2177075, at *26 (N.D.N.Y. July 27, 2007) (citing, *inter alia, Bently v. Scully,* 41 F.3d at 824).

***8** In this case, the prosecutor's improper remark constituted an "isolated, aberrant incident of prosecutorial misconduct in an otherwise fair proceeding." *Rasmussen v. Filion,* 2005 WL 318816, at *9 (W.D.N.Y. Feb.9, 2005). Although improper, the prosecutor's comment was isolated and brief. *See, e.g., Wright v. Conway,* 2009 WL 3273901, at * 16 (E.D.N.Y. Oct.9, 2009) (finding prosecutor's improper burden-shifting comment to be isolated and non-severe); *see also Tobias v. Portuondo,* 367 F.Supp.2d 384, 397 (W.D.N.Y.2004) (holding that two isolated improper burden-shifting comments did not violate due process when the prosecutor's summation, as a whole, was not inflammatory and the trial judge gave curative instructions).

Secondly, because Petitioner's attorney did not object to the prosecutor's summation, the trial court did not have the opportunity to give an immediate curative instruction regarding the impropriety of the comment. However, the trial court gave an extensive charge clarifying that the burden of proof beyond a reasonable doubt lies with the prosecution alone:

> A defendant is never required to prove anything. On the contrary, the People, having accused the defendant of the crimes charged, have the burden of proving the defendant guilty beyond a reasonable doubt. The People have the burden of proving the defendant's guilt as to every fact and every element essential to conviction. The burden never shifts. It remains with the people. And the presumption of innocence remains with every defendant from the beginning of the trial until such time when, during final deliberations, the jury may be convinced that the People have proved the defendant's guilty beyond a reasonable doubt.

Trial Tr. at p. 1598.

The above instruction "likely corrected any misperception the jury may have held" regarding the burden of proof. *Chalmers v. Mitchell,* 73 F.3d 1262, 1271 (2d Cir.), *cert. denied,* 519 U.S. 834, 117 S.Ct. 106, 136 L.Ed.2d 60 (1996). Finally, the evidence presented against Petitioner at trial was substantial. Petitioner's confession and his own testimony established that he brought a loaded, sawed-off shotgun to LaPorte's home and shot Lamberton.

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Subsequent testimony established Lamberton's death was caused by the gun shot. As such, the crucial question for the jury was Petitioner's intent. In that respect, there was substantial evidence that the murder was intentional and premeditated.

Two witnesses testified that Petitioner told them prior to the December 21, 1996, that he intended to kill Lamberton, LaPorte, and himself. Trial Tr. at pp. 516 & 719. Petitioner's mother testified that a few days prior to the shooting, Petitioner asked her to drive him to a wooded area, drop him off, and return to get him in an hour. *Id.* at pp. 552-55. Prior to his arrival at LaPorte's house with a loaded shotgun concealed inside a gift-wrapped box, Petitioner gathered various camping supplies: a sleeping bag, backpack, heater, flashlight, etc. *Id.* at pp. 558-61 & 623. Petitioner testified that after the gun fired, he ran from the house and smashed the telephone box with the gun, disabling the phone connection. *Id.* at pp. 1350-51 & 1381-82. Finally, the coroner testified that although a shotgun wound caused Lamberton's death, he also sustained, prior to his death, a blow to the back of his head which was consistent with being struck with the barrel of a shotgun. *Id.* at p. 1177.

***9** Given the isolated nature of the prosecutor's improper comment, the trial court's curative instructions, and the amount of evidence against Petitioner, the Court cannot conclude that he was prejudiced by the comment, nor that such comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. at 181. Thus, the Appellate Division did not err in concluding that the prosecutor's comment did not violate Petitioner's due process right to a fair trial.

Therefore, the Petition is **denied** on this ground.

D. Denial of Lesser-Included Offenses in the Jury Charge

Petitioner alleges the trial court violated his due process rights when it denied his request to charge the jury with First and Second Degree Manslaughter and Criminally Negligent Homicide as lesser included offenses under the First Degree Murder count. On direct appeal, Petitioner framed his argument as follows:

> In view of [Petitioner's] statements to police that he didn't intend to kill Lamberton, his trial testimony that the fatal shooting was the accidental result of the struggle with LaPorte over the gun, issues of fact existed as to whether he acted with a culpable mental state other than intent to kill. By denying Mr. Hendrie's request to charge the lesser included offenses, [the] county court invaded the province of the jury by foreclosing any consideration of whether, if Mr. Hendrie was culpable, he was responsible for something less than an intentional homicide.

R., Pet'r App. Div. Br. at p. 34.

The Appellate Division rejected Petitioner's argument that First Degree Manslaughter should have been included in the charge, but agreed that Second Degree Manslaughter "should have been charged under the first degree murder count." *People v. Hendrie,* 805 N.Y.S.2d at 469. However, the Appellate Division found such error harmless because the trial court charged Second Degree Manslaughter as a lesser included offense under the depraved indifference Second Degree Murder count, which the jury rejected. *Id.* Finally, the Appellate Division found "no error in County Court's refusal to charge criminally negligent homicide as a lesser included offense," because Petitioner must have recognized the substantial unjustifiable risk of death when he produced a "loaded sawed-off shotgun with a light-pull trigger and pointed it directly at other people." *Id.*

As Respondent notes, the Supreme Court has not determined whether the Constitution requires that a lesser included offense be included in a jury charge in a non-capital case. *Beck v. Alabama,* 447 U.S. 625, 638 n. 14, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (declining to "decide whether the Due Process Clause would require the giving of such instructions in a noncapital case"). In *Jones v. Hoffman,* 86 F.3d 46, 48 (2d Cir.1996), the Second Circuit denied a *habeas* petitioner's claim that the lesser included offense should have been included in the jury charge because "a decision interpreting the Constitution to require the submission of instructions on lesser-included offenses in non-capital cases would

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involve the announcement of a new rule," a practice that the Supreme Court expressly disallowed in *Teague v. Lane,* 489 U.S. 288, 316, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (establishing the "non-retroactivity rule" that a *habeas* petitioner cannot rely on a rule of federal law that is not announced until after the time his conviction became final; stating that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review" (emphasis in original)).[2] Therefore, pending the pronouncement of a new constitutional rule, a claim based on an alleged error to charge a lesser included offense is not cognizable in a *habeas* proceeding because absent such a rule, there is no basis to find an unreasonable application and/or violation of clearly established federal law. *See, e.g., Mills v. Girdich,* 614 F.Supp.2d 365, 382 (W.D.N.Y.2009); *Smith v. Barkley,* 2004 WL 427470, at *5 (N.D.N.Y. Feb. 18, 2004).

2 The Second Circuit also held in *Jones v. Hoffman* that "neither of the two narrowly drawn exceptions to *Teague"* applied because "[t]he lesser-included offense rule does not decriminalize a particular class of conduct, nor does it fall within that small core of 'watershed' rules requiring the observance of certain procedures that are implicit in the concept of ordered liberty." 86 F.3d at 48.
The non-retroactivity rule announced in *Teague* was later codified by the AEDPA's § 2254(d)(1). *Williams v. Taylor,* 529 U.S. 362, 379, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

***10** For these reasons, the Petition is **denied** on this ground.

E. Improper Sentence

Petitioner challenges the trial court's assessment of a consecutive sentence on his kidnapping conviction. Respondent argues that this claim is unexhausted and therefore not cognizable on *habeas* review.

A review of Petitioner's convictions and sentences is necessary. Petitioner was convicted of the following crimes: First Degree Murder, Second Degree Murder, First Degree Burglary, Second Degree Kidnapping, Criminal Use of a Firearm in the First Degree, Criminal Possession of a Weapon in the Second and Third Degrees, Making a Punishable False written Instrument, Criminal Contempt in the Second Degree, Menacing in the Second Degree, and Criminal Mischief in the Fourth Degree. *People v. Hendrie,* 24 A.D.3d 871, 805 N.Y.S.2d 464. Judge Ryan sentenced Petitioner to concurrent terms of twenty-five (25) years to life imprisonment for the First and Second Degree Murder convictions, and concurrent sentences not exceeding that amount for all his remaining convictions except for Second Degree Kidnapping and Criminal Use of a Firearm in the First Degree, for which he received consecutive sentences of five (5) to ten (10) years and five (5) years incarceration, respectively. R., Sentencing Tr. at pp. 14-17, 805 N.Y.S.2d 464.

On direct appeal, Petitioner argued that the kidnapping charge served as the predicate for the second degree felony-murder charge, and therefore, that the kidnapping charge could not run consecutively to that charge pursuant to N.Y. PENAL LAW § 70.25(2). R., Pet'r App. Div. Br. at p. 41, 805 N.Y.S.2d 464. The Appellate Division agreed with Petitioner "that Penal Law § 70.25(2) prevents the County Court from imposing consecutive sentences for kidnapping and murder in the second degree based on the underlying felony of kidnapping" but did "not perceive that this error affects the length of defendant's sentence as he makes no argument that the County Court improperly made the kidnapping sentence consecutive to any other crimes for which he was convicted." *People v. Hendrie,* 805 N.Y.S.2d at 470.[3]

3 Petitioner also argued on direct appeal that the trial court improperly imposed a consecutive sentence for the criminal use of a firearm conviction because that crime was subsumed into the First Degree Burglary conviction. *People v. Hendrie,* 805 N.Y.S.2d at 469. The Appellate Division agreed that the sentence imposed for Criminal Possession of a Firearm in the First Degree was subsumed by the elements of the First Degree Burglary charge, and vacated the five (5) year consecutive sentence imposed for that crime. *Id.* at 469-70.

Respondent argues Petitioner failed to exhaust this claim because (1) he did not raise this issue in federal constitutional terms before the state courts and (2) the argument he raised before the Appellate Division was not the same argument included in his leave application to the Court of Appeals. Dkt. No. 10, Resp't Mem. of Law at pp. 30-31.

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A state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for *habeas corpus. O'Sullivan v. Boerckel,* 526 U.S. 838, 842, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). To satisfy the exhaustion requirement with respect to a claim, a defendant must "present the substance of the same federal constitutional claim [s]" to the state courts "that he now urges upon the federal courts [.]" *Aparicio v. Artuz,* 269 F.3d 78, 89 (2d Cir.2001) (internal quotation marks omitted) (citing *Turner v. Artuz,* 262 F.3d 118, 123-24 (2d Cir.2001)). "A federal constitutional claim has not been fairly presented to the State courts unless the petitioner has informed those courts of all the 'essential factual allegations' and 'essentially the same legal doctrine he asserts in his federal petition.' " *Id.* (citing *Daye v. Att'y Gen. of the State of New York,* 696 F.2d 186, 191 (2d Cir.1982) (further citing *Picard v. Connor,* 404 U.S. 270, 276-277, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)).

***11** However, a claim may be "fairly present[ed] to the state courts [,] ... without citing chapter and verse of the Constitution," if there is: (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. *Daye v. Att'y Gen. of the State of New York,* 696 F.2d at 191; *see also Smith v. Duncan,* 411 F.3d 340, 348 (2d Cir.2005).

A review of Petitioner's Brief submitted to the Appellate Division shows that he did not present this issue in federal constitutional terms, nor did he rely on cases employing constitutional analysis. R., Pet'r App. Div. Br. at pp. 40-43. In addition, Petitioner's claim does not have obvious federal constitutional overtones as it focuses on the trial court's alleged mistake in sentencing under the strictures of New York law. Respondent is therefore correct that Petitioner did not present this claim before the state courts as a federal constitutional violation. [4]

4 Because Petitioner did not properly exhaust this claim for failure to raise the issue in federal constitutional terms, the Court need not address Respondent's second exhaustion argument that Petitioner raised a separate and distinct claim in his leave application.

However, Petitioner also does not appear to raise this claim as a violation of federal constitutional law in his present *Habeas* Petition. Indeed, in contradistinction to his other claims, Petitioner implicates and mentions no federal constitutional issue(s) with respect to the sentence he received. *See* Pet. at p. 6. Rather, his argument rests on the trial court's alleged improper sentencing pursuant to New York State law. To the extent Petitioner proffers the instant claim based solely on a misapplication of state law, such a claim does not constitute a viable basis for *habeas* relief. *See Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[F]ederal habeas corpus relief does not lie for errors of state law." (citation omitted)).

Moreover, the Appellate Division's ruling that the sentence, while partly erroneous under state law, did not require revision, was correct. Petitioner was convicted of two separate counts of felony murder, one in the first degree and another in the second degree. The underlying felony for the First Degree Murder conviction was burglary; while the underlying felony for the Second Degree Murder charge was kidnapping. R. on Appeal, Vol. I, Indictment, dated Mar. 6, 1997, at pp. 1-2 & Vol. III, Trial Tr. at pp. 1617-35 (jury charge). [5] Pursuant to N.Y. PENAL LAW § 70.25(2), consecutive sentences cannot be imposed when one crime is an element of another. As the Appellate Division held, because kidnapping was the predicate for Petitioner's Second Degree Murder conviction, Petitioner's kidnapping sentence could not run consecutively to his Second Degree Murder sentence. However, because burglary was the predicate felony for Petitioner's First Degree Murder conviction, N.Y. PENAL LAW § 70.25(2) did not prohibit the trial court from setting the kidnapping sentence to run consecutive to that crime. Moreover, the trial judge could have sentenced Petitioner to life without parole on the First Degree Murder conviction alone. N.Y. PENAL LAW §§ 70.00(2)(a), (3)(a)(1), & 125.27. Because the sentence imposed was within the range prescribed by state law, Petitioner has raised no federal constitutional violation. *White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992) (citation omitted).

5 The Indictment included one count of First Degree Murder, based on a felony-murder theory with burglary being the underlying felony. It also brought two counts of Second Degree Murder, both based on a felony-murder theory, with burglary and

kidnapping being the underlying crimes. R. on Appeal, Vol. I, Indictment, dated Mar. 6, 1997, at pp. 1-3, 805 N.Y.S.2d 464. The Indictment brought second degree felony-murder charges based on both burglary and kidnapping, but the first degree felony-murder charge was based solely on the burglary felony. The trial court instructed the jury that if they found Petitioner guilty of First Degree Murder, they would consider the second degree felony-murder charge only as to the underlying felony of kidnapping, not burglary. R. on Appeal, Vol. III, Trial Tr. at pp. 1617-35, 805 N.Y.S.2d 464 (jury charge). Thus, because Petitioner was convicted of First Degree Murder with burglary being the underlying felony, kidnapping was necessarily the underlying felony for his Second Degree Murder conviction. *Id.; see also People v. Hendrie,* 805 N.Y.S.2d at 470 (noting that the underlying felony for the Second Degree Murder conviction was kidnapping).

***12** Finally, to the extent that Petitioner's claim could arguably be viewed as a challenge under the Eighth Amendment's prohibition of cruel and unusual punishment, that claim also fails. 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); *Harmelin v. Michigan,* 501 U.S. 957, 995, 111 S.Ct. 2680, 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 v. Keane,* 969 F.2d at 1383; *Lou v. Mantello,* 2001 WL 1152817, at *13 (E.D.N.Y. Sept.25, 2001). The Supreme Court has held that, for offenses less than manslaughter, sentences longer than 25 years are not grossly disproportionate. *See Staubitz v. Lord,* 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) (25 years to life for grand theft) and *Harmelin,* 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)).

Petitioner's sentence was not contrary to or an unreasonable application of that precedent. Since the sentence imposed was plainly within the limits authorized by statute, and was not grossly disproportionate to the crime of conviction, the Petition is **denied** this ground.

F. Denial of Hendrie's § 440 Motion

In his fifth and final ground for *habeas* relief, Petitioner asserts that the trial court's "[s]ummary denial of [his] post-judgment motion to vacate judgment of conviction deprived petitioner of due process." Pet. at p. 6. Petitioner further states that his "motion papers proffered facts not discoverable with due diligence prior to trial ... which, if presented to [the] jury, might have resulted in a different verdict." *Id.*

On September 14, 2000, prior to perfecting his direct appeal, Petitioner filed a motion to vacate his conviction pursuant to N.Y. CRIM. PROC. L. § 440.10(1)(g), which provides a vehicle for defendants to collaterally attack their convictions based on the discovery of new evidence. [6] R. on Appeal, Vol. III, Pet'r § 440 Mot., dated Sept. 14, 2000. The basis for Petitioner's § 440 motion was that he had found two witnesses, Jay and Janet Jeanette, whose location was previously unknown, who would have testified that Helen LaPorte told them that she and petitioner were struggling when the gun went off, she willingly went to the woods with Petitioner, and "she was going to put [Petitioner] away so she would not have to be bothered with him any more." *Id.,* Jay and Jean Jeanette Aff., dated Feb. 12, 2000, at ¶ 3. [7] The Jeanettes furnished such testimony to the trial court in a joint Affidavit attached to Petitioner's § 440 Motion. *Id.* Petitioner's trial attorney, Livingston L. Hatch, Esq., also submitted an Affidavit stating that he knew the Jeanettes were potential witnesses prior to trial, but was unable to locate them at that time. *Id.,* Livingston L. Hatch, Esq., Aff., dated Sept. 28, 2000, at ¶ 3.

6 N.Y. CRIM. PROC. L. § 440.10(1)(g) allows a defendant to collaterally attack a judgment where:

> New evidence has been discovered since the entry of a judgment based upon a verdict of guilty at trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based on such ground must be made with due diligence after the discovery of such alleged new evidence.

7 The Jeanettes' Affidavit was supported by three Exhibits, which are in sum and substance additional statements made by the Jeanettes about LaPorte's alleged comments to them. R. on Appeal, Pet'r § 440 Mot., Jay and Jean Jeanette Aff., Exs., dated July 15, July 21, & Oct. 16, 1998.

***13** The trial court denied Petitioner's motion, ruling that the Jeanettes' proffered testimony was not "newly discovered" evidence because "[i]t was known to the defendant's attorney prior to trial," and "the substance of their statement was known to [Petitioner's trial attorney] before and during the trial." R. on App., Vol. III, County Court Decision/Order, dated Aug. 1, 2001, at p. 3. Furthermore, the trial court found Petitioner had

> failed to demonstrate that this evidence could not have been produced at trial even with the exercise of due diligence. Defense counsel did not ask the Court for assistance in locating these people at any time prior to or during the trial, or for an adjournment to attempt to do the same. Finally, the defendant has not demonstrated that this evidence, if admitted at trial, would have resulted in a more favorable verdict since it merely impeaches Ms. LaPorte's trial testimony.

Id. (internal citations and quotation marks omitted).

The Appellate Division affirmed the trial court's decision for the same reasons. *People v. Hendrie,* 805 N.Y.S.2d at 470.

The Supreme Court has held that "newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Townsend v. Sain,* 372 U.S. 293, 317, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes,* 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). Claims of actual innocence based on newly discovered evidence constitute a valid basis for *habeas* relief only when there is "an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins,* 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In this case, Petitioner fails to explain how the trial court's denial of his § 440 motion violated his constitutional due process rights.

In addition, the trial court's determination that the Jeanettes' statements did not constitute "newly discovered evidence" was based on a factual determination that prior to and during trial, Petitioner's counsel knew that the Jeanettes were potential witnesses and did not employ due diligence to discover their location and produce them at trial.[8] The state court's factual rulings are presumed to be correct and can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has offered no evidence to rebut the trial court's factual conclusions. Thus, there is no basis to conclude that the trial court's denial of Petitioner's § 440 motion violated state law, much less that it somehow ran afoul of the Constitution. *See, e.g., Morris v. Duncan,* 2007 WL 2815632, at *12 (N.D.N.Y. Sept.25, 2007) (doubting petitioner's claim that the evidence forming the basis for his motion to vacate was in fact "newly discovered evidence" given the availability of such evidence prior to trial).

8 Petitioner does not allege that he was provided constitutionally deficient representation from his attorney. *See generally* Pet.

Finally, to the extent Petitioner's claim is based on the trial court's decision not to hold a hearing before deciding his § 440 motion, claims of procedural defects in state post-conviction proceedings do not state a valid basis for *habeas* relief. *Robertson v. Artus,* 2008 WL 553200, at *11 (N.D.N.Y. Feb.27, 2008) (citing *Jones v. Duncan,* 162 F.Supp.2d 204, 217-18 (S.D.N.Y.2001) ("All the circuits that have considered the issue, except one, have held that federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings." (internal citations and quotation marks omitted))).[9]

9 The Second Circuit has not explicitly addressed whether a procedural violation in a post-conviction proceeding is a valid basis for *habeas* relief, however, district courts in this Circuit have repeatedly followed the majority rule. *Jones v. Duncan,* 162 F.Supp.2d at 218 (citing cases); *see also Dexter v. Artus,* 2007 WL 963204, at *17 (N.D.N.Y. Mar.27, 2007) (joining majority position).

***14** For these reasons, the Petition is **denied** on these grounds.

III. CONCLUSION

For the reasons stated herein, it is hereby

ORDERED, that the Petition for a Writ of *Habeas Corpus* (Dkt. No. 1) is **DENIED;** and it is further

ORDERED, that because the Court finds Petitioner has not made a "substantial showing of the denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c)(2), no certificate of appealability will issue with respect to any of Petitioner's claims. *See* 28 U.S.C. § 2253(c)(2) ("A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."); *see also Lucidore v. New York State Div. of Parole,* 209 F.3d 107, 112 (2d Cir.2000) *cert. denied* 531 U.S. 873, 121 S.Ct. 175, 148 L.Ed.2d 120 (2000).

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

Ricky SANTOS, Petitioner,
v.
D. ROCK, Respondent.

No. 10 Civ. 2896(LTS)(AJP).
|
Aug. 5, 2011.

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge.

***1 To the Honorable Laura Taylor Swain, United States District Judge:**
Pro se petitioner Ricky Santos seeks a writ of habeas corpus from his June 27, 2007 conviction following a guilty plea in Supreme Court, New York County, for first degree robbery and sentence of sixteen years imprisonment. (Dkt. No. 9: 2d Am. Pet. ¶¶ 1–5.) Santos' second amended habeas petition appears to assert that: (1) he received ineffective assistance of counsel because counsel failed to "fight by [his] side at all" and failed to notify the court of his mental state at plea or sentencing; (2) his guilty plea was involuntary because he "was in a[n] unstable state of mind, and did not know what was going on"; (3) he was mentally incompetent at plea and sentencing; and (4) his sentence was harsh and excessive. (2d Am. Pet. ¶ 13; *see also* Dkt. No. 4: Am. Pet. ¶ 13.)

For the reasons set forth below, Santos' habeas petition should be *DENIED.*

FACTS

Background

On December 4, 2006, Santos was arrested in connection with several knife-point robberies in East Harlem from November 13 to December 1, 2006. (Dkt. No. 14: La Ferlita Aff. Ex. A: Santos 1st Dep't Br. at 3.) On December 15, 2006, a New York County grand jury indicted Santos for six counts of first degree robbery and one count of first degree attempted robbery. (Santos 1st Dep't Br. at 3.)

Santos' Guilty Plea

On June 12, 2007, Santos appeared with counsel before Justice Edward McLaughlin. (Dkt. No. 12: 6/12/07 Plea Transcript ("P.") 2–3.) At Santos' attorney's request, Justice McLaughlin reviewed with Santos the terms of the pending plea offer of sixteen years imprisonment in exchange for Santos' guilty plea to a single count of first degree robbery. (P. 2–3.) Justice McLaughlin explained that if Santos accepted the plea offer he could be released after thirteen years, eight months and three weeks assuming "a good institutional record," that is, because of good time credit. (P. 3.) Justice McLaughlin explained that if Santos rejected the plea offer and was convicted after trial, he faced the possibility of consecutive sentences and thus a potential sentence of up to forty or fifty years. (P. 3–4.) Justice McLaughlin added that a sentencing judge might impose a prison term on the longer side of the permissible range because some of the crime victims were elderly. (P. 4.) Nonetheless, Justice McLaughlin also explained that while he was "telling [Santos] what the possibilities are," he was "not suggesting what the sentence would be" and "not threatening." (P. 4, 6.) After consulting with his counsel (P. 6), Santos accepted the offer and entered a plea of guilty to first degree robbery. (P. 6–10.)

Justice McLaughlin first inquired as to whether Santos understood the nature of the charges:

> THE COURT: Mr. Santos[,] do you understand that you [are] now pleading guilty to a felony crime?
>
> THE DEFENDANT: Yes.
>
> THE COURT: It is charged that on November the 13th, 2006, in Manhattan, you forcibly stole some property from a person while you threatened the use of a dangerous instrument, specifically, some kind of a cutting instrument.
>
> ***2** Did you do that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand that is what your are pleading guilty to?

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THE DEFENDANT: Yes.

(P. 7.) Justice McLaughlin next advised Santos of the rights he was giving up by pleading guilty:

THE COURT: Do you understand by pleading guilty you are giving up your right to a trial[?]

That a plea of guilty by somebody such as yourself accused of a felony [and] a conviction by the jury of the person for that felony [have] the same legal meaning, a felony conviction[?]

Do you understand they both mean the same thing?

THE DEFENDANT: Yes.

THE COURT: If the trial happened your lawyer would have questioned anybody testifying against you.

You would have the right, [though] not the obligation to testify.

The People would have to prove the case against you beyond a reasonable doubt.

Do you understand ... because you are pleading guilty[,] you are not going to have the trial?

THE DEFENDANT: Yes.

(P. 7–8.) Justice McLaughlin discussed the sentence promised as part of the plea agreement:

THE COURT: As you came into court today, you were charged with ... six [counts of] [r]obbery in the first degree [and one count of] attempt to commit robbery in the first degree and whether the aggregate [sentence] is the 40 or the 50 [years], again, I'm not threatening or promising[ ] you but in theory, you face if the jury were to find you guilty of these, consecutive sentences on one or more of them.

You have been given a chance to plead guilty to one charge [of robbery in the first degree]. On that, the minimum sentence by law, given your prior non violent felony, the minimum sentence is eight years determinate, and the maximum is 25 years on that one charge.

I have told you that I'm going to give you a sentence of 16 years determinate.... That is what I'm imposing.

...

Have you had a chance to speak, I know you have had, to [defense counsel] Ms. Conway both today and on other days, and has she explained to you your various legal rights and your options with regard to these charges within this indictment?

THE DEFENDANT: Yes.

THE COURT: Are you pleading guilty because you are in fact guilty of the charge?

THE DEFENDANT: Yes.

(P. 8–9.) Justice McLaughlin also inquired whether Santos was under the influence of drugs:

THE COURT: Are you under the influence of any drug or alcohol today?

THE DEFENDANT: No I'm not.

THE COURT: Is what you told me today true?

THE DEFENDANT: Yes.

THE COURT: So, if you were to tell me or some other judge in the future [something] different from what you are saying today, that future statement would not be true because you have told me the truth today, am I correct[?]

THE DEFENDANT: Correct.

(P. 9–10.)

Justice McLaughlin adjudicated Santos a second felony offender based on his 1998 conviction for third degree attempted criminal possession of a controlled substance. (P. 10–11.) Justice McLaughlin scheduled sentencing for June 26, 2007. (P. 11–12.)

Sentencing

***3** On June 26, 2007, pursuant to the negotiated plea agreement, Justice McLaughlin sentenced Santos to sixteen years imprisonment. (Dkt. No. 12: 6/26/07 Sentencing Transcript ("S.") 2.) When Justice McLaughlin asked Santos and his counsel if they had anything to say, Santos said "No" and his counsel stated that they would rely on the plea agreement. (S.2.)

Santos' Direct Appeal

Represented by new counsel, Santos' appeal to the First Department argued that his sentence was "harsh and excessive and should be reduced in the interests of justice." (Dkt. No. 14: La Ferlita Aff. Ex. A: Santos 1st Dep't Br. at 6–14.)

On June 2, 2009, the First Department unanimously affirmed Santos' conviction. *People v. Santos,* 63 A.D.3d 414, 414, 879 N .Y.S.2d 804, 804 (1st Dep't 2009). On July 29, 2009, the New York Court of Appeals denied leave to appeal. *People v. Santos,* 12 N .Y.3d 929, 884 N.Y.S.2d 710 (2009).

Santos' Federal Habeas Corpus Petition and Proceedings

On or about December 21, 2009, Santos filed a pro se federal habeas corpus petition. (Dkt. No. 2: Pet. at last page.) On April 5, 2010, Chief Judge Preska issued a "60 Day Order" requiring Santos to clarify the nature of his Constitutional claim and whether his claim(s) were exhausted in state court. (Dkt. No. 3: 4/5/10 Order.) On April 22, 2010, Santos filed an amended petition, essentially repeating what he had said in his original petition and adding a list of citations to the New York C.P.L. and state court decisions. (Dkt. No. 4: Am. Pet. at p. 4–5.) On May 12, 2010, this Court ordered Santos to "either (1) confirm that his only claim is the ... sentencing claim [raised on direct appeal], or (2) state what (other) claims he [was] raising." (Dkt. No. 7: 5/12/10 Order.) That order crossed in the mail with Santos' May 10, 2010 second amended petition appearing to allege that: (1) he received ineffective assistance of counsel because counsel failed to "fight by [his] side at all" or notify the court of his mental state at plea or sentencing; (2) his guilty plea was involuntary because he "was in a[n] unstable state of mind, and did not know what was going on"; (3) he was mentally incompetent at his plea and sentencing; and (4) his sentence was harsh and excessive. (Dkt. No. 9: 2d Am. Pet.)

After the State responded to all of the potential claims in Santos' second amended petition (Dkt. No. 13: State Br.), this Court stayed Santos' habeas petition, because "[o]nly the excessive sentence claim was raised in state court," and "[i]t is possible that at least [Santos'] ineffective assistance claim still can be brought in state court via a C.P.L. § 440 motion." (Dkt. No. 16: 8/2/10 Order.) This Court ordered Santos within "thirty (30) days to bring a C.P.L § 440 motion in state court to attempt to exhaust his three unexhausted claims" and to "file a Third Amended Petition in this Court within thirty (30) days of the final state court ruling." (8/2/10 Order.) [1]

1 *See, e.g., Zarvela v. Artuz,* 254 F.3d 374, 380–82 (2d Cir.) (Where some of petitioner's claims are unexhausted, action should be stayed and petitioner given thirty days in which to file state action to exhaust unexhausted claims, and thirty days to return to the district court after exhaustion is completed.), *cert. denied,* 534 U.S. 1015, 122 S.Ct. 506 (2001), *cited with approval, Rhines v. Weber,* 544 U.S. 269, 278, 125 S.Ct. 1528, 1535 (2005) (endorsing the use of *Zarvela*-type stay and abeyance techniques and time limits).

Santos' C.P.L. § 440 Motion

***4** On August 31, 2010, Santos filed a pro se C.P.L. § 440.10 motion in state court arguing that he was denied the effective assistance of counsel because counsel failed to: (1) review with Santos the facts of the case or the nature or the elements of the charges (Dkt. No. 18: Santos § 440 Br. at 11); (2) investigate a defense of not guilty due to "mental disease or defect" (*id.* at 11, 13–14); (3) pursue a dismissal of Santos' indictment on speedy trial grounds (*id.* at 12–13); and (4) notify the court of Santos' mental state at plea or sentencing (*id.* at 14–15). Santos also alleged that his guilty plea was coerced because Justice McLaughlin "threat[ened] to sentence him to 40 years in prison" if he did not accept the plea, and that he was on medication and therefore incompetent at plea and sentencing. (Santos § 440 Aff. ¶¶ 14, 19.)

On March 31, 2011, at the prosecution's request, Santos' state-court defense counsel, Claudia Conway, submitted an affidavit to the § 440 court in response to Santos' § 440 allegations about her representation. (Dkt. No. 21: Conway Aff.) Conway affirmed that, although Santos told her of his "serious drug addiction problem" and history of mental illness, he "never suggested that he was so intoxicated ... that he was unable to form the intent to commit robbery," or that he suffered from depression severe enough to support a defense of mental disease or defect. (Conway Aff. ¶¶ 7–8.) Conway also affirmed that she explained to Santos the legal standards for competency and informed him that she "did not have a factual basis to request [a competency] examination." (Conway Aff. ¶¶ 9, 13–14.) Additionally,

Conway affirmed that she did not believe "six months of speedy trial time had accrued while [Santos'] case was pending, and [she] did not suggest to [Santos] that was the case." (Conway Aff. ¶ 12.) Conway explained that "[g]iven the circumstances of the case, [she] believed that the only reasonable strategy was to negotiate a plea bargain with as low a[ ] sentence as possible." (Conway Aff. ¶ 11.)[2] Conway stated that she communicated her strategy to Santos and his brother numerous times, and that they "both agreed with [her] that [it] was the best approach." (Conway Aff. ¶ 11.)

2 Conway explained that Santos' confession to the crimes, his identification in lineups by victims and his fingerprints at one of the robbery scenes, were such that if Santos "were to go to trial in this case, he stood no chance of securing an acquittal." (Conway Aff. ¶ 10; *see also id.* ¶ 6.)

On April 26, 2011, Justice McLaughlin denied Santos' C.P.L. § 440 .10 motion. (Dkt. No. 25: 1/16/11 La Ferlita Letter to the Court Att .: Justice McLaughlin Decision.) Justice McLaughlin rejected Santos' ineffective assistance claims, finding that "[i]n the face of overwhelming evidence of guilt—seven lineup identifications, a confession for each separate crime, defendant's possession of the knife, and a fingerprint match from one of the crime scenes—defense counsel correctly determined that the only reasonable legal option was to limit the defendant's prison exposure by avoiding a trial and pleading guilty in exchange for a reduced prison sentence." (Justice McLaughlin Decision at 7–8.) Justice McLaughlin explained that Santos had "[n]o viable intoxication defense." (Justice McLaughlin Decision at 8.) Moreover, defense counsel "investigated [Santos'] mental health problem and discovered that he suffered from depression, a condition that did not provide a defense to the crimes charge[d]." (Justice McLaughlin Decision at 8.) Justice McLaughlin also determined that "defense counsel did not fail to file a meritorious speedy trial motion" under C.P.L. § 30.30 because "[t]he prosecution ... announced ready for trial within the six-month" statutory time frame. (Justice McLaughlin Decision at 8–9.)

***5** Justice McLaughlin also rejected Santos' claim that he had coerced Santos' guilty plea by threatening a forty-year prison sentence. (Justice McLaughlin Decision at 9.) Justice McLaughlin noted that he had "stated explicitly that no such threat was being made" and his statement of potential sentence exposure was "instructive, not coercive." (Justice McLaughlin Decision at 9.) Lastly, Justice McLaughlin rejected Santos' claim that he was on medication and therefore incompetent at plea and sentencing, noting that Santos had stated during the plea that "he was not under the influence of any medication." (Justice McLaughlin Decision at 9.) Moreover, neither Justice McLaughlin nor defense counsel detected in Santos' "appearance or visage [anything that] suggested or hinted that he was confused and did not understand the proceeding[s] ." (Justice McLaughlin Decision at 9–10.)

On April 28, 2011, a motion clerk from the Supreme Court, New York County, mailed a certified copy of Justice McLaughlin's April 26, 2011 § 440 decision to Santos. (Dkt. No. 25: 1/16/11 La Ferlita Letter to the Court Att.: 4/28/11 Letter.) On June 17, 2011, in an exercise of caution, this Court directed Santos "to move in the First Department for leave to appeal by *July 18,"* 2011, or the claims raised in his § 440 motion will be considered "unexhausted for federal habeas purposes." (Dkt. No. 25: 6/17/11 Memo Endorsement.) Santos has not sought leave to appeal the § 440 decision to the First Department, nor has he otherwise responded to this Court's order.

ANALYSIS

I. *ALL OF SANTOS' HABEAS CLAIMS (EXCEPT EXCESSIVE SENTENCE) ARE UNEXHAUSTED AND PROCEDURALLY BARRED BECAUSE HE FAILED TO APPEAL THE DENIAL OF HIS C.P.L. § 440 MOTION TO THE FIRST DEPARTMENT*

A. *The Exhaustion Doctrine: Background*

Section 2254 codifies the exhaustion requirement, providing 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 unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State...." 28 U.S.C. § 2254(b)(1)(A).[3] As the Supreme Court has made clear, "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy,* 455 U.S. at 518, 102 S.Ct. at 1203; *accord, e.g., O'Sullivan v. Boerckel,* 526 U.S. at 845, 119 S.Ct. at 1732.

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3 *See, e.g., O'Sullivan v. Boerckel,* 526 U.S. 838, 842, 119 S.Ct. 1728, 1731 (1999); *Rose v. Lundy,* 455 U.S. 509, 515–16, 102 S.Ct. 1198, 1201 (1982) ("The exhaustion doctrine existed long before its codification by Congress in 1948" in 28 U.S.C. § 2254.); *Picard v. Connor,* 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971); *Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994), *cert. denied,* 514 U.S. 1054, 115 S.Ct. 1436 (1995); *Pesina v. Johnson,* 913 F.2d 53, 54 (2d Cir.1990); *Daye v. Attorney Gen.,* 696 F.2d 186, 190–94 (2d Cir.1982) (en banc), *cert. denied,* 464 U.S. 1048, 104 S.Ct. 723 (1984).

The Second Circuit determines whether a claim has been exhausted by applying a two-step analysis:

> First, the petitioner must have fairly presented to an appropriate state court the same federal constitutional claim that he now urges upon the federal courts.... Second, having presented his federal constitutional claim to an appropriate state court, and having been denied relief, the petitioner must have utilized all available mechanisms to secure [state] appellate review of the denial of that claim.

***6** *Diaz v. Coombe,* 97 Civ. 1621, 1997 WL 529608 at *3 (S.D.N.Y. June 12, 1997) (Mukasey, D.J. & Peck, M.J.); *accord, e.g., O'Sullivan v. Boerckel,* 526 U.S. at 843–48, 119 S.Ct. at 1732–34.

"The exhaustion requirement is not satisfied unless the federal claim has been 'fairly presented' to the state courts." *Daye v. Attorney Gen.,* 696 F.2d at 191.[4] The Second Circuit has held that a federal habeas petitioner must have alerted the state appellate court that a federal constitutional claim is at issue. *E.g., Cox v. Miller,* 296 F.3d at 99; *Jones v. Vacco,* 126 F.3d at 413–14; *Grady v. LeFevre,* 846 F.2d 862, 864 (2d Cir.1988); *Petrucelli v. Coombe,* 735 F.2d 684, 688–89 (2d Cir.1984); *Daye v. Attorney Gen.,* 696 F.2d at 191. In *Daye,* the Second Circuit en banc stated:

4 *Accord, e.g., O'Sullivan v. Boerckel,* 526 U.S. at 844, 119 S.Ct. at 1732; *Picard v. Connor,* 404 U.S. at 275–76, 92 S.Ct. at 512; *Jones v. Keane,* 329 F.3d 290, 294–95 (2d Cir.), *cert. denied,* 540 U.S. 1046, 124 S.Ct. 804 (2003); *Cox v. Miller,* 296 F.3d 89, 99 (2d Cir.2002), *cert. denied,* 537 U.S. 1192, 123 S.Ct. 1273 (2003); *Jones v. Vacco,* 126 F.3d 408, 413 (2d Cir.1997).

> [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.

Daye v. Attorney Gen., 696 F.2d at 194.[5]

5 *Accord, e.g., Smith v. Duncan,* 411 F.3d 340, 348 (2d Cir.2005); *Jackson v. Edwards,* 404 F.3d 612, 618 (2d Cir.2005); *Rosa v. McCray,* 396 F.3d 210, 217–18 (2d Cir.), *cert. denied,* 546 U.S. 889, 126 S.Ct. 215 (2005); *St. Helen v. Senkowski,* 374 F.3d 181, 182–83 (2d Cir.2004), *cert. denied,* 543 U.S. 1058, 125 S.Ct. 871 (2005); *Cox v. Miller,* 296 F.3d at 99; *Ramirez v. Attorney Gen.,* 280 F.3d 87, 95 (2d Cir.2001); *Levine v. Comm'r of Corr. Servs.,* 44 F.3d 121, 124 (2d Cir.1995), *cert. denied,* 520 U.S. 1106, 117 S.Ct. 1112 (1997); *Grady v. LeFevre,* 846 F.2d at 864; *Garofolo v. Coomb,* 804 F.2d 201, 206 (2d Cir.1986); *Petrucelli v. Coombe,* 735 F.2d at 688.

The Supreme Court has confirmed the long-held view of the Second Circuit that "a state prisoner must present his claims to a state supreme [*i.e.,* highest] court in a petition for discretionary review in order to satisfy the exhaustion requirement." *O'Sullivan v. Boerckel,* 526 U.S. at 839–40, 119 S.Ct. at 173.[6]

6 *Accord, e.g., Rosa v. McCray,* 396 F.3d at 217; *Galdamez v.. Keane,* 394 F.3d 68, 73 (2d Cir.), *cert. denied,* 544 U.S. 1025, 125 S.Ct. 1996 (2005); *Calderon v. Keane,* 115 F. App'x 455, 457 (2d Cir.2004); *Cotto v. Herbert,* 331 F.3d 217, 237 (2d Cir.2003); *Ramirez v. Attorney Gen.,* 280 F.3d at 94; *Jordan v.. LeFevre,* 206 F.3d 196, 198 (2d Cir.2000); *Morgan v. Bennett,* 204 F.3d 360, 369 (2d Cir.), *cert. denied,* 531 U.S. 819, 121 S.Ct. 59 (2000); *Bossett v. Walker,* 41 F.3d at 828 ("To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims 'to the highest court of the pertinent state.' "); *Grey v. Hoke,* 933 F.2d 117, 119 (2d Cir.1991) ("a petitioner must present his federal constitutional claims to the highest court of the state before a federal

court may consider the merits of the petition"); *Pesina v. Johnson,* 913 F .2d at 54 ("We have held that the exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition," citing *Daye*); *Daye v. Attorney Gen.,* 696 F.2d at 191 n. 3 ("Exhaustion of available state remedies requires presentation of the claim to the highest state court from which a decision can be had.").

B. ***Application to Santos' Habeas Claims***

Here, all of Santos' claims, except his excessive sentence claim, were raised only in his C.P.L. § 440 motion, and Santos did not seek leave to appeal to the First Department from Justice McLaughlin's denial of the motion. (*See* pages 6–7, 10 above.)

The thirty-day deadline to seek leave to appeal from the denial of Santos' C.P.L. § 440.10 motion has long since passed. *See* C.P.L. § 460.10(4) (to appeal the denial of a § 440.10 motion, a defendant must apply for leave to appeal within 30 days of being served with the decision to be appealed). Santos has not alleged "improper conduct, inability to communicate, or other facts" to support a motion to extend the time limit pursuant to C.P.L. § 460.30. *People v. Kaczynski,* 119 A.D.2d 927, 927, 507 N.Y.S.2d 946, 947 (3d Dep't 1986). Therefore, Santos now would be barred from raising these claims in the First Department. *E.g., People v.. Ferraro,* 169 A.D.2d 732, 732, 564 N.Y.S.2d 479, 480 (2d Dep't) ("Since the defendant failed to timely move for leave to appeal from the order denying his postjudgment motion pursuant to CPL 440.10 to vacate the judgment, his appeal from the order is dismissed."), *appeal denied,* 77 N.Y.2d 994, 571 N.Y.S.2d 920 (1991); *see DeVito v. Racette,* No. CV–91–2331, 1992 WL 198150 at *3–4 (E.D.N.Y. Aug. 3, 1992) (passage of more than 30 days from denial of § 440 motion without appeal bars consideration on federal habeas review); *see also* cases cited at pages 15–17 & n. 8 below.

***7** " 'For exhaustion purposes, "a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." ' " *Reyes v. Keane,* 118 F.3d 136, 139 (2d Cir.1997) (quoting *Grey v. Hoke,* 933 F.2d 117, 120 (2d Cir.1991) (quoting *Harris v. Reed,* 489 U.S. 255, 263 n. 9, 109 S.Ct. 1038, 1043 n. 9 (1989))).[7] "In such a case, a petitioner no longer has 'remedies available in the courts of the State' within the meaning of 28 U.S.C. § 2254(b)." *Grey v. Hoke,* 933 F.2d at 120. Consequently, such procedurally barred claims are "deemed exhausted" by the federal courts. *E.g., St. Helen v. Senkowski,* 374 F.3d at 183; *DiGuglielmo v. Smith,* 366 F.3d at 135; *McKethan v. Mantello,* 292 F.3d at 122–23; *Ramirez v. Attorney Gen.,* 280 F.3d at 94; *Reyes v. Keane,* 118 F.3d at 139; *Bossett v. Walker,* 41 F.3d at 828; *Washington v. James,* 996 F.2d 1442, 1446–47 (2d Cir.1993), *cert. denied,* 510 U.S. 1078, 114 S.Ct. 895 (1994); *Grey v. Hoke,* 933 F.2d at 120–21.

7 *Accord, e.g., Castille v. Peoples,* 489 U.S. 346, 350, 109 S.Ct. 1056, 1059 (1989) ("It would be inconsistent with [§ 2254(b)], as well as with underlying principles of comity, to mandate recourse to state collateral review whose results have effectively been predetermined"); *St. Helen v. Senkowski,* 374 F.3d 181, 183 (2d Cir.2004) ("even if a federal claim has not been presented to the highest state court or preserved in lower state courts under state law, it will be deemed exhausted if it has become procedurally barred under state law."), *cert. denied,* 543 U.S. 1058, 125 S.Ct. 871 (2005); *DiGuglielmo v. Smith,* 366 F.3d 130, 135 (2d Cir.2004) (petitioner's procedurally defaulted claims deemed exhausted where he could no longer obtain state-court review because of his procedural default); *McKethan v. Mantello,* 292 F.3d 119, 122–23 (2d Cir.2002) (claims deemed exhausted where they were "procedurally barred for not having been raised in a timely fashion"), *cert. denied,* 129 S.Ct. 233 (2008); *Ramirez v. Attorney Gen.,* 280 F.3d 87, 94 (2d Cir.2001); *Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994) ("[I]f the petitioner no longer has 'remedies available' in the state courts under 28 U.S.C. § 2254(b), we deem the claims exhausted."), *cert. denied,* 514 U .S. 1054, 115 S.Ct. 1436 (1995).

While the application of this rule in cases where the petitioner failed to appeal the denial of his C.P.L. § 440.10 motion has not been entirely consistent, in this case Santos' claims should be deemed exhausted and procedurally barred because of his post-denial default. Prior to the Supreme Court's 1991 decision in *Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546 (1991), and hence prior to the 1995 enactment of the AEDPA, federal courts in New York generally dismissed as unexhausted habeas petitions where the petitioner did not timely seek leave to appeal the lower state court's denial of a C.P.L. § 440 motion. *See, e.g., Pesina v. Johnson,* 913 F.2d 53, 54 (2d Cir.1990). In fact, in *Pesina v. Johnson,* the Second Circuit held that the passing of the statutory time limit for applications for leave to appeal imposed by C.P.L.

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§ 460.10(4)(a) did not constitute exhaustion of the claim in the state courts, absent some attempt to seek state appellate review:

> While that statutory limit may ultimately be held by state courts to preclude them from reaching the merits of [petitioner's] ineffective assistance claim, he must still present that claim to the highest state court. We have no authority to declare as a matter of state law that an appeal from the denial of his original Section 440.10 motion is unavailable ....

Pesina v. Johnson, 913 F.2d at 54.

However, "[t]he *Pesina* rule has been called into question by several district courts based on *Bossett v. Walker,* 41 F.3d 825 (2d Cir.1994), and *Reyes v. Keane,* 118 F.3d 136, 139 (2d Cir.1997), which note that it is pointless to require a habeas petitioner to return to state court to pursue a claim that is obviously procedurally barred." *Castillo v. Hodges,* 01 Civ. 2172, 2004 WL 613075 at *4 (S.D.N.Y. Mar. 29, 2004) (citing cases). In *Thomas v. Greiner,* this Court explained why it concluded that *Pesina* was no longer good law after *Coleman:*

> ***8** [A]lthough the Second Circuit has not explicitly disavowed this aspect of *Pesina,* it has since explained that federal courts should dismiss with prejudice where "New York procedural rules plainly bar petitioner from attempting to raise his" claims in state court. *Grey v. Hoke,* 933 F.2d at 120 .... There is no reason to exempt from this general rule a petition for leave to appeal the denial of a CPL § 440.10 motion where the time to bring such a petition has expired. I agree with Chief Judge Sifton's reasoning in a case with an identical posture: *"Coleman* appears to put to rest *Pesina* 's concern that federal courts lack the 'authority' to declare claims procedurally defaulted at the state level." *DeVito v. Racette,* 1992 WL 198150 at *5. The rule articulated in *DeVito* is appropriate here. Since it is clear that the claims [petitioner] had brought in his CPL § 440.10 motion would be denied as untimely if brought back to the state courts, to require him to do so would be wasteful of judicial resources. Finally, if the lapse of a clear time limit such as the one in CPL § 460.10(4) does not provide grounds for a federal court to find exhaustion and a resulting procedural bar, it is hard to imagine a state rule that ever could until the state courts had ruled—the theory would be that state remedies are never exhausted because a petitioner can always request relief from the state court, even if it is virtually certain the state court would not grant it. In order to comply with *Coleman,* the federal courts must at some point do what *Pesina* declined to do —"declare as a matter of state law that an appeal ... is unavailable." *Pesina v. Johnson,* 913 F.2d at 54. Accordingly, [petitioner's] speedy trial and excessive sentence claims are procedurally defaulted by his failure to seek leave to appeal the denial of his CPL § 440.10 motion.

Thomas v. Greiner, 111 F.Supp.2d 271, 277–78 (S.D.N.Y.2000) (Preska, D.J. & Peck, M.J.); *accord, e.g., Castillo v. Hodges,* 2004 WL 613075 at *4–5 (finding *Thomas* "persuasive," and holding that "[b]ecause petitioner failed to appeal the denial of his 440.10 motion, the claims raised therein are deemed exhausted [and] procedurally forfeited"); *Weeks v. Senkowski,* 275 F.Supp.2d 331, 341 (E.D.N.Y.2003) (Weinstein, D.J.) ("Although the *Pesina* rule clearly cuts against the grain of *Bossett* and mandates fruitless, time-consuming and expensive litigation, the case has never been explicitly overruled. In light of *Bossett,* this court will not follow *Pesina.* Petitioner's claim is rejected on the ground that it is procedurally barred. The Second Circuit rule in *Pesina* should be explicitly reconsidered." (citations omitted)); *see, e.g., Edmee v. Coxsackie Corr. Facility,* Nos. 09–Civ–3940, 09–Civ–3939, 2009 WL 3318790 at *2 (E.D.N.Y. Oct. 14, 2009) ("The failure to timely appeal the denial of petitioner's § 440.10 motion means that the claim is not only unexhausted, but procedurally barred under state law because it is too late to take that appeal and a state court would dismiss it on that ground."); *Rodriguez v. Ercole,* 08 Civ.2074, 2008 WL 4701043 at *3 (S.D.N.Y. Oct. 24, 2008) ("Since the petitioner can no longer move timely for permission to appeal from the denial of his CPL § 440.10 motion, his ineffective assistance of trial counsel claim is procedurally barred." (citing *Thomas*)); *Diaz v. Conway,* 04 Civ. 5062, 2008 WL 2461742 at *17 (S.D.N.Y. June 17, 2008); *Ayala v. Conway,* No. 03 CV 3424, 2008 WL 2169537 at *6 (E . D.N.Y. May 22, 2008) (citing *Thomas* & other cases); *Rashid v. Kuhlman,* 97 Civ. 3037, 2000 WL 1855114 at *8 (S.D.N.Y. Dec. 19, 2000). [8]

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8 *See also, e.g., Figgins v. Conway,* No. 09–CV–0680, 2011 WL 2039573 at *4 (W.D.N.Y. May 25, 2011); *Jones v. Marshall,* 08 Civ. 5793, 2011 WL 9386 at *12 (S.D.N.Y. Jan. 3, 2011), *report & rec. adopted,* 2011 WL 1097393 (S.D.N.Y. Mar. 23, 2011); *White v. West,* No. 04–CV–02886, 2010 WL 5300526 at *17–18 (E.D.N.Y. Dec. 6, 2010) (citing *Thomas*); *Price v. Kirkpatrick,* No. 08–CV–0268, 2010 WL 3303856 at *4 (W.D.N.Y. Aug. 19, 2010); *Alejandro v. Berbary,* No. 08–CV–1809, 2010 WL 2075941 at *5 (E.D.N.Y. May 21, 2010) (citing *Thomas*); *Sams v. Donelli,* 07 Civ. 4600, 2008 WL 2939526 at *3 & n. 2 (S.D.N.Y. July 28, 2008); *Maisonet v. Conway,* No. CV–04–2860, 2007 WL 2027323 at *3 (E.D.N.Y. July 10, 2007); *but see, e.g., Quintana v. McCoy,* 03 Civ. 5747, 2006 WL 300470 at *5 (S.D.N.Y. Feb. 6, 2006) (although *Pesina* "may well be on shaky ground, it cannot be nullified by this Court"); *Priester v. Senkowski,* 01 Civ. 3441, 2002 WL 1448303 at *7 (S.D.N.Y. July 3, 2002) (while the "rule in *Pesina* has properly been called into question by several district courts ....[,] [t]his Court ... cannot overrule the holding of *Pesina"*); *Bloomer v. Costello,* 00 Civ. 5691, 2001 WL 62864 at *5 (S.D.N.Y. Jan. 24, 2001) (Lynch, D.J.) ("[I]f *Pesina* is a 'derelict on the waters of the law,' it is not for this Court to sink it." (citation omitted)).

***9** In accordance with this Court's decision in *Thomas* (and the other cases following *DeVito* and *Thomas*), Santos' claims (except his excessive sentence claim) are procedurally defaulted by his failure to seek leave to appeal the denial of his C.P.L. § 440.10 motion. [9]

9 In many but not all of the cases cited immediately above, the additional one year for an extension of the time to seek leave to appeal pursuant to C.P.L. § 460.30 also had passed. While that period has not passed here, Santos does not satisfy the requirements of C.P.L. § 460.30. In any event, this Court had granted Santos a *Rhines/Zarvela* stay and abeyance, requiring him to file a § 440 within thirty days and return to federal court within thirty days of completing state proceedings. (*See* pages 6–7 above.) After the Court learned that Santos had not sought leave to appeal to the First Department from the § 440 denial, this Court ordered Santos "to move in the First Department for leave to appeal by *July 18,"* 2011. (*See* pages 9–10 above.) Santos did not do so. At this stage of the case, Santos has not shown good cause (indeed, he has not shown any cause) for failing to exhaust his claims in state court by seeking leave to appeal to the First Department from the § 440 denial. It would violate the reasoning of the *Rhines/Zarvela* process to require this Court to continue to hold his petition in abeyance until the one-year period under C.P.L. § 460.30 were to expire, particularly where this Court specifically ordered Santos to seek leave to appeal by a certain date. Accordingly, Santos' claims are unexhausted but deemed exhausted and barred from habeas review. *See, e.g., Hernandez v. Filion,* 03 Civ. 6989, 2004 WL 286107 at *17 (S.D.N.Y. Feb. 13, 2004) (Peck, M.J.) (Where stay and abeyance granted to allow petitioner thirty days to seek leave to appeal from denial of his § 440 motion, and "[o]ver three months later, it appears that [petitioner] did not appeal the denial of his § 440 motion to the First Department, and it is now too late for [petitioner] to do so, both as a matter of state procedure and, more importantly, as a matter of habeas jurisprudence under *Zarvela,"* claim "should be dismissed as unexhausted but deemed exhausted and procedurally barred." (citing cases)), *report & rec. adopted,* 2004 WL 555722 (S.D.N.Y. Mar. 19, 2004); *see also, e.g., Castillo v. Murray,* 04 Civ. 4112, 2005 WL 2373921 at *2 (S.D.N.Y. Sept. 25, 2005) (Where stay and abeyance ordered and petitioner failed to respond to court orders to explain his failure to file and appeal § 440 motions, petition to be dismissed.).

To avoid such a procedural default, Santos would have to "show 'cause' for the default and 'prejudice attributable thereto,' or demonstrate that failure to consider the federal claims will result in a 'fundamental miscarriage of justice,' " *i.e.,* a showing of "actual innocence." *Harris v. Reed,* 489 U.S. 255, 262, 109 S.Ct. 1038, 1043 (1989) (citations omitted); *accord, e.g., Schlup v. Delo,* 513 U.S. 298, 324–27, 115 S.Ct. 851, 865–67 (1995); *Coleman v. Thompson,* 501 U.S. 722, 735, 111 S.Ct. 2546, 2557 (1991); *see also, e.g., Messiah v. Duncan,* 435 F.3d 186, 195 (2d Cir.2006); *Green v. Travis,* 414 F.3d 288, 294 (2d Cir.2005); *Smith v. Duncan,* 411 F.3d 340, 347 (2d Cir.2005); *DeBerry v. Portuondo,* 403 F.3d 57, 64 (2d Cir.), *cert. denied,* 546 U.S. 884, 126 S.Ct. 225 (2005); *St. Helen v. Senkowski,* 374 F.3d 181, 183–84 (2d Cir.2004), *cert. denied,* 543 U.S. 1058, 125 S.Ct. 871 (2005); *DiGuglielmo v. Smith,* 366 F.3d 130, 135 (2d Cir.2004); *Jones v. Vacco,* 126 F.3d 408, 415 (2d Cir.1997); *Glenn v. Bartlett,* 98 F.3d 721, 724 (2d Cir.1996), *cert. denied,* 520 U.S. 1108, 117 S.Ct. 1116 (1997); *Velasquez v. Leonardo,* 898 F.2d 7, 9 (2d Cir.1990). Here, Santos has not attempted to show cause and prejudice or "actual innocence." [10] Therefore, his procedural default bars federal habeas relief on those claims.

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10 Indeed, Santos has admitted to this Court that he "did commit robbery, but only 3," not the six he has been charged with. (Dkt. No. 23: 6/2/11 Order, Att.: Santos Letter at 2.) He pleaded guilty to just one robbery (*i.e.,* less than the three he admits to committing), and thus cannot claim actual innocence.

II. *SANTOS' EXCESSIVE SENTENCE CLAIM IS NOT COGNIZABLE ON HABEAS REVIEW*

Santos' excessive sentence claim (Dkt. No. 9: 2d Am. Pet. ¶ 13) should be denied because it is not cognizable on habeas review. [11]

11 In addition, this claim is unexhausted and procedurally barred because Santos only raised his excessive sentence claim under state law-requesting that his sentence be reduced in the interest of justice (*see* page 5 above)-without citing any federal case law and making no mention of any constitutional rights. *See, e.g., McClelland v. Kirkpatrick,* No. 08–CV–0683, ––– F.Supp.2d ––––, 2011 WL 1518671 at *19 (W.D.N.Y. Apr. 21, 2011) ("Petitioner's appellate brief ... invoking the power of the Appellate Division to reduce his sentence in the interest of justice under C.P.L. § 470 .15(6)(b).... [was] insufficient to alert the state court that the claim [was] of a federal constitutional dimension."); *Rodriguez v. Lee,* 10 Civ. 3451, 2011 WL 1362116 at *7 (S.D.N.Y. Feb. 22, 2011) (Excessive sentence claim was unexhausted and procedurally barred because "petitioner argued on direct appeal that his sentence should be reduced in the interest of justice, but never alluded to a single federal law, case, or constitutional provision."), *report & rec. adopted,* 2011 WL 1344599 (S.D.N.Y. Apr. 8, 2011); *Edwards v. Marshall,* 589 F.Supp.2d 276, 290 (S.D.N.Y.2008) ("This Court and other courts in this district have found that a prisoner's reliance on a state procedural law granting courts discretionary authority to reduce sentences does not 'fairly present' a federal constitutional claim in state court."); *King v.. Cunningham,* 442 F.Supp.2d 171, 181 (S.D.N.Y.2006) ("[T]he constitutional nature of [petitioner's excessive sentence] claim was not 'fairly presented' to the state courts on direct appeal" because petitioner's "Appellate Division brief presented his excessive sentence claim in terms of state law, invoking the power of a state appellate court to reduce sentences in the interest of justice under C.P.L. § 470.15(6)(b).").

An excessive sentence claim does not provide a basis for habeas relief, because "[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). [12]

12 *Accord, e.g., Black v. Conway,* 11 Civ. 0480, 2011 WL 2610530 at *12 (S.D.N.Y. June 30, 2011) (Peck, M.J.); *Robinson v. Smith,* 09 Civ. 8222, 2011 WL 1849093 at *27 (S.D.N.Y. May 17, 2011) (Peck, M.J.); *Jackson v. Lee,* 10 Civ. 3062, 2010 WL 4628013 at *44 (S.D.N.Y. Nov. 16, 2010), *report & rec. adopted,* 2010 WL 5094415 (S.D.N.Y. Dec. 10, 2010); *Garcia v. Rivera,* 07 Civ. 2535, 2007 WL 2325928 at *17 & n. 18 (S.D.N.Y. Aug. 16, 2007) (Peck, M.J.) (& cases cited therein); *see, e.g., Thomas v. Senkowski,* 968 F.Supp. 953, 956 (S.D.N.Y.1997) ("It is well established that, when a sentence falls within the range prescribed by state law, the length of the sentence may not be raised as grounds for federal habeas relief."); *see also, e.g., Townsend v. Burke,* 334 U.S. 736, 741, 68 S.Ct. 1252, 1255 (1948) (severity of sentence generally not reviewable on habeas).

Justice McLaughlin sentenced Santos to sixteen years imprisonment for one count of first degree robbery. (*See* page 5 above.) First degree robbery is a class B violent felony. Penal Law §§ 70.02(1)(a), 160.15. Santos was a second felony offender. (*See* page 5 above.) New York law authorized Justice McLaughlin to impose a maximum term of twenty five years imprisonment for first degree robbery. *See* Penal Law §§ 70.06(6)(a).

Because Santos' sentence is within the statutory range, it is not reviewable on federal habeas corpus as "excessive." Accordingly, Santos' excessive sentence habeas claim should be *DENIED.*

CONCLUSION

For the reasons discussed above, Santos' habeas petition should be *DENIED* in its entirety and a certificate of appealability should not be issued.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

***10** 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.[13] Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Laura Taylor Swain, 500 Pearl Street, Room 755, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Swain (with a courtesy copy to my chambers). Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466 (1985); *IUE AFL–CIO Pension Fund v. Herrmann,* 9 F.3d 1049, 1054 (2d Cir.1993). *cert. denied,* 513 U.S. 822, 115 S.Ct. 86 (1994); *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993); *Frank v. Johnson,* 968 F.2d 298, 300 (2d Cir.), *cert. denied,* 506 U.S. 1038, 113 S.Ct. 825 (1992); *Small v. Sec'y of Health & Human Servs.,* 892 F.2d 15, 16 (2d Cir.1989); *Wesolek v. Canadair Ltd.,* 838 F.2d 55, 57–59 (2d Cir.1988); *McCarthy v. Manson,* 714 F.2d 234, 237–38 (2d Cir.1983); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72.

13 If the pro se petitioner requires copies of any of the cases reported only in Westlaw, petitioner should request copies from opposing counsel. *See Lebron v. Sanders,* 557 F.3d 76, 79 (2d Cir.2009); SDNY–EDNY Local Civil Rule 7.2.

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

Milton F. LEE, Petitioner,
v.
Gary GREENE, Superintendent, Respondent.

No. 9:05–CV–1337 (GTS/DEP).
|
Feb. 10, 2011.

Attorneys and Law Firms

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MEMORANDUM–DECISION and ORDER

Hon. GLENN T. SUDDABY, District Judge.

***1** Milton F. Lee ("Petitioner") filed his petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 on October 24, 2005. (Dkt. No. 1.) By Report–Recommendation dated December 15, 2010, 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. 65.) For the reasons set forth below, Magistrate Judge Peebles's Report–Recommendation is accepted and adopted in its entirety, and Petitioner's petition is denied and dismissed.

I. APPLICABLE LEGAL STANDARDS

A. 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–CV2826, 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).

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 (1996).

B. Standard Governing Review of Petitioner's Habeas Petition

"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. §

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2254." *Capra v. LeClair,* 06–CV–1230, 2010 WL 3323676, at *7 (N.D.N.Y. Apr. 12, 2010) (Peebles, M.J.). 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). 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.

***2** 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 (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) (citing *Francis S. v. Stone,* 221 F.3d 100, 108–09 [2d Cir.2000] [citing *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495 [2000]).

"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." *Capra,* 2010 WL 3323676, at *8 (citing *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.' " *Id.* (quoting *Sellan v. Kuhlman,* 261 F.3d 303, 312 [2d Cir.2001]) (other citations omitted). "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 claimeven if the state court does not explicitly refer to either the federal claim or to relevant federal case law.' " *Id.* (quoting *Sellan,* 261 F.3d at 312).

"When it is determined that a state court's decision was 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." *Id.* (quoting *Williams,* 529 U.S. at 405–06). "Additionally, 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.' " *Id.* (quoting *Sellan,* 261 F.3d at 315). 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.

II. RELEVANT BACKGROUND

***3** For the sake of brevity, the Court will not repeat the factual background of Petitioner's 2001 conviction for murder in the second degree, but will simply refer the parties to the relevant portions of Magistrate Judge Peebles's Report–Recommendation, which accurately recites that factual background. (Dkt. No. 65, at 2–5.)

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A. Petitioner's Claim

In his petition, Petitioner asserts the following claims in support of his petition: (1) the trial court erred in admitting evidence that was the product of Fourth Amendment violations;[3] (2) the trial court erred in permitting witnesses to testify regarding his handling of the victim's body following her death; (3) the trial court erred in refusing to allow him to call Dr. Lesswing as an expert witness; and (4) he was denied a fair trial through the introduction of an excessive number of photographs of the victim's body. (Dkt. No. 1.)

3 More specifically, Petitioner alleges that the trial court should not have permitted the prosecution to present evidence obtained by law enforcement agents following his traffic stop, including the results of a consensual search of his vehicle, and oral and written statements in which he admitted to murdering the victim.

B. Magistrate Judge Peebles's Report–Recommendation

In his Report–Recommendation, Magistrate Judge Peebles recommends dismissal of Petitioner's petition because Petitioner failed to make a substantial showing that he was denied a constitutional right. (Dkt. No. 65, at 39.) More specifically, in his Report–Recommendation, Magistrate Judge Peebles recommends as follows: (1) that Petitioner's first claim (i.e. that the trial court erred in allowing the prosecution to admit evidence that was the product of a Fourth Amendment violation) be dismissed because Petitioner failed to establish that the trial court failed to conduct a meaningful suppression hearing prior to ruling that this evidence was admissible; (2) that Petitioner's second and fourth claims (i.e. that Petitioner was deprived of the right to a fair trial based on rulings made by the trial court that permitted the prosecution to adduce the quantity of evidence that it did regarding (a) his handling of the victim's body following her death, and (b) the photographs of the victim's body) be dismissed because, based on the record, the evidence was properly admitted, and, even if it was not, Petitioner failed to demonstrate that the trial court's rulings regarding the admissibility of this evidence deprived him of a fundamentally fair trial; and (3) that Petitioner's third claim (i.e. that the trial court violated his due process rights by not allowing him to call Dr. Lesswing as a witness) be dismissed because the trial court's rejection of Dr. Lesswing's testimony was based on adequate and independent state grounds, and, even assuming that the rejection was not based on adequate and independent grounds, Petitioner failed to show that Dr. Lesswing's testimony was fundamental to his defense such that denying this testimony deprived him of a fundamentally fair trial. (Dkt. No. 65.)

C. Petitioner's Objection

On December 30, 2010, Petitioner submitted his Objections to the Report–Recommendation. (Dkt. No. 67.) Generally, in his Objections, Petitioner argues, *inter alia,* as follows: (1) Magistrate Judge Peebles erred in not considering two grounds for relief (i.e., that his conviction was against the weight of the evidence, and that Yvette Rivers should not have been permitted to testify based on her unsettled mental condition), which were asserted by Petitioner in his original Petition; (2) Magistrate Judge Peebles erred in finding that the trial court did not err in declining to suppress certain evidence based on a violation of his Fourth Amendment rights because the officer's testimony at the suppression hearing that he acquired probable cause to search Petitioner's vehicle after viewing the victim's body in plain sight was false; (3) Magistrate Judge Peebles erred in concluding that the evidence of Petitioner's guilt introduced at trial was overwhelming; and (4) with regard to the precluded testimony of Dr. Lesswing, Petitioner should not have had to comply with the notice requirement set forth in CPL 250.10 because he does not suffer from any psychiatric disorders, and therefore Magistrate Judge Peebles should only have considered whether denying him the opportunity to call Dr. Lesswing as a witness denied him a fundamentally fair trial. (Dkt. No. 67.)

III. ANALYSIS

***4** As an initial matter, the Court finds that Petitioner has failed to make specific objections to Magistrate Judge Peebles's Report–Recommendation. Rather, Petitioner has simply restated arguments he presented in his prior papers to the Court. As a result, the Court reviews the Report–Recommendation only for clear error.

After carefully reviewing all of the papers in this action, including Magistrate Judge Peebles's Report–Recommendation and Petitioner's Objections thereto, the Court agrees with each of the recommendations made by Magistrate Judge Peebles, and rejects each of Petitioner's Objections thereto. (Dkt. Nos.65, 67.)

Magistrate Judge Peebles employed the proper legal standards, accurately recited the facts, and correctly applied the law to those facts. (Dkt. No. 65.) As a result, the Court accepts and adopts Magistrate Judge Peebles's Report–Recommendation in its entirety for the reasons stated therein. The Court would add only four points.

First, Magistrate Judge Peebles's thorough and correct Report–Recommendation would survive even a *de novo* review.

Second, contrary to the argument raised in Plaintiff's Objections, the Court does not construe Ground Two of Plaintiff's petition as asserting a challenge to his conviction based on the weight of the evidence. Rather, Ground Two asserts that Petitioner was deprived of his right to a fair trial based on rulings made by the trial court that permitted the prosecution to adduce the quantity of evidence that it did regarding Petitioner's handling of the victim's body following her death. (Dkt. No. 1.) Accordingly, Magistrate Judge Peebles did not err in declining to consider Petitioner's weight-of-the-evidence argument.

Moreover, even assuming that Ground Two could be liberally construed as asserting a challenge to his conviction based on the weight of the evidence, the record reflects that Petitioner did not exhaust such a weight-of-the-evidence claim. (Dkt. No. 67 at 3–4.) Furthermore, the Court agrees with Magistrate Judge Peebles that the evidence of Petitioner's guilt introduced at trial was overwhelming.

Third, with regard to Petitioner's argument that Magistrate Judge Peebles erred in not considering his argument that Yvette Rivers should not have been permitted to testify based on her unsettled mental condition, the Court finds that Magistrate Judge Peebles correctly concluded that this was not a ground for relief asserted in Petitioner's original petition. Rather, this claim was recited (albeit much more vaguely) in the section of his petition detailing the grounds for relief that he raised in his 440 motion to vacate the judgment, which he filed in state court in addition to his direct appeal from the judgment of conviction and sentence.

In any event, even assuming that his argument that Yvette Rivers should not have been permitted to testify based on her unsettled mental condition was a ground for relief asserted in his petition, the Court has considered this argument and finds that it does not create grounds for habeas relief. As an initial matter, the trial court already considered and rejected that argument. In addition, Petitioner has not exhausted this claim for relief, [4] and the time in which to do so has long since passed. [5] *See* N.Y. C.P .L. §§ 460.10(4)(a), 460.30 (noting that the deadline for leave to appeal may be extended to at most 1 year and 30 days). As a result, the claim is procedurally barred. *See Jones,* 2011 WL 9386, at *12 (collecting cases). Moreover, even assuming that the claim is not procedurally barred, as the trial court noted in dismissing Petitioner's 440 motion, in light of the overwhelming evidence of guilt introduced at trial aside from Ms. Rivers's testimony, it cannot be said that permitting her to testify deprived Petitioner of a fundamentally fair trial.

4 *Jones v. Marshall,* 08–CV–5793, 2011 WL 9386, at *12 (S.D.N.Y. Jan. 3, 2011) (noting that petitioner must "seek leave to appeal the New York Supreme Court's denial of [ ]his [440.10] motion[, and] [b]ecause he has not presented this claim to the highest state court from which a decision could be had, the claim is unexhausted"); *Pesina v. Johnson,* 913 F.2d 53, 54 (2d Cir.1990) ("[B]y failing to appeal the denial of his Section 440.10 motion, [petitioner] has not fulfilled [the exhaustion] requirement with respect to his ineffective assistance claim.").

5 Petitioner's 440.10 motion to vacate his conviction was denied on December 9, 2003.

***5** Fourth and finally, contrary to Petitioner's argument in his Objections, Magistrate Judge Peebles did consider whether denying Petitioner the opportunity to call Dr. Lesswing as a witness denied him a fundamentally fair trial; and Magistrate Judge Peebles concluded, based on the overwhelming evidence of guilt introduced at trial, that it did not deny Petitioner a fundamentally fair trial.

ACCORDINGLY, it is

ORDERED that Magistrate Judge Peebles' Report–Recommendation (Dkt. No. 65) is ***ACCEPTED*** and ***ADOPTED*** in its entirety; and it is further

ORDERED that Petitioner's petition (Dkt. No. 1) is ***DENIED*** and ***DISMISSED;*** and it is further

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ORDERED that a certificate of appealability not issue with respect to any of the claims set forth in the petition, because Petitioner has not made a "substantial showing of the denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c)(2).

All Citations

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

Jose PEREZ, Petitioner,
v.
John LEMPKE, Respondent.

No. 10–CV–0303(MAT).
|
July 13, 2011.

Attorneys and Law Firms

Jose R. Perez, Romulus, NY, pro se.

Thomas Benjamin Litsky, Office of New York State Attorney General, New York, NY, for Respondent.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** Jose R. Perez ("Perez" or "Petitioner") brings this habeas corpus application pursuant to 28 U.S.C. § 2254 alleging that he is in Respondent's custody at Five Points Correctional Facility in violation of his federal constitutional rights. Petitioner was convicted after a jury trial in Seneca County Court (Bender, J.) on charges of third degree criminal possession of a weapon, second degree attempted assault, endangering the welfare of a child, and second degree harassment. The charges stemmed from an incident in which Petitioner repeatedly struck his former girlfriend Bobbie Jo Halstead ("Halstead") with a wrench, in the presence of Halstead's young son, mother, and several witnesses.

II. Factual Background

A. The Prosecution's Case at Trial

In May 2007, Nicole Miner ("Miner") was at Halstead's apartment with Petitioner, and Halstead was chatting with someone else. Halstead had stopped dating Petitioner about a month or two prior earlier. Petitioner told Miner, "[T]his fucking bitch is done messing with me for the last time ... I don't know what I am going to do, but I am going to make her sorry. I am going to hurt her." T.276. [1] Sometime later in that month or the next, Petitioner called Halstead and threatened her.

1 Citations to "T. ___" refer to pages from the transcript of Petitioner's trial.

Shortly after midnight on June 14, 2007, Bernard Tibbs ("Tibbs"), drove Halstead and her four-year-old son home to the apartment that Halstead shared with her mother, Donna Stone ("Stone"). Petitioner was lying in wait. As soon as Halstead opened her car door, he punched her in the head. When Halstead got out of the car, Petitioner hit her in the ear, eye, and nose with a nickel plated wrench or ratchet. Hearing her daughter's "awful scream," Stone ran outside.

During the attack, Tibbs held Halstead's child because he did not want him to get hurt. When Petitioner started to chase Tibbs, threatening to kill him, Tibbs directed the child to run into the apartment. The child was screaming throughout Petitioner's attack on Halstead.

Neighbor Deon Watkins ("Watkins") was on his way to bed when he heard Halstead screaming. Looking out his window, Watkins saw the attack in progress. While Stone was attempting to persuade Petitioner to leave, Petitioner struck Halstead again with the metal object. Petitioner left only after another neighbor, told Petitioner that "he needed to get the heck out of there." T.257.

While the police were inside Halstead's apartment filling out paperwork, Petitioner called Halstead's cell telephone. Halstead's mother answered and instead of giving the phone to Halstead, placed Petitioner on speaker-phone. Petitioner stated that Halstead deserved what she got and that he was going to kill her. T.285.

B. The Defense Case

Kevin Erb ("Erb") met Petitioner at the Seneca County Jail in the Fall of 2007, while Erb was being held for a probation violation. Erb recognized Petitioner from an incident three months earlier based upon Petitioner's hairstyle, which he described as "long dreads."

***2** On June 14, 2007, while on his way to see a friend at the apartment complex where Halstead and her mother lived, Erb saw Petitioner grab a blond-haired woman by her hair and slap her two or three times with an open hand.

Erb said that he "wasn't like paying, like a lot of details [sic]" because he did not want to get involved. T.368. Erb did not intervene because he did not want anything to do with the police.

Willie Love ("Love") encountered Tibbs (one of the eyewitnesses) at the Seneca County Jail in January of 2008. Tibbs said that he had to testify against Petitioner. According to Love, Tibbs saw Petitioner slap Halstead. Tibbs then was chased by Petitioner. Tibbs purportedly also told Love that at the time of the incident, "no baby [was] there" and "there was no metal object." T.379. Love had several prior convictions, including harassment, assault, and larceny.

The jury returned a verdict of guilty on all charges (Criminal Possession of a Weapon in the Third Degree, Attempted Assault in the Second Degree, Endangering the Welfare of a Child; and Harassment in the Second Degree). Petitioner was sentenced, as a persistent felony offender, to concurrent prison terms of fifteen years to life on the third-degree criminal possession of a weapon and attempted second-degree assault counts, one year on the endangering the welfare of a child count, and fifteen days on the harassment count.

III. General Legal Principles Applicable to Habeas Petitions

A. Title 28, Sections 2254(a) and 2254(d)

Habeas relief is only available to redress errors in a state court criminal proceeding that are of a federal constitutional magnitude. 28 U.S.C. § 2254(a). The Anti-terrorism and Effective Death Penalty Act ("AEDPA") amended 28 U.S.C. § 2254(d) to provide that 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 unless the adjudication of the claim 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 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)(1), (2). *See also Williams v. Taylor,* 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

B. 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 to consider the claim rendering a judgment in the case clearly and expressly rested its judgment 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)).

IV. Analysis of the Petition

A. Denial of the Right to Testify at the Grand Jury

***3** Petitioner contends that he was denied his right to testify before the grand jury. On appeal, the Appellate Division, Fourth Department, of New York State Supreme Court found that there was no evidence in the record that Petitioner or his attorney gave the required written notice to the District Attorney that Petitioner intended to testify before the grand jury. *People v. Perez,* 67 A.D.3d 1324, 1325, 888 N.Y.S.2d 689 (App.Div. 4th Dept.2009) (citations omitted). The Fourth Department further found that to the extent Perez contended that he was denied effective assistance of counsel on the ground that his attorney failed to effectuate his intent to testify, there was no indication in the record that Perez conveyed or attempted to convey his wish to testify to his attorney. *Id.* (citation omitted).

Perez's claim pertaining to the denial of the right to testify at the grand jury does not present a federal question and is not cognizable on federal habeas review. While indictment by grand jury is guaranteed by the New York State Constitution, *see* N.Y, Const. Art. 1, § 6; *People v. Iannone,* 45 N.Y.2d 589, 594, 412 N.Y.S.2d 110, 384

N.E.2d 656 (N.Y.1978)), such a right is purely a state-created right. *E.g., Velez v. People of the State of New York,* 941 F.Supp. 300, 315 (E.D.N.Y.1996). Moreover, claims based on alleged defects in grand jury proceedings are not reviewable in a petition for habeas corpus relief. *See Lopez v. Riley,* 865 F.2d 30, 32–33 (2d Cir.1989) (citing *United States v. Mechanik,* 475 U.S. 66, 67, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986)). This specifically includes a claim that a defendant was deprived of his right to testify before the grand jury. *Brown Woods,* No. 07 Civ. 10391(JGK), 2010 WL 2605744, at *2 (S.D.N.Y. June 9, 2010). The rationale is that conviction by a petit jury transforms any defect with the grand jury proceeding into harmless error because the trial conviction establishes not only probable cause to indict but also proof of guilt beyond a reasonable doubt. *Lopez,* 865 F.2d at 32–33 (citation omitted).

Because Petitioner was convicted after a jury trial at which the prosecution proved his guilt beyond a reasonable doubt, any error with regard to his right to testify at the grand jury proceeding was rendered harmless. *See id.*

B. Erroneous Admission of Evidence of Petitioner's Prior Bad Acts

Petitioner contends that the trial court erred in allowing the prosecution to elicit testimony from Halstead's friend, Miner, regarding threats Petitioner made against Halstead prior to the attack. At trial, Miner testified that in May 2007, she was at Halstead's apartment with Petitioner, while Halstead was talking with another person. At the time, Petitioner told Miner, "[T]his fucking bitch is done messing with me for the last time ... I don't know what I am going to do, but I am going to make her sorry. I am going to hurt her." T.276. Miner also testified that in May or June 2007, she was with Halstead when Halstead received calls on her cell phone from petitioner. Halstead would hold up her phone so that Miner could hear the conversation, too. Miner recognized Petitioner's voice. Petitioner accused Halstead of having sex with other men and threatened her. T.279.

***4** The trial court instructed the jury that the testimony concerning threatening statements by Petitioner regarding Halstead was not offered as an attempt to prove that Petitioner possessed a propensity or disposition to commit criminal or other bad acts. The court emphasized that, if the jury found the evidence to be true, it could not be considered to establish criminal propensity. Rather, the court explained, the evidence was offered solely to show that Petitioner had a motive to commit the offenses alleged in the indictment. *See* T.440–41.

On direct appeal, the Appellate Division rejected this evidentiary claim, holding that the trial court properly exercised its discretion in admitting testimony regarding threats made by Petitioner to Halstead for the purpose of establishing motive and to provide background information concerning the relationship between Petitioner and Halstead. *People v. Perez,* 67 A.D.3d at 1326, 888 N.Y.S.2d 689 (citations omitted). The Appellate Division observed that "[u]nlike evidence of general criminal propensity, evidence that a particular victim was the focus of a defendant's continuing aggression may be highly relevant[.]" *Id.* (quotation and citation omitted).

Federal courts, generally, cannot consider challenges to a state court's evidentiary rulings. *See Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions ."). Even where a petitioner describes an evidentiary error as unduly prejudicial, it must be recognized that "not all erroneous admissions of [unduly prejudicial] evidence are errors of constitutional dimension." *Dunnigan v. Keane,* 137 F.3d 117, 125 (2d Cir.1998). Here, the trial court's ruling was correct as a matter of New York state law.

People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (N.Y.1901), sets forth the rule that evidence of prior crimes or bad acts is admissible to prove a specific crime if it tends to establish motive, intent, absence of mistake or accident, a common scheme or plan between the commission of two or more crimes, or the identity of the person charged with the commission of the crime. *Accord, e.g., People v. Till,* 87 N.Y.2d 835, 837, 637 N.Y.S.2d 681, 661 N.E.2d 153 (N.Y.1995) (evidence of uncharged crimes may be introduced at trial "when the evidence is relevant to a pertinent issue in the case other than a defendant's criminal propensity to commit the crime charged" and if the probative value of the evidence outweighs any prejudice to the defendant.). The evidence regarding the threats made by Petitioner to Halstead clearly was relevant for purposes of completing the narrative of events and establishing his motive to attack Halstead. *See Till,* 87 N.Y.2d at 837, 637 N.Y.S.2d 681, 661 N.E.2d 153 (holding that testimony of prior

bad acts may be admitted into evidence, after a finding by the court that the probative value outweighs any undue prejudice caused by its admission, when "needed as background material" or to "complete the narrative of the episode" that established a motive for and provided the jury with a thorough appreciation for the interwoven events leading up to the defendant's criminal conduct) (citing, *inter alia, People v. Montanez,* 41 N.Y.2d 53, 58, 390 N.Y.S.2d 861, 359 N.E.2d 371 (N.Y.1976) (noting that the trial court has the discretion to admit some evidence of other crimes when it is needed as background material)and *People v. Gines,* 36 N.Y.2d 932, 932–33, 373 N.Y.S.2d 543, 335 N.E.2d 850 (N.Y.1975) (complainant properly permitted to testify that defendant had raped her incident to and immediately following the robbery; such testimony was admissible to complete the narrative of events and to establish the complainant's opportunity to identify defendant as her assailant)). Perez has failed to demonstrate an error of state law, much less an error of constitutional dimension in the trial court's *Molineux* ruling.

***5** Moreover, "the issue of whether an admission of uncharged crimes can ever constitute a violation of the Due Process Clause has not been decided by the Supreme Court." *Jones v. Conway,* 442 F.Supp.2d 113, 131 (S.D.N.Y.2006) (citing *Estelle v. McGuire,* 502 U.S. at 75 n. 5 ("[W]e express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime ."). 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 cannot be said to be contrary to or an unreasonable application of clearly established Supreme Court law.

C. Claims Regarding the Sufficiency of the Evidence as to the Verdict on the Count Charging Third Degree Possession of Weapon

Petitioner contends that the evidence was legally insufficient to prove beyond a reasonable doubt that he possessed or exercised dominion or control over a weapon. This issue was found by the Appellate Division to be unpreserved for appellate review.

"[T]here can be no doubt that New York case law requires that a sufficiency objection be specifically made to the trial court in the form of a motion to dismiss at trial." *Donaldson v. Ercole,* No. 06–5781–pr, 2009 WL 82716, at *1 (2d Cir. Jan.14, 2009) (unpublished opn.) (citing *People v. Hines,* 97 N.Y.2d 56, 736 N.Y.S.2d 643, 762 N.E.2d 329, 333 (N.Y.2001) ("[W]e have repeatedly held that an indictment may be dismissed due to insufficient evidence only where the sufficiency issues pursued on appeal were preserved by a motion to dismiss at trial. Indeed, even where a motion to dismiss for insufficient evidence was made, the preservation requirement compels that the argument be specifically directed at the alleged error.") (citations and internal quotation marks omitted in original)).

Here, defense counsel failed to renew his motion for a trial order of dismissal, thereby failing to preserve the legal-insufficiency claim. Accordingly, as Respondent argues, the Appellate Division's decision denying the claim based upon the lack of a specific, contemporaneous objection rested upon a state law ground that was "independent of the federal question and adequate to support the judgment[,]" *Coleman v. Thompson,* 501 U.S. at 729.

Because of the independent and adequate state procedural bar, the Court cannot review the sufficiency of the evidence claim unless Perez can show cause and prejudice, or that a fundamental miscarriage of justice would occur should this Court decline to consider the claim. Perez has not adduced cause, prejudice, or facts to support the miscarriage of justice exception. Therefore, the claim is dismissed.

Petitioner also argues that the guilty verdict with respect to the weapons-possession count was against the weight of the evidence. His "weight of the evidence" claim derives from New York Criminal Procedure Law ("C.P.L.") § 470.15(5), which permits an appellate court in New York 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). A "weight of the evidence" argument is a pure state law claim grounded in the criminal procedure statute, whereas a legal sufficiency claim is based on federal due process principles. *People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 (N.Y.1987).

***6** Since a "weight of the evidence claim" is purely a matter of state law, it is not cognizable on habeas review. *See* 28 U.S.C. § 2254(a) (permitting federal habeas

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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"); *Estelle v. McGuire,* 502 U.S. at 68 ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *see also* *Maldonado v. Scully,* 86 F.3d 32, 35 (2d Cir.1996) (dismissing habeas petitioner's claim attacking the weight of the evidence; noting that "assessments of the weight of the evidence or the credibility of witnesses are for the jury and not grounds for reversal on appeal").

D. Prosecutorial Misconduct During Summation

Defendant contends that the cumulative effect of several instances of alleged prosecutorial misconduct on summation deprived him of a fair trial. On appeal, the Appellate Division held that inasmuch as defense counsel failed to object to any of the prosecutor's allegedly inappropriate remarks, Perez's contention was unpreserved for review. *People v. Perez,* 67 A.D.3d at 1326, 888 N.Y.S.2d 689 (citing *People v. Smith,* 32 A.D.3d 1291, 1292, 821 N.Y.S.2d 356 (App.Div. 4th Dept.2006) (failure to object to prosecutorial misconduct on summation renders claim unpreserved for appellate review).

Respondent argues that the comments to which no objection was made are not subject to habeas review because the Appellate Division relied on the contemporaneous objection rule to dismiss them. It is well-settled that "federal habeas review is foreclosed 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." *Velasquez v. Leonardo,* 898 F.2d 7, 9 (2d Cir.1990). Courts in this circuit have consistently held that a state court's reliance on defendant's failure to object contemporaneously to a prosecutor's allegedly improper summation constitutes an adequate and independent state ground for deciding the claim. *See, e.g., Velasquez,* 898 F.2d at 9 (holding that state court's reliance on contemporaneous objection rule was as an independent and adequate state ground which barred habeas review of claims of prosecutorial misconduct).

Under the circumstances presented here, "[t]he decision of the state court, having rested on 'independent and adequate state grounds,' is necessarily beyond the reach of federal habeas corpus review." *Brunson v. Tracy,* 378 F.Supp.2d 100, 106 (E.D.N.Y.2005) (quoting *Cotto v. Herbert,* 331 F.3d 217, 238 (2d Cir.2003) and citing *Garcia v. Lewis,* 188 F.3d 71, 79 (2d Cir.1999) ("[W]e have observed and deferred to New York's consistent application of its contemporaneous objection rules.") (citations omitted)).

Perez cannot demonstrate cause and prejudice, or that a fundamental miscarriage of justice will occur if this Court does not review the prosecutorial misconduct claims. Because the procedural default remains unexcused, these claims will not be reviewed on the merits.

E. Sentencing as a Persistent Felony Offender in Violation of the Sixth Amendment

***7** The Second Circuit has held that the New York Court of Appeals reasonably applied clearly established Supreme Court precedent in holding that New York Penal Law § 70.10 does not run afoul of the Sixth Amendment's guarantee to a criminal defendant of a trial-by-jury. *Portalatin v. Graham,* 624 F.3d 69, 73, 90–94 (2d Cir.2010) (*en banc*), *reversing* *Besser v. Walsh,* 601 F.3d 163, 189 (2d Cir.2010). Based upon the authority of *Portalatin v. Graham,* 624 F.3d 69, Petitioner's claim challenging the constitutionality his sentencing as a persistent felony offender under P.L. § 70.10 must be denied. *See* *Gibson v. Artus,* No. 08–1576, 2010 WL 4342198, at *2 (2d Cir. Nov.3, 2010) (unpublished opinion) ("We recently upheld New York's persistent felony offender statute ... explaining that in the enactment of that statute, 'predicate felonies alone expand the indeterminate sentencing range within which [a] judge has the discretion to operate, and that discretion is cabined only by an assessment of defendant's criminal history.' Under the circumstances, the claim that New York's persistent felony offender statute violated petitioner's right to a jury trial under the Sixth Amendment is without merit.") (quoting *Portalatin,* 624 F.3d at 94).

F. Harshness and Excessiveness of the Sentence

In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a). When Perez appealed his sentence in the state courts, he urged the Appellate Division to exercise its discretionary authority to review factual questions and reduce the length of his sentence in the interests of justice.

It is well settled that a habeas petitioner's challenge to the length of his prison term does not present a cognizable constitutional issue if the sentence falls within the statutory range. *See Townsend v. Burke,* 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948) ("The [petitioner's] sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus."); *White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992) ("No federal constitutional issue is presented where, as here, the sentence is within the range prescribed by state law."). Petitioner, having been adjudicated as a persistent felony offender, was required to be sentenced to an indeterminate life term, with the minimum sentence ranging from fifteen to twenty-five years. *See* N.Y. Penal Law § 70.00(3)(a)(i). Since Petitioner received the minimum sentence authorized by law for persistent felony offenders, his claim that his sentence was harsh and excessive does not present a federal constitutional issue amenable to habeas review. *Accord, e.g., White v. Keane,* 969 F.2d at 1383; *Fielding v. LeFevre,* 548 F.2d 1102, 1108 (2d Cir.1977); *Underwood v. Kelly,* 692 F.Supp. 146 (E.D.N.Y.1988), *aff'd,* 875 F.2d 857 (2d Cir.), *cert. denied,* 493 U.S. 837, 110 S.Ct. 117, 107 L.Ed.2d 79 (1989).

V. Conclusion

***8** For the reasons stated above, Jose Perez's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied, and the Petition is dismissed. Because Petitioner 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 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 *in forma pauperis.*

SO ORDERED.

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

Stephen STRAIN, Petitioner,
v.
Ada PEREZ, Warden, Respondent.

No. 9:11–CV–0345 (TJM).
|
May 24, 2012.

Attorneys and Law Firms

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Eric T. Schneiderman, Attorney General for the State of New York, Alyson J. Gill, Esq., Assistant Attorney General, of Counsel, New York, NY, for the Respondent.

MEMORANDUM–DECISION AND ORDER

THOMAS J. McAVOY, Senior District Judge.

I. BACKGROUND

A. State Court Proceedings

***1** The records supplied to this Court establish that in a letter dated May 19, 2009, the Rensselaer County District Attorney ("District Attorney") offered petitioner, *pro se* Stephen Strain an opportunity to plead guilty to attempted robbery in the second degree, in violation of New York Penal Law ("Penal Law") §§ 110.00 and 160. 10, in satisfaction of charges that were brought against him in a felony complaint which included a charge of attempted robbery in the first degree. Dkt. No. 1 at 36.[1] That letter noted that if petitioner accepted that offer, he would receive a determinate, seven year prison term, to be followed by five years of post release supervision. *Id.* That correspondence further provided that if the offer was not accepted prior to June 4, 2009, it would be withdrawn. *Id.* Petitioner did not accept that offer, and a Rensselaer County Grand Jury thereafter charged him with attempted robbery in the first degree, in violation of Penal Law § § 110.00 and 160.15(3); burglary in the second degree, contrary to Penal Law § 140.25(1)(c); and criminal possession of a weapon in the third degree, in violation Penal Law § 265.02(1). *See* Appellant's Brief on Appeal ("App.Br.") (Dkt. No. 13–2) at 3.[2]

1 Petitioner attached various state court records to the original petition he filed with the Court.

2 This Court was not provided with a copy of the Indictment returned against petitioner.

On September 25, 2009, petitioner appeared before the county court for purposes of entering a guilty plea. At that time, defense counsel noted that petitioner would be pleading guilty to the second count in the indictment (*i.e.,* burglary in the second degree) in full satisfaction of all charges returned against petitioner in that instrument. *See* Transcript of Change of Plea ("Plea Tr.") (Dkt. No. 1 at 15) at 3. Petitioner's counsel also noted at that time that under the terms of that plea proposal, petitioner "would receive an eight and a half year determinate sentence [and] ... five years post release supervision." *Id.* After the trial court informed petitioner of the various rights he was waiving by entering a guilty plea, petitioner answered a series of questions posed to him by the court which ensured that petitioner's plea was knowingly, intelligently and voluntarily made. *Id.* at 4–9. He then admitted to entering a Domino's pizza restaurant in Rensselaer County on May 9, 2009, and using or threatening to use a dangerous instrument while intending to commit a crime at that establishment. *Id.* at 9–10. The trial court thereafter accepted petitioner's guilty plea. *Id.* at 10.

On November 2, 2009, the District Attorney prepared a second felony offender statement relating to petitioner in which the prosecutor declared that on March 3, 2003, petitioner was convicted of robbery in the third degree in Albany County Court, and thereafter sentenced to an indeterminate prison term of one to three years. *See* Second Felony Offender Statement ("SFOS") (Dkt. No. 13–1).

On November 23, 2009, petitioner appeared with counsel for purposes of sentencing on the burglary conviction. *See* Transcript of Sentencing ("Sentencing Tr.") (Dkt. No. 1 at 29). At that proceeding, petitioner admitted to the previous conviction referenced in the SFOS, Sentencing Tr. at 5, and the county court then imposed the agreed-upon sentence of eight and one-half years, to be followed by a five year period of post-release supervision. *Id.* at 5–6.

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***2** With the assistance of counsel, petitioner filed an appeal of the foregoing with the New York State, Supreme Court, Appellate Division, Third Department. *See* App. Br. The District Attorney filed a brief in opposition to that appeal, Dkt. No. 13–3, and on September 23, 2010, the Appellate Division affirmed the judgment of conviction. *People v. Strain,* 76 A.D.3d 1123 (3d Dep't 2010). Petitioner did not file an application seeking leave to appeal that decision with the New York Court of Appeals.

Petitioner thereafter filed a motion to set aside the imposed sentence pursuant to New York Criminal Procedure Law ("CPL") § 440 .20 ("CPL Motion") (Dkt. No. 13–8). In that application, petitioner claimed he had received the ineffective assistance of counsel because his attorney did not object to the District Attorney's alleged failure to comply with CPL § 400.21 concerning the filing of a second felony offender statement,[3] or thereafter contest the fact that petitioner was sentenced as a second felony offender. CPL Motion at 3–5. The county court denied petitioner's application, finding that: (1) the District Attorney complied with CPL § 400.21; (2) petitioner was properly sentenced as a second felony offender; and (3) petitioner had received the effective assistance of counsel. *See* Decision and Order of Rensselaer County Court Judge Robert M. Jacon (1/21/11) ("January, 2011 Decision") (Dkt. No. 13–5) at 2–4. Petitioner did not seek leave to appeal the January, 2011 Decision from the Appellate Division.

3 CPL § 400.21 discusses the procedure to be followed where the prosecutor alleges that a criminal defendant should be sentenced as a second felony offender.

B. This Action

Petitioner commenced the present action by filing a petition seeking a writ of habeas corpus on March 17, 2011 in the Eastern District of New York. Dkt. No. 1. Since the conviction challenged herein occurred within the geographical boundaries of the Northern District of New York, on March 28, 2011, United States District Judge Allyne R. Ross transferred this matter to this District. Dkt. No. 2. This Court thereafter directed petitioner to file an amended pleading if he wished to proceed with this action (Dkt. No. 4), and on April 21, 2011, petitioner filed an amended petition in compliance with the terms of that order ("Am.Pet.") (Dkt. No. 5).

In that pleading, petitioner claims that: (1) his trial attorney rendered ineffective assistance; and (2) he was illegally sentenced by the county court as a second felony offender. *See* Am. Pet., Grounds One, Two.[4] On September 19, 2011, the Office of the Attorney General of the State of New York, acting on respondent's behalf, filed an answer in opposition to petitioner's amended pleading. Dkt. No. 11. At that time, respondent's counsel also filed a memorandum of law in opposition to the amended pleading ("Resp.Mem.") (Dkt. No. 10), together with various state court records related to the criminal matter challenged herein (Dkt. No. 13).

4 Petitioner attached a supporting memorandum of law to his amended pleading. *See* Attachment to Am. Pet. ("Supp.Mem.") (Dkt. No. 5–1).

On October 3, 2011, petitioner filed a reply memorandum of law in further support of his habeas application. Dkt. No. 14 ("Reply").

***3** This matter is currently before this Court for disposition.

II. DISCUSSION

A. Exhaustion Doctrine

Respondent contends that this Court must deny and dismiss petitioner's amended petition because he failed to fully exhaust his habeas claims in the state courts. *See* Resp. Mem. at 8–9. Respondent specifically argues that petitioner raised his claims alleging ineffective assistance of counsel in his CPL Motion, but that he never sought leave to appeal the denial of that application from the Appellate Division. Resp. Mem. at 8. With respect to petitioner's second and final claim, respondent argues that this theory is unexhausted because when petitioner asserted his challenge to the sentence imposed on him in the context of his direct appeal, "[p] etitioner relied only on New York's Criminal Procedure Law and state cases to support his claims, and did not rely at all on the United States Constitution or federal cases." *Id.* Respondent contends that such ground is also unexhausted because petitioner never sought leave to appeal the Appellate Division's order that denied petitioner's direct appeal from New York's Court of Appeals. *Id.*

In light of the foregoing, a brief review of the exhaustion doctrine applicable to federal habeas corpus petitions is in order.

A federal district court may not grant the habeas petition of a state prisoner " 'unless it appears that ... the applicant has exhausted the remedies available in the courts of the State.' " *Richardson v. Superintendent of Mid–Orange Correctional Facility,* 621 F.3d 196, 201 (2d Cir.2010) (quoting 28 U.S.C. § 2254(b)(1)(A)), *cert. denied sub nom. Richardson v. Inserra,* — U.S. ——, 131 S.Ct. 1019 (2011). This is because "[s]tate courts, like federal courts, are obliged to enforce federal law." *Smith v. Duncan,* 411 F.3d 340, 347 (2d Cir.2005) (quoting *O'Sullivan v. Boerckel,* 526 U.S. 838, 844 (1999)). As the Supreme Court noted in *O'Sullivan,* "[c]omity ... 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 th[e] claim and provide any necessary relief." *Id.,* 526 U.S. at 844 (citations omitted); *see also Smith,* 411 F.3d at 347 (quoting *O'Sullivan*).

A petitioner exhausts his state remedies in the federal habeas context by: "(i) present[ing] the federal constitutional claim asserted in the petition to the highest state court (after preserving it as required by state law in lower courts); and (ii) inform[ing] that court (and lower courts) about both the factual and legal bases for the federal claim." *Ramirez v. Attorney Gen.,* 280 F.3d 87, 94 (2d Cir.2001) (citations omitted); *see also Aller v. Lape,* No. 09–CV–1192, 2011 WL 1827443, at *3 (E.D.N.Y. May 12, 2011) (citing *Ramirez*) (other citation omitted). A petitioner fairly presents the federal nature of his claims to the state courts by:

> ***4** (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.

Carvajal v. Artus, 633 F.3d 95, 104 (2d Cir.) (citation omitted), cert. denied, — U.S. ——, 132 S.Ct. 265 (2011); *see also Clark v. Bradt,* No. 10–CV–0964, 2012 WL 28275, at *4 (W.D.N.Y. Jan. 5, 2012) (citation omitted).

1. Ground One

In his initial ground, petitioner argues that his trial attorney rendered ineffective assistance by failing to: (i) advise the District Attorney and the trial court that petitioner wished to accept the prosecution's initial plea proposal that would have resulted in petitioner receiving a seven year determinate sentence;[5] and (ii) object to the prosecution's alleged failure to file a predicate felony statement, and the subsequent sentencing of petitioner as a second felony offender. Am. Pet., Ground One.

5 Though not clear from petitioner's *pro se* submissions, petitioner may also be (alternatively) claiming in this ground that his attorney wrongfully failed to communicate to petitioner the initial plea proposal offered by the prosecution. *See* Am. Pet., Ground One; Supp. Mem. at 7–8.

In his CPL Motion, petitioner did not argue that his trial attorney wrongfully failed to accept, on petitioner's behalf, the initial plea proposal offered by the District Attorney. Nor did petitioner claim in that collateral challenge to his conviction that his attorney failed to inform petitioner about the initial plea offer. *Compare* CPL Motion *with* Am. Pet., Ground One. Therefore, this aspect of petitioner's initial ground for relief is plainly unexhausted.[6]

6 Although respondent contends that petitioner claimed in his CPL Motion that counsel never informed petitioner of the initial plea proposal, *see* Resp. Mem. at 11, the Court's review of the CPL Motion fails to confirm that assertion.

Next, as noted *ante,* petitioner argued in his collateral challenge that his attorney rendered ineffective assistance by not objecting to the District Attorney's alleged failure to file a SFOS, and by failing to object to the trial court's decision to thereafter sentence petitioner as a second felony offender. *See* CPL Motion at 3–5. In addressing the substance of those claims, the county court recognized a criminal defendant's "State and Federal constitutional right" to the effective assistance of counsel, and cited the Supreme Court's case in *Hill v. Lockhart,* 474 U.S. 52 (1985) in resolving the issue before it. *See* January, 2011 Decision at 3. Petitioner's CPL Motion therefore alerted the trial court to the federal nature of this aspect

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of his ineffective assistance claim. *Carvajal,* 633 F.3d at 104; *Clark,* 2012 WL 28275, at *4. However, petitioner failed to seek leave to appeal the denial of that application from the Appellate Division. Furthermore, the time within which petitioner could properly file an application seeking appellate review of the January, 2011 Decision has now passed. *Sumpter v. Sears,* No. 09–CV–0689, 2012 WL 95214, at *2 (E.D.N.Y. Jan. 12, 2012) (noting that an individual has thirty days after service of order denying a CPL motion within which to file an application seeking leave to appeal) (citations omitted). This Court therefore finds that this claim must be "deemed exhausted" for purposes of this habeas action. *Santos v. Rock,* No. 10 CIV. 2896, 2011 WL 3449595, at *8–9 (S.D.N.Y. Aug. 5, 2011) (finding claims asserted in CPL § 440 motion to be procedurally defaulted due to petitioner's failure to seek leave to appeal the denial of such motion); *Fountaine v. Burge,* 06–CV–6305, 2010 WL 173557, at *4 (W.D.N.Y. Jan. 13, 2010) (same); *Castillo v. Hodges,* No. 01 CIV. 2172, 2004 WL 613075, at *4–5 (S .D.N.Y. Mar. 29, 2004) (same). [7]

7 There is authority which stands for the proposition that courts may not properly "deem" CPL § 440 motions exhausted where the petitioner never sought leave to appeal the denial of such a motion from the Appellate Division in light of the Second Circuit's decision in *Pesina v. Johnson,* 913 F.2d 53, 54 (2d Cir.1990). *See Quintana v. McCoy,* 03 Civ. 5747, 2006 WL 300470 at *5 (S.D.N.Y. Feb. 6, 2006). However, this Court is persuaded that the Supreme Court's decision in *Coleman v. Thompson,* 501 U.S. 722 (1991)—decided **after** the Second Circuit's decision in Pesina—makes clear that federal courts are to determine whether an avenue of appeal regarding a habeas claim is available to a petitioner under state law, and therefore whether a petitioner's request for review of such a claim by a state court would be futile. *See Thomas v. Greiner,* 111 F.Supp.2d 271, 278 (S.D.N.Y.2000) (holding that "[i]n order to comply with Coleman, the federal courts must at some point do what *Pesina* declined to do—'declare as a matter of state law that an appeal ... is unavailable' ") (quoting *Pesina); DeVito v. Racette,* No. CV–91–2331, 1992 WL 198150, at *5 (E.D.N.Y. Aug. 3, 1992) (observing that *"Coleman* appears to put to rest *Pesina's* concern that federal courts lack the 'authority' to declare claims procedurally defaulted at the state level") (citing *Pesina*).

2. Ground Two

***5** Turning to petitioner's second and final ground, in the portion of petitioner's appellate brief wherein counsel claimed that the sentence imposed on petitioner was illegal, appellate counsel failed to cite any provision of the United States Constitution, federal law, or opinion decided by any federal court. *See* App. Br. Additionally, none of the state cases cited by appellate counsel in the portion of petitioner's brief that concerned the issue of whether petitioner was properly sentenced as a second felony offender employed any constitutional analysis in like-fact situations. *See id.* at 8–11 (citing *People v. Kluck,* 156 A.D .2d 830 (3d Dep't 1989); *People v. Woodard,* 48 A.D.2d 980 (3d Dep't 1975); *People v. Ladson,* 30 A.D.3d 836 (3d Dep't 2006); *People v. Bryant,* 47 A.D.2d 51 (2d Dep't 1975); *People v. Farrow,* 69 A.D.3d 980 (3d Dep't 2010); *People v. Mosley,* 54 A.D.3d 1098 (3d Dep't 2008); and *People v. Anthony,* 52 A.D.3d 864 (3d Dep't 2008)). Nor does petitioner's claim that he was improperly sentenced as a second felony offender call to mind a specific right protected by the United States Constitution, or allege a pattern of facts that is well within the mainstream of constitutional litigation. *See Santos v. Payant,* 538 F.Supp.2d 549, 554 (E.D.N.Y.2007) (citations omitted). Petitioner has therefore not exhausted his second and final claim. [8]

8 To the extent that petitioner's CPL Motion may be liberally construed as having asserted a claim that his sentence was illegal, separate and apart from his ineffective assistance claim relating to his sentence, *see* January, 2011 Decision at 2, any such claim is necessarily unexhausted because, as noted above, petitioner failed to seek leave to appeal that order from the Appellate Division.

Furthermore, to satisfy the exhaustion requirement applicable to habeas actions, a petitioner must have articulated the federal nature of his claims in an application seeking leave to appeal filed with the New York Court of Appeals. *See Galdamez v. Keane,* 394 F.3d 68, 74 (2d Cir.2005) (citations omitted); *Jamison v. Bradt,* No. 09–CV–0747, 2011 WL 2728394, at *4 (W.D.N.Y. July 12, 2011) (noting that petitioner failed to properly exhaust ground for relief because he did not include claim in his application seeking leave to appeal) (citations omitted). Since petitioner failed to seek leave to appeal concerning the Appellate Division's decision denying his appeal, his second ground for relief is unexhausted for this reason as well.

3. Consequences of Failure to Exhaust

When claims have not been fully exhausted by a habeas petitioner, a federal court may find that there is an absence of available state remedies when "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 v. Artuz,* 269 F.3d 78, 90 (2d Cir.2001); *Robinson v. Superintendent, Green Haven Correctional Facility,* No. 09–CV–1904, 2012 WL 123263, at *4 (E.D.N.Y. Jan. 17, 2012) (citing *Aparicio*). Therefore, this Court must determine whether it would be futile for petitioner to now present the above claims to the state courts in federal terms.

Petitioner's CPL Motion only challenged the effectiveness of his counsel with respect to petitioner's sentencing, and was filed pursuant to CPL § 440.20, not CPL § 440.10. In New York, "there is no time limit on claims pursuant to CPL § 440. 10, and a defendant may move at *nisi prius* to vacate the judgment at any time." *Ptak v. Superintendent,* No. 9:08–CV–0409 (TJM), 2009 WL 2496607, at *6 (N.D.N.Y. Aug 13, 2009) (internal quotation marks and citation omitted). Since petitioner may still file a CPL § 440.10 motion with the county court in which he argues that his counsel wrongfully failed to either accept the initial plea proposal, or inform petitioner of that offer, this Court may not properly deem this aspect of his initial ground for relief to be exhausted. *Ptak,* 2009 WL 2496607, at *6.

***6** However, as is discussed more fully above, petitioner may not now properly file an application with the Appellate Division seeking leave to appeal the denial of his CPL Motion wherein he argued that his counsel was ineffective in allowing petitioner to be sentenced as a second felony offender because the time to seek such leave has passed. *Sumpter,* 2012 WL 95214, at *2; *Santos,* 2011 WL 3449595, at *8–9; *Fountaine,* 2010 WL 173557, at *4; *Castillo,* 2004 WL 613075, at *4–5. Therefore, this theory is both deemed exhausted and procedurally defaulted. *See Aparicio,* 269 F.3d at 90 (citing *Coleman,* 501 U.S. at 735 n. 1); *see also Moore v. Ercole,* No. 09–CV–1003, 2012 WL 407084, at *7 (E.D.N .Y. Feb. 8, 2012) (holding that unexhausted claims which petitioner can no longer pursue in state court are "deemed exhausted and procedurally defaulted") (citation omitted).

With respect to petitioner's second ground, he cannot now file a second appeal with the Third Department in which he argues the federal nature of his sentencing claim because a defendant is "entitled to one (and only one) appeal to the Appellate Division." *See Aparicio,* 269 F.3d at 91 (citation omitted); *Allison v. Khahaifa,* No. 10–CV–3453, 2011 WL 3298876, at *8 (E.D.N.Y. Aug. 1, 2011) (quoting *Aparicio*) (other citation omitted). Moreover, petitioner may not now properly file an application seeking leave to appeal concerning the Appellate Division's order denying his appeal because such application must be filed with the Court of Appeals "within thirty days after service upon the appellant of a copy of the order sought to be appealed." *See* CPL § 460.10(5)(a). Thus, the claims asserted by petitioner in his final ground for relief are also deemed exhausted and procedurally defaulted. *Garcia–Lopez v. Fischer,* No. 05 CIV 10340, 2007 WL 1459253, at *4 n. 3 (S.D.N.Y. May 17, 2007); *Castro v. Fisher,* No. 04 CIV. 0346, 2004 WL 2525876, at *8 (S.D.N.Y. Nov. 8, 2004) (habeas claim is procedurally defaulted where petitioner did not seek leave to appeal from New York's Court of Appeals within thirty days of the party's receipt of the Appellate Division's order); *see also St. Helen v. Senkowski,* 374 F.3d 181, 183–84 (2d Cir.2004); *Hall v. Bezio,* No. 9:10–CV–0837 (DNH), 2011 WL 3566845, at *6 (N.D.N.Y. Aug. 12, 2011).

Federal courts may only consider the merits of procedurally defaulted claims where the petitioner can establish both cause for his procedural default and resulting prejudice or, alternatively, that a fundamental miscarriage of justice would occur absent federal court review of the claims. *Acosta v. Artuz,* 575 F.3d 177, 184 (2d Cir.2009) (citation omitted); *Smith v. Fischer,* No. 07 CIV. 2966, 2012 WL 695432, at * 16 (S.D.N.Y. Mar. 5, 2012) (citations omitted).

To establish legal "cause" which would enable this Court to consider his procedurally forfeited claims, petitioner must show that some objective, external factor impeded his ability to fully exhaust them. *See Eckhardt v. Superintendent, Attica Correctional Facility,* No. 9:04–CV–0559 (GLS/GHL), 2008 WL 8156688, at *7 (N.D.N.Y. Mar. 25, 2008); *Doleo v. Reynolds,* No. 00 CIV.7927, 2002 WL 922260, at *3 (S.D.N.Y. May 7, 2002). "Cause may be established by 'showing that the factual or legal basis for a claim was not reasonably available to counsel ... or that 'some interference by officials' ... made compliance impracticable ... [or that] the procedural default is the result of ineffective assistance

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of counsel.' " *McCallie v. Poole,* No. 07–CV–0473, 2011 WL 1672063, at *3 (W.D.N.Y. May 3, 2011) (quoting *Murray v. Carrier,* 477 U.S. 478, 488 (1986)); *see also Maxis v.. Philips,* No. 10–CV–1016, 2011 WL 1397184, at *5 (E.D.N.Y. Apr. 13, 2011) (citations omitted).

***7** In his Reply, petitioner claims that because the county court denied his CPL Motion on procedural grounds, that decision "forfeit[ed] appealability to the intermediate appellate division as to the arguments of issue." Reply at 1. However, petitioner has cited no authority, and this Court's research has disclosed none, which stands for the proposition that a party may not seek leave to appeal the denial of a CPL motion from the Appellate Division where the county court denied such application on procedural grounds. In fact, case law in this Circuit demonstrates that a party is required to seek leave under such circumstances in order to properly exhaust his claims. *See Fountaine,* 2010 WL 173557, at *4 (observing that certain of petitioner's claims which had been "denied on state procedural grounds" were unexhausted because that petitioner failed to seek leave to appeal the denial of his CPL motion from the Appellate Division). Petitioner has failed to establish cause for his failure to exhaust his ineffective assistance claim as it relates to his sentencing. [9]

9 Habeas corpus petitioners bear the burden of demonstrating that they have exhausted available state remedies. *Bessaha v. Rock,* No. 09–CV–3581, 2012 WL 1458195, at *10 (E.D.N.Y. Apr. 27, 2012) (citations omitted); *Brown v. Superintendent, Oneida Correctional Facility,* No. 07–CV–1809, 2011 WL 317726, at *3 (E.D.N.Y. Jan. 28, 2011) (citation omitted).

With respect to petitioner's claim which argues, as he did in his direct appeal, that he could not be properly sentenced as a second felony offender, petitioner asserts that he has demonstrated legal cause excusing his failure to file a leave application with New York's Court of Appeals because he purportedly asked his appellate attorney to file such an application, but such counsel wrongfully failed to file same on petitioner's behalf. Reply at 1. However, petitioner never filed a *coram nobis* application with the Appellate Division in which he argued that his counsel rendered ineffective assistance by failing to file a leave application with New York's Court of Appeals. *See, e.g.,* Am. Pet. at ¶ 7 (petitioner listing the sole collateral challenge he filed concerning his conviction as the CPL Motion). Thus, petitioner's claim that his appellate counsel rendered ineffective assistance by failing to file a leave application on petitioner's behalf is itself unexhausted. A petitioner may not properly assert an ineffective assistance claim as cause excusing a procedural default when that claim is itself procedurally barred. *See Reyes v. Keane,* 118 F.3d 136, 140 (2d Cir.1997) ("a petitioner may not bring an ineffective assistance claim as cause for a default when that ineffective assistance claim itself is procedurally barred") (citation omitted); *see also Tucker v. Artus,* No. 07 CIV. 10944, 2011 WL 7109332, at *14 (S.D.N.Y. Dec. 12, 2011). Petitioner has therefore failed to establish cause for his failure to exhaust his second ground for relief.

Since petitioner has not established that legal cause exists which excuses his procedural defaults, and nothing in the record before this Court suggests that his defaults may be properly excused, this Court need not consider whether he has suffered the requisite prejudice because federal habeas relief is unavailable under this limited exception permitting review of procedurally forfeited claims unless the petitioner demonstrates ***both*** cause and prejudice. *See Stepney v. Lopes,* 760 F.2d 40, 45 (2d Cir.1985); *Collazo v. Lee,* No. 11 CIV. 1804, 2011 WL 6026301, at *3 (E.D.N.Y. Dec. 2, 2011) (finding that because petitioner "failed to show 'cause' for his procedural default, this Court does not need to determine whether he suffered prejudice because relief is unavailable unless both cause and prejudice have been established") (citing *Stepney); Tillery v. Lempke,* No. 9:10–CV–1298 (GTS), 2011 WL 5975068, at *4 (N.D.N.Y. Nov. 29, 2011) (citations omitted).

***8** The finding that petitioner has failed to demonstrate cause for his procedurally defaulted claims does not necessarily preclude this Court from considering his grounds for relief, however, because, as noted above, a federal court may nonetheless properly review such claims if it is convinced that the failure to consider them would amount to a fundamental miscarriage of justice. *Acosta,* 575 F.3d at 184 (citation omitted); *Noakes v. Kaplan,* No. 10 CIV. 5141, 2012 WL 718553, at *11 (S.D.N.Y. Mar. 5, 2012); *Tillery,* 2011 WL 5975068, at *4 (citation omitted). However, in discussing this limited exception to the rule prohibiting district courts from considering procedurally barred claims, the Second Circuit has noted that:

> The Supreme Court has explained that the fundamental miscarriage of justice exception is "extremely rare" and should be applied only in "the extraordinary cases." *Schlup v. Delo,* 513 U.S. 298, 321–22, 115 S.Ct. 851,

> 130 L.Ed.2d 808 (1995). " '[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

Sweet v. Bennett, 353 F.3d 135, 142 (2d Cir.2003); *see also Mastowski v. Superintendent,* 10–CV–0445, 2011 WL 4955029, at *14 (W.D.N.Y. Oct. 18, 2011) (citations omitted).

The habeas claims that this Court must deem to be exhausted and also procedurally defaulted are rooted in petitioner's assertion that he could not be properly sentenced as a second felony offender. *See* Am. Pet., Grounds One, Two. To establish actual innocence in the context of a challenge to the imposition of an enhanced sentence, a petitioner must demonstrate " 'by clear and convincing evidence' that ' he is actually innocent of the act on which his harsher sentence was based.' " *Breeden v. Ercole,* No. 06 CV 3860, 2007 WL 3541184, at *2 (E.D.N.Y. Nov. 14, 2007) (quoting *Spence v. Superintendent, Great Meadow Corr. Facility,* 219 F.3d 162, 172 (2d Cir.2000)). For the reasons discussed more fully below, petitioner has not demonstrated that he could not be properly sentenced as a second felony offender. Moreover, petitioner admitted at his sentencing hearing that he was convicted of the March, 2003 felony robbery conviction upon which his enhanced sentence was based. *See* Sentencing Tr. at 5. Petitioner has therefore not demonstrated that he is actually innocent of the second felony offender sentence imposed on him.

Since petitioner cannot now seek safe harbor from the dismissal of his defaulted claims under this final exception permitting habeas review of those grounds, the Court denies, as procedurally forfeited, the portion of petitioner's initial ground for relief which argues that his trial counsel rendered ineffective assistance by failing to object to petitioner being sentenced as a second felony offender. Additionally, his second ground for relief, which asserts that the county court wrongfully sentenced him as a second felony offender, must also be denied as procedurally defaulted.

B. Substance of Petitioner's Claims [10]

10 This Court also reviews the merits of petitioner's grounds for relief.

1. Standard of Review

***9** Enactment of the Anti–Terrorism and Effective Death Penalty Act ("AEDPA") brought about significant new limitations on the power of a federal court to grant habeas relief to a state prisoner under 28 U.S.C. § 2254. In discussing this deferential standard, the Supreme Court noted in *Harrington v. Richter,* ––– U.S. ––––, 131 S.Ct. 770 (2011) that:

> Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of this Court, § 2254(d)(1); *Williams v. Taylor,* 529 U .S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); or that it "involved an unreasonable application of" such law, § 2254(d)(1); or that it "was based on an unreasonable determination of the facts" in light of the record before the state court, § 2254(d)(2).

Harrington, 131 S.Ct. at 785; *see also Schriro v. Landrigan,* 550 U.S. 465, 473 (2007) (citing 28 U.S.C. § 2254(d) (1), (2)). In providing guidance concerning application of this standard, the Supreme Court has observed that:

> A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor, supra,* at 405, 120 S.Ct. 1495; *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (*per curiam*). A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra,* at 405, 120 S.Ct. 1495; *Woodford v. Visciotti,* 537 U.S. 19, 24–25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (*per curiam*).

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Brown v. Payton, 544 U.S. 133, 141 (2005); *see also* *Portalatin v. Graham,* 624 F.3d 69, 79 (2d Cir.2010) (citation omitted), *cert. denied,* ––– U.S. ––––, 131 S.Ct. 1693 (2011).

For a federal court to properly find a state court's application of Supreme Court precedent to be unreasonable in this context, the state court's decision must have been "more than incorrect or erroneous.... The state court's application must have been objectively unreasonable." *Wiggins v. Smith,* 539 U.S. 510, 520–21 (2003) (internal quotation marks and citations omitted); *Ryan v. Miller,* 303 F.3d 231, 245 (2d Cir.2002) (citation omitted); *Kelly v. Conway,* No. 10–CV–3053, 2011 WL 3555823, at *2 (E.D.N.Y. Aug. 11, 2011) (citations omitted). "While the precise method for distinguishing objectively unreasonable decisions from merely erroneous ones is somewhat unclear, it is well-established in this Circuit that the objectively unreasonable standard of § 2254(d)(1) means that petitioner must identify some increment of incorrectness beyond error in order to obtain habeas relief." *Sorto v. Herbert,* 497 F.3d 163, 169 (2d Cir.2007) (internal quotation marks, citation and alteration omitted). As the Court noted in *Schriro,* "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro,* 550 U.S. at 473 (citation omitted).

2. Review of Petitioner's Claims

i. Ground One

***10** Prior to considering the substance of petitioner's claim alleging ineffective assistance of trial counsel (Am. Pet., Ground One), the Court finds that a brief review of what petitioner must demonstrate in order to prevail on such claim is appropriate.

The Sixth Amendment to the United States Constitution provides, in part, 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. To establish a violation of this right to the effective assistance of counsel, a habeas petitioner must show both: (1) that counsel's representation fell below an objective standard of reasonableness, measured in light of prevailing professional norms; and (2) resulting prejudice, that is, a reasonable probability that, but for counsel's unprofessional performance, the outcome of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 688, 692–94 (1984); *Harrington,* 131 S.Ct. at 787–88.[11] In establishing prejudice in the plea context, the petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S. at 58–59.

11 Claims alleging ineffective assistance in the plea context are governed by the two part test set forth in *Strickland. See Hill,* 474 U.S. at 58; *Missouri v. Frye,* ––– U.S. ––––, 132 S.Ct. 1399, 1405 (2012).

As noted *ante,* petitioner has claimed for the first time in this action that his trial attorney failed to accept the prosecution's initial plea offer in a timely fashion, or, alternatively, failed to communicate the terms of that initial plea proposal to petitioner. However, this claim is not credible. Other than petitioner's own statements regarding these claims, petitioner has offered no proof to substantiate these assertions. Petitioner offers no explanation, theory or reason as to why his counsel would not have accepted the initial plea proposal on behalf of petitioner—or informed petitioner of that offer—yet several months later negotiate on petitioner's behalf, and thereafter accept, a subsequent plea proposal offered by the prosecutor.[12] Furthermore, at the proceeding wherein petitioner pleaded guilty, defense counsel specifically noted that the plea proposal offered by the District Attorney had been "modified," but that counsel had "had an opportunity to discuss [the] offer" with petitioner, who was "prepared to accept that [offer] today." Plea Tr. at 3–4. That statement strongly suggests that counsel had discussed the initial plea proposal with petitioner, who eventually agreed to plead guilty to the modified plea proposal subsequently offered by the prosecution. Significantly, petitioner never claimed at the hearing at which he entered his guilty plea that he had directed his attorney to accept the earlier plea offer, or that petitioner was unaware of the plea proposal before it had been "modified" by the prosecutor. Instead, petitioner assured the trial court that counsel's understanding of the plea proposal comported with petitioner's understanding of that agreement. *Id.* at 4.

12 The county court specifically observed that "[t]he plea agreement [was] worked out by defense counsel," and

that petitioner had "agreed to and [did] not object to" that plea agreement. January, 2011 Decision at 3.

***11** It has been properly observed that " 'in most circumstances a convicted felon's self-serving testimony is not likely to be credible.' " *Smith v. McGinnis,* No. 02 CIV. 1185, 2003 WL 21488090, at *4 (S.D.N.Y. June 25, 2003) (quoting *Purdy v. Zeldes,* 337 F.3d 253, 259 (2d Cir.2000)). Petitioner's self-serving claims that his attorney wrongfully failed to accept the initial plea offer on petitioner's behalf, or, alternatively, that counsel did not disclose the terms of that initial plea proposal to the petitioner, are not supported by the record and are plainly meritless. Therefore, the Court denies these claims. *See Ricks v. Superintendent of Marcy Correctional Facility,* No. 10–CV–0785, 2012 WL 162608, at *2 (W.D.N.Y. Jan. 19, 2012) (observing that although neither the Supreme Court nor the Second Circuit has established the standard of review that district courts are to utilize in considering unexhausted habeas claims, "the common thread" in decisions that dispose of unexhausted claims is that such grounds for relief are "unquestionably meritless") (other quotation marks and citations omitted); *Diaz v. Marshall,* No. 04–CV–1650, 2011 WL 2802836, at *8 (E.D.N.Y. July 14, 2011).

The second and final theory asserted by petitioner in support of his ineffective assistance claim contends that petitioner was unaware that he would be sentenced as a second felony offender until after the sentencing proceeding had begun, and that "[a]t no time did trial attorney object to the absence of the predicate statement, nor did he offer any challenge as to the procedure." Am. Pet., Ground One; *see also* Supp. Mem. at 5–8. However, this claim appears to overlook the fact that, in rejecting this claim brought in petitioner's CPL Motion, the trial court opined that petitioner's counsel was "obvious[ly]" aware that petitioner was a second felony offender at the time of the plea because the negotiated sentence was one that was imposed on second felony offenders. *See* January, 2011 Decision at 3–4. Additionally, the record supports the conclusion that the SFOS was provided to the county court and defense counsel prior to petitioner's November 23, 2009 sentencing hearing. Specifically, the District Attorney affirmed the veracity of the statements contained in that statement, under penalty of perjury, on November 2, 2009. *See* SFOS at 2. It defies logic to assume that the District Attorney would not file such notice with the trial court, and serve a copy of same on defense counsel, soon after that statement was executed.[13] Moreover, the trial court specifically referred to the March, 2003 third degree robbery conviction referenced in the SFOS at petitioner's sentencing. *Compare* Sentencing Tr. at 5 *with* SFOS at ¶ 4. Neither defense counsel nor petitioner claimed at the time of petitioner's sentencing that no SFOS had been provided to the defense, or filed in petitioner's criminal action. *See* Sentencing Tr. Nor did petitioner indicate at that time that he was unaware that he was to be sentenced as a second felony offender. *Id.* Finally, in denying petitioner's CPL Motion, the county court specifically determined that "[t]he Rensselaer County District Attorney's Office provided copies [of the SFOS to] both the Court and the Defendant." January, 2011 Decision at 4. These facts support the conclusion that the SFOS was filed with the trial court, and served on defense counsel, prior to petitioner's sentencing hearing. Therefore, there was no basis for counsel to either object to the alleged failure of the prosecutor to serve and/or file the SFOS statement, or otherwise challenge the procedure by which petitioner was sentenced as a second felony offender. Counsel therefore did not render ineffective assistance as to these matters.

13 The prosecutor specifically declared in the SFOS that such statement was being ***"filed*** pursuant to section 400.21" of the CPL. SFOS at ¶ 2 (emphasis added).

***12** Furthermore, as noted *ante,* petitioner admitted at his sentencing that he had been convicted of the prior felony conviction referenced in the SFOS. Sentencing Tr. at 5. He therefore cannot demonstrate that he was prejudiced by trial counsel's failure to object to the second felony offender sentence imposed on petitioner. *See People v. Buckman,* 90 A.D.3d 1635, 1636 (4th Dep't 2011) (rejecting challenge to alleged defects concerning felony offender statement where appellant had "received adequate notice and an opportunity to be heard with respect to the prior conviction[s]") (internal quotation marks and citation omitted); *Ladson,* 30 A.D.3d at 837 (rejecting claim challenging legality of second felony offender sentence where appellant admitted that "he was the person convicted of the prior felony and ... he was given sufficient notice of and an opportunity to controvert the allegations made in the second felony offender statement.").

In light of the above, this Court also denies petitioner's initial ground for relief on the merits.

ii. Ground Two

In his second and final ground, petitioner argues that the sentence imposed on him is "illegal" because it was imposed on him without petitioner having received notice that the prosecutor intended to have petitioner sentenced as a second felony offender. Am. Pet., Ground Two. Petitioner also asserts that the trial court improperly failed to conduct a hearing required under New York law prior to sentencing petitioner as a second felony offender, and that, for this reason as well, the imposed sentence is illegal. *Id.*

However, as is discussed more fully above, the record supports the conclusion that petitioner was properly sentenced as a second felony offender by the county court. Thus, any claim that the sentence imposed on him was illegal because he was not properly found to be a second felony offender is without substance.[14] Additionally, there is no evidence that the agreed upon sentence imposed on petitioner for his second degree burglary conviction is outside the statutory range allowed by New York law. Thus, petitioner's sentencing claim "does not present a constitutional claim amenable to review in a federal habeas corpus." *Roundtree v. Kirkpatrick,* No. 11–CV–6188, 2012 WL 1413054, at *23 (W.D.N.Y. Apr. 23, 2012); *see Madrid v. Smith,* No. 08–CV–5262, 2012 WL 912945, at *7 (E.D.N.Y. Mar. 13, 2012). That fact also prevents petitioner from prevailing on any claim which argues that the imposed sentence violated his Eighth Amendment right to be free from cruel and unusual punishment. *Madrid,* 2012 WL 912945, at *7; *Rivera v. Graham,* No. 11 CIV. 3546, 2012 WL 397826, at *6 (E.D.N .Y. Feb. 7, 2012). Petitioner's second and final ground for relief is therefore also (alternatively) denied on the merits.

14 Furthermore, as the court held in *Saracina v. Artus,* No. 10–3898–pr, 452 Fed.Appx. 44 (2d Cir. Dec. 20, 2011): "[w]hether a New York court erred in applying a New York recidivist sentencing enhancement statute is a question of New York State law ... [a]nd it is well-established that '[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.' " *Saracina,* 452 Fed.Appx. at 46 (quoting *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991)); *see also Zayas v. Ercole,* No. 08–CV–1037, 2009 WL 6338395, at * 14 (E.D.N.Y. Nov. 9, 2009) (holding that petitioner's claim that he was improperly sentenced as a persistent violent felony offender "asserts a violation of state law, and thus is not cognizable on federal habeas corpus review") (citation omitted).

III. CERTIFICATE OF APPEALABILITY

Finally, the Court notes that 28 U.S.C. § 2253(c) provides, in relevant part, as follows:

> ***13** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court....

28 U.S.C. § 2253(c)(1)(A).[15] A Certificate of Appealability may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Since petitioner has failed to make such a showing herein, the Court declines to issue any Certificate of Appealability in this matter.

15 Rule 22 of the Federal Rules of Appellate Procedure also provides that an appeal may not proceed "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R.App. P. 22(b)(1).

ACCORDINGLY, it is

ORDERED that petitioner's Amended Petition (Dkt. No. 5) is ***DENIED*** and ***DISMISSED;*** and it is further

ORDERED that no Certificate of Appealability shall issue because petitioner has failed to make a "substantial showing of the denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c); and it is further

ORDERED that any state court records that were not filed in this action be returned directly to the Attorney General at the conclusion of these proceedings (including any appeal of this Decision and Order filed by any party).

IT IS SO ORDERED.

All Citations

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

Miguel A. ROJAS, Petitioner,
v.
Philip D. HEATH, Superintendent, Respondent.

No. 11 Civ. 4322(CS)(PED).
|
Oct. 18, 2012.

REPORT AND RECOMMENDATION

PAUL E. DAVISON, United States Magistrate Judge.

***1 TO: THE HONORABLE CATHY SE1BEL, UNITED STATES DISTRICT JUDGE**

I. *INTRODUCTION*

Petitioner Miguel Rojas ("Petitioner"), appearing *pro se,* seeks a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 from his June 6, 2008 conviction entered in Dutchess County Court (Hayes, J). Petitioner was convicted, upon a plea of guilty, of one count of manslaughter in the first degree, in violation of N.Y. Penal Law § 125.20, and sentenced, *inter alia,* to a determinate term of twenty-three years imprisonment and five years post-release supervision. He was also ordered to pay $8,350.00 in restitution. This petition comes before me pursuant to an Order of Reference dated July 20, 2011. (Dkt.8.) For the reasons set forth below, I respectfully recommend that the petition be **DENIED.**

II. *BACKGROUND* [1]

1 Unless otherwise indicated, the information within this section is taken from a review of the petition ("Pet."), (Dkt.2); Respondent's Memorandum of Law ("Resp't's Mem."), (Dkt.19); Petitioner's Reply to Respondent's Opposition ("Pet'r's Reply"), (Dkt.13); Respondent's Affidavit in Answer to a Petition for *Habeas Corpus* ("Resp't's Aff."), (Dkt.10); Respondent's Brief ("Resp't's Br."), (attached to Resp't's Aff., at Ex. 10); and the Brief for Appellant ("Appellant's Br.") (attached to Resp't's Aff., at Ex. 9). All exhibits cited herein are attached to Resp't's Aff. (Dkt.10).

A. *The Crime*

On September 6, 2007, in Poughkeepsie, New York, Petitioner pushed his mother in-law, Brenda Vantassell ("Vantassell"), down a flight of steps. Vantassell threatened to call the police. Petitioner then kicked, punched, and pushed Vantassell's head against the floor. Vantassell later died of severe head trauma. (*See* Apr. 29, 2008 Tr., at 16–17 (Ex. 6).) On October 4, 2007, Petitioner was indicted on one count of murder in the second degree, in violation of N.Y. Penal Law § 125.25. [2] (*See* Indictment (Ex. 2).)

2 "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...." N.Y. Penal Law § 125.25(1).

On November 29, 2007, Petitioner moved by pretrial omnibus motion to suppress his confession and certain evidence obtained from the crime scene. The court granted the motion to the extent that it ordered a pretrial hearing. However, the hearing was not held because Petitioner subsequently pled guilty. (*See* Jan. 22, 2008 Decision and Order (Ex. 5); Resp't's Aff. ¶¶ 6–7.)

B. *Guilty Plea and Sentencing*

On April 29, 2008, Petitioner, accompanied by counsel and an interpreter, [3] informed the court that he had agreed to a plea bargain. He stated that he intended to plead guilty to manslaughter in the first degree, in violation of N.Y. Penal Law § 125.20, in full satisfaction of the indictment. [4] He also stated that he understood that his guilty plea would result in a determinate sentence of twenty-three years imprisonment and five years of post-release supervision. (*See id.* at 2–4.)

3 Petitioner apparently understands English, but indicated he that he is more comfortable participating in court proceedings through a Spanish interpreter. (*See* Apr. 29, 2008 Tr., at 2.)

4 "A person is guilty of manslaughter in the first degree when ... [w]ith intent to cause serious physical

injury to another person, he causes the death of such person...." N.Y. Penal Law § 125.20(1).

Petitioner was then placed under oath and stated that he decided to plead guilty after he consulted with counsel. He stated that he understood that by pleading guilty he waived, among things, the rights to a trial by jury or judge; to be proven guilty beyond a reasonable doubt as to each element of the offense; to cross-examine and to confront witnesses; and to remain silent. (*See id.* at 6–14.)

Petitioner again confirmed that he was voluntarily pleading guilty to manslaughter in the first degree in exchange for a sentence of twenty-three years imprisonment. He also stated that he understood the offense carried a maximum possible sentence of twenty-five years. (*See id.* at 14.) Petitioner then allocuted to the crime. Specifically, he stated that, in the City of Poughkeepsie, New York, with the intent to seriously injure Vantassell, he caused Vantassell's death by striking her in the face with his fists and by pushing her head into the floor. The court accepted Petitioner's plea. (*See id.* at 16–17.) On June 6, 2008, Petitioner was sentenced in accordance with the terms of the plea bargain and ordered to pay $8,350.00 in restitution to Vantassell's family. (*See* June 6, 2008 Tr., at 11 (Ex. 7).)

C. *Direct Appeal*

***2** Petitioner, through counsel, appealed his conviction to the New York State Appellate Division, Second Department, on the following grounds: (1) the sentence was excessive; [5] (2) the court failed to properly inquire into whether Petitioner understood the nature of the charge and was intelligently entering his plea; [6] and (3) the court erred by failing to set a time and manner for Petitioner to pay the restitution that it ordered. [7] (*See* Appellant's Br., at 2–17.) The Second Department affirmed the conviction on June 29, 2010. *People v. Rojas,* 903 N.Y.S.2d 258 (App.Div.2010). Petitioner sought leave to appeal to the New York Court of Appeals, which was denied on September 2, 2010. *People v. Rojas,* 15 N.Y.3d 855 (2010). Petitioner did not seek a writ of *certiorari* to the United States Supreme Court or file post-conviction collateral motions in state court. (*See* Pet., at 2 (unpaginated).)

5 Specifically, the Brief for Appellant states that "appellant's sentence of 23 years' imprisonment, upon his plea to manslaughter in the first degree, was excessive." (Appellant's Br., at 5 (typeface altered from original).) The brief also cited *Robinson v. California.* 370 U.S. 660 (1962), and argued that the sentence constituted cruel and unusual punishment because it was significantly higher than sentences received by similarly-situated defendants. (*See id.* at 9–10.)

6 Specifically, the Brief for Appellant states that, "after Appellant said 'it was never my intention to hurt [the victim],' the court never conducted further inquiry to ensure either that the defendant understood the nature of the charge or that the plea was being intelligently entered." (Appellant's Br., at 11 (typeface altered from original).)

7 Specifically, the Brief for Appellant states that, "despite a request from Appellant, the County Court failed to fix the time and manner of the restitutionary payment." (Appellant's Br., at 15 (typeface altered from original).)

D. *Habeas Corpus Proceedings*

On June 6, 2011, Petitioner filed a petition seeking a federal writ of *habeas corpus.* [8] (*See generally id.*) He raises the same claims that he raised on direct appeal, but has inserted references to the Constitution and federal caselaw in stating those claims. Specifically, Petitioner argues: (1) his sentence was excessive in view of the fact that the court failed to conduct a hearing pursuant to *Bovkin v. Alabama.* 395 U.S. 238 (1968), in violation of his Sixth and Fourteenth Amendment rights; [9] (2) the state court's failure to conduct a *Bovkin* hearing violated his Sixth and Fourteenth Amendment rights; [10] and (3) Petitioner's Sixth and Fourteenth Amendment rights were violated when the state court failed to set the time and manner to pay the restitution that it ordered. (*See* Pet., at 6.)

8 The petition was timely filed. *See* 28 U.S.C. § 2244(d)(l)-(2).

9 Specifically, Ground One states:

> Petitioner's Sentence of 23 years imprisonment, upon his plea to Manslaughter in the first degree, was excessive in view of the fact that the court failed to conduct a *Bovkin Rule* hearing See: *Bovkin v. Alabama.* 395 U.S. 238, and such was violative of Petitioner's rights under the VI & XIV Amendment's of the United States Constitution.

(Pet., at 6 (typeface altered from original).)

10 Specifically, Ground Two states:

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> After petitioner said "it was never my intention to hurt [the victim," the court never conducted further inquiry to ensure either that the defendant understood the nature of the charge or that the plea was being intelligently entered was such that the court could not willingly accept such plea where the Petitioner is a non English speaking person with limited education, and such was contrary to the *Boykin rule,* 395 U.S. 238, *See* also: *Johnson v. Zerbst,* 304 U.S. 458 (1938), and contrary to the VI & XIV amendment's of the United States Constitution.

(Pet., at 6 (typeface altered from original).

On September 15, 2011, Respondent filed its answer. (Dkt.10.) Petitioner filed a reply which was received in chambers on November 29, 2011. (Dkt.13.) In that reply, he stated that, even if this Court deemed Grounds Two and Three procedurally barred from federal review, his petition should still be reviewed because it was "brought in Federal Constitutional Terms, clearly stating constitutional abridgements, which are protected to the extent of Due Process and Equal Protection under the XIV Amendment of the United States Constitution." (*Id.* ¶ 5 (emphasis omitted).) [11]

[11] Petitioner stated in his reply that he never received Respondent's Memorandum of Law. I directed Respondent to serve the memorandum on Petitioner and granted Petitioner 30 days to file a supplemental response thereafter. (*See* Dkt. 14.) The docket reflects that Petitioner was served with Respondent's memorandum on or about June 27, 2012. (Dkt.20.) Petitioner did not file a supplemental reply.

III. *DISCUSSION*

A. *Applicable Law on Habeas Corpus Review*

"Habeas review is an extraordinary remedy." *Bouslev v. United States.* 523 U.S. 614, 621 (1998) (citing *Reed v. Farley,* 512 U.S. 339, 354 (1994)). Before a federal district court may review the merits of a state criminal judgment in a *habeas corpus* action, the court must first determine whether the petitioner has complied with the procedural requirements set forth in 28 U.S.C. §§ 2244 and 2254. If there has been procedural compliance with these statutes, the court must then determine the appropriate standard of review applicable to the petitioner's claims in accordance with § 2254(d). The procedural and substantive standards applicable to *habeas* review, which were substantially modified by the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1220 (Apr. 24, 1996), are summarized below.

1. *Timeliness Requirement*

***3** A federal *habeas corpus* petition is subject to AEDPA's strict, one-year statute of limitations. *See* 28 U.S.C. § 2244(d). The statute provides four different potential starting points for the limitations period, and specifies that the latest of these shall apply. *See id.* § 2244(d)(1). Under the statute, the limitations period is tolled only during the pendency of a properly filed application for State post-conviction relief, or other collateral review, with respect to the judgment to be challenged by the petition. *See id.* § 2244(d)(2). The statute reads as follows:

> (d) (1) A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period 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.
>
> (d) (2) The time during which a properly filed application for State postconviction 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.
>
> *Id.* § 2244(d).

The one-year limitation period is subject to equitable tolling, which is warranted when a petitioner has shown "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida.* 130 S.Ct. 2549, 2562 (2010) (quoting *Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005)). In the Second Circuit, equitable tolling is confined to "rare and exceptional circumstance[s]," *Smith v. McGinnis,* 208 F.3d 13, 17 (2d Cir.2000) (per curiam) (internal quotation marks omitted), which have "prevented [the petitioner] from filing his petition on time," *Valverde v. Stinson.* 224 F.3d 129, 134 (2d Cir.2000) (internal quotation marks and emphasis omitted). The applicant for equitable tolling 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." *Id.*

2. *Exhaustion Requirement*

***4** A federal court may not grant *habeas* relief unless the petitioner has first exhausted his claims in state court. *O'Sullivan v. Boerckel,* 526 U.S. 838, 842 (1999); *see* § 2254(b)(1) ("[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 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) (the petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State ... if he has the right under the law of the State to raise, by any available procedure, the question presented"). The exhaustion requirement promotes interests in comity and federalism by demanding that state courts have the first opportunity to decide a petitioner's claim. *See Rose v. Lundy,* 455 U.S. 509, 518–19 (1982).

To exhaust a federal claim, the petitioner must have "fairly present[ed] his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim," and thus "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) (internal quotation marks omitted). "Because non-constitutional claims are not cognizable in federal habeas corpus proceedings, a habeas petition must put state courts on notice that they are to decide federal constitutional claims." *Petrucelli v. Coombe,* 735 F.2d 684, 687 (2d Cir.1984) (internal citation omitted) (citing *Smith v. Phillips.* 455 U.S. 209, 221 (1982)). Such notice requires that the petitioner "apprise the highest state court of both the factual and legal premises of the federal claims ultimately asserted in the habeas petition." *Galdamez v. Keane.* 394 F.3d 68, 73 (2d Cir.2005). A claim may be "fairly presented" to the state courts, therefore, even if the petitioner has not cited "chapter and verse of the Constitution," in one of several ways:

> (a) [R]eliance 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.

Dave v. Attorney Gen. of State of N.Y., 696 F.2d 186, 194 (2d Cir.1982). A *habeas* petitioner who fails to meet a state's requirements to exhaust a claim will be barred from asserting that claim in federal court. *Edwards v. Carpenter,* 529 U.S. 446, 451 (2000).

However, "[f]or exhaustion purposes, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." *Reyes v. Keane,* 118 F.3d 136, 139 (2d Cir.1997) (internal quotation marks omitted). "In such a case, a petitioner no longer has remedies available in the courts of the State within the meaning of 28 U.S.C. § 2254(b)." *Grey v. Hoke,* 933 F.2d 117, 120 (2d Cir.1991) (internal quotation marks omitted). Such a procedurally barred claim may be deemed exhausted by a federal *habeas* court. *See, e.g., Reyes,* 118 F.3d at 139. However, absent a showing of either "cause for the procedural default and prejudice attributable thereto," *Harris v. Reed.* 489 U.S. 255, 262 (1989), or "actual innocence," *Schlup v. Delo,* 513 U.S. 298 (1995), the petitioner's claim will remain unreviewable by a federal court.

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***5** Finally, notwithstanding the procedure described above, a federal court may yet exercise its discretion to review and deny a mixed petition containing both exhausted and unexhausted claims, if those unexhausted claims are "plainly meritless." *Rhines v. Weber.* 544 U.S. 269, 277 (2005); *see* § 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."); *see also, e.g., Padilla v. Keane,* 331 F.Supp.2d 209, 216 (S.D.N.Y.2004) (interests in judicial economy warrant the dismissal of meritless, unexhausted claims).

3. *Procedural Default*

Even where an exhausted and timely *habeas* claim is raised, comity and federalism demand that a federal court abstain from its review when the last-reasoned state court opinion to address the claim relied upon "an adequate and independent finding of a procedural default" to deny it. *Harris,* 489 U.S. at 262; *see also Coleman v. Thompson,* 501 U.S. 722, 730 (1991); *Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991); *Levine v. Comm'r of Corr. Servs.,* 44 F.3d 121, 126 (2d Cir.1995).

A state court decision will be "independent" when it "fairly appears" to rest primarily on state law. *Jimenez v. Walker.* 458 F.3d 130, 138 (2d Cir.2006) (citing *Coleman.* 501 U.S. at 740). A decision will be "adequate" if it 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 (1991)).

4. *AEDPA Standard of Review*

Before a federal court can determine whether a petitioner is entitled to federal *habeas* relief, the court must determine the proper standard of review under AEDPA for each of the petitioner's claims. § 2254(d)(1)—(2). This statute "modifie[d] the role of federal habeas courts in reviewing petitions filed by state prisoners," and imposed a more exacting standard of review. *Williams v. Taylor.* 529 U.S. 362, 402 (2000). For petitions filed after AEDPA became effective, federal courts must apply the following standard to cases in which the state court adjudicated on the merits of the claim:

> 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.

§ 2254(d)(l)—(2). The deferential AEDPA standard of review will be triggered when the state court has both adjudicated the federal claim "on the merits," and reduced its disposition to judgment. *Sellan v. Kuhlman,* 261 F.3d 303, 312 (2d Cir.2001). Where the state court "did not reach the merits" of the federal claim, however, "federal habeas review is not subject to the deferential standard that applies under AEDPA.... Instead, the claim is reviewed *de novo." Cone v. Bell,* 556 U.S. 449, 472 (2009); *see* § 2254(d).

***6** Under the first prong of the AEDPA deferential standard, a state court decision is contrary to federal law only if it "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if [it] decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams.* 529 U.S. at 413. A decision involves an "unreasonable application" of Supreme Court precedent if the state court "identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," or if it "either unreasonably extends a legal principle from [Supreme Court] 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." IcL at 407. Under the second prong of AEDPA, the factual findings of state courts are presumed to be correct. § 2254(e)(1); *see Nelson v. Walker.* 121 F.3d 828, 833 (2d Cir.1997). The petitioner must rebut this presumption by "clear and convincing evidence." § 2254(e)(1).

B. ***Application***

1. *Ground One: Excessive Sentence*

Petitioner's first claim argues that his sentence was excessive, and that the state court's failure to conduct a *Boykin* hearing violated his Sixth and Fourteenth

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Amendment rights. (*See* Pet., at 6.) Respondent contends that this Petitioner does not state a cognizable federal sentencing claim and that the claim is otherwise unexhausted. (*See* Resp't Mem., at 4–7.)

I agree with Respondent that, to the extent that Petitioner argues his sentence was excessive, that claim is not cognizable upon *habeas* review. It is well-settled that "[n]o federal constitutional issue is presented where ... the sentence is within the range prescribed by law." *White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992). In this case, a determinate sentence of twenty-three years is within the range permitted by New York law. *See* N.Y. Penal Law § 125.20 (classifying manslaughter in the first degree as a class B felony); *id.* § 70.02(l)(a) (classifying manslaughter in the first degree a class B violent felony offense); *id.* § 70.02(2)(a) (requiring a determinate sentence for class B violent felony offense); *id.* § 70.02(3)(a) (requiring a term of sentence of at least five years and no greater than twenty-five years for a class B violent felony offense). Accordingly, this claim must be denied.

As noted above, Petitioner has appended a reference to *Boykin v.. Alabama,* 395 U.S. 238 (1968) to the excessive sentence claim he presented to the state courts on direct appeal. [12] This *Boykin* reference is *non sequitur,* however, as Petitioner has not explained how any defect in his plea allocution is relevant to his sentencing claim. I do not agree with Respondent that Petitioner's unexplained citation to *Boykin* represents a separate, unexhausted claim. (Resp't Mem., at 4.) Instead, I construe Petitioner's citation to *Boykin* as pertaining to Petitioner's exhausted challenge to his plea hearing, addressed below under Ground Two.

12 In *Boykin,* the Supreme Court held that the record must clearly show that a defendant was apprised of his Fifth and Sixth Amendment rights before the court accepts his guilty plea. 395 U.S. at 243.

2. *Ground Two: Petitioners's Guilty Plea*

***7** Petitioner argues that the state court's failure to make additional inquiry during his plea hearing, pursuant to *Boykin v. Alabama.* 395 U.S. 238 (1968), violated his Sixth and Fourteenth Amendment rights. (*See* Pet., at 6.) Respondent contends that this claim remains procedurally barred and is otherwise without merit. (*See* Resp't Mem., at 7–10.) I agree with Respondent that this claim is procedurally barred.

It is clear from the Second Department's written decision that it actually relied upon a state procedural rule in denying this claim. [13] Specifically, the court relied upon New York State's requirement that a challenge to the validity of a guilty plea be preserved for appellate review by first seeking in the trial court to withdraw the plea [14] or by moving to vacate the judgement of conviction. [15] *See Rojas,* 903 N.Y.S.2d at 258. It is well-settled that in New York, such challenges must be preserved in the manner described, and state courts regularly follow this rule in denying claims. *See, e.g., Garcia v. Boucaud,* No. 09 Civ. 5758, 2011 WL 1794626, at *3 (S.D.N.Y. May 11, 2011) (internal quotation marks and citation omitted) ("Treating a failure to withdraw a plea as a procedural default is well-established in the New York courts.... [T]he Court of Appeals [has] noted [in] its prior holdings that in order to preserve a challenge to the factual sufficiency of a plea allocution there must have been a motion to withdraw the plea under [N.Y.Crim. Proc. Law] § 220.60(3) or a motion to vacate the judgment of conviction under [N.Y.Crim. Proc. Law] § 440.10. Numerous New York courts, including federal courts on habeas review, have applied that rule in rejecting challenges to the sufficiency of guilty pleas as ... procedurally barred."); [16] *Hunter v. McLaughlin,* No. 04 Civ. 4058, 2008 WL 482848, at *3 (S.D.N.Y. Feb. 21, 2008) (collecting cases and determining that "[t]here is ample case law holding that a defendant must notify the trial court of his request to withdraw a guilty plea on a specific basis in order to preserve that issue for appeal"); *Anaya v. Brown,* No. 05 Civ. 8974, 2006 WL 2524079, at *7–8 (S.D.N.Y. Sept. 1, 2006) (collecting cases and determining that "New York case law clearly indicates that [petitioner] was required to present his failure-to-inquire claim to the trial court in the first instance if he wanted to preserve it for appellate review"). Accordingly, in denying this claim, the state court relied upon an independent and adequate procedural bar that precludes federal review. [17]

13 The opinion reads in pertinent part:

> The defendant's challenge to the factual sufficiency of his plea allocution is unpreserved for appellate review since the defendant failed to move to withdraw his plea prior to sentencing....

Rojas, 903 N.Y.S.2d at 258.

14 At any time before the imposition of sentence, the court in its discretion may permit a defendant who

has entered a plea of guilty to the entire indictment or to part of the indictment, or a plea of not responsible by reason of mental disease or defect, to withdraw such plea, and in such event the entire indictment, as it existed at the time of such plea, is restored.

N.Y.Crim. Proc. Law § 220.60(3).

15 "At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment...." N.Y.Crim. Proc. Law § 440.10(1).

16 Copies of unreported cases cited herein will be mailed to Petitioner. *See Lebron v. Sanders,* 557 F.3d 76 (2d Cir.2009).

17 The New York Court of Appeals has recognized a narrow exception to this waiver rule, holding that "where a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered." *People v. Lopez,* 71 N.Y.2d 662, 666 (1988). Here, however, the Second Department specifically determined that the *Lopez* exception does not apply. *See Rojas.* 903 N.Y.S.2d at 258.

Petitioner has not asserted cause or prejudice or a fundamental miscarriage of justice that would permit this Court to circumvent his procedural default and review the merits of this claim. Accordingly, Ground Two must be denied.

3. *Ground Three: Restitution*

Petitioner argues that his Sixth and Fourteenth Amendment rights were violated when the state court failed to set a time and manner to pay the restitution that it ordered. (*See* Pet., at 6.) Respondent contends that Petitioner's restitution claim is procedurally barred and not cognizable upon *habeas* review. (*See* Resp't's Mem., at 10–12.) Respondent is correct.

***8** It is clear from the Second Department's decision that the court actually relied upon New York's contemporaneous objection rule in denying the claim as unpreserved for appellate review. [18] *Rojas,* 903 N.Y.S.2d at 258. The court's reliance upon this state procedural rule constitutes an independent and adequate ground for its decision. *See Wainwright v. Sykes,* 433 U.S. 72, 86 (1977) (contemporaneous objection rule constitutes adequate procedural ground for dismissal); *Bossett v. Walker,* 41 F.3d 825, 829 n. 2 (2d Cir.1994) (same).

18 The opinion reads in pertinent part: "The defendant's challenge to the restitution component of his sentence is unpreserved for appellate review (*see* CPL 470.05[2]; *People v. Bruno.* 900 N.Y.S.2d 447; *People v. Harris.* 900 N.Y.S.2d 137)...." Rojas, 903 N.Y.S.2d at 258 (parallel citations omitted). The court's citation to N.Y.Crim. Proc. Law § 470.05(2) reveals that it relied upon New York's contemporaneous objection rule.

> For 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.

N.Y.Crim. Proc. Law § 470.05(2). Under this section, "an objection to a ruling or instruction of a criminal court must be raised contemporaneously with the challenged ruling or instruction in order to preserve the objection for appellate review." *Green v. Travis,* 414 F.3d 288, 294 (2d Cir.2005) (citing *People v. Jones,* 440 N.Y.S.2d 248, 254 (App.Div.1981)). Additionally, the objection must "be made with sufficient specificity to enable the trial court to respond." *Id.*

As in Ground Two, Petitioner has not asserted cause or prejudice or a fundamental miscarriage of justice that would permit this Court to circumvent his procedural default and review the merits of this claim. Accordingly, Ground Three must be denied. [19]

19 Furthermore, *habeas* relief is unavailable for claims that have no effect upon a petitioner's custody. *See* 28 U.S.C. § 2254(a) (emphasis added) (stating that a district court may entertain a petition for a writ *of habeas corpus* "only on the ground that [the Petitioner] is *in custody* in violation of the Constitution or laws or treaties of the United States"). I note that the Second Circuit has declined to grant *habeas* relief for restitution claims brought under § 2255. *See United States v. Boyd,* 407 F. App'x 559, 560 (2d Cir.2011) (quoting *Kaminski v. United States,* 339 F.3d 84, 87 (2d Cir.2003)) ("Restitution orders cannot be challenged through a habeas petition because a 'monetary fine is not a sufficient restraint on liberty to meet the in custody requirement', even if raised

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in conjunction with a challenge to a sentence of imprisonment.").

IV. *CONCLUSION*

For the reasons set forth above, I conclude-and respectfully recommend that Your Honor should conclude—that the Petition should be **DENIED.** Further, because reasonable jurists would not find it debatable that Petitioner has failed to demonstrate by a substantial showing that he was denied a constitutional right, I recommend that no certificate of appealability be issued. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel,* 529 U.S. 473, 483–84 (2000).

V. *NOTICE*

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, plus an additional three (3) days, or a total of seventeen (17) days, from service of this Report and Recommendation to serve and file written objections. *See also* Fed.R.Civ.P. 6(a), (b), (d). Such objections, if any, along with any responses to the objections, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of the Honorable Cathy Seibel, at the Honorable Charles L. Brieant, Jr. Federal Building and United States Courthouse, 300 Quarropas Street, White Plains, New York 10601, and to the chambers of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered. Requests for extensions of time to file objections must be made to Judge Seibel.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5878679

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2012 WL 5878752
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Miguel A. ROJAS, Petitioner,
v.
Philip D. HEATH, Superintendent, Respondent.

No. 11–CV–4322 (CS)(PED).
|
Nov. 16, 2012.

ORDER ADOPTING REPORT AND RECOMMENDATION

SEIBEL, District Judge.

***1** Before the Court is the Report and Recommendation ("R & R") of United States Magistrate Judge Paul E. Davison, dated October 18, 2012, (Doc. 21), recommending denial of Petitioner's Petition pursuant to 28 U.S.C. § 2254, (Doc. 2). Familiarity with the prior proceedings and the R & R is presumed.

A district court reviewing a magistrate judge's report and recommendation "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). Parties may raise objections to the magistrate judge's report and recommendation, but they must be "specific," "written," and submitted "[w]ithin 14 days after being served with a copy of the recommended disposition." Fed.R.Civ.P. 72(b)(2); *accord* 28 U.S.C. § 636(b)(1)(C). A district court must conduct a *de novo* review of those portions of the report or specified proposed findings or recommendations to which timely objections are made. 28 U.S.C. § 636(b)(1)(C); *see* Fed.R.Civ.P. 72(b)(3) ("The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions."). The district court may adopt those portions of a report and recommendation to which no timely objections have been made, provided no clear error is apparent from the face of the record, *Lewis v. Zon,* 573 F.Supp.2d 804, 811 (S.D.N.Y.2008); *Nelson v. Smith,* 618 F.Supp. 1186, 1189 (S.D.N.Y.1985); Fed.R.Civ.P. 72 advisory committee's note (b).

Plaintiff has raised no objections to the Magistrate Judge's carefully considered R & R. I have reviewed the R & R and find no error, clear or otherwise. Accordingly, I adopt the R & R as the decision of the Court. The Petition is dismissed with prejudice. As Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c); *Lozada v. United States,* 107 F.3d 1011, 1016–17 (2d Cir.1997), *abrogated on other grounds by United States v. Perez,* 129 F.3d 255, 259–60 (2d Cir.1997). The Clerk of the Court is respectfully directed to close the case.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5878752

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2012 WL 2389663
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Edwin POLLARD, Petitioner,
v.
Superintendent Paul GONYEA, Respondent.

No. 11 Civ. 5712(RMB)(MHD).
|
March 14, 2012.

REPORT & RECOMMENDATION

MICHAEL H. DOLINGER, United States Magistrate Judge.

***1** TO THE HONORABLE RICHARD M. BERMAN, U.S.D.J.

Pro se petitioner Edwin Pollard seeks a writ of habeas corpus to challenge his 2009 conviction in New York State Supreme Court, Bronx County, on one count of assault in the second degree. The trial court sentenced Pollard to a prison term of five years, with an additional supervised-release term of three years.

Petitioner presses three claims in support of his petition. He complains that he was denied effective assistance of trial counsel because his attorney failed to request a justification charge, that the trial court denied him his right to counsel by not granting a request to change his appointed attorney and that new evidence has surfaced that demonstrates that the principal witness against him committed perjury by claiming that Pollard had stabbed him in the chest rather than in some other part of his body. In connection with his last claim he appears to suggest, at least in his reply papers, that the prosecutor knew that the victim's testimony was false and actively misled the court and that his attorney improperly failed to challenge that testimony or to undertake an adequate pretrial investigation.

Respondent asserts that the first ineffective-assistance claim is procedurally barred but urges the court to reject it on the merits. As for the choice-of-counsel claim, the State argues that the claim is both moot and otherwise meritless. Finally, insofar as petitioner argues witness perjury, respondent notes that the claim is unexhausted and procedurally barred and is, in any event, groundless.

For the reasons that follow, we conclude that the three claims are meritless and hence recommend that the writ be denied and the petition dismissed.

PRIOR PROCEEDINGS

Pollard's conviction stemmed from his non-fatal stabbing of a man named Edward Herrmann on July 11, 2007. The police arrested Pollard the same day, and a Bronx County grand jury returned a seven-count indictment charging him with single counts of first- and second-degree attempted assault, second- and third-degree assault, and fourth-degree criminal possession of a weapon and two counts of third-degree menacing. Petitioner filed an omnibus suppression motion to preclude identification testimony and the use of his post-arrest statement to the police in which he admitted that he may have stabbed Herrmann. After a hearing, the court denied that motion. (Villecco Decl. Ex. 2 (Resp't's App. Br.) at 3).

Pollard went to trial on January 15, 2009 [1] before the Hon. David Stadtmauer and a jury. At trial the State presented testimony of Mr. Herrmann, Ms. Faye DeCosta (a former girlfriend of Pollard), Ms. DaCosta's sister Carla Hill, and the arresting police officer. Pollard testified in his own defense.

1 The transcript itself is actually dated January 15, 2008. Given the dates of prior hearings in Pollard's case, we assume this to be a typographical error.

Based on the evidence presented by the prosecution, the jury was free to find that Pollard had stabbed Herrmann after a series of hostile exchanges both the day before the stabbing and the day of the crime. Pollard and DeCosta testified that on July 10, 2007 they were in each others' company when they encountered Pollard, who was a former boyfriend of DeCosta. According to these two witnesses, Pollard angrily asked DeCosta "Who the fuck is this?", referring to Herrmann. Herrmann introduced himself, but Pollard refused to shake his hand. (Tr. 14–16, 18, 20, 48–49, 53, 57, 123–26, 186). Herrmann then stepped away as Pollard and DeCosta began to argue. When Pollard shoved DeCosta, Herrmann stepped between them, at which point Pollard said "Stay right

there. I'll be back". As he walked into DeCosta's nearby building, DeCosta told Herrmann that Pollard had a set of keys to DeCosta's apartment. (Tr. 21–23, 32–33, 124, 126–27, 188). Herrmann followed Pollard into the building, grabbed him and demanded to know what he was going to get. He then punched Pollard in the face and warned him not to threaten Ms. DeCosta, indicating that he could end up in jail, and that if he wished to fight, Herrmann was ready to do so. During this altercation Herrmann also said "Little people like you get fucked for things like this in prison. If you abuse women, you deserve to be abused". Herrmann also took Pollard's cell phone, broke it and threw it out of a window. He then demanded that Pollard return Ms. DeCosta's apartment keys, and Pollard complied. At that point Pollard left on his bicycle, saying "I will be back. I will be back." (Tr. 23–26, 32, 57–61, 71–72, 74, 128–33, 180–83, 185–86, 189).

***2** Less than an hour later, Pollard rang the downstairs buzzer to the apartment of Ms. Carla Hill, Ms. DeCosta's sister. When Ms. Hill descended, he told her—as he kept his hand in his pocket—that he had a gun and was going to hurt DeCosta and her "little boyfriend" and that he would burn DeCosta's apartment. He then left on his bicycle. (Tr. 77, 82–85). Hill communicated this event by phone to DeCosta, who was with Herrmann and became notably upset. (Tr. 26–29, 35, 85–86, 90, 135–37).

The next day, at DeCosta's request, Herrmann went to Hill's apartment to pick up DeCosta's work clothes. He left with a bag and, while walking away from her apartment on the street, he encountered Pollard riding his bicycle. Pollard, who was an estimated thirty-six feet from Herrmann at the time, jumped off his bicycle, rushed at Herrmann, pulled a knife and stabbed him in his upper abdomen below the heart. Pollard then dropped the knife and walked away with his bicycle. (Tr. 34, 138–50, 173–75, 190).

Herrmann, who was bleeding, walked to the apartment of DeCosta's mother, where DeCosta was staying, told DeCosta that Pollard had stabbed him and asked her to call the police, which she did. (Tr. 36–37, 144–45, 150–51). In response to the call, Officer Elisha Duncan came to the apartment and observed Herrmann bleeding from the abdomen. Herrmann reported that Pollard had stabbed him and provided the officer with a physical description of his assailant. Herrmann then went to St. Barnabas Hospital, where doctors used four staples to seal the wound. He suffered discomfort from the wound, including sleep interruption for about two weeks, and limited shoulder movement while the staples were in place. Eventually the wound healed, leaving a permanent scar. (Tr. 38, 98–100, 103, 161, 163–66).

After leaving the apartment, Officer Duncan proceeded to 176th Street and Monroe Avenue, where other officers had stopped Pollard, still in possession of his bicycle. He admitted to the officers that he believed that he had stabbed Herrmann after his fight with him the day before and that he had discarded the knife in the vicinity of Jerome Avenue and Mount Hope. DeCosta came to the location and identified Pollard, and the next day Herrmann identified him from a lineup. (Tr. 40, 100–04, 106, 109–12, 115, 170–71).

Pollard testified in his own defense. [2] He reported that on July 10, 2007, he had been staying at DeCosta's apartment and went downstairs, where he encountered DeCosta and Herrmann. According to Pollard he asked DeCosta "Who's that guy?", and she said that he was a friend. Herrmann tried to shake hands, but Pollard refused. He then said to DeCosta that he would talk to her about money that she owed him, but only in her apartment. He proceeded to walk into the building, at which point Herrmann followed him, saying "Oh you're too good to shake my hand." Pollard reported that he ran up the stairs but that Herrmann grabbed him in a choke hold. Pollard bit Herrmann's hand, and Herrmann punched him in the face, saying "I'll take you for a ride where they can't find you ... We fuck little niggers like you in jail." (Resp't's App. Br. at 8–9; Villecco Decl. Ex. 1 (Def.'s App. Br.) at 5–6). Pollard narrated that Herrmann had then seized Pollard's cell phone and thrown it out the window, and that he also had grabbed the apartment keys from Pollard. According to Pollard, DeCosta then entered the building and told Herrmann to stop fighting, at which point Pollard left the premises. (Resp't's App. Br. at 9; Def.'s App. Br. at 6).

2 Respondent has apparently been unable to locate the portion of the trial transcript that includes Pollard's testimony. (*See* Villecco Decl. ¶ 4 (reporting inability to locate portions of trial transcript, though failing to indicate that any of the missing portions included testimony). The state appellate briefs, however, contain a detailed summary of that testimony, and there appears to be no dispute between the parties as to the substance of that testimony.

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***3** Pollard recounted that he then stopped at Hill's building and asked her "Who's that guy [DeCosta's] with? This guy beat me up for no reason.", to which Hill replied that he was a family friend. Pollard reported that he had then said, "If I had a gun, I would kill him." He then left and went home. (Resp't's App. Br. at 9).

As described by Pollard, the next day he spent some time repairing his bicycle with the use of a broken four-inch-long paring knife. He reported that he then put the knife in his pocket and was walking his bike near 176th Street and Walton Avenue, when he saw Herrmann standing some distance away on the sidewalk. He testified that Herrmann said "Run now. I told you I know where you live. Run now, you little bitch." At that point, Pollard claimed, Herrmann began to run toward him. Pollard, by his own admission, continued to walk towards Herrmann, and when he recognized the other man, he pulled the knife from his pocket and swung it at Herrmann to avoid being grabbed by the throat. According to Pollard, Herrmann then ran away. (*Id.* at 9–10; Def.'s App. Br. at 6–7). Pollard resumed walking with his bicycle, when police officers ordered him to stop and asked if he had just been in a fight. In response he admitted that he had and said "I sw[u]ng the knife and I think I cut him." (Resp't's App. Br. at 10).

The jury ultimately acquitted Pollard of attempted first-degree assault but convicted him of second-degree assault. (*Id.* at 1, 12). Justice Stadtmauer subsequently sentenced Pollard to a determinate prison term of five years, with three years of supervised release. (*Id.* at 1; Def.'s App. Br. at 1).

Petitioner filed a direct appeal from his conviction. In his brief he asserted that he had been denied effective assistance of trial counsel because his attorney had chosen not to seek a justification instruction even though the prosecutor had suggested that it was appropriate in light of Pollard's trial testimony. He also argued that his right to effective counsel had been violated because he had repeatedly advised the trial court in the months leading up to trial that he was dissatisfied with his appointed attorney, and yet the court refused to inquire as to the basis for his unhappiness and declined to allow a change of counsel even though at one point the lawyer herself had said that she and her client had irreconcilable differences. (Def.'s App. Br. at 12–30).

The First Department unanimously affirmed the conviction. *People v. Pollard,* 78 A.D.3d 618, 912 N.Y.S.2d 192 (1st Dep't 2010). In rejecting petitioner's challenge to his attorney's decision to eschew the justification defense, the panel first noted that Pollard had failed to pursue this claim by way of a section 440 .10 motion, which would have created an evidentiary record on which to assess counsel's performance and that this omission made the claim "unreviewable". *Id.* at 618, 912 N.Y.S.2d at 193. The panel then proceeded, however, to consider the merits of the claim to the extent that the record permitted such review and concluded that Pollard had not shown that his attorney's performance was constitutionally deficient. In this regard the court noted that there were strategic reasons not to invoke the defense formally, which would trigger a complete instruction to the jury as to the limitations of that defense. In particular, the court noted that Pollard had admitted using a knife to strike near the victim's heart even though he knew that Herrmann was unarmed. Since the justification defense would not be applicable to the use of deadly physical force in these circumstances, the panel implied that the attorney may well have decided to avoid having the jury so instructed in that case, leaving it to the jury informally to apply a self-defense theory to acquit. *Id.* As for the change-of-counsel issue, the court held that the claim was moot because the Legal Aid Society had replaced the trial attorney about whom Pollard had complained and had done so before the start of the trial. *Id.*

***4** Petitioner sought leave to appeal from this decision to the New York Court of Appeals, but that court denied his application. *People v. Pollard,* 17 N.Y.2d 799, 952 N.Y.S.2d 1102 (2011).

In January 2010, while Pollard's appeal was still pending, he filed a *pro se* section 440.10 motion to vacate his conviction. In support of that request, he asserted that Herrmann had committed perjury by testifying that he had been stabbed in the chest, since the medical records, not used at trial, showed only a stab wound in the abdomen. He further claimed that the prosecutor had lied to the court about this matter. (Villecco Decl. Ex. 3). By order dated May 12, 2010, Justice Stadtmauer denied the motion, observing that Pollard's application rested on purely conclusory "self-serving" assertions unsupported by evidence or corroborating details, including the medical records to which Pollard alluded. According to the court, these omissions precluded any basis for vacatur

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or for holding an evidentiary hearing, as Pollard had requested. (*Id.* Ex. 5). In the wake of this decision, Pollard did not seek leave to appeal the ruling to the Appellate Division. (Villecco Decl. ¶ 10).

Pollard filed a second *pro se* section 440.10 motion, dated June 22, 2010. This application largely reiterated the prior one but seemed to articulate a revised theory that petitioner had been denied effective representation of counsel because the lawyer had not challenged the victim's testimony that he had been stabbed in the chest. (*Id.* Ex. 6).

By Decision and Order dated December 6, 2010, Justice Stadtmauer denied this motion, noting that Pollard's claims of witness perjury, prosecutorial misconduct, insufficiency of trial evidence, ineffective counsel and judicial error and misconduct were all asserted in a conclusory and self-serving fashion. He also observed that the claims of perjury, prosecutorial misconduct and insufficiency of trial evidence had previously been asserted by Pollard in his first motion, which the court had denied. Treating the current motion as one for reargument on these matters, he found no basis to reexamine the prior decision. Finally, the court noted that the sufficiency of the evidence was a matter that could be raised on direct appeal, and accordingly he declined to reach that question. (Villecco Decl. Ex. 8). As was the case with Pollard's first section 440.10 motion, he did not seek leave to appeal to the Appellate Division from this adverse ruling. (Villecco Decl. ¶ 12).

Following the exhaustion of his direct appellate remedies in the state courts, Pollard turned to this court, filing his habeas petition dated July 29, 2011.

ANALYSIS

Petitioner asserts here the two claims that his counsel raised on his direct appeal as well as the central complaint that he aired in his two section 440.10 motions. Before addressing these claims, we summarize the standards by which a habeas court is to review challenged decisions of the state courts.

I. *Habeas Standard of Review*

***5** The stringency of federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") turns on whether the state courts have passed on the merits of the petitioner's claim, that is, whether the decision of the highest state court to consider the claim is "based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman,* 261 F.3d 303, 311 (2d Cir.2001) (discussing 28 U.S.C. § 2254(d)). If the state court has addressed the merits, then the petitioner may obtain relief only if the state court's ruling "(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, e.g., Bell v. Cone,* 535 U.S. 685, 693–94 (2002); *Williams v. Taylor,* 529 U.S. 362, 412–13 (2000) (O'Connor, J., concurring); *Howard v. Walker,* 406 F.3d 114, 121–22 (2d Cir.2005); *Brown v. Artuz,* 283 F.3d 492, 498 (2d Cir.2002). "[I]f the federal claim was not adjudicated on the merits, 'AEDPA deference is not required, and conclusions of law and mixed findings of fact and conclusions of law are reviewed *de novo.'* " *Dolphy v. Mantello,* 552 F.3d 236, 238 (2d Cir.2009) (quoting *Spears v. Greiner.* 459 F.3d 200, 203 (2d Cir.2006)).

"Clearly established" federal law " 'refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision.' " *Howard,* 406 F.3d at 122 (quoting *Kennaugh v. Miller,* 289 F.3d 36, 42 (2d Cir.2002)). "[A] decision is 'contrary to' clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.' " *Id.* (quoting *Williams,* 529 U.S. at 413).

What constitutes an "unreasonable application" of settled law is a somewhat murkier proposition. "A federal court may not grant habeas simply because, in its independent judgment, the 'relevant state-court decision applied clearly established federal law erroneously or incorrectly.' " *Id.* (quoting *Fuller v. Gorczyk,* 273 F.3d 212, 219 (2d Cir.2001) (quoting *Williams,* 529 U.S. at 411)), The Supreme Court observed in *Williams* that "unreasonable" did not mean "incorrect" or "erroneous," noting that the writ could issue under the "unreasonable application" provision only "if the state court identifies the correct governing legal

principle from this Court's decisions [and] unreasonably applies that principle to the facts of the prisoner's case." 529 U .S. at 410–13. The Second Circuit has interpreted this language to mean that while "[s]ome increment of incorrectness is required ... 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.' " *Monroe v. Kuhlman,* 433 F.3d 236, 246 (2d Cir.2006) (quoting *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir.2000)).

***6** The Supreme Court's most recent decision on this issue reflects a seemingly narrower view of what constitutes an "unreasonable" application of federal law. It states that "[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." *Harrington v. Richter,* 131 S.Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)). "Under § 2254(d), a habeas court must determine what arguments or theories supported or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* Under this more recent interpretation, a federal habeas court has "authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.* In other words, to demonstrate an "unreasonable" application of Supreme Court law, the habeas petitioner "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." *Id.* at 786–87.

As for the state court's factual findings, under the habeas statute "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Richard S. v. Carpinello,* 589 F.3d 75, 80–81 (2d Cir.2009); *McKinney v. Artuz,* 326 F.3d 87, 101 (2d Cir.2003); *see generally Rice v. Collins,* 546 U.S. 333, 338–39 (2006).

II. *The Sixth Amendment Claim: Waiver of a Justification Defense*

Petitioner first argues that he was denied the effective assistance of trial counsel, because his lawyer chose, apparently quite deliberately, to forego a justification defense. He asserts, in substance, that in his own testimony he admitted the elements of the crime of second-degree assault and hence his only hope of acquittal rested on the jurors agreeing that he had acted in reasonable self-defense. By foregoing that defense and arguing to the jury, *inter alia,* that the State had not proven intent to cause injury, counsel acted unreasonably, and his error likely caused Pollard's conviction.

Respondent asserts that this claim is procedurally barred because the appellate panel observed that Pollard had failed to raise it on a section 440.10 motion, as he should have done. Nonetheless, respondent urges that this court reach the merits of the claim and reject it as baseless. (Resp't's Mem. of Law at 4–5).

We conclude that the claim is not procedurally barred, but that it is without merit. Accordingly, we recommend its dismissal.

A. *Procedural Bar*

***7** If the highest state court to address a federal-law claim disposed of it on a "state law ground that is independent of the federal question and adequate to support the judgment," a petitioner may not obtain habeas review unless he demonstrates both cause for his default and prejudice or else establishes that a failure to address the claim would constitute a fundamental miscarriage of justice. *E.g., Coleman v. Thompson,* 501 U.S. 722, 729 (1991); *Jimenez v. Walker,* 458 F.3d 130, 136 (2d Cir.2006) (quoting *Harris v. Reed,* 489 U.S. 255, 260 (1989)). If the state court rejects a claim as unpreserved and then, in the alternative, notes that it would have rejected the claim on its merits if it had considered it, then the ruling is still considered to rest on procedural grounds. *See, e.g., Bell v. Miller,* 500 F .3d 149, 155 (2d Cir.2007) (state court's "contingent observation" is not an "adjudication on the merits" for purposes of habeas review); *Green v. Travis,* 414 F.3d 288, 294 (2d Cir.2005).

To be independent, the state court's holding must rest on state law that is not "interwoven with the federal law." *Jimenez,* 458 F.3d at 137 (quoting *Michigan v. Long,* 463 U.S. 1032, 1040–41 (1983)). Since it can be " 'difficult to determine if the state law discussion is truly an independent basis for decision or merely a passing

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reference,' ... reliance on state law must be 'clear from the face of the opinion.' " *Fama v. Comm'r of Corr. Servs.,* 235 F.3d 804, 809 (2d Cir.2000) (quoting *Coleman,* 501 U.S. at 732, 735). *Accord, e.g., McKethan v. Mantello,* 522 F.3d 234, 237–38 (2d Cir.2008) (*per curiam*). When determining whether we may entertain a claim, we "apply a presumption against finding a state procedural bar and 'ask not what we think the state court actually might have intended but whether the state court plainly stated its intention.' " *Galarza v. Keane,* 252 F.3d 630, 637 (2d Cir.2001) (quoting *Jones v. Stinson,* 229 F.3d 112, 118 (2d Cir.2000)).

As for adequacy, the state procedural requirement must be " 'firmly established and regularly followed by the state in question' in the specific circumstances presented in the instant case." *Murden v. Artuz,* 497 F.3d 236, 241 (2d Cir.2007) (quoting *Monroe v. Kuhlman,* 433 F.3d 236, 241 (2d Cir.2006)); *see Lee v. Kemna,* 534 U.S. 362, 376 (2002); *Cotto v. Herbert,* 331 F.3d 217, 239 (2d Cir.2003) (quoting *Garcia v. Lewis,* 188 F.3d 71, 77 (2d Cir.1999)). However, even "[s]tate rules that are firmly established and regularly followed will not foreclose review of a federal claim where the particular application of the rule is 'exorbitant.' " *Brown v. Lee,* 2011 WL 3837123, at *5 (S.D.N.Y. Aug. 30, 2011) (quoting *Kemna,* 534 U.S. at 376). In assessing adequacy, the Second Circuit has adopted from *Kemna* three general considerations as pertinent to the analysis. These are:

> (1) whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the ... court's decision; (2) whether state caselaw indicated that compliance with the rule was demanded in the specific circumstances presented; and (3) whether petitioner had "substantially complied" with the rule given "the realities of trial," and, therefore, whether demanding perfect compliance with the rule would serve a legitimate governmental interest.

***8** *Murden,* 497 F.3d at 192 (quoting *Cotto,* 331 F.3d at 240). The federal court, in making this determination, owes deference to the state courts, and should find a state procedural-default ruling adequate as long as it has "a fair or substantial basis in state law." *Garcia,* 188 F.3d at 78 (citing, *inter alia, Arce v. Smith,* 889 F.2d 1271, 1273 (2d Cir.1989)) (internal quotation marks omitted). It bears emphasis that "[b]ecause of comity concerns, a decision that a state procedural rule is inadequate should not be made 'lightly or without clear support in state law.' " *Murden,* 497 F.3d at 192 (quoting *Garcia,* 188 F.3d at 77).

We assume for purposes of our analysis that a holding by the Appellate Division that petitioner erred in not pursuing his Sixth Amendment claim first by a section 440.10 motion and that this omission was fatal to his appellate argument would be adequate. The New York Court of Appeals has cautioned that "[g] enerally, the ineffectiveness of counsel is not demonstrable on the main record" so "in the typical case it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or postconviction proceeding brought under CPL 440.10." *People v. Brown,* 45 N.Y.2d 852, 853–54, 410 N.Y.S.2d 287, 287 (1978); *see also People v. Harris,* 109 A.D.2d 351, 360, 491 N.Y.S.2d 678, 687 (2d Dep't 1985) (citing cases) (stating that "[t]he Court of Appeals has time and time again advised that ineffective assistance of counsel is generally not demonstrable on the main record"). " 'Where the ineffective assistance of counsel claim is not record-based, federal habeas courts have held that the rule of CPL § 440.10(2)(c) is not adequate' to bar habeas review." *McCollough v. Bennett,* 2010 WL 114253, *6 (E.D.N.Y. Jan. 12, 2010) (quoting *Byron v. Ercole,* 2008 WL 2795898, *13 (E.D.N.Y. July 18, 2008)). [3]

[3] There are circumstances in which the claimed errors of counsel may be adequately assessed from the record before the trial court, and in such cases, the defendant may be required to pursue such claims on his direct appeal. *E.g., People v. Moore,* 66 A.D.3d 707, 710–12, 886 N.Y.S.2d 468, 471–73 (2d Dep't 2009); *People v. Nusbaum,* 222 A.D.2d 723, 725 634 N.Y.S.2d 852, 854 (3d Dep't 1995) (citing *People v. English,* 215 A.D.2d 871, 873, 627 N.Y.S.2d 105, 107 (3d Dep't 1995)).

The failure of Pollard to press his claim initially before the trial court appears to fall within this range of cases because, by proceeding directly to the appellate court, he deprived the courts of the opportunity to review whatever explanation the trial attorney may have had for his

decision as to how to proceed and why he chose to forego the justification defense. The factual predicates for this aspect of the Sixth Amendment analysis were not part of the preexisting record and hence were simply not available to the Appellate Division.

That said, however, the decision of the Appellate Division on this claim cannot be said to rest on an independent state-law ground. After noting that petitioner had failed to follow the required procedure and that as a result the claim was "unreviewable" insofar as it did not reflect the trial counsel's reasons for his approach, the court did not say that as a result it would not address the merits. Rather, it proceeded directly to specify that it would nonetheless consider the merits insofar as the claim could be assessed in light of the record before it, presumably because a rationale for the trial attorney's approach was implicit in the record. The panel then proceeded to analyze Pollard's claim, concluding that it was meritless because Pollard had "not shown the 'absence of strategic or other legitimate explanations' for counsel's choice of defenses." 78 A.D.3d at 618, 912 N.Y.S.2d at 193. More specifically, the panel noted that a justification defense could not succeed "unless the jury was persuaded that even though [petitioner] swung a knife at an unarmed opponent that cut him just below the heart, this did not constitute deadly physical force as defined in Penal Law § 10.00(11)." *Id.* It also observed that "a competent attorney" could well "have concluded that his client was better off with the jury not knowing about the legal limitations on the use of deadly physical force." *Id.* (citing N.Y. Penal Law § 35.15[2][a]). It then concluded that Pollard had not demonstrated that his attorney "should have pursued a justification defense, or that the absence of such a defense caused him any prejudice." *Id.*

***9** In short, the court did not refuse to consider the merits of the claim, and did not clearly address the merits only as an alternative to an articulated holding that it was rejecting the claim for procedural reasons. Given the presumption against finding that a state-court ruling was based on an independent state-law ground when the court's reasoning is ambiguous on that point, this mode of articulation must be deemed to amount to a decision on the merits. *Compare, e.g., Bell,* 500 F.3d at 155, *with Zarvela v. Artuz,* 364 F.3d 415, 417 (2d Cir.2004) (*per curiam*); *Dinh v.. Rock,* 2011 WL 6329699, *4 (E.D.N.Y. Dec. 16, 2011). Accordingly, we do not view the claim as procedurally barred from consideration here. We further note that since the decision of the Appellate Division is presumed to rest on the merits, the required deference embodied in section 2254(d) applies to our review of the state court's ruling.

B. *The Merits*

As for the merits of the claim, to demonstrate ineffective assistance of counsel a petitioner must show that his lawyer's performance was "so defective that 'counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment,' " "and that counsel's errors were 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Brown v. Artuz,* 124 F.3d 73, 79 (2d Cir.1997) (quoting *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). As summarized in *Brown:*

> To satisfy the first, or "performance," prong, the defendant must show that counsel's performance was "outside the wide range of professionally competent assistance," and to satisfy the second, or "prejudice," prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 79–80 (quoting *Strickland,* 466 U.S. at 690, 694); *accord, e.g., Smith v. Spisak,* 130 S.Ct. 676, 685 (2010); *Palacios v. Burge,* 589 F.3d 556, 561 (2d Cir.2009); *Henry v. Poole,* 409 F.3d 48, 62–64 (2d Cir.2005); *Cox v. Donnelly,* 387 F.3d 193, 197 (2d Cir.2004).

It bears emphasis that the *Strickland* standard is quite deferential, and that a claim of constitutional dimension does not arise unless a lawyer's error is so egregious as to amount to a failure to provide minimal professional representation. Thus, a habeas court weighing an ineffective-assistance claim "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," and must "determine whether, in light of all the circumstances, [counsel's] identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690; *accord, e.g., Kimmelman v. Morrison,* 477 U.S. 365, 386 (1986); *Loliscio v. Goord,* 263 F.3d 178, 192 (2d Cir.2001). In making this determination, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions

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in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690.

***10** The burden of proving prejudice is equally onerous. As noted, the petitioner 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 one sufficient to undermine confidence in the outcome of the trial or appeal." *Aparicio v. Artuz,* 269 F.3d 78, 95 (2d Cir.2001) (citing *Strickland,* 466 U.S. at 694).

Petitioner cannot meet these standards, and at the very least the appellate court's conclusion to that effect was neither inconsistent with Supreme Court precedent nor an unreasonable application of it.

The justification defense is embodied in N.Y. Penal Law §§ 35.15. Under its terms, a person is authorized to "use physical force upon another person when and to the extent that he ... reasonably believes such to be necessary to defend himself ... from what he ... reasonably believes to be the use or imminent use of unlawful physical force by such other person", provided that the unlawful physical force was not provoked by the actor. The statute precludes the use of "deadly physical force", however, unless the actor

> reasonably believes that such other person is using or about to use deadly physical force. Even in such a case, however, the actor may not use deadly physical force if he knows that with complete personal safety, to [himself] and others he ... may avoid the necessity of so doing by retreating ...

N.Y. Penal Law § 35.15(2)(a). *See also* N.Y. Penal Law §§ 35.15(2)(b) & (c) (authorizing deadly force to prevent certain enumerated crimes, including kidnapping, rape, robbery and burglary). "Deadly physical force" is defined to cover "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." N.Y. Penal Law § 10.00(11). Given these provisions, a justification defense in this case would plainly have failed.

The law in New York is clear that the use of a knife to slash another man near his heart or in the abdomen—a version supported both by the victim and by the newly proffered medical records—constitutes deadly physical force. *See, e.g., People v. Steele,* 19 A.D.3d 175, 175–76, 798 N.Y.S.2d 391, 391 (1st Dep't 2005); *accord, e.g., People v. Jones,* 24 A.D.3d 815, 816, 805 N.Y.S.2d 169, 171 (3d Dep't 2005); *see also Almonte v. Lake,* 2006 WL 839073, *10 (S.D.N.Y. Mar. 30, 2006). Since Pollard conceded that his victim was unarmed at the time, the statute appears to preclude the use of a justification defense by petitioner. *E.g., Steele,* 19 A.D.3d at 176, 798 N.Y.S.2d at 391. Furthermore, given the testimony of Pollard himself that he saw Herrmann at an initial distance of thirty-six feet and continued to walk toward him even as he perceived danger, it appears that petitioner had a means of retreat, which would also preclude invocation of the defense. *See, e.g., People v. Hall,* 48 A.D.3d 1032, 1033, 849 N.Y.S.2d 743, 744 (4th Dep't 2008).

***11** Given these evident problems with invoking the justification defense, it was reasonable for defense counsel to pursue an alternative approach, emphasizing the asserted failure of the prosecutor to prove that Pollard intended to injure Herrmann, who, at least in Pollard's version of events, was the aggressor. (*See* Resp't's App. Br. at 12) (citing defense counsel's summation reference to lack of proof of intent to injure). At the very least, this approach was not so deficient as to constitute the denial of minimal professional representation. [4]

4 Indeed, as the appellate panel hinted, counsel may well have assumed that his client would be better off by letting the jurors themselves take the threat from Herrmann into consideration without a jury instruction that would have limited them in applying whatever version of a self-defense defense that they thought appropriate.

Moreover, even if counsel had sought a jury instruction on this point and the court had granted it, the record reflects that it is entirely implausible that a properly instructed jury would have found that Pollard met the statutory requirements. Hence petitioner fails to demonstrate either inadequate representation or prejudice. Finally, in any event the Appellate Division's holding in this respect was obviously not an unreasonable application of Supreme Court precedent.

III. *The Refusal to Replace Defense Counsel*

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On several occasions Pollard communicated with the court in the months, and then the days, before the trial to express unhappiness with his then-appointed counsel. On each occasion, however, the court declined to investigate the matter and did not order a change of attorney. (Villecco Decl. ¶ 13 & Exs. 9–12). Before trial, however, the attorney about whom Pollard was complaining was replaced by another Legal Aid lawyer, whose performance petitioner did not criticize in the trial court. (*See* Resp't's App. Br. 23–26).

When petitioner raised this issue on appeal, the Appellate Division held that the claim was moot since the criticized attorney had been replaced. *Pollard,* 78 A.D.3d at 618–19, 912 N.Y.S.2d at 193. That ruling was certainly correct.

Petitioner offered no basis for asserting that the pretrial conduct of his first attorney prejudiced him in terms of the result of the trial, and hence he was not pressing a potentially viable claim for denial of effective representation. Thus, his claim reduced to the complaint that he had a right to a replacement appointed counsel, an assertion inconsistent with the Supreme Court's decision in *Wheat v. United States,* 486 U.S. 153, 159 (1988). In any event, as the appellate panel noted, he did receive a new attorney, thus mooting his substitution claim. [5]

5 As we note above, Pollard did complain on his appeal about that second attorney's decision not to pursue a justification defense, but for reasons noted that Sixth Amendment claim is meritless.

IV. *The Testimony of The Victim*

Petitioner's remaining claim is a pastiche of allegations that the testimony of Mr. Herrmann was perjurious insofar as he asserted that Pollard had stabbed him in the chest. Petitioner further accuses the prosecutor of knowingly proffering this purportedly false testimony, complains about the trial judge countenancing it also, and finally asserts that his trial attorney was constitutionally incompetent for not uncovering the falsehood. In support of this argument, Pollard proffers a medical document apparently reflecting the treatment of Herrmann by the Emergency Medical Service immediately after the stabbing. (Pet. at last attach.).

***12** Pollard first presented elements of this claim in his two section 440.10 motions, both of which the trial court denied. Since he never sought leave to appeal from these denials, he plainly failed to exhaust his state-court remedies. *See, e.g., Gruyair v. Lee,* 2011 WL 4549627, *6 (S.D.N.Y. Oct. 3, 2011) ("Exhaustion requires that the factual and legal basis for each claim be fairly presented to the highest available state court and that the petitioner utilize all available mechanisms to secure appellate review of the denial of that claim.") (citing, *inter alia, Galdamez v. Keane,* 394 F.3d 68, 72 (2d Cir.2005); *Torres v. McGrath,* 407 F.Supp.2d 551, 557 (S.D.N.Y.2006); *Mayen v. Artist,* 2008 WL 2201464, *4 (S.D.N .Y. May 23, 2008)) (internal quotation marks omitted); *see also Galdamez,* 394 F.3d at 73 (noting that a petitioner must allow the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process") (emphasis omitted); *Ramirez v. Att'y Gen. of N.Y.,* 280 F.3d 87, 94 (2d Cir.2001) (discussing presentation of claims to the New York Court of Appeals, in which review is discretionary). That said, respondent asks that we bypass the exhaustion analysis and deny the claim or claims on the merits under section 2254(b)(2). (Resp't's Mem. of Law at 24). That is the appropriate approach.

The point that Pollard seems to want to make is that although Herrmann assertedly testified that he had been stabbed in the chest, he was actually stabbed in the abdomen. Petitioner seems to imply that this alleged inaccuracy led to a flawed result in the trial, although he fails to explain why.

In any event, his argument is plainly misguided. Herrmann testified that "when [petitioner] came up with the blade, he was coming straight at me. The way I saw it, he was coming towards the heart. I blocked it and again he stabbed me just below the heart area." (Tr. 148, 152). In testifying, Herrmann pointed to where he had suffered the stab wound, and the prosecutor characterized the location, without objection, as "the area below the left pectoral muscle in the upper left torso area." (Tr. 148). In addition, the State introduced two photographs of the stab wound, thus presumably allowing the jury to decide where Herrmann had been wounded. (*See* Tr. 162–64). Finally, the medical record proffered by Pollard is entirely consistent with this evidence, since it refers to a leftside abdomen stab wound. (*See* Pet. at last attach.).

Apart from these problems with petitioner's argument, the precise location of the wound, whether in the lower chest or upper abdomen, does not affect the viability of the

verdict. Petitioner was convicted of second-degree assault, which requires proof that the defendant, "[w]ith intent to cause physical injury to another person, ... causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; ..." N.Y. Penal Law § 120.05(2). The testimony of Herrmann and that of Pollard himself establish all of these elements, since petitioner approached Herrmann, pulled a knife while doing so, swung the knife at Herrmann's torso, and apparently took a second swing with the knife when initially blocked by Herrmann, slashing him in the process. There is also no question that the knife, as used, was a dangerous instrument. *See, e.g., People v. Brown,* 52 A.D.3d 1237, 1238, 859 N.Y.S.2d 548, 548 (4th Dep't 2008); *People v. Prior,* 23 A.D.3d 1076, 1076, 804 N.Y.S.2d 877, 878 (4th Dep't 2005); *People v. Vincent,* 231 A.D.2d 444, 445, 647 N.Y.S.2d 205, 205 (1st Dep't 1996).

***13** In sum, Pollard proffers no evidence of false testimony, and the trial evidence, whether with or without the medical record, was ample to sustain the conviction.

CONCLUSION

For the reasons stated, we recommend that the writ be denied and the petition dismissed with prejudice. We further recommend denial of a certificate of appealability, as petitioner fails to raise any grounds justifying appellate review. *See, e.g., Cintron v. Fisher,* 2012 WL 213766, *3 (S.D.N.Y. Jan. 24, 2012) (citing *Lucidore v. N.Y. State Div. of Parole,* 209 F.3d 107, 111–12 (2d Cir.2000)); *see also* 28 U.S.C. § 2253(c)(2).

Pursuant to Rule 72 of the Federal Rules of Civil procedure, the parties shall have fourteen (14) days from this date 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 to be delivered to the chambers of the Honorable Richard M. Berman, Room 1320, and to the chambers of the undersigned, Room 1670, 500 Pearl Street, New York, New York 10007. Failure to file timely objections may 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); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(d).

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

Dana GARNER, Petitioner,
v.
SUPERINTENDENT, Respondent.

No. 9:10–CV–1406 (GTS).
|
Sept. 10, 2012.

Attorneys and Law Firms

Dana Garner, Rome, NY, pro se.

Hon. Eric T. Schneiderman, New York State Attorney General, Leilani J. Rodriguez, Esq., Ass't Attorney General, of Counsel, New York, NY, for Respondent.

DECISION and ORDER

GLENN T. SUDDABY, District Judge.

I. INTRODUCTION

***1** Petitioner Dana Garner is incarcerated as the result of a 2009 judgment of conviction in Oneida County Court. Petitioner pleaded guilty to attempted second degree burglary (N.Y. PENAL LAW § 110 .00/140.25). Dkt. No. 1, Petition ("Pet.") at 2. He seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the grounds that (1) the county court lacked jurisdiction; (2) his plea was induced by defense counsel's threats and misinformation; (3) counsel placed his own interests before petitioner's interests when he denied the truth of petitioner's version of events and attacked petitioner's credibility; and (4) counsel was ineffective. Pet. at 7–8 (Grounds One through Four); Dkt. No. 7–1, Memorandum of Facts and Memorandum of Law ("Mem."), at 1–12; Dkt. No. 8, Supplement to Memorandum of Law ("Supp.Mem.") at 1–3.

On April 19, 2011, respondent filed an answer, memorandum of law and the relevant state court records. Dkt. No. 12, Response; Dkt. No. 13, Respondent's Memorandum of Law, ("R.Mem."); Dkt. No. 14, State Court Records.[1] Petitioner has filed a reply, a supplemental reply, and a supplemental affidavit. Dkt. No. 17, Reply Brief; Dkt. No. 18, Supplemental Reply ("Supp.Reply"); Dkt. No. 29, Supplemental Affidavit ("Supp.Affidavit"). For the reasons that follow, the petition is denied and dismissed.

1 The court does not have the plea or sentencing transcripts. Respondent has informed the court that these proceedings were not transcribed because petitioner did not perfect his direct appeal. R. Mem. at 3 n1. Based upon a review of the records submitted by petitioner and respondent, the court finds that the current record suffices to resolve the petition. Rule 5, Rules Governing Section 2254 Cases in the United States District Courts (providing that the respondent must submit state court records he or she considers relevant, that the court may order that parts of "untranscribed recordings be transcribed and furnished," and that if "a transcript cannot be obtained, the respondent may submit a narrative summary of the evidence."); *Williams v. Ercole,* No. 1:09–CV–5169, 2010 WL 3785521 at *2 n. 1 (S.D.N.Y. Sept. 10, 2010). The background information in this Decision and Order is based upon the state court records submitted by petitioner and respondent.

II. RELEVANT BACKGROUND

On May 21, 2009, a felony complaint was filed in Rome City Court accusing petitioner of committing second degree burglary (N.Y. PENAL LAW § 140.25(2)). Dkt. No. 14, Ex. D, Felony Complaint. The complaint arose from petitioner's involvement in the February 21, 2009 burglary of a home belonging to Damon M. Parmeter in Rome, New York. *Id;* Dkt. No. 14, Ex. A, Supporting Deposition of Damon Parmeter ("Parmeter Dep."). A 42–inch television, a Playstation 3 gaming system, two Playstation 3 games, and an HDMI cord were removed from Parmeter's home. Parmeter Dep. On February 25, 2009, David A. Davis bought the 42–inch television from petitioner for $600.00. Dkt. No. 14, Ex. B, Supporting Deposition of David Davis ("Davis Dep."); Ex. C, Supporting Deposition of Jason Davis. Petitioner told Davis his landlord gave him the television as payment for work petitioner did for him. Davis Dep. Davis did not know the television was stolen. *Id.* Petitioner also made admissions to law enforcement. Dkt. No. 14, Ex. O, Letter from Frank Nebush, Jr., Esq., to petitioner, dated Apr. 8, 2010 ("Nebush Letter"), at 1; Dkt. No. 7–1, Mem. at 1–5.

On July 13, 2009, petitioner signed a Memorandum of Understanding ("MOU") in which he accepted the prosecutor's offer to plead guilty to the reduced charge of attempted second degree burglary in exchange for a determinate sentence of five years in prison, followed by five years postrelease supervision. Dkt. No. 1, MOU, Jul. 13, 2009; Nebush Letter. He also agreed to be sentenced as a second violent felony offender, and waived speedy trial concerns "for a reasonable time," waived the right to have the case presented to the grand jury, and waived his right to appeal. *Id.* Sentencing was scheduled for midOctober 2009, and petitioner was permitted to remain free on his own recognizance until sentencing in order to complete a construction job. *Id.*

***2** On August 12, 2009, petitioner waived a felony preliminary hearing in Rome City Court and agreed to have his case transferred to the Oneida County Superior Court. Dkt. No. 14, Ex. F, Divestiture to Superior Court; Nebush Letter at 2. On August 31, 2009, petitioner pleaded guilty under the terms of the MOU, and he was sentenced on October 19, 2009, to the agreed upon sentence. Dkt. No. 14, Ex. I, Decision and Order, Donalty, J., Apr. 19, 2010 ("Decision I"), at 1. On October 23, 2009, petitioner's counsel filed a timely notice of appeal, but to date petitioner has not perfected his direct appeal. *Id.;* Dkt. No. 29, Decision and Order, Appellate Division, Fourth Department, Aug. 3, 2012. [2]

2 Petitioner states that on August 8, 2012, he mailed a request to the Appellate Division for poor person status and for the appointment of counsel to represent him on his direct appeal. Dkt. No. 29, Supp. Aff. at 2. It is unclear what claims petitioner intends to raise in his appeal.

On February 22, 2010, petitioner filed a motion to vacate his conviction pursuant to New York Criminal Procedure Law ("CPL") § 440.10 in which he argued that: (1) Oneida County Court lacked jurisdiction when he pleaded guilty because he was arraigned in Rome City Court, a felony hearing was still pending there, and the waiver of his right to be indicted by a grand jury was signed in his attorney's office and not in open court; and (2) he pleaded guilty under duress because his attorney told him he faced up to fifteen years in prison if he did not accept the plea. Dkt. No. 14, Ex. G, "Affidavit in Support of Motion to Vacate Judgment 440.10(a)(h)" at ¶¶ 5–17. The prosecutor opposed the motion. Ex. H, Affirmation, Steven G. Cox, Assistant District Attorney, Oneida County, Apr. 7, 2010.

On April 19, 2010, petitioner's section 440 motion was denied without a hearing. Decision I. The court first denied the motion pursuant to CPL § 440.10(2)(b), because petitioner's claims were record-based and although petitioner filed a timely notice of appeal, he had not yet perfected his direct appeal. *Id.* at 2. Alternatively, the court rejected petitioner's claims that his plea was entered under duress, and that counsel was ineffective, on the merits. *Id.* at 2–7. First, the court found that petitioner "freely, knowingly and voluntarily agreed to waive" his rights, and admitted the factual allegations that formed the basis of the charge against him. *Id.* at 2–3. Petitioner was represented by counsel, informed of his rights on the record, and there was no "indication of duress and coercion on the record." *Id.* The court also noted that petitioner "had an opportunity to place sufficient facts on the record to provide a basis for appellate review" before sentencing, but that he failed to do so. *Id.* at 3.

Next, the court found that counsel's representation of petitioner was "nothing other than effective and was more than meaningful." Decision I at 3. The court noted that the maximum sentence petitioner faced was fifteen years in prison if he was convicted of second degree burglary, and that his plea to the reduced charge of attempted second degree burglary, together with the negotiated five-year determinate sentence, was favorable to petitioner. *Id.* at 4. Finally, the court found that petitioner failed to show that but for counsel's alleged errors, he would not have pleaded guilty. *Id.* at 5–6.

***3** On May 10, 2010, petitioner sought leave to appeal the denial of his section 440 motion in the Appellate Division, Fourth Department. Dkt. No. 14, Ex. J, "Notice of Application" and "Affidavit in Support of Motion Pursuant to C.P.L. 460.15." In his affidavit, petitioner argued that the Oneida County Court lacked jurisdiction; the judgment was obtained in violation of his rights; the prosecutor failed to conduct a preliminary hearing in order to circumvent petitioner's rights; and the evidence was insufficient. *Id.* at 1–2. On June 22, 2010, the Appellate Division denied leave to appeal. Dkt. No. 14, Ex. K, Order denying Leave to Appeal, Jun. 22, 2010. Petitioner's application for permission to appeal to the New York Court of Appeals was dismissed on August 19, 2010 because the Appellate Division's order was not appealable. Dkt. No. 14, Ex. L, Certificate Dismissing Application, Graffeo, J., Aug. 19, 2010.

On August 30, 2010, petitioner filed a second section 440 motion in which he argued that his plea was the product of counsel's threats and misinformation; that counsel placed his interests above petitioner's by denying the truth of petitioner's allegations and attacking petitioner's credibility; and counsel was ineffective for advising him to plead guilty when an investigation would have shown that there was no evidence to support the charges. Dkt. No. 14, Ex. M, "Notice of Motion to Vacate Judgment 440.10" and "Affidavit in Support of Motion to Vacate Judgment." On September 8, 2010, the state court denied the motion pursuant to CPL § 440.10(2)(b), again noting that petitioner "filed a timely Notice of Appeal within thirty days of the date of conviction," that he waived his right to appeal, and that section 440 motions were not substitutes for appeal. Dkt. No. 14, Ex. N, Decision and Order, Donalty, J., Sept. 8, 2010 ("Decision II") at 2. The court further found that petitioner was advised of his rights, "freely, knowingly and voluntarily agreed to waive them," and that he admitted "the factual allegations which form[ed] the basis for the charges in the indictment." *Id.* at 2. Finally, the court rejected petitioner's ineffective assistance claims on the merits for substantially the same reasons set forth in the court's decision rejecting petitioner's first section 440 motion. *Id.* at 2–4. Petitioner did not seek permission to appeal the denial of his second section 440 motion.

This action followed.

III. DISCUSSION

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas corpus relief with respect to a claim adjudicated on the merits in state court only if, based upon the record before the state court, the adjudication 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; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Cullen v. Pinholster,* ––– U.S. ––––, 131 S.Ct. 1388, 1398, 1400 (2011) (citing 28 U.S.C. §§ 2254(d)(1), (2)); *Premo v. Moore,* –––U.S. ––––, 131 S.Ct. 733, 739 (2011); *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007). The AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson,* 131 S.Ct. 1305, 1307 (2011) (per curiam) (quoting *Renico v. Lett,* 130 S.Ct. 1855, 1862 (2010)) (internal quotation marks omitted). Federal habeas courts must presume that the state courts' factual findings are correct unless a petitioner rebuts that presumption with " 'clear and convincing evidence.' " *Schriro,* 550 U.S. at 473–74 (quoting § 2254(e)(1)). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Id.* at 473.

B. The defective jurisdiction claims

***4** In Ground One of his petition, petitioner claims that the Oneida County Court lacked jurisdiction to accept his plea because a felony preliminary hearing was still pending in Rome City Court and he did not waive his rights to a preliminary hearing or to have the case presented to a grand jury. Pet. at 5, 7; Mem. at 6–9. He further argues that although he signed a waiver of these rights on July 13, 2009, the waiver was signed in his attorney's office and not in open court. Mem. at 6–8.

Petitioner raised his defective jurisdiction claims in his first section 440 motion. Dkt. No. 14, Ex. G. The state court denied the claims under CPL § 440.10(2)(b), which provides that a court must deny a motion to vacate a judgment if that judgment "is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review" of the claim on direct appeal. CPL § 440.10(2)(b); Decision I at 1–2. The denial of a claim under CPL § 440.10(2)(b) rests upon an independent and adequate state ground and this claim is therefore procedurally defaulted. *Holland v. Irvin,* 45 F. App'x. 17, 20 (2d Cir.2002); *McCormick v. Morrisey,* 770 F.Supp.2d 556, 563 (W.D.N.Y.2011); *Brown v. New York State,* 374 F.Supp.2d 314, 318–19 (W.D.N.Y.2005).

This claim may only be reviewed if petitioner demonstrates (1) good cause for the default and actual resulting prejudice; or (2) that the denial of habeas relief would leave unremedied a "fundamental miscarriage of justice," i.e., that he is actually innocent. *Calderon v. Thompson,* 523 U.S. 538, 559 (1998); *Sweet v. Bennett,* 353 F.3d 135, 141 (2d Cir.2003); *McCormick,* 770 F.Supp.2d at 563–64. To establish cause, a petitioner must show

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that some objective external factor impeded his or her ability to comply with the relevant procedural rule. *Maples v. Thomas,* ––– U.S. ––––, 132 S.Ct. 912, 922 (2012); *Coleman v. Thompson,* 501 U.S. 722, 753 (1991) (citing *Murray v.. Carrier,* 477 U.S. 478, 488 (1986)).

In an apparent attempt to establish cause, petitioner argues that this court must review his defective jurisdiction claim because the state court disposed of it without specifying if its decision rested on the merits or on a procedural bar. Supp. Reply at 2–3. The state court was clear, however, that petitioner's motion was denied in its entirety based upon CPL § 440.10(2)(b). Decision I at 2.[3] Additionally, in a letter filed August 15, 2012, petitioner appears to argue that he did not know counsel filed a timely notice of appeal until three years after his plea. Dkt. No. 29, Supp. Affidavit at 1–2. As petitioner notes, however, the Oneida County Court stated in its April 19, 2010, Decision and Order denying his first section 440 motion that petitioner filed a timely notice of appeal, and denied his section 440 motion because the claims raised in the motion could have been raised on direct appeal. Dkt. No. 29, Supp. Affidavit at 1; Decision I at 1. Petitioner is not excused from showing cause because he was proceeding pro se, or was unaware of the applicable procedure or law. *Faison v. McKinney,* No. 1:07–CV–8561, 2009 WL 4729931 at *11 (S.D.N.Y. Dec. 10, 2009) (stating that it is "well established that a pro se petitioner is not excused from showing cause merely because of his pro se status or ignorance of his rights.") (quoting *Robertson v. Abramajtys,* 144 F.Supp.2d 829, 838 (E.D.Mich.2001) (collecting cases)); *Neff v. United States,* 971 F.Supp. 771, 774 (E.D.N.Y.1997) ("An appellant's ignorance of the law does not satisfy the cause and prejudice requirements necessary to excuse appellant's failure to seek relief on direct appeal."). Since petitioner has failed to show cause for his procedural default, the court need not decide whether he suffered actual prejudice, because federal habeas relief is generally unavailable as to procedurally defaulted claims unless both cause and prejudice are demonstrated. *See Murray,* 477 U.S. at 496 (referring to the "cause-and-prejudice standard"); *Stepney v. Lopes,* 760 F.2d 40, 45 (2d Cir.1985) (same).

3 The fact that the state court explicitly reviewed the merits of his ineffective assistance of counsel claim in the alternative does not change that result. *See Harris v. Reed,* 489 U.S. 255, 264 n. 10 (1989) ("Moreover, a state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.").

***5** Finally, petitioner appears to argue that it would be a "miscarriage of justice" to deny his petition because, if he were granted a hearing,[4] he could show that without his statement to police, the evidence was insufficient to prove that he committed a burglary. Reply Brief at 3–4. But petitioner pleaded guilty to attempted second burglary, and the state court found that he did so "freely, knowingly and voluntarily," and that he admitted "the factual allegations which form[ed] the basis for the charges in the indictment." Decision I at 3. The state court was free to credit petitioner's statements at his plea allocution, and this court cannot say that decision was contrary to or an unreasonable application of Supreme Court precedent. *See Blackledge v. Allison,* 431 U.S. 63, 74 (1977) ("Solemn declarations in open court [during a plea colloquy] carry a strong presumption of verity."); *United States v. Hernandez,* 242 F.3d 110, 112–13 (2d Cir.2001) (finding that habeas petitioner's claim of ineffective assistance of counsel in regard to plea agreement and plea hearing failed on the merits where petitioner's allegations contradicted his plea allocution statements); *Baker v. Murray,* 460 F.Supp.2d 425, 433 (W.D.N.Y.2006) ("petitioner has not provided credible evidence that would justify overlooking his statements under oath that he was choosing to plead guilty of his own accord."); *Gomez v. Duncan,* No. 1:02–CV–0846, 2004 WL 119360 at *19 (S.D.N.Y. Jan. 27, 2004) ("This Court may credit [petitioner's] statements at the plea allocution-that his guilty plea was voluntary and not the result of any threats or promises-over his later allegations of coercion.") (record citations omitted; citing cases), *aff'd* 317 F. App'x. 79 (2d Cir.2009). Although petitioner argues that his statement to police contradicted the statements of the prosecutor's witnesses, that claim is not based on new information that was unavailable at the time of his plea. *See* Dkt. No. 7–1, Mem. at 1–6. Since petitioner has not produced any new evidence that he is actually innocent, there is no basis to conclude that the failure to consider the merits of his defective jurisdiction claims would result in a fundamental miscarriage of justice. *House v. Bell,* 547 U.S. 518, 536–39 (2006); *Schulp v. Delo,* 513 U.S. 298, 327 (1995). Accordingly, petitioner's defective jurisdiction claim (Ground One) is procedurally defaulted and dismissed.[5]

4 To the extent petitioner requests an evidentiary hearing, that request is denied. "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief ." *Schriro,* 550 U.S. at 474. If the record refutes the petitioner's factual allegations or "otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.* The record in this case shows that petitioner could not develop facts at an evidentiary hearing that, if true, would entitle him to habeas relief.

5 Even if these claims were not procedurally defaulted, no habeas relief would issue. Petitioner's guilty plea forecloses the court's consideration of his claims that he was denied a felony preliminary hearing and the right to have his case presented to the grand jury. *Tollett v. Henderson,* 411 U.S. 258, 266 (1973); *Walter v. Superintendent,* No. 9:06–CV–0128, 2008 WL 4163122 at *13 (N.D.N.Y. Sept. 4, 2008). Additionally, these claims are not cognizable because state defendants have no federal constitutional right to be tried for a felony only upon a grand jury indictment. *See Campbell v. Poole,* 555 F.Supp.2d 345, 377 (W.D.N.Y.2008) ("The Fifth Amendment right to be tried for a felony only upon a grand jury indictment was not incorporated by the Due Process Clause of the Fourteenth Amendment, and therefore does not pertain to the states.") (citing *Hurtado v. California,* 110 U.S. 516 (1884)). Petitioner's claims are also meritless. He waived his right to a felony hearing, and his right to have his case presented to a grand jury, in writing on July 13, 2009, and again in open court on August 12, 2009, and agreed to have his case transferred to the Oneida County Superior Court in order to take advantage of the plea offer. Nebush Letter; MOU. To the extent that petitioner claims that the waiver was invalid because it was signed in his attorney's office in violation of section 195.20 of the Criminal Procedure Law, that claim is not cognizable because habeas relief does not lie for errors of state law. *Wilson v. Corcoran,* ––– U.S. ––––, 131 S.Ct. 13, 16 (2010) (it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts" (emphasis in original)) (per curiam); *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

B. Petitioner's claims that his guilty plea was induced by threats and misinformation, and by ineffective assistance of counsel

Petitioner claims in Grounds Two, Three and Four of his petition that his guilty plea was induced by threats made by his counsel, and that counsel's advice to plead guilty was based upon misinformation or ineffectiveness. Pet. at 7–8. Specifically, petitioner claims that counsel told him he could be convicted based upon only his statements to police, that he faced fifteen years in prison if he rejected the plea offer and was indicted, and that prison time petitioner owed on a parole violation would run concurrently to his sentence for attempted burglary. Pet. at 8, Grounds Two and Three. He further asserts that counsel advised him to plead guilty even though a felony hearing was still pending in Rome City Court. *Id.,* Ground Four. Petitioner states that counsel put his own interests above petitioner's by advising him to plead guilty without investigating his version of events, and by attacking his credibility, and argues that had counsel conducted an investigation, he would have discovered that there was no evidence petitioner committed a burglary. *Id.* at 8, Ground Three; Mem. at 1–12; Supp. Mem. at 1–3; Reply Brief at 1–3; Supp. Reply at 1–6.

***6** Petitioner raised these claims in his second section 440 motion, and the state court rejected them pursuant to CPL § 440.10(2)(b), an adequate and independent state court ground. *Holland,* 45 F. App'x. at 20. Additionally, petitioner did not seek leave to appeal the denial of the second section 440 motion in the Appellate Division. Dkt. No. 14, Ex. M. Therefore, he did not present these claims to the highest state court capable of reviewing them, and they are unexhausted. *See Baldwin v. Reese,* 541 U.S. 27, 29 (2004) (explaining that substantive exhaustion requires that a petitioner "fairly present" each claim for habeas relief in "each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.") (quoting *Duncan v. Henry,* 513 U.S. 364, 365 (1995) (per curiam) (quoting *Picard v. Connor,* 404 U.S. 270, 275 (1981)).

Petitioner cannot now seek leave to appeal the denial of his second section 440 motion in the Appellate Division, because he was required to do so within thirty days after service of the court's order denying his motion. CPL §§ 450.15(1); 460.10(4)(a); *Sumpter v. Sears,* No. 1:09–CV–0689, 2012 WL 95214, at *2 (E.D.N.Y. Jan. 12,

2012). Although he could arguably file another section 440 motion in an attempt to properly exhaust these claims, that motion would again be met by section 440.10(2)(b), and by section 440.10(3)(b), which provides that a court may deny a motion to vacate where the grounds raised were previously determined on the merits in a prior motion. *See Soto v. Portuondo,* No. 1:02–CV–0028, 2004 WL 2501773, at *5 (E.D.N.Y. Nov. 5, 2004) (alluding to section 440.10(3)(b) as a procedural bar). Based upon the state court's decisions rejecting petitioner's previous section 440 motions, there is no reason to believe the outcome would be any different.

Accordingly, petitioner's claims may be deemed exhausted [6] for purposes of this action, but they are also procedurally defaulted absent a showing of good cause for the default and actual resulting prejudice, or that the denial of habeas relief would leave unremedied a fundamental miscarriage of justice. *Calderon,* 523 U.S. at 559; *Sweet,* 353 F.3d at 141. Petitioner has not established cause for his failure to seek review of his claims on direct appeal, or for his failure to seek leave to appeal the denial of his second section 440 motion. His claims that he did not know a timely notice of appeal had been filed, and that he did not appeal the denial of his second 440 motion because he did not understand how to properly raise his claims, are insufficient to establish cause. *Washington v. James,* 996 F.2d 1442, 1447 (2d Cir.1993) ("Ignorance or inadvertence will not constitute 'cause.' "); *Moore v. New York,* 378 F.Supp.2d 202, 207 (W.D.N.Y.2005) (same).

6 There is authority for the proposition that courts may not properly "deem" section 440 motions exhausted if the petitioner never sought leave to appeal the denial of the motion in light of the Second Circuit's decision in *Pesina v. Johnson,* 913 F.2d 53, 54 (2d Cir.1990). *See Quintana v. McCoy,* 1:03–CV–5747, 2006 WL 300470 at *5 (S.D.N.Y. Feb. 6, 2006). But this court is persuaded that the Supreme Court's decision in *Coleman v. Thompson,* 501 U.S. 722 (1991), decided after the Second Circuit's decision in *Pesina,* makes clear that federal courts are to determine whether an avenue of appeal regarding a habeas claim is available to a petitioner under state law, and therefore whether a petitioner's request for review of that claim by a state court would be futile. *See Thomas v. Greiner,* 111 F.Supp.2d 271, 278 (S.D.N.Y.2000) (holding that "[i]n order to comply with *Coleman,* the federal courts must at some point do what *Pesina* declined to do-'declare as a matter of state law that an appeal ... is unavailable' ") (quoting *Pesina*); *DeVito v. Racette,* No. 1:91–CV–2331, 1992 WL 198150, at *5 (E.D.N.Y. Aug. 3, 1992) (observing that "*Coleman* appears to put to rest *Pesina's* concern that federal courts lack the 'authority' to declare claims procedurally defaulted at the state level") (citing *Pesina*).

Since petitioner has failed to establish cause, the court need not decide whether he suffered actual prejudice, because federal habeas relief is generally unavailable as to procedurally defaulted claims unless both cause and prejudice are demonstrated. *Murray,* 477 U.S. at 496; *Stepney,* 760 F.2d at 45. And, as previously noted, petitioner also has not produced any new evidence that he is actually innocent. Therefore, there is no basis to conclude that the failure to consider the merits of the claims set forth in Grounds Two through Four of the petition would result in a fundamental miscarriage of justice. *House,* 547 U.S. at 536–39; *Schlup,* 513 U.S. at 327. Accordingly, these claims are procedurally defaulted and are dismissed. [7]

7 Even if these claims were not procedurally defaulted, the state court's decision denying petitioner's second section 440 motion was not an unreasonable application of clearly established Supreme Court precedent. Petitioner's claims that counsel failed to conduct an adequate investigation is foreclosed from habeas review by virtue of his guilty plea because that claim does not relate to the nature of counsel's advice to plead guilty. Tollett, 411 U.S. at 266; *see Smith v. Burge,* No. 1:03–CV–8648, 2005 WL 78583 at *7–8 (S.D.N.Y. Jan. 12, 2005) (guilty plea foreclosed habeas review of claim that trial counsel failed to raise a defense prior to petitioner's plea). Further, "[t]o establish ineffective assistance of counsel 'a defendant must show both deficient performance by counsel and prejudice.' " *Premo,* 131 S.Ct. at 739 (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 122 (2009)); *Strickland v. Washington,* 466 U.S. 668, 687–88 (1984). In the context of a guilty plea, a petitioner must show that there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Premo,* 131 S.Ct. at 743 (quoting *Hill v. Lockhart,* 474 U.S. 52, 59 (1985)). Contrary to petitioner's arguments, it is "not coercion if a defendant pleads guilty to avoid a harsher sentence." *Spikes v. Graham,* No. 9:07–CV–1129 (DNH/GHL), 2010 WL 4005044, at *7 (N.D.N.Y. July 14, 2010), *adopted by* 2010 WL 3999474 (N.D.N.Y. Oct. 12, 2010) (citing *Brady v.*

United States, 397 U.S. 742, 752–53 (1970)); *Gomez,* 2004 WL 119360 at *20 ("Every defendant involved in plea negotiations suffers the threat of conviction (often of greater charges or with a greater penalty), and must face such difficult choices.") (internal quotation marks omitted).

Petitioner was charged with one count of second degree burglary, a class C violent felony, for which counsel correctly informed him that, as a second violent felony offender, he faced a possible maximum sentence of fifteen years in prison. N.Y. PENAL LAW §§ 140.25(2); 70.02(1)(b); 70.04(3)(b). Counsel negotiated a plea agreement that reduced the charge to an attempted second degree burglary, a class D violent felony, and negotiated a determinate term of five years in prison. *See* N.Y. PENAL LAW §§ 70.02(1)(c); 70.04(3)(c) Petitioner has not presented any evidence demonstrating that counsel's advice to accept this plea fell below an objective standard of reasonableness. *Premo,* 131 S.Ct. at 740. His dissatisfaction with the ultimate sentence imposed "is not a valid basis on which to find that his counsel was ineffective." *Ariola v. LaClair,* No. 9:07–CV–0057, 2008 WL 2157131, at *16 (N. D.N.Y. Feb. 20, 2008); *see* *United States v. Garguilo,* 324 F.2d 795, 797 (2d Cir.1963) ("A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence.").

III. CONCLUSION

***7 WHEREFORE,** based upon the foregoing, it is

ORDERED that the petition for a writ of habeas corpus, Dkt. No. 1, is **DENIED** in its entirety and **DISMISSED;** and it is

ORDERED that 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). [8]

8 *See* *Miller–El v. Cockrell,* 537 U.S. 322, 336 (2003) (" § 2253 permits the issuance of a COA 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") (citation omitted)).

IT IS SO ORDERED.

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Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Edwin POLLARD, Petitioner,
v.
Paul GONYEA, Superintendent, Mohawk Correctional Facility, Respondent.

No. 11 Civ. 5712(RMB)(MHD).
|
June 25, 2012.

DECISION & ORDER

RICHARD M. BERMAN, District Judge.

I. Background

***1** On March 14, 2012, United States Magistrate Judge Michael H. Dolinger, to whom the matter had been referred, issued a thorough Report and Recommendation ("Report"), recommending that the Court deny Edwin Pollard's ("Petitioner" or "Pollard") *pro se* petition, filed on August 10, 2011, for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition"), (Report at 34; Pet. at 1.) Petitioner challenges his 2009 conviction following a jury trial of one count of assault in the second degree, under New York Penal Law § 120.05, in New York Slate Supreme Court, Bronx County. (Report at 1, 33.) Petitioner was sentenced to a term of five years of imprisonment and three years of supervised release. (Report at 1.) [1]

[1] Petitioner was transferred into federal custody on or around October 14, 2011, and is currently incarcerated at Coleman United States Penitentiary in Coleman, Florida, "where he is serving his sentence for his conviction of a federal offense." (Pet'r's Change of Address, dated Oct. 26, 2011; Deck of Thomas R. Villecco, dated Jan. 10, 2012, ¶ 5.)

The Report recommends, among other things, that (1) the Court reject Petitioner's claim that his trial counsel was ineffective when he failed to pursue a justification defense because that defense "would plainly have failed" and "it was reasonable for defense counsel to pursue an alternative approach"; (2) the Court reject Petitioner's claim that he was denied "his right to counsel by not granting [his] request to change his appointed attorney" because the criticized attorney was, in fact, replaced; and (3) the Court reject Petitioner's claim that an alleged inaccuracy in the victim's testimony at trial "led to a flawed result" because Petitioner "proffers no evidence of false testimony, and the trial evidence ... was ample to sustain the conviction." (Report at 1, 18, 27–28, 32, 34.)

On or about March 28, 2012, Petitioner submitted objections to the Report ("Objections") substantially restating the claims set forth in the Petition and arguing, among other things, that (1) his trial counsel was ineffective because he did not pursue a justification defense; (2) the trial court erred in refusing to allow Petitioner to dismiss his attorney; and (3) false statements by the victim misled the jurors and the trial court. (Obj. at 3–4.) Petitioner also argues for the first time in his Objections that his trial counsel was ineffective because he represented the victim in a prior matter. (Obj. at 3.) To date, Respondent has not submitted a response to Petitioner's Objections.

For the reasons set forth below, the Court adopts the Report in its entirety and the Petition is denied.

II. Standard of Review

The Court may adopt any portions of a magistrate judge's report to which no objections have been made and which are not clearly erroneous or contrary to law. *See Thomas v. Arn,* 474 U.S. 140, 149 (1985). The Court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of 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); *see also* Fed.R.Civ.P. 72(b); *DeLeon v. Strack,* 234 F .3d 84, 87 (2d Cir.2000) (quoting *Grassia v. Scully,* 892 F.2d 16, 19 (2d Cir.1989)).

***2** A "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland v. Washington,* 466 U.S. 668, 689 (1984) (quoting *Michel v. Louisiana,* 350 U.S. 91, 101 (1955)).

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Where, as here, a petitioner is proceeding pro se, the Court construes the petitioner's claims liberally, *see Marmolejo v. United States,* 196 F.3d 377, 378 (2d Cir.1999), and will "interpret them to raise the strongest arguments that they suggest," *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994).

III. Analysis

The facts and procedural history as set forth in the Report are incorporated herein by reference unless otherwise noted. The Court has conducted a *de novo* review of, among other things, the Petition, the Report, Petitioner's Objections, the record, and applicable legal authorities, and concludes that the determinations and recommendations of Judge Dolinger are supported by the record and the law in all respects. *See Pizarro v. Bartlett,* 776 F. Supp 815, 817 (S.D.N.Y.1991). Petitioner's Objections do not provide any basis for departing from the Report's conclusions and recommendations. [2]

[2] As to any portion of the Report to which no objections have been made, the Court concludes that the Report is not clearly erroneous. *See Pizarro,* 776 F.Supp. at 817. Any Objections not specifically addressed in this Order have been considered *de novo* and rejected.

(1) Alleged Ineffective Assistance of Counsel

Judge Dolinger properly concluded that Petitioner "fails to demonstrate either inadequate representation or prejudice." (Report at 18, 29); *Strickland,* 466 U.S. at 687–88, 694 (To establish an ineffective assistance of counsel claim, a defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness"; and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). A justification defense "would have plainly failed" because, among other things, Petitioner "conceded [at trial] that his victim was unarmed at the time" of the assault. (Report at 27–28); *People v. Rosil,* 240 A.D.2d 439, 440 (2d Dep't 1997) (the evidence "was legally sufficient to negate the defense of justification beyond a reasonable doubt," because the "victim was unarmed when the defendant stabbed him").

And, it was reasonable strategically for defense counsel to pursue an alternative approach to the justification defense. (Report at 28); *Greiner v. Wells,* 417 F.3d 305, 319 (2d Cir.2005); *Aparicio v. Artuz,* 269 F.3d 78, 99 (2d Cir.2001); *People v. Steele,* 19 A.D.3d 175, 175–76 (1st Dep't 2005).

(2) Replacement Counsel

Judge Dolinger properly determined that Petitioner's allegedly deficient counsel, Carol Carter, Esq., had been replaced by Christopher Spellman, Esq., who represented Petitioner through trial. (Report at 30; Resp't Mem. of Law, dated Jan. 10, 2012, at 15–16); *Liner v. Jafco, Inc.,* 375 U.S 301, 306 n. 3 (1964); *People v. Pollard,* 78 A.D.3d 618, 618 (2d Dep't 2010).

(3) Statements During Trial

***3** Judge Dolinger properly concluded that Petitioner "proffers no evidence of false testimony, and the trial evidence ... was ample to sustain the conviction." (Report at 33–34); *United States. v. Yi Guo Cao,* 420 F. App'x 25, 27 (2d Cir.2011); N.Y. Penal Law § 10.00(13); *People v. Chiddick,* 8 N.Y.3d 445, 447 (N.Y.2007).

(4) Remaining Objections

Petitioner's arguments which were raised for the first time in his Objections are untimely. *See Abu–Nassar v. Elders Futures, Inc.,* 88 Civ. 7906, 1994 WL 445638, at *4 n. 2 (S.D.N.Y. Aug. 17, 1994) ("If the Court were to consider formally these untimely contentions, it would unduly undermine the authority of the Magistrate Judge by allowing litigants;he option of waiting until a Report is issued to advance additional arguments.").

IV. Certificate of Appealability

A certificate of appealability may not be issued unless "the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Petitioner has not made such a showing and a certificate of appealability is neither warranted nor appropriate in this case. *See Lucidore v. New York State Div. of Parole,* 209 7.3d 107, 112 (2d Cir.2000). Any appeal from this Order would not be taken in good faith. *See* 28 U.S.C. § 1915(a)(3).

V. Conclusion and Order

For the reasons stated herein and therein, the Report is adopted in its entirety and the Petition [# 1] is denied. The Clerk of Court is respectfully requested to close this case.

All Citations

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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).

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).

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 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.

(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;

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).

***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]

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.

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> 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.

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 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

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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.*

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.

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.*

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.

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).

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.*

[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).

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 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).

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).

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).

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.

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.

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United States District Court,
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Willie SINGLETON, Petitioner,
v.
William A. LEE, Respondent.

No. 6:10–CV–6094(MAT).
|
June 20, 2013.

Attorneys and Law Firms

Willie J. Singleton, Stormville, NY, pro se.

Leilani Julia Rodriguez, New York State Attorney General, Poughkeepsie, NY, for Respondent.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** *Pro se* petitioner Willie Singleton ("Singleton" or "Petitioner") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his judgment of conviction entered on October 17, 2007, following a jury trial in New York States Supreme Court (Ontario County), on one count of Assault in the Second Degree (New York Penal Law ("P.L.") § 120.05(7)).

II. Factual Background and Procedural History

The conviction stems from Singleton's assault on a fellow inmate on November 27, 2006, when he was incarcerated at the Ontario County Jail. Singleton, who was part of the facility's cleaning detail, went to the janitor's closet to retrieve his cleaning supplies and cart at about 4:30 p.m. T.196–97, 247–48.[1] As Singleton left the janitor's closet with his cart, he encountered another inmate named Michael Manka ("Manka"). Manka either bumped into Singleton's cart or was accidentally struck by the cart, and a mop handle almost hit him in the face. Manka said, "Watch out, motherfucker. You almost hit me." T.249, 275. Singleton responded, "What did you say?" T.183, 249. Singleton then punched him four or five times in the face. T.182–83. Manka sustained bruising to the left side of his face and substantial swelling to his left eye. Manka testified that his pain persisted for several days and he had headaches during that time. T.278–79.

1 Numbers preceded by "T." refer to the trial transcripts, and numbers preceded by "S." refer to the sentencing minutes. These transcripts are submitted as attachments (Dkt # 9–3) to Respondent's Answer (Dkt # 9).

Correctional Officer Ronald Buckley intervened in the altercation and ordered the men to return to their cells. T.183–84, 235. When Sergeant Christian Smith spoke to Singleton after the incident, Singleton stated that Manka had bumped into his cart and called him a "motherfucker." Petitioner also admitted that he punched Manka. T.311–12.

At approximately 6:30 p.m., Investigator James McCaig interviewed Singleton. After being issued his *Miranda* warnings, Singleton again admitted that Manka had called him a "motherfucker" and, in response, Singleton punched Manka in the face. T.328.

Petitioner took the stand and testified at his trial. Petitioner stated that he was pushing a cart with cleaning materials, when Manka walked into the cart and said, "Watch where you are going motherfucker!" T.341. Petitioner responded, "What did you say?" Manka stated, "You heard what I said." Singleton replied, "I thought so," and an "altercation" ensued. T.341. According to Petitioner, there was a lot of "loud talking", and then he and Manka were returned to their cells. T.342. Singleton denied striking Manka. T.347.

On October 10, 2007, the jury returned a verdict finding Singleton guilty as charged in the indictment. T.404. On October 17, 2007, Singleton was sentenced to a six-year term of imprisonment and three years of post-release supervision. S.11.

On August 11, 2008, Singleton filed a motion to vacate the judgment pursuant to New York Criminal Procedure Law ("C.P.L.") 440.10 on the grounds that he was denied his right to counsel at the arraignment and that the trial court issued erroneous instructions regarding his right to request his arraignment be adjourned for the purpose of securing counsel. On November 6, 2008, the trial court denied the motion, relying on C.P.L. § 440.10(3)(c), which

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states that the court may, but is not required to, deny a motion when the defendant was in a position to raise the claim in a prior motion to vacate[2] but failed to do so. The Ontario County District Attorney's Office did not file opposition papers. The trial court found that Singleton had presented no new facts which justified his failure to raise the arguments in a prior motion to vacate. The trial court also found that, pursuant to C.P.L. § 440.10(2)(c), sufficient facts appeared on the record for Singleton to have raised these claims on direct appeal, yet he unjustifiably failed to do so. Singleton's application for leave to appeal to the Appellate Division, Fourth Department, of New York State Supreme Court, was denied on September 30, 2009.

2 The trial court refers in its decision refers to two other motions to vacate dated July 24, 2008 and September 9, 2008. Those motions pertain to Singleton's conviction for Failure to Register as a Sex Offender, which was challenged in another habeas corpus petition filed in the Western District of New York, *Singleton v. Lee,* 6:09–CV 6654(MAT) (W.D.N.Y. Mar. 31, 2012), *appeal dismissed, Singleton v. Lee,* 12–1211(L), 12–1273(Con) (2d Cir. July 5, 2012), and is not at issue here.

***2** On January 6, 2009, Singleton filed a second C.P.L. § 440.10 motion to vacate the judgment on the ground that the prosecution failed to prove the "physical injury" element of second degree assault. The Ontario County District Attorney's Office again did not file opposition papers. On February 27, 2009, the trial court denied the motion, finding that Singleton had presented no new facts that could not have been raised in his previous C.P.L. § 440.10 motions. On August 20, 2009, the Fourth Department denied leave to appeal.

On direct appeal, Petitioner's appellate counsel submitted a brief in the Fourth Department arguing that (1) the trial court erroneously limited the scope of cross-examination of the victim regarding his prior crimes, thereby violating Petitioner's Sixth Amendment right to confrontation; (2) Petitioner was vindictively sentenced because he asserted his right to trial; and (3) the sentence was harsh and excessive. The Ontario County District Attorney's Office submitted a brief in opposition.

In a memorandum decision dated November 13, 2009, the Fourth Department unanimously affirmed the conviction. *People v. Singleton,* 67 A.D.3d 1455, 887 N.Y.S.2d 892 (4th Dept.2009). The court concluded that the trial judge had erred in limiting cross-examination of the victim with respect to his prior arrests for rape and conviction of sexual abuse. However, there was "no reasonable possibility that the error might have contributed to [Singleton]'s conviction" and therefore it was "harmless beyond a reasonable doubt". *Id.* (quotation and citation omitted). The Fourth Department rejected as unpreserved and, in any event, without merit, the contention that the trial court penalized Singleton for asserting his right to trial by imposing a greater sentence than that offered during plea negotiations. The Fourth Department rejected Singleton's argument raised in his *pro se* supplemental brief that the evidence of physical injury was legally insufficient to support the conviction. Finally, the Fourth Department rejected as unpreserved Singleton's argument, raised in his *pro se* brief, that the trial court failed to comply with the requirements of C.P.L. 200.60. Leave to appeal to the New York Court of Appeals was denied on November 30, 2009. *People v. Singleton,* 13 N.Y.3d 862, 891 N.Y.S.2d 697, 920 N.E.2d 102 (2009).

This timely habeas petition followed in which Singleton asserts the following grounds for relief: (1) he was denied his Sixth Amendment right to counsel at his arraignment and was erroneously instructed by the trial court with respect to his right to an adjournment in order to obtain an attorney; (2) he was not arraigned on a special information in violation of C.P.L. § 200.60 and his Fourteenth Amendment right to due process; (3) he was improperly held for forty-three days in the local criminal court while awaiting disposition of the felony complaint; and (4) he was denied his First Amendment right to not be subjected to obscene and profane language.

***3** Respondent answered the petition and has asserted that all but one of the claims are unexhausted, but also procedurally defaulted because Petitioner has no viable means of returning to state court to exhaust them. *See* Respondent's Memorandum of Law ("Resp't Mem.") at 8–11 (Dkt # 10). Respondent also contends that certain claims are procedurally defaulted because they were rejected by the state courts based upon adequate and independent state grounds. *Id.* at Finally, Respondent argues, in the alternative, that all of the claims lack merit. *Id.* at 12–20, 891 N.Y.S.2d 697, 920 N.E.2d 102 (Dkt # 10). Petitioner filed a reply brief. (Dkt # 11).

Because Petitioner's claims are easily disposed of the merits, the Court declines to address the potentially more cumbersome issues of exhaustion and procedural default. *See, e.g., Goston v. Rivera,* 462 F.Supp.2d 383, 392 (W.D.N.Y.2006) (citing *Boddie v. New York State Div. of Parole,* 285 F.Supp.2d 421, 428 (S.D.N.Y.2003)).

III. Discussion

A. Errors at Petitioner's Arraignment

Petitioner claims that he was denied his right to counsel when he was arraigned on a felony complaint in town court. Petitioner has submitted a letter from the Town of Hopewell court clerk, stating that Petitioner was arraigned on December 12, 2006, and Scott Falvey, Esq. was appointed as counsel. Apparently, the trial court was unable to set bail on that day. As Respondent points out, it is not clear whether Attorney Falvey was actually present at the initial arraignment. The letter goes on to state that on December 19, 2006, Marc Duclos, Esq., was substituted as counsel.

Attorney Duclos appeared with Singleton when he testified before the grand jury. After Singleton was indicted by the grand jury on January 18, 2007, one count of second degree assault, Attorney Duclos moved, on January 23, 2007, to have the felony complaint dismissed. The trial court dismissed the felony complaint without prejudice, and the matter was transferred to the superior court. On February 21, 2007, with Attorney Duclos still representing him, Singleton was arraigned on the indictment.

The Sixth Amendment right to counsel "attaches only at the initiation of adversary criminal proceedings[.]" *Davis v. United States,* 512 U.S. 452, 457, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (internal and other citations omitted). A defendant is constitutionally entitled to the assistance of counsel solely in those pre-trial circumstances considered "critical stages" in the proceedings. *Claudio v. Scully,* 982 F.2d 798, 802 (2d Cir.1992) (citing, *inter alia, Coleman v. Alabama,* 399 U.S. 1, 7, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970)). "Critical stages" include "the type of arraignment ... where certain rights may be sacrificed or lost." *United States v. Wade,* 388 U.S. 218, 255, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *see also Hamilton v. State of Alabama,* 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (holding that under Alabama state law, the arraignment was a critical stage in criminal proceedings in the sense that certain defenses (such as insanity) would be irretrievably lost if not asserted); *Hurrell–Harring v. State,* 15 N.Y.3d 8, 20, 904 N.Y.S.2d 296, 930 N.E.2d 217 (N.Y.2010) (holding that under the circumstances of the instant case, arraignments must be deemed a "critical stage" since, even if guilty pleas were not elicited from the plaintiffs (indigent criminal defendants in New York State), plaintiffs' pretrial liberty interests were regularly adjudicated at arraignments with serious consequences, both direct and collateral) (citations omitted).

***4** The Court assumes *arguendo* that Singleton's arraignment in town court was such a "critical" stage and that his right to counsel was violated. Courts in this Circuit have held that habeas relief is not warranted where a criminal defendant was denied his right to counsel at an initial arraignment, but the defendant was not deprived of his rights or otherwise prejudiced. *See United States ex rel. DeBerry v. Follette,* 395 F.2d 686, 688 (2d Cir.1968); *Holland v. Allard,* No. 04–CV–3521(DRH)(MLO), 2005 WL 2786909, at *7 (E.D.N.Y. Oct. 26, 2005) (citations omitted); *Bradley v. LaClair,* 599 F.Supp.2d 395 (W.D.N.Y.2009) (citations omitted); *United States ex rel. Hussey v. Fay,* 220 F.Supp. 562, 563 (S.D.N.Y.1963).[3] Thus, even assuming that Singleton was denied counsel at his original arraignment on the felony complaint, this error was harmless. Here, counsel was immediately appointed after the initial arraignment; Singleton was able to testify in the grand jury with the assistance of counsel; and he was arraigned on the indictment with counsel present. *See Fry v. Pliler,* 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (A constitutional error is harmless, for purposes of habeas review, unless it had a "substantial and injurious effect" on the verdict).

3 According to the New York State Court of Appeals, these cases do not stand for the general proposition that the presence of counsel is optional at arraignment but "rather stand for the very limited proposition that where it happens that what occurs at arraignment does not affect a defendant's ultimate adjudication, a defendant is not[,] on the ground of nonrepresentation[,] entitled to a reversal of his or her conviction." *Hurrell–Harring,* 15 N.Y.3d at 21, 904 N.Y.S.2d 296, 930 N.E.2d 217.

B. Failure to Comply with C.P.L. 200.60

Petitioner contends that he is entitled to habeas relief because the trial court failed to arraign him on the

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special information as required by C.P.L. § 200.60. "A 'special information' is a statutory creature" found in C.P.L. § 200.60. *People v. Powlowski,* 172 Misc.2d 240, 243, 658 N.Y.S.2d 558, 561 (N.Y.Sup.Ct.1997) (citing N.Y. CRIM. PROC. LAW § 200.60(1)). C.P.L. § 200.60 provides, in sum and substance, that "[w]hen the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment for such higher offense may not allege such previous conviction." *Adorno v. Portuondo,* No. 97CV696FJSGLS, 2000 WL 33767758, at *2 n. 6 (N.D.N.Y. Aug.31, 2000) (citing N.Y. CRIM. PROC. LAW 200.60(1), (2)). Where the statutory name of an offense contains a reference to previous conviction, the statutory name may not be used in the indictment. *Id.* Instead, "an improvised name or title must be used which, by means of the phrase 'as a felony' or in some other manner, labels and distinguishes the offense without reference to a previous conviction." *Id.* (citing N.Y. CRIM. PROC. LAW 200.60(1), (2)).

The purpose of C.P.L. § 200.60 is to give a defendant the opportunity to stipulate to a prior conviction so as "to avoid the prejudicial impact of having the prior offense proven to the jury[.]" *People v. Reynolds,* 283 A.D.2d 771, 772, 728 N.Y.S.2d 503 (3d Dept.2001) (citing *People v. Cooper,* 78 N.Y.2d 476, 480–82, 577 N.Y.S.2d 202, 583 N.E.2d 915 (1991)). Even if there was error, Petitioner was not prejudiced, because "[t]he setting, participants and witnesses to the incident underlying the charges necessarily put the jury on notice that defendant was incarcerated." *People v. Reynolds,* 283 A.D.2d at 772, 728 N.Y.S.2d 503. Furthermore, Plaintiff's challenge based on the alleged misapplication of C.P.L. § 200.60 asserts an issue of state criminal procedure and does not set forth a claim of federal constitutional magnitude cognizable in this habeas proceeding. *E.g., Adorno,* 2000 WL 33767758, at *2.

C. Failure to Release Petitioner Pursuant to C.P.L. § 190.80

***5** Petitioner claims that he was held in custody for forty-three days while awaiting action by the grand jury, and that this violated his right to due process under the Fourteenth Amendment. Respondent has construed this as a claim pursuant to C.P.L. § 190.80, which provides that a defendant, who, "on the basis of a felony complaint has been held by a local criminal court for the action of a grand jury, and who, at the time of such order or subsequent thereto, has been committed to the custody of the sheriff pending such grand jury action, and who has been confined in such custody for a period of *more than forty-five days* ... without the occurrence of any grand jury action [,]" shall be released on his own recognizance unless the lack of a grand jury disposition was due to the defendant's request or occurred with his consent; or the prosecution has shown good cause why the defendant should not be released. N.Y. CRIM. PROC. LAW § 190.80 (emphasis supplied).

It bears noting that Singleton claims that he was erroneously held for forty-three days without grand jury action, but the statute under which he alleges injury does not provide for release until forty-five days has passed. Thus, Singleton's case is outside the purview of C.P.L. § 190.80. Furthermore, this claim only raises an issue of state criminal procedure, and as such, is not cognizable on habeas review. *See, e.g., Strong v. Mance,* 07 cv 878, 2010 WL 1633398, at *8 (N.D.N.Y. Apr.2, 2010) ("Petitioner's second argument that counsel was ineffective by failing to seek his grounded in the state criminal procedure statute, and accordingly, is not cognizable on habeas review.") (citing, *inter alia,* 28 U.S.C. § 2254(a); *Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (holding that federal habeas corpus review not available to remedy alleged error of state law)).

D. First Amendment Violation

Petitioner contends that he was entitled, under the First Amendment, to not be subjected to the "obscene and profane" language (i.e., "Watch where you're going, motherfucker!") uttered by the victim, Manka, at the time of the incident. In support of this claim, Petitioner notes that there are facility rules which prohibit the use of this type of language, because it presents a "clear and present danger to institutional safety and can lead to violence." Petition at 8 (Dkt # 1).

Very broadly interpreted, these allegations may suggest that Petitioner believes he is entitled to some type of justification defense, that is, he was incited to violence by Manka's use of what he deems "fighting words". This argument, albeit creative, is without merit. *See, e.g., People v. Bova,* 118 Misc.2d 14, 17, 460 N.Y.S.2d 230, 232 (N.Y.Sup.Ct.1983) ("It is axiomatic that the use of force against another is not justified in response to a mere verbal provocation."); *Bennett v. State,* 59 Misc.2d 306, 309, 299 N.Y.S.2d 288, 292 (N.Y.Ct.Cl.1969) ("Words, no

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matter how coarse and abusive, which tend to excite angry passions never justify a physical assault.") (quotation omitted).

***6** A petition for a writ of habeas corpus may be brought by a person in custody pursuant to a state court judgment "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). Petitioner has not explained how Manka's use of profanity had any effect whatsoever on the constitutionality of his conviction, sentence, and resultant custody.

Furthermore, Petitioner has no private right of action under the First Amendment to the United States Constitution to be "free from obscene and profane" speech. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST., amend. I. Profane or obscene language generally is not entitled to protection under the First Amendment, and the Supreme Court has upheld governmental restrictions on its public use. *See, e.g., Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.") (quotation omitted). From these basic tenets, however, it does not follow that the First Amendment protects an individual from being subjected to obscene or profane language. Furthermore, the statement, "Watch where you're going, motherfucker!" arguably is not equivalent to "fighting words" as that term has been interpreted by the United States Supreme Court. *See R.A.V. v. City of St. Paul, Minnesota,* 505 U.S. 377, 432, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) ("Whether words are fighting words is determined in part by their context. Fighting words are not words that merely cause offense....") (Stevens, J., concurring).

IV. Conclusion

For the foregoing reasons, Petitioner Willie Singleton's request for a writ of habeas corpus is denied, and the petition is dismissed. Because Petitioner 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 certifies, pursuant to 28 U.S.C. § 1915(a)(3) and FED. R.APP. P. 24(a)(3), that any appeal from this Decision and Order would not be taken in good faith. Therefore, the Court denies leave to appeal as a poor person. *See Coppedge v. United States,* 369 U.S. 438, 445–46, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

A further application for leave to appeal *in forma pauperis* must be made to the Second Circuit Court of Appeals in accordance with FED. R.APP. P. 24(a)(1), (4), & (5). 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.

IT IS SO ORDERED.

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

Ralik BAILEY, Petitioner,
v.
Supt. Michael SHEAHAN, Respondent.

No. 6:13–CV–6438(MAT).
|
Signed June 26, 2014.

Attorneys and Law Firms

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Lisa Ellen Fleischmann, New York State Department of Law, New York, NY, Alyson Gill (E–Service) Arlene Roces (E–Service), for Respondent.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

***1** Ralik Bailey ("Petitioner") has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he is being held in Respondent's custody in violation of his federal constitutional rights. Petitioner is incarcerated as the result of a judgment entered against him on July 29, 2010, in New York County Court (Wyoming County), following a bench trial before Judge Mark Dadd convicting him of two counts of Assault in the Second Degree (N .Y. Penal Law ("P.L.") § 120.05(3)).

II. Factual Background and Procedural History

On January 4, 2010, a Wyoming County grand jury charged Petitioner, then an inmate at Attica Correctional Facility, with one count of Promoting Prison Contraband in the First Degree (P.L. § 205 .25(2)), one count of Criminal Possession of a Weapon in the Third Degree (P.L. § 265.02(1)), one count of Assault in the Second Degree (P.L. § 120.05(7); assault in a correctional facility); and three counts of Assault in the Second Degree (P.L. § 120.05(3); causing physical injury in the course of preventing a peace officer from performing a lawful duty). The charges stemmed from an incident on May 30, 2009, in which Petitioner and another inmate, Roach Kerrick ("Kerrick"), had a physical altercation, after which Petitioner allegedly struck one of the corrections officers who was escorting him through the facility. Based on one corrections officer's observations, Petitioner was accused of possessing a shank during the fight with Kerrick.

Trial counsel moved to dismiss the indictment, asserting that Petitioner's statement to a police investigator that he "wished to be present at any criminal proceedings or hearing if any take place" served to provide notice to the District Attorney of his desire to testify before the grand jury, and the prosecutor failed to provide notice that he was presenting Petitioner's case to a grand jury. In opposition, the prosecutor asserted that Petitioner had made no request to testify and therefore was not notified of the scheduling of the Grand Jury. According to the prosecutor, the District Attorney's office had reviewed Petitioner's file prior to seeking an indictment and found no correspondence that might have "even hint[ed]" that he wished to testify, and no such correspondence had arrived at any time since the grand jury presentation. Judge Dadd found that Petitioner had failed to serve the District Attorney with a written request to testify, as he was required to do pursuant to New York Criminal Procedure Law ("C.P.L.") § 190.50(5)(a).

Because Petitioner's sole habeas claim relates to the prosecution's failure to advise him of his right to testify before the grand jury, the Court need not repeat the trial testimony here but rather incorporates Respondent's thorough and detailed summary set forth in his brief.

During the bench trial, Judge Dadd dismissed the first two counts of the indictment (promoting prison contraband and possession of a weapon) because the prosecution had learned that Kerrick possessed the shank recovered after the incident. Judge Dadd found Petitioner guilty of second-degree assault as to Officers Bell and Leonard, not guilty of second-degree assault (assault in a correctional facility), and not guilty of second-degree assault as to Officer Meegan.

***2** On July 15, 2010, Judge Dadd held a hearing regarding whether Petitioner could be sentenced as a second violent felony offender. After taking testimony from an inmate records coordinator on Petitioner's incarceration history, Judge Dadd reserved decision on

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the issue. Judge Dadd then addressed Petitioner's *pro se* motion to set aside the verdict pursuant to C.P.L. § 330.30, in which he sought dismissal of the indictment because the prosecution had not honored his right to testify before the grand jury. Petitioner's counsel joined in the motion, and Judge Dadd reserved decision.

In a decision and order dated July 20, 2010, Judge Dadd held that the prosecution had proven that Petitioner had a valid prior violent felony conviction for purposes of permitting him to be sentenced as a second violent felony offender. Judge Dadd then denied the C.P.L. § 330.30 motion, finding that it "merely attempt[ed] to reargue the [Petitioner's] motion to dismiss the indictment, which was denied by the Court's decision and order dated March 2, 2010."

On July 29, 2010, Petitioner was sentenced, as a second violent felony offender, to two concurrent, determinate prison terms of five years on each assault count, to be followed by a five-year period of post-release supervision.

Petitioner pursued a direct appeal of his conviction to the Appellate Division, Fourth Department, of New York State Supreme Court. Appellate counsel argued that Petitioner was deprived of his right to testify before the grand jury in violation of C.P.L. § 190.50; the verdict was against the weight of the evidence; and the sentencing court erred in using a prior conviction to enhance Petitioner's sentence. On December 30, 2011, the Appellate Division unanimously affirmed the conviction. *People v. Bailey,* 90 A.D.3d 1664, 935 N.Y.S.2d 822 (4th Dep't 2011). The New York Court of Appeals denied leave to appeal. *People v. Bailey,* 19 N.Y.3d 861, 947 N.Y.S.2d 410, 970 N.E.2d 433 (2012).

This timely habeas petition followed. Petitioner asserts one ground for relief-that he was deprived of his due process right to testify before the grand jury. Respondent answered the petition, and Petitioner filed a reply brief. For the reasons set forth below, the petition is dismissed.

III. Discussion

Petitioner's sole claim is that he was deprived of his due process right to testify in the grand jury. Respondent argues that this claim is not cognizable on federal habeas review because it does not present a question of federal constitutional magnitude. *See Estelle v. McGuire,* 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); 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").

Respondent is correct that the right to testify before the grand jury in New York is not a creature of federal constitutional law. *See Velez v. People of State of N.Y.,* 941 F.Supp. 300, 315 (E.D.N.Y.1996) ("The Supreme Court has long held that the United States Constitution's Fifth Amendment provision for presentment or indictment by grand jury does not apply to the several states through the Fourteenth Amendment; in short, there is no federal constitutional right to be indicted by a grand jury prior to trial in a state criminal action.") (citing, *inter alia, Alexander v. Louisiana,* 405 U.S. 625, 633, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); *Hurtado v. California,* 110 U.S. 516, 538 (1884); *Cobbs v. Robinson,* 528 F.2d 1331, 1334 (2d Cir.1975), *cert. denied,* 424 U.S. 947, 96 S.Ct. 1419, 47 L.Ed.2d 354 (1976)). Although the New York State Constitution guarantees a criminal accused the right to be indicted by a grand jury when charged with a capital or otherwise "infamous" crime, *see* N.Y. CONST. art. I, § 6, it says nothing about the right to appear before the grand jury. Rather, an accused's right to be indicted by a grand jury in New York is "purely statutory." *Velez,* 941 F.Supp. at 315 (citing N.Y. CRIM. PROC. LAW § 190.50) (stating that a person as to whom a criminal charge is being submitted to a grand jury "has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney ... a written notice making such request ...")).

***3** Petitioner, in his traverse, concedes that there is no federal constitutional right to be indicted by or testify before a grand jury. However, he argues, once a state creates such a right, as New York did by statute, it "cannot cause that right to be forfeited in a manner that is arbitrary or fundamentally unfair." Traverse at 5 (citing *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)). As Petitioner correctly notes, the Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment."

Vitek v. Jones, 445 U.S. 480, 488, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). Some district courts in this Circuit have held that C.P.L. § 190.50 creates such a right. *E.g., Gayle v. Senkowski,* No. 02 CV 1694(JG), 2004 WL 503796, at *4 (E.D.N.Y. Mar.16, 2004) (citing *Saldana v. State of N. Y.,* 665 F.Supp. 271, 275 (S.D.N.Y.1987) (once a state creates a right for a defendant to testify before a grand jury, "it cannot cause that right to be forfeited in a manner which is arbitrary or fundamentally unfair"), *rev'd on other grounds,* 850 F.2d 117 (2d Cir.1988)); *see also Jones v. Keane,* 250 F.Supp.2d 217, 234 (W.D.N.Y.2002).

Although the state cannot arbitrarily deny an individual access to rights that it has created, here the facts do not support a claim of an arbitrary denial of Plaintiff's statutorily created right to testify before a grand jury hearing evidence against him. Rather, the New York State courts have reviewed this claim three times and found it without merit. The trial judge considered the claim in a pre-trial motion to dismiss the indictment and again in post-trial motion to set aside the verdict. The Appellate Division considered the claim on direct appeal, and noted that in order to preserve the statutory pretrial right to testify before the grand jury, a defendant must assert it "at the time and in the manner that the Legislature prescribe[d]" in C.P.L. § 190.50, the requirements of which are to be "strictly enforced[.]" *Id.* (quotations omitted). The Appellate Division found that Petitioner's oral statement to the police investigator that he "wished to be present at any criminal proceedings or hearing if any take place" was not sufficient to invoke his right to testify before the grand jury under C.P.L. § 190.50 for several reasons-it was not in writing, it was not served upon the District Attorney, and it "merely asserted" a desire to "be present at any proceedings but did not expressly request to testify before the grand jury[.]" *Id.* Courts in New York have held that to effectuate the right to testify before a grand jury, a "defendant must activate it in affirmative manner by making unqualified, specific request to come before grand jury and testify...." *People v. Leggio,* 133 Misc.2d 320, 322, 507 N.Y.S.2d 131 (N.Y.Sup.Ct.1986) (attorney's letter to prosecutor stating that defendant "reserves" his right to testify upon notice to office of presentment of evidence against defendant before grand jury was not proper request for purposes of C.P.L. § 190.50(2)); *see also People v. Hunter,* 169 A.D.2d 538, 538, 564 N.Y.S.2d 391 (1st Dep't 1991) ("Although defendant expressed a desire to testify before the grand jury, he never submitted a written request as required by CPL § 190.50(5)(a); his oral notice to the People and the Supreme Court was insufficient.") (citation omitted).

***4** The Appellate Division also found that the prosecution did not have any obligation to inform Petitioner of the grand jury presentation because he had not been arraigned "in a local criminal court upon a currently undisposed of felony complaint". *Bailey,* 90 A.D.3d at 1665, 935 N.Y.S.2d 822 (citing *People v. Mathis,* 278 A.D.2d 803, 803, 719 N.Y.S.2d 419 (4th Dep't 2000)). Under these circumstances, Petitioner has not established that his right to testify before the grand jury was denied by the New York State courts in a manner that was "arbitrary" or "fundamentally unfair". *See Mirrer v. Smyley,* 703 F.Supp. 10, 12 (S.D.N.Y.1989); *Gayle v. Senkowski,* 2004 WL 503796, at *4.

IV. Conclusion

For the foregoing reasons, Petitioner's request for a writ of habeas corpus is denied, and the petition is dismissed. The Court declines to issue a certificate of appealability because Petitioner has failed to make a substantial showing of the denial of a constitutional right. The Court certifies, pursuant to 28 U.S.C. § 1915(a), that any appeal from this Decision and Order would not be taken in good faith, and therefore denies leave to appeal *in forma pauperis.*

SO ORDERED.

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

Mark W. BLOND, Jr., Petitioner,
v.
Harold GRAHAM, Superintendent,
Auburn Correctional Facility, Respondent.

No. 9:12–cv–1849–JKS.
|
Signed June 5, 2014.
|
Filed June 6, 2014.

Attorneys and Law Firms

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

I. BACKGROUND/PRIOR PROCEEDINGS

The Appellate Division summarized the facts of the case as follows:

> [Blond] was indicted on 10 counts stemming from his sexual abuse and rape of a 15–year–old victim, his attempted assault with a brick on his wife [Kasha Hudson], who was the victim's aunt, and property damage he caused to his wife's vehicle when he repeatedly drove his own vehicle into it. When he was arrested and taken into custody, he also caused property damage to a police vehicle by shattering its window in a violent rage. Following a jury trial, [Blond] was convicted of rape in the first degree, rape in the third degree, criminal sexual act in the third degree, sexual abuse in the third degree, attempted assault in the second degree, endangering the welfare of a child, criminal mischief in the third degree and criminal mischief in the fourth degree. [The New York] Supreme Court ... sentenced [Blond] to an aggregate prison term of 22 $^{2}/_{3}$ years followed by 20 years of postrelease supervision.

People v. Blond, 96 A.D.3d 1149, 946 N.Y.S.2d 663, 665 (N.Y.App.Div.2012).

Blond filed a *pro se* motion to vacate the judgment and set aside the sentence pursuant to New York Criminal Procedure Law ("CPL") §§ 440.10 and 440.30. Blond raised a litany of ineffective assistance of counsel claims, including allegations that counsel: 1) failed to move for a mistrial after defense witness Jean Blond was arrested outside the courtroom following her testimony; 2) failed to move for a mistrial based on "threatening gestures" made by Rene Minus to members of the jury; 3) failed to prepare for trial; 4) failed to call several lay witnesses; 5) failed to secure Blond's right to testify before the grand jury; 6) failed to request an adjournment during the *Huntley* hearing [1] to review 911 calls and police recordings; 7) failed to allow Blond to testify at the *Huntley* hearing; 8) failed to move for a change of venue; 9) failed to advise Blond of a favorable plea deal; 10) unconstitutionally excused all females from the jury pool; 11) waived Blond's right to be present at "crucial stages of trial," including conferences and sidebars; 12) failed to challenge the racial composition of the jury; 13) failed to object to the badgering of Blond on cross-examination; 14) failed to suppress physical evidence taken from Blond's home as well as Blond's DNA sample; 15) failed to obtain Blond's work and school records as well as records of Hudson's whereabouts to disprove that the prior bad acts ever

occurred; 16) failed to object to the introduction of an email from Blond; 17) failed to object to the admittance of a tampered audio/video recording; 18) failed to interview and investigate the People's DNA testing experts prior to trial; 19) failed to inquire into lab protocols for DNA testing; 20) failed to call expert witnesses; 21) failed to investigate Blond's claim that around the time of the alleged crimes, his wife was giving him Zoloft which had not been prescribed to him; 22) failed to make post-trial motions; 23) failed to competently argue for a minimum sentence; 24) failed to object to or request a hearing on the fines imposed on Blond; 25) failed to object to the late disclosure of DNA evidence; 26) failed to reveal that certain witnesses had prior convictions or any pending criminal actions; 27) failed to show any interest in explaining his right to a speedy trial to him; 28) failed to argue to sever the indictment; 29) failed to obtain police records of an incident in which Blond's wife allegedly battered him; 30) failed to select and impanel an impartial jury; 31) failed to object to his wife testifying on the ground of marital privilege; 32) failed to properly argue to set aside the sentence; 33) had only 6 months' experience in handling sex crimes cases; 34) failed to move for a mistrial on various occasions; 35) failed to timely move to suppress his statement to police before the grand jury indicted him; and 36) threatened Blond that if he did not take the plea deal he could face 25 years' imprisonment.

1 *People v. Huntley,* 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (N.Y.1965). The term *"Huntley* hearing" is a shorthand reference to a hearing held in New York on a challenge to the admissibility of statements made to law enforcement personnel.

***2** In addition, Blond argued that: 1) his right to equal protection was violated because the county and state caps money it provides for the defense of the criminally accused; 2) the trial court failed to question the potential jurors about their attitudes "towards sex crimes and/or crimes against teens and/or crimes against multi-gender's [sic] and/or crimes against multi-races"; 3) the trial court failed to inquire as to Blond's competency; 4) the jury instructions were unconstitutional; 5) the People withheld and/or delayed production of evidence; 6) the bailiff committed misconduct by "grabbing his gun" in front of the jury when Blond walked by him; 7) the "conflict defender" yelled "Give him 100 years" and many county workers were present during trial, which had "a great impact [on] the trial and the conviction"; 8) the trial judge was biased; 9) his right to due process was violated at sentencing because the court imposed a stricter sentence without offering any justification for doing so; 10) a restitution hearing should have been held on fees imposed on Blond as part of his sentence; 11) he was not fully allowed to address the sentencing court; 12) his sentence was an abuse of discretion and a violation of the right to due process, equal protection, and the right against cruel and unusual punishment; 13) the prosecution implied while cross-examining Blond that if he was telling the truth then the People's witnesses were lying; 14) the state failed to preserve DNA samples for testing at the time the crime was committed; 15) the People failed to turn over various documents; 16) the prosecution played to the fears and sympathies of the jury; 17) the police interfered with his right to access to counsel; 18) he was prejudiced by the presence of a juror who was sleeping; 19) hearsay evidence was impermissibly admitted into evidence at trial; 20) exculpatory evidence was not admitted at trial; 21) the court should perform a polygraph on both himself and the witness; 22) public defenders are not invested in the cases they are working on and are just out to make money; 23) the grand jury proceedings were defective and prejudicial; 24) the prosecution committed misconduct by leading the victim in her testimony; 25) the prosecution denied him the opportunity of confronting several witnesses; 26) the prosecution failed to prove that he was guilty of attempted assault in the second degree; 27) during the grand jury proceedings, Blond's wife testified as to a "domestic violence situation of a family court nature" which prejudiced him, and otherwise testified to information protected by marital privilege; 28) the prosecution over-charged Blond with duplicitous charges; 29) the prosecution purposely suppressed his interrogation; 30) the prosecution vindictively "up[ped] the anti [sic] of crimes charged, to gain a tactical advantage at [the] bargaining stage"; 31) although our legal system is "accusatory" in nature, the grand jury process is unconstitutionally an "inquisitory" system; 32) the police used force upon his arrest rendering his statements to police involuntary; 33) the victim did not resist his advances and there was doubt as to whether he used force or threats against her; 34) the jury should have been sequestered; and 35) the sentence was excessive and cruel and unusual.

***3** The trial court denied the motion, concluding that Blond's ineffective assistance of counsel claims were "conclusory and ... not supported by any other affidavit or evidence." The court further denied Blond's claims of jury

improprieties, that his sentence was cruel and unusual, and that he was unlawfully searched and seized on the ground that they should be brought on direct appeal pursuant to CPL § 440.10(2)(c). The court did not otherwise address Bond's numerous claims.

Blond sought leave to appeal the denial of his motion to vacate the judgment and to consolidate that appeal with his direct appeal. The Appellate Division granted that motion.

Blond then moved *pro se* to set aside his sentence on the ground that it was "Constitutionally harsh, excessive and greatly disproportioned [sic] to any of the pre-trial and trial plea bargains," and that counsel was ineffective. The trial court denied the motion on the ground that he had already raised the same claims in his motion to set aside the verdict.

Through counsel, Blond directly appealed, arguing that: 1) a new trial was required based on the court's failure to conduct an inquiry of a sleeping juror; 2) trial counsel was ineffective for failing to move to dismiss the indictment and properly advise Blond of the maximum sentence for first-degree rape; 3) the admission of *Molineux/Ventimiglia* [2] evidence deprived Blond of a fair trial; 4) the court erred in denying Blond's request to offer the testimony of three social workers to impeach the victim's credibility; 5) the jury charge was insufficient; and 6) his sentence was harsh and excessive. Blond filed a supplemental *pro se* brief in which he additionally argued that: 1) trial counsel was ineffective for a) failing to advise him of a favorable plea, b) failing to investigate and prepare for trial, and c) failing to object to the indictment as duplicitous; 2) counts 1 through 4 and 8 were based on duplicitous acts; 3) prosecutorial misconduct denied him his right to a fair trial; and 4) the evidence was legally insufficient to support his conviction and the verdict was against the weight of the evidence. The Appellate Division unanimously affirmed Blond's judgment of conviction in a reasoned opinion.

2 *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286 (N.Y.1901); *People v. Ventimiglia,* 52 N.Y.2d 350, 438 N.Y.S.2d 261, 420 N.E.2d 59 (N.Y.1981). *A Molineux/Ventimiglia* hearing is a New York state pre-trial hearing on the admissibility of evidence of prior uncharged crimes or other bad acts by the defendant in a criminal trial.

Blond initially filed a *pro se* application for leave to appeal to the Court of Appeals. Blond argued that: 1) the trial court failed to conduct a proper inquiry of a sleeping juror as required by state law; 2) counsel was ineffective for failing to a) secure his right to testify before the grand jury and move to dismiss the indictment, b) properly advise him of a plea bargain and his sentencing exposure, c) move to dismiss counts 1 through 4 as duplicitous, d) investigate and prepare for trial, and e) compel the court to review the grand jury minutes and move to dismiss or reduce the charges; 3) the court abused its discretion in admitting the *Molineux/Yentimiglia* evidence; 4) the court erred in precluding him from presenting the testimony of three social workers; 5) the jury charge failed to relate the facts to the application of law; 6) the prosecutor committed misconduct; 7) the evidence was legally insufficient to support conviction on counts 1–4 and 6; and 8) the trial court should have dismissed counts 1–4 as duplicitous. Blond then filed a counseled leave application, in which he argued that: 1) the trial court's *Molineux/Yentimiglia* ruling was an abuse of discretion; 2) the trial court erred in excluding the testimony of three social workers to impeach the credibility of the victim's complaints of sexual abuse; and 3) his sentence was an abuse of discretion given the discrepancy between the pre-trial plea offer and the aggregate sentence imposed after trial. Blond subsequently filed a letter motion stating that counsel had failed to ask the Court of Appeals to "to review all issues raised in the Appellate Division." The Court of Appeals summarily denied leave to appeal. Blond filed his Petition for Writ of Habeas Corpus with this Court on October 22, 2012.

II. GROUNDS RAISED

***4** Blond raises the following claims in his *pro se* Petition before this Court: 1) trial counsel was ineffective for failing to: a) properly advise him of a favorable plea offer, b) advise him of his maximum sentencing exposure, c) secure his right to testify before the grand jury, d) object to the duplicitous nature of counts 1 through 4 of the indictment, e) investigate and prepare for trial, and f) move to inspect the grand jury minutes and dismiss the indictment; 2) he was deprived of a fair trial because a juror was sleeping during trial and the court failed to conduct a proper inquiry of that juror; 3) counts 1 through 4 of the indictment were duplicitous; 4) the court erroneously admitted *Molineux/Yentimiglia* evidence and

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failed to give a limiting instruction; 5) the prosecutor committed misconduct; 6) the court improperly denied his request to present testimony of three social workers who would undermine the victim's credibility; 7) the evidence was legally insufficient to support his conviction; and 8) the trial court vindictively sentenced him for exercising his right to trial.

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).

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

***5** 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). To be deemed exhausted, a claim must have been presented to the highest state court that may consider the issue presented. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). In New York, to invoke one complete round of the State's established appellate process, a criminal defendant must first appeal his or her conviction to the Appellate Division and then seek further review by applying to the Court of Appeals for leave to appeal. *Galdamez v. Keane,* 394 F.3d 68, 74 (2d Cir.2005). Blond failed to raise his vindictive sentence claim in either his *pro se* or counseled petitions for review to the New York Court of Appeals, and it is accordingly unexhausted. *See* ECF 32–20; 32–19. *Grey v. Hoke,* 933 F.2d 117, 119 (2d Cir.1991).

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Respondent also correctly points out that Blond has only partially exhausted other claims because he presented those claims on direct appeal only on state-law grounds. Exhaustion of state remedies requires the petitioner 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. 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. 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). Blond raised the claims that the court should have conducted an inquiry with respect to a sleeping juror, that counts 1 through 4 of the indictment were duplicitous, and that the court abused its discretion in admitting the *Molineux/Yentimiglia* evidence, solely on state grounds and they are accordingly also unexhausted.

Because Blond's unexhausted claims are based on the record, they could have been raised in his direct appeal but were not; consequently, Blond cannot bring a motion to vacate as to these claims. CPL § 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, Blond 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,* 933 F.2d at 120–21.

"[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) (citation omitted); *see also Grey,* 933 F.2d at 121. Because Blond 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).

***6** Despite Blond's failure to exhaust a number of his claims, this Court nonetheless may deny his 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,* 544 U.S. at 277. Accordingly, this Court will not dismiss the unexhausted claims solely on exhaustion grounds and instead reach the merits of the claims as discussed below.

B. Ineffective Assistance of Counsel (Claim 1)

1. *Strickland and New York standards on habeas review*
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, Blond must show that his 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

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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)).

***7** 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.

2. *Failure to properly advise of plea offer and maximum sentencing exposure (Claims 1(a) & (b))*

At arraignment, the trial court informed Blond of his maximum sentencing exposure, stating that he could be subject to 25 years' imprisonment if found guilty of first-degree rape, a class B felony. The court also informed Blond of his maximum sentencing exposure on each of the remaining 9 charges.

Prior to trial, the court informed Blond in open court that the prosecution had made a plea offer of 3½ years' imprisonment and that the court would accept the offer if Blond agreed after conferring with defense counsel. The court further advised Blond that defense counsel had requested that the offer remain on the table until the following day prior to jury selection. After that, the prosecution would withdraw the offer.

Just prior to jury selection the following day, the court again stated that the prosecution had offered 3½ years' imprisonment followed by post-release supervision to be determined at the discretion of the court. Defense counsel advised the court that Blond did not want to avail himself of that offer. Defense counsel requested to make a record with respect to Blond's rejection of the offer, stating as follows:

> [DEFENSE COUNSEL]: [W]ith regard to the offer, and that is that I have advised [Blond] that I believe he should take the offer, particularly in light of two B felony counts present in the indictment, which I believe there is a substantial likelihood of conviction on, and for each of which he could receive up to four years in prison. Obviously if the offer is 3½ it would be an advantageous plea-bargain offer or advantageous plea, at least in my estimation.
>
> THE COURT: I assume you discussed with your client the full range of sentencing, if you will, that will be at the Court's discretion at the conclusion of the case in the event that he is found guilty?
>
> [DEFENSE COUNSEL]: I have, your Honor.
>
> THE COURT: I assume you've also discussed with him that based upon the various counts in this indictment, the factual recitations, if you will, under each of these counts that in the event that [Blond] is found guilty of each of these counts that the Court has the discretion to sentence [a] certain number of these consecutively?
>
> ***8** [DEFENSE COUNSEL]: Yes, your Honor, we have discussed that.

According to Blond, after the victim testified against him, he was offered 7 years' imprisonment "and the offer never was tak[en] off the table." Blond nevertheless rejected that plea offer, continuing to "protest[ ] his innocence."

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Blond argues that trial counsel was ineffective for failing to properly advise him of the original plea offer of 3½ years' imprisonment. Blond contends that counsel failed to adequately communicate the strengths and weaknesses of the case, the improbability of an acquittal, and the correct maximum sentencing exposure. Blond asserts that "had counsel properly advised him, [he] would have been amenable to the pre-trial plea offer of 3 1/2 years," which was "clearly in his best interests."

The Appellate Division rejected this claim as follows:

> Although [Blond] also claims that his counsel incorrectly advised him of the maximum sentence to which he was exposed while he was considering the pretrial offer, and despite the apparent mistake either in what counsel said on the record or what was transcribed when [Blond] rejected the pretrial offer against his counsel's advice, the affidavit [Blond] submitted in support of his CPL 440.10 motion confirms that, prior to proceeding to trial, he was well aware of the potential for a 25–year sentence on the top count of rape in the first degree.

Blond, 946 N.Y.S.2d at 667.

The Sixth Amendment right to counsel extends to the plea bargaining process. *Lafler,* 132 S.Ct. at 1384. Criminal defendants are entitled to the effective assistance of competent counsel during plea negotiations. *Id.* "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Id.* at 1387. Defense counsel has "a constitutional duty to give their clients professional advice on the crucial decision of whether to accept a plea offer from the government." *Pham v. United States,* 317 F.3d 178, 182 (2d Cir.2003). "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye,* —– U.S. ——, ——, 132 S.Ct. 1399, 1408, 182 L.Ed.2d 379 (2012). Defense counsel "should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." *Purdy v. United States,* 208 F.3d 41, 45 (2000); *United States v. Gordon,* 156 F.3d 376, 380 (2d Cir.1998) ("[K]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty."); *Carrion v. Smith,* 644 F.Supp.2d 452, 467 (S.D.N.Y.2009). When a petitioner contends that counsel's defective advice caused him to reject a plea offer and proceed to trial, he has shown prejudice where "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.,* that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler,* 132 S. Ct at 1385.

***9** There is no question here that the relevant terms of the plea offer were conveyed to Blond, as they were discussed in open court in Blond's presence. Counsel also stated in open court in Blond's presence that he had recommended that Blond take the plea offer in light of the likelihood of conviction on two of the charges. Counsel further represented that he had advised Blond of his full sentencing exposure and that the court had the discretion to sentence Blond to consecutive terms if found guilty.

Blond focuses on the fact that defense counsel stated that he had advised Blond that he should accept the plea offer because he could face up to 4 years in prison on two unidentified class B felony charges. Defense counsel's calculation was incorrect, as under New York Law, a defendant can face up to 25 years' imprisonment if convicted of a class B felony. N.Y. PENAL LAW § 70.00(2)(b). Nevertheless, defense counsel did not represent that this was the maximum exposure Blond faced, but that it was a sentence he supposedly faced on 2 of the 10 charges against him. It is not clear what total sentencing exposure counsel advised Blond that he was subject to when they discussed the plea bargain off the record. Nevertheless, Blond cannot demonstrate that, but for counsel's error, there is a reasonable probability that he would have otherwise accepted the plea offer. At arraignment, the court advised Blond of the maximum exposure he faced on each individual charge, including informing him that he faced up to 25 years' imprisonment on the first-degree rape charge. In addition, as the Appellate Division noted, Blond stated in his CPL §

440.10 motion to vacate the judgment that he was "under constant pressure to take the plea" because he had received "threats of imprisonment of 25 years." Blond was therefore aware of his maximum exposure and elected to reject the plea offer of 3½ years in any event. Thus, he cannot show that he would have otherwise accepted the plea bargain had defense counsel not misstated his exposure on 2 individual counts, especially considering his concession that he continued to make "protestations of innocence" after hearing the victim's testimony against him and rejecting yet another plea offer. Blond is therefore not eligible for relief on this claim.

3. *Failure to secure his right to testify at the grand jury (Claim 1(c))*

Blond next argues that trial counsel was ineffective for ignoring his request to testify before the grand jury. The Appellate Division rejected this claim on the ground that there was no evidence that Blond informed counsel of his desire to testify before the grand jury, and that failure to facilitate grand jury testimony is not *per se* ineffective assistance of counsel. *Blond,* 946 N.Y.S.2d at 667.

Blond's claim is not cognizable on federal habeas review because the right to present testimony before a grand jury is purely a matter of New York state law and not a federal constitutional right. *Davis v. Mantello,* 42 F. App'x 488, 491 n. 1 (2d Cir.2002); *Hutchings v. Herbert,* 260 F.Supp.2d 571, 577 (W.D.N.Y.2003) ("It is ... well settled that a criminal defendant's right to testify before the grand jury is not a constitutional right; rather, it is a creature of state statute."); *Gibbs v. New York,* No. 01 Civ. 5046, 2002 WL 31812682, at *4 (S.D.N.Y.2002) (petitioner's claim that he was denied the opportunity to testify before the grand jury was not cognizable on federal habeas review because it is a right created by state law alone); N.Y. CRIM. PROC. LAW § 190.50. Even if counsel waived Blond's right to testify without Blond's permission, any prejudice was cured by his conviction. *See Turner v. Fischer,* Nos. 01–CV–3251, 03–MISC–0066, 2003 WL 22284177, at *6 (E.D.N.Y. Aug. 20, 2003) (Even "[a]ssuming ... counsel waived [petitioner's] right to appear before the grand jury without petitioner's permission, petitioner cannot demonstrate that he was prejudiced thereby. He was afforded a jury trial and was convicted by a petit jury after testifying before it. Any prejudice suffered by petitioner was rendered harmless by his conviction at trial by the petit jury, which assessed his guilt under a heightened standard of proof."); *Keeling v. Varner,* Nos. 99–CV–6565, 03–MISC–0066, 2003 WL 21919433, at *7 (E.D.N.Y. June 17, 2003) ("Petitioner claims his counsel was ineffective because he did not inform him of his right to testify before the grand jury.... Claims regarding the conduct of the grand jury are not cognizable in a habeas proceeding where a petit jury has heard the evidence and convicted defendant. Counsel was not ineffective in this regard. Petitioner's fair trial and due process rights were not infringed.") (internal citation omitted); *Bingham v. Duncan,* 01 Civ. 1371, 2003 WL 21360084, at *4 (S.D.N.Y. June 12, 2003) (Rejecting petitioner's claim that counsel was ineffective for failing to secure petitioner's right to testify before the grand jury: "Given that any defect in the grand jury proceeding was cured by petitioner's subsequent conviction, ... it necessarily follows as a matter of law that petitioner cannot establish that any errors made by his trial counsel with respect to the grand jury proceeding prejudiced him, thereby foreclosing the possibility of a Sixth Amendment violation.") (quotation, internal quotation marks and brackets omitted). Blond is therefore not entitled to relief on this claim.

4. *Failure to object to the duplicitous nature of the indictment (Claim 1(d))*

***10** Blond next argues that counsel was ineffective for failing to object to counts 1 through 4 of the indictment as duplicitous. According to Blond, counts 1 though 4 "encompassed such a multiplicity of acts that it was impossible to determine which acts the jury reached a unanimous verdict of guilty on." The Appellate Division rejected this claim, concluding that Blond received meaningful representation. *Blond,* 946 N.Y.S.2d at 667–68.

New York Criminal Procedure Law § 200.30(1) provides that "[e]ach count of an indictment may charge one offense only." "Hence, where a crime is made out by the commission of one act that act must be the only alleged offense alleged in the count. Put differently, acts which separately and individually make out distinct crimes must be charged in separate and distinct counts." *People v. Keindl,* 68 N.Y.2d 410, 509 N.Y.S.2d 790, 502 N.E.2d 577, 580 (N.Y.1986). Counts 1 through 4 of the indictment charged Blond with: 1) "engag[ing] in sexual intercourse with a female person ... by forcible compulsion" on or about May 2, 2008 (count 1); 2) "engag[ing] in sexual intercourse with ... a female child ... who is less than seventeen years old" on or about May 2, 2008 (count 2); 3) "engag[ing] in oral sexual conduct ..., by putting his

penis in the mount of a female child ... who is less than seventeen years old" on or about May 2, 2008 (count 3); and 4) "insert[ing] his finger into the vagina of a female child ... while she is less than seventeen years of age" on or about the month of April 2008 (count 4). The four counts at issue charged Blond with 4 separate and distinct crimes and gave him adequate notice of the charges against him. Any objection by counsel or motion to dismiss the indictment on grounds of duplicitousness would have been meritless, and counsel cannot be ineffective for failing to raise a meritless claim. *See Lockhart v. Fretwell,* 506 U.S. 364, 374, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (O'Connor, J., concurring) (failing to raise a meritless objection cannot constitute prejudice under a *Strickland* ineffective assistance of counsel claim); *Aparicio v. Artuz,* 269 F.3d 78, 99 (2d Cir.2001) (holding that it is not ineffective counsel to fail to raise meritless claims). Blond cannot prevail on this claim.

5. *Failure to investigate and prepare for trial (Claim 1(e))*

Blond next raises a host of claims under his allegation that trial counsel was ineffective for failing to "prepare and properly investigate for trial."

First, Blond asserts that counsel failed to call "any medical experts on sexual abuse and rape," and that counsel "essentially conceded that the physical evidence was indicative of sexual penetration without conducting any investigation to determine if that was the case." He also claims counsel made a "nominal effort to contact witnesses."

The ultimate decision of whether to call witnesses to testify is well within counsel's "full authority to manage the conduct of the [proceeding]." *Taylor v. Illinois,* 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) ("Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision ... to decide not to put certain witnesses on the stand ...."). "The decision of whether to call any witnesses on behalf of a defendant, and which witnesses to call or omit to call, is a tactical decision which ordinarily does not constitute incompetence as a basis for a claim of ineffective assistance of counsel." *Speringo v. McLaughlin,* 202 F.Supp.2d 178, 192 (S.D.N.Y.2002); *United States v. Nersesian,* 824 F.2d 1294, 1321 (2d Cir.1987). Claims that counsel was ineffective for failing to call certain witnesses are disfavored on habeas review because "allegations of what a witness would have testified [to] are largely speculative." *Speringo,* 202 F.Supp.2d at 192 (citation omitted); *see also Montalvo v. Annetts,* 02 Civ. 1056, 2003 WL 22962504 (S.D.N.Y. Dec.17, 2003) (the decision not to call a particular witness "generally should not be disturbed" because of "its inherently tactical nature").

***11** Moreover, counsel did not concede that the prosecution's expert witness was correct in asserting that the physical evidence was indicative of sexual penetration. Counsel skillfully cross-examined JeanMarie Reid, a forensic nurse examiner with specialized training in conducting sexual assault exams, and was able to elicit that the victim's hymenal tears and the condition of her cervix and vagina could have been caused by something other than sexual intercourse. Nurse Reid agreed that the victim's injuries were not necessarily the result of sexual behavior. As to his claim that counsel made a nominal effort to contact other witnesses, Blond fails to specify which other witnesses should have been called or what would have been the thrust of their testimony, and his claim is therefore rejected. *See Baptiste v. Ercole,* 766 F.Supp.2d 339, 363 (N.D.N.Y.2011) ("Petitioner has not identified any witness counsel failed to call, nor has he set forth any facts or arguments in support of this assertion. Petitioner's vague and conclusory statement that counsel failed to call exculpatory witnesses is therefore denied." (citing *Blackledge v. Allison,* 431 U.S. 63, 75, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977))).

Second, Blond claims that counsel was ineffective for failing to object to the prosecution's comments during summation. However, as discussed *infra,* the prosecution's comments did not amount to misconduct, and again, counsel is not ineffective for failing to raise a meritless argument. *Lockhart,* 506 U.S. at 374; *Aparicio,* 269 F.3d at 99.

Blond additionally claims that counsel 1) failed to gather evidence against Blond; 2) only briefly met with him; 3) failed to interview other, unspecified witnesses; 4) failed to research relevant law; 5) failed to put forth a defense; 6) failed to consult with Blond before filing the omnibus motion; 7) failed to request the severance of unspecified charges; 8) failed to "minimize prejudice" against Blond; 9) failed to move for a mistrial at five different points in the trial; and 10) made only general objections. Blond has failed to include any facts or argument to support these claims. All Blond offers are conclusory, self-serving

statements, which are insufficient to support an ineffective assistance of counsel claim. *See Larweth v. Conway,* 493 F.Supp.2d 662, 670–71 (W.D.N.Y.2007); *Skeete v. People of New York State,* No. 03–CV–2903, 2003 WL 22709079, at *2 (E.D.N.Y. Nov.17, 2003).

Moreover, as Appellate Division noted, Blond overall received the effective assistance of counsel as required by the Sixth Amendment:

> When viewed in their totality, the circumstances reveal that counsel was prepared, made appropriate pretrial motions, pursued a credible defense strategy, made cogent opening and closing statements, ably cross-examined the People's witnesses, presented witnesses on the defense case and obtained dismissal of two counts of the indictment. We have considered all of the ineffective assistance claims, including each of those made by defendant in his pro se brief, and find that he received meaningful representation.

***12** *Blond,* 946 N.Y.S.2d at 667–68.

The Appellate Division's conclusion is supported by the record, and Blond accordingly cannot prevail on this claim.

6. *Failure to move to inspect the grand jury minutes and dismiss the indictment (Claim 1(f))*

Blond next argues that his counsel filed an omnibus motion requesting that the court inspect the grand jury minutes and reduce or dismiss the charges set forth in the indictment. He claims that the court ordered the People to produce the grand jury minutes, but that the People did not comply. He asserts that the court never revisited the omnibus motion and that defense counsel failed to renew his motion for inspection of the minutes. Blond claims that counsel's failure to do so denied him "his due process right to have insufficient, or inadequate counts in the indictment reduced or dismissed, and as such, the prejudice is manifest."

Blond is not entitled to relief because claims of error in New York grand jury proceedings, including allegations that the evidence was insufficient to indict, are not cognizable in federal habeas corpus proceedings where, as here, Blond has been convicted by a petit jury. *See Lopez v. Riley,* 865 F.2d 30, 32–33 (2d Cir.1989); *Afrika v. New York,* No. 12–CV–0537, 2013 WL 5936999, at *6 (W.D.N.Y. Nov.4, 2013). Blond therefore cannot prevail on this claim.

C. Inquiry into the Presence of a Sleeping Juror (Claim 2)

During trial, the court asked the clerk to "nudge" a juror who apparently appeared to be sleeping, acknowledging that it had "been a long day." The following day, defense counsel asked if either the prosecution or the court had observed the juror sleeping again that day. The court stated that it was "constantly observing the jury," and that it had "stopped the proceeding" the previous day because it had briefly observed the juror sleeping. Since then, the court was "constantly looking" and "watch[ing] [the juror in question] specifically," and did not notice her sleeping. The court would have stopped the proceeding again if it had observed her sleeping. Defense counsel replied, "Fine, judge."

Blond argues that he was "denied a fair and impartial jury trial based on a sleeping juror." Blond claims that the trial court was required under CPL § 270.35 to inquire of the juror how much testimony she missed and whether she was qualified to continue serving. As discussed *supra,* this claim is unexhausted and procedurally defaulted because Blond raised this claim on direct appeal only on state-law grounds.

The Appellate Division concluded that the claim was unpreserved because Blond failed to request that the court conduct an inquiry of the sleeping juror and did not object to the juror's continued service, citing *People v. Galloway,* 94 N.Y. S.2d 699, 702 (N.Y.App.Div.2012) (defendant failed to preserve for appellate review his claim that he was denied a fair trial based on the selection of two jurors because he failed to make appropriate objections at trial). *Blond,* 946 N.Y.S.2d at 667. The court alternatively concluded that the trial court's "observations provided it with an adequate basis for its conclusion that the juror had not missed a significant portion of the trial testimony and, therefore, was not grossly unqualified to continue to serve as a juror." *Id.*

***13** Blond's claim is barred from federal habeas review because the Appellate Division relied on an independent and adequate state ground to dismiss it. *See Coleman,* 501 U.S. at 729 (federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment"). Where a state-court holding contains a plain statement that a claim is procedurally barred, a federal habeas court may not review it, even if, as here, 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) (explaining that "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); *Velasquez v. Leonardo,* 898 F.2d 7, 9 (2d Cir.1990). The New York procedural rule that a party must preserve an issue with a contemporaneous objection is recognized as an independent and adequate state law ground for dismissal. *Garvey v. Duncan,* 485 F.3d 709, 714–15 (2d Cir.2007); *Richardson v. Greene,* 497 F.3d 212, 218–20 (2d Cir.2007).

To avoid a procedural bar, a petitioner must demonstrate either cause for the default and actual prejudice, or that the failure to consider the claims will result in a fundamental miscarriage of justice, i.e., that he is actually innocent of the crime for which he has been convicted. *Coleman,* 501 U.S. at 749–50 (citing *Murray v. Carrier,* 477 U.S. 478, 495–96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)); *Dunham v. Travis,* 313 F.3d 724, 729 (2d Cir.2002). " 'Actual innocence' means factual innocence, not mere legal insufficiency." *Dunham,* 313 F.3d at 730 (quoting *Bousley v. United States,* 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (internal brackets omitted)). Blond has not carried his burden. However, recognizing that Blond is proceeding *pro se* and that his pleadings must be liberally construed, *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam), this Court nonetheless will address the merits of this claim.

In addition, to the extent Blond asserts that the trial court failed to comply with CPL § 270.35, Respondent correctly notes that he raises an issue purely of state law. *See Hameed v. Jones,* 750 F.2d 154, 160 (2d Cir.1984); *Faria v. Perez,* 04–CV–2411, 2012 WL 3800826 (E.D.N.Y. Sept.2, 2012). As such, this claim does not present a federal question cognizable on habeas corpus review. *See Estelle,* 502 U.S. at 67–68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Nevertheless, even if Blond's claim were reviewable in this forum, it still fails. Habeas relief is available for juror misconduct only where a petitioner can demonstrate that he has suffered prejudice as a result. *See Knapp v. Leonardo,* 46 F.3d 170, 176 (2d Cir.1995) (citing *Irvin v. Dowd,* 366 U.S. 717, 724, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)). A trial court is in the best position to assess alleged juror misconduct. *See Wainwright v. Witt,* 469 U.S. 412, 424–26, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *United States v. Parker,* 903 F.2d 91, 101 (2d Cir.1990). Moreover, a trial judge has "wide discretion to decide upon the appropriate course to take, in view of his personal observations of the jurors and parties." *United States v. Aiello,* 771 F.2d 621, 629 (2d Cir.1985); *see also Jones v. Donnelly,* 487 F.Supp.2d 403, 414 (S.D.N.Y.2007).

***14** Here, the court noted that the juror was sleeping only briefly the previous day, and that it asked the clerk to alert her. The court informed the parties that it was constantly watching that juror specifically and that it was prepared to stop proceedings if she was observed sleeping again in court. Defense counsel did not object to retaining that juror, and there is no evidence that the juror's brief period of sleeping adversely affected the jury's deliberations or had an injurious effect on its ultimate conclusions. *United States v. Diaz,* 176 F.3d 52, 78 (2d Cir.1999) (trial court did not abuse its discretion in denying motion to remove sleeping juror where the trial court, "from the moment the sleeping juror allegation was raised, investigated the matter and carefully observed the juror in question throughout the trial," observing that the juror "perhaps had slept for a brief moment" and was otherwise alert and attentive); *see also United States v. Steele,* 390 F. App'x 6, 14 (2d Cir.2010) (trial court did not abuse its discretion in failing to remove sleeping juror where it carefully observed the juror and brought the situation to the attention of the parties, neither party objected to the district court's actions, and the appellate court "infer[red] from the [trial] court's diligence that it continued to monitor the juror"); *United States v. Freitag,* 230 F.3d 1019, 1023 (7th Cir.2000) ("[A] court is not invariably required to remove sleeping jurors, and a court has considerable discretion in deciding how to handle

a sleeping juror.") (internal citations omitted). Blond is therefore not entitled to relief on this claim.

D. *Non-specific and Duplicitous Indictment* (Claim 3)
Blond next argues that counts 1 through 4 of the indictment were non-specific and duplicitous in violation of the right against double jeopardy, the right to a trial by jury, and the right to notice of the charges against him. Specifically, Blond argues that because the indictment uses "on or about" language to identify the dates of the alleged crimes, it suggested "the possibility of overlapping crimes." He further argues that "the grand jury and trial made clear that [counts 1 through 4] were or did encompass such a multiplicity of acts that it was virtually impossible to have determined the particular acts to which the jury could have reached a unanimous verdict on." Blond suggests that the trial court should have *sua sponte* dismissed counts 1 through 4. The Appellate Division dismissed this claim as unpreserved and without merit. This claim is unexhausted, procedurally defaulted, and Blond has failed to assert cause or prejudice to avoid procedural bar. *Coleman,* 501 U.S. at 749–50.

"It is ... well-settled that challenges to the sufficiency of an indictment are generally not cognizable on habeas review." *United States v. Logan,* 845 F.Supp.2d 499, 518 (E.D.N.Y.2012) (citing *Davis,* 42 F. App'x at 490 ("Claims of deficiencies in state grand jury proceedings are not cognizable in a habeas corpus proceeding in federal court.")); *Gray v. Khahaifa,* No. 08 Civ. 4889, 2010 WL 2653340, at *11 (E.D.N.Y. June 24, 2010) ("A challenge to the sufficiency of a state indictment is not cognizable on habeas review ...."); *Humphrey v. Fisher,* No. 07 Civ. 1200, 2010 WL 7417094, at *19 (N.D.N.Y. July 23, 2010) ("It is well-settled that challenges to the sufficiency of an indictment are generally not cognizable on habeas review.").

***15** "The only instance in which a defect in an indictment is cognizable on habeas review is if 'the indictment falls below basic constitutional standards.' " *Logan,* 845 F.Supp.2d at 518 (quoting *Carroll v. Hoke,* 695 F.Supp. 1435, 1438 (E.D.N.Y.1988)). An indictment is deemed constitutionally sufficient if "it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events." *DeYonish v. Keane,* 19 F.3d 107, 108 (2d Cir.1994) (quotations and citations omitted). Thus, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime ." *United States v. Stavroulakis,* 952 F.2d 686, 693 (2d Cir.1992) (quoting *United States v. Tramunti,* 513 F.2d 1087, 1113 (2d Cir.1975)).

Here, counts 1 through 4 tracked the charging statutes and identified the location and approximate dates of the alleged crimes. Blond's claim that the use of "on or about" terms to identify the date of the offenses renders the indictment constitutionally defective is without merit because an indictment may state the date of an alleged crime in approximate terms. *Stavroulakis,* 952 F.2d at 693; *see DeYonish,* 19 F.3d at 109 (petitioner's indictment "satisfied the Constitution's minimum standards since it tracked the language [of the statute charged], and stated the approximate time and place of the alleged crime"). Blond cannot therefore prevail on this claim.

E. *Molineux/Yentimiglia* Evidence (Claim 4)
Blond next argues that "the erroneous ruling and admission of the extensive *Molineux/Yentimiglia* evidence deprive[d] him of his fair trial and substantial rights, because its per se prejudicial effect far outweighed its probative value." Blond further asserts that the "trial court failed its duty to give limit[ing] instructions at the time this evidence was given to minimize prejudice to [him], and this evidence offer by the state limited [his] defense to the charges."

The Appellate Division described the facts of this claim and denied Blond relief as follows:

> Prior to trial, Supreme Court held a *Molineux/Yentimiglia* hearing and determined that the People would be allowed to offer evidence of prior domestic violence and abusive behavior by [Blond] for the purposes of establishing the element of forcible compulsion, providing necessary background information on the nature of the relationship and placing the charged conduct in context. [Blond] concedes that there was a proper nonpropensity purpose for the admission of the evidence, but he argues that the

> probative value of these prior bad acts was outweighed by their prejudicial nature. We cannot agree. Supreme Court balanced the probative value and prejudicial nature of the evidence by limiting it to specific acts of violence that were witnessed by the victim and occurred after she began residing with defendant and his wife. The evidence has substantial probative value and provided necessary background information regarding the victim's fear of [Blond] and resulting unwillingness to tell anyone about the sexual abuse until after he was in police custody as a result of his most recent violent altercation with his wife. As contemporaneous limiting instructions on the use of such evidence were given twice during the trial, as well as in the final jury charge, any error in failing to give the instructions a third time after the wife's testimony—a failure that was not called to the court's attention by counsel—is harmless.

***16** *Blond,* 946 N.Y.S.2d at 665.

The Supreme Court has acknowledged its "traditional reluctance to impose constitutional restraints on ordinary evidentiary rulings by state trial courts." *Crane v. Kentucky,* 476 U.S. 683, 689, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). The Supreme Court has further made clear that federal habeas power does not allow granting relief on the basis of a belief that the state trial court incorrectly interpreted the state evidence code in ruling on the admissibility of evidence. *Estelle,* 502 U.S. at 72 (citing *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977); *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). On direct appeal, the appellate court determined that, in line with New York state case law, the trial court properly allowed evidence of prior domestic violence and abusive behavior by Blond, that its probative value was outweighed by their prejudicial nature, and that appropriate limiting instructions were given. This Court is bound by the state court's interpretation of New York state law. *Bradshaw v. Richey,* 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005). Blond did not raise before that court and does not raise in his Petition before this Court an issue of federal constitutional dimension, and the Supreme Court specifically expressed "no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Estelle,* 502 U.S. at 75 n. 5; *see also 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"). Blond therefore cannot prevail on this claim.

F. Prosecutorial Misconduct (Claim 5)

Blond next argues that the prosecutor committed misconduct by: 1) introducing evidence of his prior bad acts and uncharged crimes; 2) "badger[ing]" witness Jean Blond; and 3) arguing in summation that "she vouched for the credibility of the state's witnesses, mischaracterized Blond's testimony ..., denginated [sic] the defense and defense counsel, and advocated as an unsworn witness by injecting her personal beiefs and extra record comments." The Appellate Division denied Blond relief on this claim on the ground that it was unpreserved and without merit. Blond has failed to assert any cause or prejudice sufficient to overcome procedural bar. *Coleman,* 501 U.S. at 749–50.

***17** In any event, his claim is without merit. "The appropriate standard of review for a claim of prosecutorial misconduct on a writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power." *Floyd v. Meachum,* 907 F.2d 347, 353 (2d Cir.1998) (quoting *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (internal quotation marks omitted)). The petitioner must demonstrate that the alleged misconduct " '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) (quoting *Darden,* 477 U.S. at 181). The court must look at the totality of the circumstances in deciding whether the egregiousness of the prosecutor's alleged misconduct justifies relief. *United States v. Young,* 470 U.S. 1, 11–12, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). In the Second Circuit, this inquiry includes three factors: (1) the severity of the prosecutor's misconduct, (2) any curative measures taken by the court; and (3) the certainty of the conviction without the prosecutor's comments. *See, e.g., United States v. Melendez,* 57 F.3d 238, 241 (2d Cir.1995); *Bentley v. Scully,* 41 F.3d 818, 824 (2d Cir.1994); *Floyd,* 907 F.2d at 355. Standing alone, prosecutorial misconduct is insufficient to overturn a conviction. *Duran v. Miller,* 322 F.Supp.2d 251, 259 (E.D.N.Y.2004).

With respect to his claim that the prosecution improperly introduced evidence of Blond's prior uncharged crimes or bad acts, Blond has not demonstrated that the prosecution strayed from the court's ruling that it could admit the evidence for certain purposes, and as the Appellate Division noted, the court gave proper limiting instructions with respect to the admission of that evidence. Accordingly, he has failed to establish any misconduct whatsoever.

Blond's next claim that the prosecution committed misconduct by improperly badgering a witness is also unsupported by the record. Defense counsel called Jean Blond, Blond's sister, to testify as to acts of violence she had observed between Blond and his wife, Hudson, which the sexual assault victim might have witnessed. A review of the transcripts indicates that the prosecutor's questions were all in response to Jean's testimony or questions regarding her criminal history, including open warrants for arrest. Defense counsel did not object on the grounds of badgering, likely because any such objection would have been meritless. The United States Supreme Court has "recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska,* 415 U.S. 308, 316–17, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Accordingly, subject to the discretion of the trial judge to preclude repetitive and unduly harsh interrogation, a cross-examiner is allowed to impeach a witness by introducing evidence of that witness's prior criminal history. *Id.* at 317. The prosecution's cross-examination of Jean Blond was therefore proper.

***18** Jean was arrested outside the courtroom on an outstanding warrant or warrants after she testified. The court notified counsel for both parties that the courtroom door was not likely completely closed when Jean was arrested, and that the jury might have accordingly "heard the handcuffs being placed upon the witness." Defense counsel suggested that the court issue a limiting instruction, and when trial resumed, the court immediately admonished the jury as follows:

> Ladies and gentlemen, I provide you at this time with further instruction. The last witness who testified, testified and acknowledged —questions were asked regarding active warrants, and I think she may have testified she wasn't aware of same. In any event if you heard or saw anything immediately outside this courtroom while counsel and I were in the deliberation room pertaining to certain legal processes undertaken with regard to that witness, you're to disregard that. You're not to speculate. Understand the fact that someone may or may not have had an active warrant is no evidence of any guilt; it's all part of the legal process.

A jury is presumed to follow a court's instructions, *Weeks v. Angelone,* 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), and there is no evidence that the prosecution, either by act or omission, somehow played a part in Jean's arrest being heard or otherwise witnessed by the jury. Again, Blond has not demonstrated misconduct.

With respect to summation, Blond fails to identify the specific comments he finds objectionable. Blond argues that the prosecution suggested that he was lying, "vouched for the credibility of the state's witnesses," "denginated [sic] the defense and defense counsel," and "advocated as an unsworn witness by injecting her personal beliefs and extra record comments." Blond's claim is not supported by the record in any event. In summation, the prosecutor argued that defense counsel was "grabbing at straws" and that Blond's version of events didn't "make sense" and was "incredible ." However, because Blond testified at trial, the prosecution was permitted

to fairly comment during summation on his credibility as a witness. *Portuondo v. Agard,* 529 U.S. 61, 69, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000); *Perry v. Leeke,* 488 U.S. 272, 282, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) ("[W]hen [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well."). The prosecution did not manipulate or misstate the evidence; rather, the prosecution repeatedly urged the jury to refer back to the evidence in reaching a verdict. *Darden,* 477 U.S. at 169 (1986) (prosecution's improper comments during summation did not deny petitioner of a fair trial where the prosecution did not manipulate or misstate the evidence or implicate other specific rights of the accused). Nor did the prosecution vouch for the credibility of any witness or inject her personal opinion into closing argument. *Cf. Floyd,* 907 F.2d at 354 (2d Cir.1990) (discussing the impropriety of the prosecution's request that the jury pass on her personal integrity and professional ethics before deliberating on the evidence, thereby implying that she personally vouched for a witeness's testimony). Collectively, the prosecutions's comments come nowhere near comments that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Blond is therefore not entitled to relief on this claim.

G. Denial of Right to Present Testimony of Three Social Workers (Claim 6)

***19** Blond next argues that the court improperly denied him his right to offer "testimony of three clinician/ social workers to impeach the credibility of [the victim's] complaint of daily sexual abuse and rape." The Appellate Division denied Blond relief on this claim as follows:

> [Blond] also contends that Supreme Court improperly precluded him from calling three social workers to testify that they had conducted a statement validity analysis test of the victim for use in Family Court, where such testimony is authorized if it tends to support the reliability of a child victim's out-of-court statement of abuse or neglect. [Blond] concedes that such opinion evidence cannot be used in a criminal proceeding by the People during their case-in-chief, but argues that it should be admissible for purposes of impeachment where, as here, such validation testing fails to corroborate the victim's claims. We are not persuaded, however, as there is no corresponding statutory authority for the admission of such evidence in a criminal proceeding. Moreover, [Blond] was otherwise fully able to attack the victim's credibility through cross-examination based on her alleged bias in favor of the wife and her failure to report her accusations earlier.

Blond, 946 N.Y.S.2d at 667.

As already discussed, the Supreme Court has acknowledged its "traditional reluctance to impose constitutional restraints on ordinary evidentiary rulings by state trial courts." *Crane,* 476 U.S. at 689, and has further made clear that federal habeas power does not allow granting relief on the basis of a belief that the state trial court incorrectly interpreted the state evidence code in ruling on the admissibility of evidence, *Estelle,* 502 U.S. at 72 (citations omitted). This Court is bound by the state court's interpretation that New York law permitted the admission of such evidence in family court but not in a criminal proceeding. *Bradshaw,* 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005). Moreover, there is no evidence that Blond was deprived of a fair trial because, as the Appellate Division noted, defense counsel was able to cross-examine the victim and call her credibility into question. *See Washington v. Scriver,* 255 F.3d 45, 56 (2d Cir.2001) ("state evidentiary rules cannot be inflexibly applied in such a way as to violate fundamental fairness"). Blond is therefore not entitled to relief on this claim.

H. Insufficiency of the Evidence (Claim 7)

Blond next argues that the evidence was legally insufficient to convict him of counts 1, 2, 3, 6 and 8.

The Appellate Division denied Blond relief on this claim, concluding as follows:

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We next turn to [Blond's] allegations that the People failed to establish forcible compulsion with respect to the charge of rape in the first degree, that the verdicts were contrary to the physical evidence and that the victim's testimony was incredible as a matter of law. In evaluating the legal sufficiency of the evidence, we view it in a light most favorable to the People and will not disturb a verdict as long as there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury." As relevant here, forcible compulsion includes "a threat, express or implied, which places a person in fear of ... physical injury to ... herself or another person." In determining whether an implied threat existed, the jury could consider the victim's age relative to that of [Blond], the relationship between them and the victim's fear of what [Blond] might have done if she did not comply.

***20** The People's evidence established that the victim had witnessed numerous instances of violence by [Blond] against his wife since she had moved in with the couple in October 2007.

During the early morning hours of May 2, 2008, when the victim was 15 years old, the 29–year–old [Blond] demanded sex and, when she said no, he pulled her pants down, maneuvered her to the floor and held her there while he had intercourse with her. The victim testified that she was afraid to cry out for fear that it would only lead to more physical violence by [Blond]. The victim's testimony regarding a number of sexually abusive encounters with [Blond] during the relatively short time frame in which she resided in his home, her fear of [Blond], his use of physical force to hold her down, as well as the atmosphere of physical violence and intimidation she had witnessed were sufficient to establish the element of forcible compulsion.

A physical examination of the victim performed a few days after the rape revealed recent injuries to her hymen and irritation consistent with the reported sexual activity. The evidence also showed that a pair of the victim's jeans—which had [Blond's] semen on them—were recovered by the police during a search of [Blond's] home. [Blond] points to no inconsistencies or other aspects of the victim's testimony that would render it incredible as a matter of law. In short, our review of the record convinces us that the evidence was legally sufficient to satisfy each element of every crime for which [Blond] was convicted. Furthermore, upon our independent review of the evidence in a neutral light, with due regard to the jury's credibility determinations, we find that the verdicts are not against the weight of the evidence.

Blond, 946 N.Y.S.2d at 666–67.

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.

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; *Ponnapula v. Spitzer,* 297 F.3d 172, 179 (2d Cir.2002) ("When considering the sufficiency of the evidence of a state conviction, a federal court must look to state law to determine the elements of the crime." (citation, internal brackets and quotation marks omitted)). 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, 546 U.S. at 76. "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.

1. *Counts 1, 2, and 3*

***21** Count 1 charged Blond with first-degree rape in violation of New York Penal Law § 130.35(1). A person "is guilty of rape in the first degree when he or she engages in sexual intercourse with another person ... [b]y forcible compulsion." N.Y. PENAL LAW § 130.35(1). "Forcible compulsion" means to compel by either use of physical force or "a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." N.Y. PENAL LAW § 130.00(8). New York Courts have held that "prior and concurrent threats and violence to the victim's family and uncharged sexual assaults and threats against the victim are admissible as proof of the element of forcible compulsion and to explain the victim's failure to reveal the ongoing sexual assaults." *People v. Greene,* 306 A.D.2d 639, 760 N.Y.S.2d 769, 773 (N.Y.App.Div.2003).

Count 2 charged Blond with third-degree rape in violation of New York Penal Law § 130.25(2). A person "is guilty of rape in the third degree when ... [b]eing twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old." N.Y. PENAL LAW § 130.25(2).

Count 3 charged Blond with third-degree criminal sexual act in violation of New York Penal Law § 130.40(2). A person "is guilty of criminal sexual act in the third degree when ... "[b]eing twenty-one years old or more, he or she engages in oral sexual conduct ... with a person less than seventeen years old." N.Y. PENAL LAW § 130.40(2).

The victim testified as to specific instances of violence she had observed by Blond, including an instance where he pushed and repeatedly hit Hudson and disabled the telephones so no one could call the police. She had also observed him hit Hudson's children. The victim also testified that Blond had "smack[ed] [her in] the face," punched her, and verbally abused her. She stated that she occasionally skipped school because she was "afraid of [Hudson's] safety in the house." Blond was sexually abusing the victim "almost every day of the week."

On May 2, 2008, when the victim was 15 years old, Blond started making loud noises in the middle of the night. The victim and Hudson were woken up by the noise and went into the living room to watch television because they could not fall back asleep. Hudson went back to bed around 5 a.m. The victim wanted to go back to bed, but Blond told her that she "shouldn't go to bed, ... that he was horny and ... if [she] gave him some, which [she] knew [ ] meant sex, that he would leave [the victim and Hudson] alone and that he wouldn't continue to bother [them]." The victim said "no," but Blond approached her and partially pulled her pants down. Blond told her to perform oral sex on him, and she did. He started to pull her pants down more and the victim said "no," but then she "figured it was going to happen" and it "would have been forced" so she pulled her pants off the rest of the way herself. Blond put his penis in her vagina while she was standing. Blond then "grabbed [her] down to the ground," "pull [ed][her] legs open" and put his penis in her vagina again. The victim tried to get up, but Blond held her legs down. She did not yell or scream out for her aunt because she was afraid that "violence in the house would have got worse."

***22** At the time of the conduct, the victim was 15, and Blond does not contest that he was over 21 years old. Although he argues that the victim's testimony was not corroborated, in New York a victim's testimony alone can be sufficient, if found credible by a jury, to establish firstdegree rape by forcible compulsion. *People v. Alford,* 287 A.D.2d 884, 731 N.Y.S.2d 563, 565–65 (N.Y.App.Div.2001) ("[C]orroboration is not required to establish rape or other sex offenses under Penal Law article 130 which include forcible compulsion as an element."). Her testimony was also sufficient to establish third-degree rape and third-degree criminal sexual act because her incapacity to consent was a product of her age. *See id.* at 566. Although Blond urges this Court to find the victim's testimony "incredible," "[i]t is beyond cavil that a reviewing court must defer to the trier-of-fact's assessment of witness credibility." *Mobley v. Kirkpatrick,* 778 F.Supp.2d 291, 312 (W.D.N.Y.2011). The victim's testimony, which the jury found credible, was sufficient to support a conviction on first- and third-degree rape as well as criminal sexual act in the third degree. Blond cannot prevail on this claim.

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2. *Count 6*

Count 6 charged Blond with second-degree attempted assault in violation of New York Penal Law §§ 110 & 120.05(2). A person is guilty of second-degree attempted assault where, with intent to cause physical injury to another person, he attempts to cause such injury "by means of a deadly weapon or a dangerous instrument." N .Y. PENAL LAW §§ 110, 120.05(2). Both Hudson and the victim testified that Blond struck Hudson in the head with a brick during an argument. Hudson also testified that her head was sore for days afterwards. A jury could have reasonably found Blond guilty of the second-degree attempted assault of Hudson, and therefore he cannot prevail on this claim.

3. *Count 8*

Count 8 charged Blond with third-degree criminal mischief in violation of New York Penal Law § 145.05. A person "is guilty of criminal mischief in the third degree when, with an intent to damage property of another person, and having no right to do so ..., he ... damages property of another in an amount exceeding two hundred and fifty dollars." N.Y. PENAL LAW § 145.05(2). Hudson testified that after the incident in which Blond struck her in the head with a brick, she went to stay with her sister, Rene Minus. She later went back to the home she shared with Blond to pick up some clothes as well as her vehicle, a Kia Rio which was registered in her name. She returned to Minus's home, looked out the window and observed Blond drive his Ford Taurus into her Kia Rio. Blond then "popped the hood [on the Kia Rio] and proceeded to go into the car and take out the plugs and stuff like that." Lisa Kaese, a Lia Collision Center manager, testified that the "entire right side" of the Kia was damaged and that she appraised the damage at $4,000. Thus, the jury could have reasonably found Blond guilty of third-degree criminal mischief, and he cannot prevail on this claim.

I. Vindictive Sentence (Claim 8)

***23** Blond lastly argues that his "sentence would have been shorter had counsel properly advised Blond of the maximum sentencing exposure he could face after being found guilty at trial ... and if the court did not vindictively sentence [him] for exercising his right to a jury trial." His claim in unexhausted because he failed to raise it in his petition for review to the New York Court of Appeals. In any event, it is without merit.

As an initial matter, as discussed *supra,* although defense counsel did misstate Blond's maximum sentencing exposure with respect to class B felonies, Blond fails to assert how counsel's mistake had any bearing on the court's sentencing decision.

With respect to his claim that the trial court vindictively sentenced him for exercising his right to trial, the Appellate Division rejected this claim as follows:

> With respect to the sentence, [Blond] argues that the disparity between the final pretrial offer of 3½ years in prison and the sentence ultimately imposed reflects an extreme penalty for his exercise of his right to a jury trial. Although the disparity is significant, there is no record evidence that the sentences were retaliatory or vindictively imposed as a penalty for [Blond's] exercise of his right to a jury trial. We must agree with Supreme Court that the crimes are of a serious nature, they were committed against a backdrop of physical violence, they involved a vulnerable teenager who was living [Blond's] household, he received less than the maximum allowable sentence for rape in the first degree and he has refused to take any responsibility for his conduct or exhibit any remorse. Accordingly, we can find no abuse of discretion or extraordinary circumstances that would warrant our modification of the sentence.

Blond, 946 N.Y.S.2d at 668.

A sentence is unconstitutionally vindictive if it imposes greater punishment because the defendant exercised a constitutional right such as the right to a jury trial or the right to appeal. *Wasman v. United States,* 468 U.S. 559, 567–68, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984) (citations omitted); *Bordenkircher v. Hayes,* 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) ("To punish a person

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because he has done what the law plainly allows him to do is a due process violation of the most basic sort."). However, the Supreme Court has likewise noted that a defendant in plea bargaining circumstances will often be "confronted with the certainty or probability that, if he determines to exercise his right to plead innocent and to demand a jury trial, he will receive a higher sentence than would have followed a waiver of those rights." *Chaffin v. Stynchcombe,* 412 U.S. 17, 30–31, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) (citation and internal quotation marks omitted). Thus, the fact that a petitioner receives a greater sentence than one previously offered in plea negotiations does not, by itself, establish vindictive sentencing. *See, e.g., Edwards v. Artus,* 06–CV–5995, 2009 WL 742735 (E.D.N.Y. Mar.20, 2009) ("[I]n the absence of proof of actual vindictiveness, the Supreme Court has upheld as perfectly constitutional the disparity between a sentence negotiated as part of a plea and one imposed after a trial."). In this case, Blond provides no evidence aside from the disparity in the original plea offer and ultimate sentence imposed to suggest that his sentence was vindictive, and he therefore cannot prevail on this claim.

V. CONCLUSION AND ORDER

***24** Blond 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 Writ of Habeas Corpus is **DENIED.**

IT IS FURTHER ORDERED THAT the Court declines to issue a Certificate of Appealability. *See* 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 Second Circuit 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

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

Brian D. HODGES, Petitioner,
v.
Norman BEZIO, Respondent.

No. 9:11–CV–0439 (LEK/DEP).
|
Signed June 19, 2014.

Attorneys and Law Firms

Brian D. Hodges, Comstock, NY, pro se.

Hon. Eric T. Schneiderman, New York State Attorney General, Paul B. Lyons, Esq., Assistant Attorney General, Albany, NY, for Respondent.

ORDER

LAWRENCE E. KAHN, District Judge.

***1** This matter comes before the Court following a Report–Recommendation filed on May 19, 2014, by the Honorable David E. Peebles, U.S. Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3. Dkt. No. 14 ("Report–Recommendation").

Within fourteen days after a party has been served with a copy of a magistrate judge's reportrecommendation, the party "may serve and file specific, written objections to the proposed findings and recommendations." FED. R. CIV. P. 72(b); L.R. 72.1(c). "If no objections are filed ... reviewing courts should review a report and recommendation for clear error." *Edwards v. Fischer,* 414 F.Supp.2d 342, 346–47 (S.D.N.Y.2006); *see also Cephas v. Nash,* 328 F.3d 98, 107 (2d Cir.2003) ("As a rule, a party's failure to object to any purported error or omission in a magistrate judge's report waives further judicial review of the point."); *Farid v. Bouey,* 554 F.Supp.2d 301, 306 (N.D.N.Y.2008).

No objections to the Report–Recommendation were filed in the allotted time period. *See* Docket. After a thorough review of the Report–Recommendation and the record, the Court has determined that the Report–Recommendation is not subject to attack for clear error or manifest injustice.

Accordingly, it is hereby:

ORDERED, that the Report–Recommendation (Dkt. No. 14) is **APPROVED** and **ADOPTED in its entirety;** and it is further

ORDERED, that the Petition (Dkt. No. 1) is **DENIED and DISMISSED in all respects;** and it is further

ORDERED, that, because Petitioner has not made a "substantial showing of the denial of a constitutional right" pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability shall not issue; and it is further

ORDERED, that the Clerk serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

DAVID E. PEEBLES, United States Magistrate Judge.

Pro se petitioner Brian D. Hodges, a New York State prison inmate who was convicted at trial of arson, reckless endangerment, and criminal mischief, has commenced this proceeding, pursuant to 28 U.S.C. § 2254, requesting a writ of habeas corpus. In his petition, Hodges asserts several grounds for relief, including that the jury verdicts lacked the support of sufficient evidence at trial. For the reasons set forth below, I recommend that the petition be denied either because the majority of petitioner's claims are not cognizable on habeas review or they lack merit.

I. *BACKGROUND*

A. *Factual Background*

Petitioner's conviction stems from the termination of a sexual relationship with his sixteen year-old second cousin ("HH") that began in the spring of 2005, when Hodges was twenty-six. After HH ended the relationship in June 2006, her parents sent her to spend time with relatives in Brant Lake, New York. The relatives operated a general

store in that town, and HH resided with them in an apartment above the store during her visit.

***2** On July 31, 2006, petitioner drove to Brant Lake and ignited a fire under a deck at the rear of the general store. The fire eventually spread and consumed the building, including the upstairs apartment and two vehicles parked nearby. The occupants of the building, however, including HH, managed to escape from the building unharmed.

B. *State Court Proceedings*

Petitioner was indicted by a Warren County grand jury on November 14, 2006, and accused of (1) arson in the second degree, in violation of New York Penal Law § 150.15; (2) arson in the fourth degree, in violation of New York Penal Law § 150.15; (3) criminal mischief in the second degree, in violation of New York Penal Law § 145.10; and (4) five counts of reckless endangerment in the first degree, in violation of New York Penal Law § 10.25. A1 0–13.[1] A jury trial was conducted in connection with those charges in Warren County Court beginning on May 7, 2007. *See generally* T1–1295.[2] At the close of the trial, petitioner was convicted of single counts of second-degree arson and second-degree criminal mischief, as well as five counts of reckless endangerment in the first degree.[3] T1286–89. On July 18, 2007, petitioner was sentenced in connection with those convictions to two concurrent terms of incarceration, the lengthiest period being twenty-two years, with an additional five-year period of post-release supervision. S24–25.[4] In addition, the sentencing court issued orders of protections in favor of each of the victims of petitioner's crimes, and directed that Hodges pay restitution for the losses suffered as a result of his actions. S28–29; RII 22–23.[5]

1 Citations with the prefix "A" refer to Exhibit E of the index of state court records submitted with respondent's answer in opposition to the pending petition. Exhibit E constitutes petitioner's appendix on appeal to the New York State Supreme Court, Appellate Division, Third Department.

2 Citations with the prefix "T" refer to the portion of respondent's submission in this matter labeled "TRIAL TRANSCRIPT" that constitutes the transcript from the jury trial. Respondent's submission labeled "TRIAL TRANSCRIPT," filed in opposition to the pending petition, contains the transcript from the jury trial, as well as all court proceedings related to the underlying state criminal proceedings.

3 In a separate criminal prosecution in Saratoga County, defendant pleaded guilty to third-degree rape stemming from the sexual relationship with HH, a minor, and was sentenced to a period of incarceration. A354, A382.

4 Citations with the prefix "S" refer to the portion of respondent's submission in this matter labeled "SENTENCING & RESTITUTION HEARING" that constitutes the transcript from the sentencing hearing. Respondent's submission labeled "SENTENCING & RESTITUTION HEARING," filed in opposition to the pending petition, contains the transcript from the sentencing hearing, as well as the transcript of a two-part restitution hearing.

5 Citations with the prefix "RII" refer to the portion of respondent's submission in this matter labeled "SENTENCING & RESTITUTION HEARING" that constitutes the transcript from the second day of the restitution hearing, which took place on July 25, 2008.

Petitioner appealed his convictions to the New York State Supreme Court, Appellate Division, Third Department ("Third Department"). Resp. Exh. D. In that appeal, petitioner argued that (1) the jury's verdict convicting him of arson in the second degree and criminal mischief in the second degree was unsupported by legally sufficient evidence and against the weight of the evidence; (2) the trial court erred in denying his motions (a) for a continuance in order to permit him to review newly presented *Rosario* evidence, and (b) to set aside the verdict; (3) the portion of the jury verdict relating to arson in the second degree and criminal mischief in the second degree was repugnant to the convictions of reckless endangerment in the first degree; and (4) the court's orders of protection and restitution were unlawful. *Id.* On October 29, 2009, the Third Department issued a decision (1) modifying the judgment of conviction by reducing the amount of restitution awarded, (2) remanding the matter for further consideration regarding the appropriate duration of the orders of protection, and (3) otherwise rejecting the remaining arguments raised by the petitioner and unanimously affirming in his convictions. *People v. Hodges,* 66 A.D.3d 1228, 888 N.Y.S.2d 224 (3d Dep't 2009). Petitioner's application for leave to appeal to the New York Court of Appeals was denied on January 22, 2010. *People v. Hodges,* 13 N.Y.3d 939, 895 N.Y.S.2d

330, 922 N.E.2d 919 (2010). Prior to commencing this proceeding, petitioner did not mount any collateral challenges to his conviction, either in the state courts or otherwise.

II. *PROCEDURAL HISTORY*

***3** Petitioner commenced this proceeding by the filing of a petition, dated April 12, 2011, seeking a writ of habeas corpus. Dkt. No. 1. Appropriately named as the respondent in that petition is Norman Bezio, the superintendent of the correctional facility in which petitioner was confined at the time of filing. *Id.* at 1. In his petition, Hodges advances six grounds for relief, arguing that (1) his arson and criminal mischief convictions are not supported by legally sufficient evidence; (2) his arson and criminal mischief convictions are against the weight of the evidence adduced at trial; (3) the trial court erred in not granting a continuance to permit Hodges' counsel to review material produced by the prosecution relating to one of its testifying experts; (4) petitioner's convictions for arson and criminal mischief are mutually inconsistent with and repugnant to the convictions of reckless endangerment; (5) the trial court's orders of protection are unlawful because their expiration dates exceed the statutory maximum of twenty-five years; and (6) the amount of restitution ordered by the trial court exceeds the lawful maximum. *Id.* at 5–10, 15.

Respondent has answered Hodges' petition, arguing that five of the six grounds asserted are unexhausted and procedurally defaulted based upon petitioner's failure to raise the constitutional claims associated with those grounds before the state courts, and that all of the grounds, including the sixth (exhausted) claim lack merit. *See generally* Dkt. Nos. 8, 9. In addition to submitting an answer and accompanying memorandum of law, respondent's counsel has filed with the court a compilation of the state court records associated with the underlying criminal proceedings in state court. Dkt. No. 10.

This matter is now fully briefed and ripe for determination, and 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* Fed.R.Civ.P. 72(b).

III. *DISCUSSION*

A. *Governing Legal Standard*

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas corpus relief with respect to a claim adjudicated on the merits in state court only if, based upon the record before the state court, the adjudication 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; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Cullen v. Pinholster,* ––– U.S. ––––, 131 S.Ct. 1388, 1398, 1400, 179 L.Ed.2d 557 (2011) (citing 28 U.S.C. § 2254(d)); *Premo v. Moore,* ––– U.S. ––––, 131 S.Ct. 733, 739, 178 L.Ed.2d 649 (2011); *Thibodeau v. Portuondo,* 486 F.3d 61 (2d Cir.2007) (Sotomayor, J.). The AEDPA " 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.' " *Felkner v. Jackson,* ––– U.S. ––––, 131 S.Ct. 1305, 1307, 179 L.Ed.2d 374 (2011) (*per curiam*) (quoting *Renico v. Lett,* 559 U.S. 766, 773, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)); *accord, Cullen,* 131 S.Ct. at 1398. Federal habeas courts must presume that the state court's factual findings are correct "unless applicants rebut this presumption with 'clear and convincing evidence.' " *Schriro v. Landrigan,* 550 U.S. 465, 473–74, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (quoting § 2254(e)(1)); *see also Boyette v. Lefevre,* 246 F.3d 76, 88 (2d Cir.2001). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.' *Schriro,* 550 U.S. at 473 (citing *Williams v. Taylor,* 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

***4** As required by section 2254, on federal habeas review, a court may only consider claims that have been adjudicated on the merits by the state courts. 28 U.S.C. § 2254(d); *Cullen,* 131 S.Ct. at 1398; *Washington v. Schriver,* 255 F.3d 45, 52–55 (2d Cir.2001). The Second Circuit has 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 v. Kuhlman,* 261 F.3d 303, 312 (2d Cir.2001).

B. *Ground One—Sufficiency of the Evidence*

In his first ground for relief, petitioner contends that there was insufficient evidence at trial to support his convictions of second-degree arson and second-degree criminal mischief. Dkt. No. 1 at 2.

In light of the considerable deference owed to a jury's verdict and to a state court's decision on habeas review, a petitioner seeking to undermine a conviction on evidence sufficiency grounds bears a heavy burden. *See Coleman v. Johnson,* ––– U.S. ––––, ––––, 132 S.Ct. 2060, 2062, 182 L.Ed.2d 978, (2012) (*per curiam*) (reiterating that evidence-sufficiency claims "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference"—deference owed to a jury's verdict and deference owed to a state court's decision rejecting a defendant's sufficiency claim on appeal); *Fama v. Comm'r of Corr. Servs.,* 235 F.3d 804, 811 (2d Cir.2000) ("[P]etitioner bears a very heavy burden in convincing a federal *habeas* court to grant a petition on the grounds of insufficiency of the evidence."); *see also United States v. Brewer,* 36 F.3d 266, 268 (2d Cir.1994). A petitioner invoking this ground is entitled to relief 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." *Jackson v. Va.,* 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Cavazos v. Smith,* 565 U.S. 2, 3 (2011) (*per curiam*). In determining whether sufficient evidence existed below to support a conviction, courts are required to "consider the evidence in the light most favorable to the prosecution and make all inferences in its favor." *Fama,* 235 F.3d at 811 (citing *Jackson,* 443 U.S. at 319). Moreover, a federal court may overturn a state court's decision rejecting a petitioner's sufficiency claim "only if [the decision] was objectively unreasonable." *Coleman,* 132 S.Ct. at 2062 (quotation marks omitted).

When examining an evidence-sufficiency claim on habeas review, "[a] federal court must look at state law to determine the elements of the crime." *Quartararo v. Hanslmaier,* 186 F.3d 91, 97 (2d Cir.1999); *accord, Fama,* 235 F.3d at 811. In this instance, petitioner challenges the sufficiency of the evidence at trial supporting his convictions of seconddegree arson and second-degree criminal mischief. Dkt. No. 1 at 2. In New York, arson in the second degree is defined, in pertinent part, as follows:

> ***5** A person is guilty of arson in the second degree when he intentionally damages a building or motor vehicle by starting a fire, and when (a) another person who is not a participant in the crime is present in such building or motor vehicle at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility.

N.Y. Penal Law § 150.15. New York law defines second-degree criminal mischief as follows:

> A person is guilty of criminal mischief in the second degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such a right, he damages property of another person in an amount exceeding one thousand five hundred dollars.

N.Y. Penal Law § 145.10.

The Third Department's conclusion that the evidence adduced at petitioner's trial "was legally sufficient to support both convictions" is not objectively unreasonable. *Hodges,* 66 A.D.3d at 1230, 888 N.Y.S.2d 224. The following evidence was adduced at trial. In the spring of 2005, petitioner began visiting the home where HH, the sixteen year-old daughter of his first cousin, resided. T718, T748–50. Petitioner and HH began a friendship at that time, and by December 2005, the two were spending significant periods of time together at each other's residences. T719–24, T750–53. Their relationship eventually turned sexual. T999, T1027–28.

In June 2006, the relationship changed when HH advised petitioner that she was no longer interested in him. T725, T1030–31. Despite termination of the relationship, petitioner continued to pursue and have contact with HH. *Id.* For example, in late June or early July, HH and her family went on a camping trip, and petitioner appeared at the campsite and attempted to persuade HH to renew a relationship with him. T726, T754. According to HH,

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petitioner became angry after she resisted his advances. T126–27.

On or about July 4, 2006, shortly after the family camping trip, HH and her sister were sent by their parents to live temporarily with their aunt who lived in Brant Lake, New York, and owned a general store at which the girls worked during their stay. T727, T730, T757. Petitioner visited the store several times while HH was there, and on one occasion became involved in an argument with HH's father claiming that HH did not want to stay in Brant Lake. T728–29, T759–61, T1000–01, T1033, T1037–38. During his visits, Hodges always requested HH to return home. T731–33, T1035–36, T1046.

On July 27, 2006, petitioner drove HH and her sister to the race track in Saratoga, New York, for the day, and returned them to Brant Lake sometime in the early evening. T733–34, T1042–43. During that trip, HH informed petitioner that she and her sister had plans to go to see fireworks that evening in Lake George, New York, with a couple of seventeen yearold boys with whom petitioner was unacquainted. T735, 1043. Despite petitioner's urging not to go to Lake George, HH and her sister went anyway. T1043–44. On the way to Lake George, the car in which HH was riding passed defendant's vehicle on the side of the road, at which point the petitioner's vehicle pulled out onto the highway and followed her vehicle. T737–38, 1043–44.

***6** On July 31, 2006, petitioner sent an e-mail to the New York State Department of Agriculture and Markets, utilizing a pseudonym, alleging that the general store owned by HH's aunt operated under unsanitary conditions. T795, T800, T1047–48. Later that evening, Hodges drove his mother's minivan to Brant Lake and parked it on a side street, where it was unlikely to be seen. T1006–07, T1055–56, T1060, T1063–64, T1100. A short time later, the building was destroyed by fire. T1016.

When first questioned about the fire by police, petitioner denied any involvement, and told investigators that he was drinking and having dinner with friends at a bar near his house until 10:30 p.m., after which he went home to bed. T834–35, T1021–22. Months later, when petitioner was again interviewed by police, he was confronted with cellular telephone records placing him in the vicinity of the fire on July 31, 2006. T842. At that time, Hodges admitted having driven to Brant Lake after leaving the bar, igniting a fire with a cigarette, building it up with leaves, and fanning the flames with cardboard. T860–64, T10006–12, T 1023–24, T1061–62, T1069. After attempting, without success, to attract HH's attention by throwing sticks at two different windows, and stepping on the area where he thought the lighted cigarette might still be, petitioner left the vicinity, despite the fact that smoke was still coming from under the deck where he had thrown his cigarette. T1006–1015. Petitioner, a trained volunteer firefighter, claimed that he started the fire in order to make the building's occupants aware of the building's existing fire hazards, and did not intend to damage the building, particularly because the girl he loved was inside. T833, T860–64, T1012–15, T1019, T1026–27, T1092, T1095, T1124. Before leaving the general store, petitioner did not alert anyone of the smoldering coming from underneath the deck. T1015, T1087–88.

At trial, the prosecution offered the testimony of a fire cause and origin expert who ruled out natural and accidental causes, and opined the fire at the general store began under the deck and was incendiary in nature, meaning that a human element was required to ignite it. T568, T623, T626–27, T688–89.

Taking into consideration all of this evidence as a whole, and viewing the evidence in the light most favorable to the prosecution, I find that the jury's guilty verdict with respect to second-degree arson and second-degree criminal mischief was well-supported, and the Third Department's conclusion that there was sufficient evidence at trial to support those verdicts is not objectively unreasonable. Accordingly, I recommend that petitioner's sufficiency-of-the-evidence claim be dismissed.

B. *Ground Two—Weight of the Evidence*

Petitioner's second habeas claim is that the convictions of arson and criminal mischief were against the weight of the evidence adduced at trial. Dkt. No. 1 at 7. This claim, however, is derived from New York Criminal Procedure Law § 470.15(5),[6] *People v. Bleakley,* 69 N.Y.2d 490, 515 N.Y.S.2d 761, 508 N.E.2d 672, and does not implicate constitutional considerations or federal law, and is therefore not cognizable on habeas review. 28 U.S.C. § 2254; *see Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law [.]"); *McClelland v. Kirkpatrick,* 778 F.Supp.2d 316, 335

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(W.D.N.Y.2011) ("Since a 'weight of the evidence claim' is purely a matter of state law, it is not cognizable on habeas review."). Accordingly, I recommend that this claim be dismissed.

6 That section provides that, if "a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence," a New York appellate court may reverse or modify the conviction. N.Y. C.P.L. § 470.15(5).

D. *Ground Three—Continuance*

***7** In the third ground of his petition, Hodges challenges the trial court's denial of his request for a continuance to permit his counsel to prepare for cross-examination of a prosecution witness because the prosecution allegedly failed to timely provide *Rosario* material to the defense. Dkt. No. 1 at 8.

As an initial matter, because this argument is, again, grounded in state law, it is not cognizable on habeas review. *See Moss v. Phillips,* No. 03–CV–1496, 2008 WL 2080553, at *7 (N.D.N.Y. May 15, 2008) (Kahn, J.) ("To the extent [petitioner] claims he is entitled to federal habeas relief due to alleged *Rosario* violations committed by the prosecution, the Court notes that because such violations are grounded in state law, federal district courts have held that a claimed *Rosario* violation cannot form a basis for federal habeas relief." (footnote omitted) (listing cases)). [7]

7 To the extent that petitioner intended to assert his third ground for relief in constitutional or federal law terms, thus rendering it cognizable under section 2254, it is unexhausted and procedurally defaulted, and therefore not subject to review by a federal court. *See Aparicio v. Artuz,* 269 F.3d 78, 90 (2d Cir.2001) (holding that a petitioner must exhaust available state law remedies prior to filing a petition for a writ of habeas corpus with respect to all claims raised in the petition, and, where a petitioner fails to exhaust available remedies and is unable to do so at the time his petition is filed, unless he can prove 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, federal courts are precluded from addressing those claims on habeas review).

In any event, to the extent that this claim may be construed as asserting a due process claim, and assuming the Third Department considered the federal grounds (thus rendering the claim exhausted and reviewable on habeas review), the trial court's denial of petitioner's request for a continuance was neither contrary to nor an unreasonable application of clearly established law. Whether a trial court grants a continuance "is a matter traditionally within [its] discretion." *Drake v. Portuondo,* 321 F.3d 338, 344 (2d Cir.2003) (quotation marks omitted). The Supreme Court has said that "only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the [Constitution]." *Morris v. Slappy,* 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) (quoting *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)); *accord, Drake,* 321 F.3d at 344. "When a denial of a continuance forms the basis for a habeas claim, the petitioner must show not only that the trial court abused its discretion, but also that the denial was so arbitrary and fundamentally unfair that it violated constitutional principles of due process." *Childs v. Herbert,* 146 F.Supp.2d 317, 322 (S.D.N.Y.2001) (listing cases).

In this case, the Third Department affirmed the trial court's denial of petitioner's request for a continuance finding that "there was no *Rosario* violation." *Hodges,* 66 A.D.3d at 1233, 888 N.Y.S.2d 224. Because petitioner has not established that the trial court's denial was contrary to or involved an unreasonable application of clearly established federal law, or that the denial was based on an unreasonable determination of the facts, he is not entitled to relief on this claim, and I recommend that it be dismissed.

E. *Ground Four—Inconsistent Verdict*

Petitioner next contends that portions of the jury's verdict finding him guilty of arson and criminal mischief are inconsistent with the verdict finding him guilty of reckless endangerment. Dkt. No. 1 at 10. Petitioner specifically argues that, because arson and criminal mischief require a *mens rea* of intent and criminal mischief requires a finding of recklessness, the verdicts are repugnant. *Id.* Because it is well settled that an alleged inconsistent jury verdict does not provide a basis for federal habeas relief,

***8** I recommend that this claim be dismissed. *See United States v. Powell,* 469 U.S. 57, 65, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) ("[T]he possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such

convictions at the defendant's behest." (citing *Harris v. Rivera,* 454 U.S. 339, 345, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981)); *Baker v. Kirkpatrick,* 768 F.Supp.2d 493, 511 (W.D.N.Y.2011) ("[I]nconsistent jury verdicts are not a ground for habeas relief." (citing cases)).

F. *Grounds Five and Six—Sentencing*

Petitioner finally contends that his sentence was unduly harsh and excessive. Dkt. No. 1 at 15. He specifically contends that (1) the trial court erred in determining the duration of the orders of protection and (2) the trial court erred in awarding lost income as part of restitution. *Id.*

In his fifth ground for relief, petitioner states that the trial court "improperly placed the orders of protection to 30 years from sentencing date not taking into account the Jail Time served," but that the Third Department "agreed and remanded to the trial court for proper calculation." Dkt. No. 1 at 15. He also contends as follows:

> Upon recalculation trial court had defendant sign the same expiration stating that after the 22 year sentence the 5 years post release supervision is part of the sentence imposed. However that would be a[n] illegal sentence with the punishment more than the statutory maximum of 25 years. Thus the Orders of Protection are still invalid.

Id. Liberally construed, this claim asserts that the duration of the orders of protection issued by the trial court on remand are unlawful. According to the parties' appellate briefs, the original orders of protection were to expire on July 18, 2037. Resp. Exh. D at 45; Resp. Exh. F at 23. Petitioner successfully argued to the Third Department, and respondent conceded, that the expiration date violated New York Criminal Procedure Law § 530.12(5). *Hodges,* 66 A.D.3d at 1233, 888 N.Y.S.2d 224. The Third Department remanded the matter to the trial court "to determine the amount of jail time credit to which defendant is entitled and to specify a duration for the orders of protection eight years after the expiration of his maximum term of imprisonment[.]" *Id.* That court instructed the trial court that "[i]n calculating the expiration of defendant's maximum term ... [,] the five-year period of postrelease supervision should be added to his 22–year minimum term [.]" *Id.* (citation omitted). On remand, the trial court entered new orders of protection that again will expire on July 18, 2037. Those new orders are dated March 17, 2010.

Even assuming that petitioner is correct that the duration of the new orders of protection issued by the trial court on remand remains unlawful under state law, this claim is not cognizable for federal habeas relief. It is well established that an "order of protection issued incident to a criminal proceeding ... is not a part of a sentence imposed." *People v. Nieves,* 2 N.Y.3d 310, 316, 778 N.Y.S.2d 751, 811 N.E.2d 13 (2004). "Thus, even if the orders of protection in this case are defective as [petitioner] argues, those defects do not render [petitioner]'s sentence ... invalid[.]" *Nieves,* 2 N.Y.3d at 316, 778 N.Y.S.2d 751, 811 N.E.2d 13. In this case, while the orders of protection may be invalid under New York state law, [8] they do not violate any of petitioner's constitutional rights. *See McKeon v. Heath,* No. 12–CV–0485, 2013 WL 5818591, at *15 (W.D.N.Y. Oct. 29, 2013) (dismissing the petitioner's claim because it "impermissibly seeks to repackage an error of state statutory law as a federal constitutional matter," and finding that "[t]he orders of protection, although defective under New York state law, do not infringe on any rights guaranteed by the federal constitution"). Accordingly, I recommend that this claim be dismissed.

8 The court expresses no opinion regarding whether the expiration date of the orders of protection issued on remand violate state law.

***9** Turning to petitioner's contention that the state court erred in including lost income in the restitution award because it violates New York statutory law, Dkt. No. 1 at 15, that claim similarly is not cognizable on federal habeas review because it is not grounded in federal law. *See* 28 U.S.C. § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus ... only on the ground that he is in custody in violations of the Constitution or laws or treaties of the United States."). Instead, petitioner maintains that the amount of restitution awarded by the state court violates New York Penal Law § 60.27. Dkt. No. 1 at 15. Because there is no basis for this contention in constitutional or federal law, it does not provide a basis for an award of habeas relief. Accordingly, I recommend that this claim be denied.

Finally, petitioner argues that, "[a]s a first time violent felon[,] the leng [th]y sentence should be reduced in the interest of justice[.]" Dkt. No. 1 at 15. It is well established,

however, that "[n]o federal constitution issue is presented where ... the sentence is within the range prescribed by law." *White v. Keane,* 969 F.3d 1381, 1383 (2d Cir.1992). In this case, petitioner has not established that his sentence was contrary to any law, and, even assuming it was unlawful as originally imposed, any error was remedied by the Third Department on appeal. Thus, this claim is both not cognizable (because his sentence accords with state law) and, in any event, moot (because any error was cured by the state court). For these reasons, I recommend that this claim be dismissed.[9]

9 To the extent that petitioner intended to assert his fifth and sixth grounds for relief in constitutional or federal law terms, thus rendering them cognizable under section 2254, they are unexhausted and procedurally defaulted and therefore not subject to review by a federal court. *Aparicio,* 269 F.3d at 90.

G. *Certificate of Appealability*

To appeal a final order denying a request for habeas relief by a state prisoner, a court must issue the petitioner a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A); *see also* Fed. R.App. P. 22(b)(1) ("[T]he applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)."). A COA may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may demonstrate a "substantial showing" if "the issues are debatable among jurists of reason; ... a court could resolve the issues in a different manner; or ... the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle,* 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (quotation marks and alterations omitted); *accord, Lucidore v. N. Y. State Div. of Parole,* 209 F.3d 107, 112 (2d Cir.2000). In this instance, I conclude that the petitioner has not made a substantial showing of the denial of a constitutional right, and therefore recommend against the issuance of a COA.

IV. *SUMMARY AND RECOMMENDATION*

With the exception of his claim that the arson and criminal mischief convictions entered against him are not supported by legally sufficient evidence, the grounds asserted in the petition in this matter are not cognizable on federal habeas review, and are therefore subject to dismissal. Turning to the merits of petitioner's sufficiency-of-the-evidence claim, I conclude that the Third Department's finding that there exists sufficient record evidence to support the arson and criminal mischief convictions is not objectively unreasonable. Accordingly, it is hereby respectfully

***10** RECOMMENDED that the petition in this matter be DENIED and DISMISSED in all respects; and is further hereby

RECOMMENDED, based upon my finding that Hodges 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 must 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.

Filed May 19, 2014.

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

Cesar LOPEZ, Petitioner,
v.
Robert ERCOLE, Superintendent, Greenhaven Correctional Facility, Respondent.

No. 09 Civ. 1398(PAC)(AJP).
|
Jan. 27, 2014.

OPINION & ORDER

Honorable PAUL A. CROTTY, District Judge.

***1** On December 2, 2002, Petitioner Cesar Lopez was convicted of murder in the second degree after a jury trial, conducted in New York State Supreme Court, Bronx County. He was sentenced to a term of 20 years to life.

Lopez stabbed his common law wife, Nilda Torres, eleven times after she had threatened to kill him. Ms. Torres was an alcoholic, who had been drinking for three days at the time of the incident. An autopsy revealed that she had .37 grams of alcohol in her blood (four times the legal limit), and that she also had cocaine in her blood, brain, and urine.

Lopez retained Manuel Ortega to represent him at trial. At trial, Lopez argued that the killing was justified, forcing the People to prove beyond a reasonable doubt that the killing was not in self defense. On appeal, Lopez's new lawyer argued that Lopez was denied the effective assistance of counsel for two reasons: (1) Ortega failed to adequately defend Lopez because he did not use the defense of extreme emotional disturbance ("EED")[1] at the time he murdered his common law wife; and (2) Ortega failed to object to the Judge's charge on the justification defense.

1 New York Penal Law § 125.25(1)(a) provides for a partial affirmative defense to a charge of second degree murder when the "defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Since this is an affirmative defense, defendant bears the burden of convincing the jury by a preponderance of evidence that (1) the defendant actually acted under the influence of EED; and (2) the explanation or excuse for this EED was reasonable. *People v. Roche,* 98 N.Y.2d 70, 75 (2002). When the defense is successful in proving the EED defense, the result is not an acquittal, but instead a conviction for manslaughter. This is different from the defense of justification (self defense) where the prosecutor bears the burden of proof beyond a reasonable doubt that the killing was not in self defense. If the defense is successful on this theory, the result is an acquittal-not a manslaughter conviction.

The Appellate Division rejected the arguments and affirmed the conviction. After collateral proceedings pursuant to CPL § 440, Lopez commenced this habeas corpus proceeding. On February 25, 2009, this Court referred the § 2254[2] Petition to Magistrate Judge Andrew J. Peck. He conducted a hearing, and on April 21, 2010, Magistrate Judge Peck issued his Report and Recommendation ("R & R"). He found that Lopez was denied the effective assistance of counsel in violation of the Sixth Amendment right to counsel by Ortega's failure to raise the affirmative defense of EED. Accordingly, he recommended that the Court grant the Petition and order the State to retry Lopez or resentence him for manslaughter. (R & R 76). The apparent basis for the direction to resentence Lopez for manslaughter is the assumption that had the affirmative defense of EED been pursued, it would have been successful, resulting in a manslaughter conviction. Magistrate Judge Peck recommended that the Court deny Lopez's second claim of ineffective assistance of counsel concerning the State Court judge's charge on justification. *Id.* at 75. The People filed objections to the R & R on June 22, 2010. Lopez filed a response on July 23, 2010, and the People filed a reply on August 5, 2010. The Court has reviewed the R & R and the parties' submissions. For the reasons that follow, the Court denies habeas relief based on ineffective assistance of counsel.

2 28 U.S.C. § 2254(a) provides that "the Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in 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."

I. *FACTS*[3]

3 The facts are taken from the R & R, unless otherwise noted. Transcript citations have been omitted.

On February 15, 2002, at approximately 10:25 p.m., Lopez killed his long-time common law wife, Nilda Torres ("Torres") in their Bronx apartment by stabbing her eleven times. Thereafter, Lopez went to his neighbor's apartment, and asked them to call the police because his phone was broken. Lopez returned to his apartment, but left his door open so the police could enter peacefully. Lopez received his *Miranda* warnings; waived them; and when asked "What happened tonight?" confessed to the police. Later the same evening Lopez confessed again a videotaped interview with the Bronx District Attorney. On March 8, 2002, a Bronx grand jury indicted Lopez on two counts of second degree murder (intentional murder and depraved indifference murder).

A. Trial in New York Supreme Court, Bronx County

1. The Prosecution's Case

***2** At trial, the prosecutor's case consisted primarily of Lopez's statements and admissions, as well as a report from the police and the Medical Examiner. The evidence established that on February 15, 2002, at 10:30 p.m., police arrived at Lopez's apartment on Hoe Avenue in the Bronx. Police found the door open and, upon entering, saw Lopez standing in front of Torres, who was dead on the couch, with multiple stab wounds. The officers observed a bloody knife on the kitchen floor. When directed to step outside the apartment, Lopez told the officers that he "could not take it anymore." At approximately 10:45 p.m., he was arrested and brought to the 41st Precinct for questioning.

At the precinct, Lopez waived his *Miranda* rights. When the investigating detectives asked "what happened tonight?" Lopez responded:

> My wife, Nilda Torres, started drinking a lot since 1999—vodka. Tonight she started accusing me of having an affair with a woman on the second floor and [,] as usual, started to abuse me physically and verbally.
>
> This started at 6 p.m. tonight. She is mentally sick and when she drinks. She gets much worse. Tonight I was in bed watching TV and she came into the bedroom holding a knife in her right hand.
>
> She says you keep fucking with that woman, I will kill you. I told her to try ... and kill me when I am asleep or I will take that knife and stab you in the belly.
>
> She then came at me with [the] knife and I was able to take the knife away and stab her six times. I then go to my next door neighbor and tell her I stabbed my wife [and] call the police. I put a ten inch knife with duct tape on [the] handle on the kitchen sink. This is the knife I used to stab Nilda.

At 4:10 a.m., an Assistant District Attorney ("ADA") questioned Lopez on videotape, which was played for the jury at trial. Lopez stated that he was sixty-six years old and worked as the superintendent of the building where he and Torres had lived for four years. They had lived together for a total of sixteen years and, over the past few years, Torres's drinking problem had worsened. Lopez said that Torres once told him that she did not care if she dropped dead from drinking the next day, to which he responded that he wished she would drop dead that day. Lopez also told the ADA that Torres had stabbed him on several occasions and revealed stab wounds on his arm, hand, stomach, and torso. At the time, there was a criminal case pending against Torres for allegedly stabbing Lopez in the hand. Lopez stated that Torres was "mentally disturbed" and that he had tried to sleep in a separate room from her, which he claims she would not allow. He was unable to fall asleep in the same bedroom with her for fear that she would attack him. He stated, however, that he was capable of defending himself unless she stabbed him in the back, and that he was not afraid Torres would kill him. He further commented that he was "an idiot" and should "have walked away from [Torres] a long time ago."

***3** Lopez told the ADA on the videotape that, on February 15, 2002 at approximately 6:00 p.m., he and Torres began fighting when she accused him of having an affair with a woman in their building. She had been making this accusation since 1999, and he told her to leave him alone because he did not want any more problems. She continued to yell at him, until around 10:00 p.m., when she entered the bedroom with a 10 inch kitchen

knife. Lopez told Torres, "you better go back to the living room because if you attempt anything with that knife, and you don't kill me, I'm going to take the knife away from you and I am going to kill you because I'm fed up with it because you have been abusing ... me like that." Torres lunged at Lopez, who sustained a wound as he deflected the knife with the palm of his hand. He stated that she made him "so angry when she did that" that he slapped her in the face, took the knife away from her, and told her to go to the living room and leave him alone. At this point, Lopez stated, Torres was "so drunk, she wouldn't even walk."

According to Lopez's videotaped statement, Torres went to the living room, where she continued to yell at Lopez. He stated that she made him "so angry" that he "couldn't take it anymore," went into the living room, and stabbed her five or six times. He said he was "tired of being abused," "just can't take it no more," and was fed up with the law because a "woman can kill a man and she get[s] away with murder" but if "a man touch[es] a woman, he's in trouble." Lopez concluded as follows:

> What I did, I did it, and that's it.... I got to face the fact that I did it, and if I'm guilty, I'm guilty.... I've been very frank.... I've been very helpful, I think, you know, by telling you the truth, you know.... I'm not saying I don't know why I did it.... I did it because I'm fed up with it. I can't take it no more. You know, you push me today, you push me tomorrow, and you push me the following day, be careful because sooner or later, I'm going to get angry and if I get angry, you're going to be in trouble, you see.... That's the person I am. That—that's it. That's the story of my life.

Dr. Margaret Prial of the Office of the Chief Medical Examiner performed Torres's autopsy. Torres suffered eleven stab wounds, including wounds to her head, face, neck, torso, and left arm, ranging from one-quarter of an inch to eight inches in depth. The fatal wounds were the "stab wounds of torso with penetration of heart and perforation of duodenum and mesentery." Torres also had bruises on her scalp and left arm. Dr. Prial testified that the wound on her left arm was consistent with an effort at self-defense. The toxicology report indicated that Torres, who was approximately 5#9# tall and 180 pounds, had .37 grams of alcohol in her blood and urine, as well as cocaine in her blood, brain, and urine.

At the close of the People's case, Lopez moved to dismiss on the ground that the prosecution had not "established a *prima facie* case." Justice Newman denied the motion.

2. Lopez's Trial Testimony

***4** Lopez took the stand in his defense and testified that he felt threatened by Torres' behavior. He elaborated on earlier incidents with Torres involving threats and attacks. On November 21, 2001, Torres attacked Lopez with a knife and cut his hand. After her arrest on his complaint, a protective order issued against her, barring her from being near Lopez if she "committed any disturbances." Although Lopez initially told Torres's lawyer that he did not want her to live with him anymore, he allowed her to stay when she returned shortly thereafter. Following her return, she continued to threaten and attack Lopez (including an incident a week before the fatal night), causing Lopez to call the police "many times" to report violations of the protective order, but not on the night of the killing because his phone was out of order.

On February 15, 2002, Torres was in the midst of a three-day drinking binge. When Torres drank, she became belligerent; and on this occasion she threatened him, saying that Lopez was "not going to live past today because [he was] fucking with that whore from the second floor."[4] As a result, Lopez was only able to sleep for a few hours each of the three previous nights. Lopez went to work at 9:00 a.m. the day of the killing and picked up his pay on the way home. Around 3:30 p.m., he laid down in the bedroom while Torres continued drinking. While he was laying down, Torres began "fighting alone," threatening that she would kill Lopez and that "[t]onight [was] going to be [his] night." At approximately 9:30 p.m., she entered Lopez's bedroom with a knife in her hand, telling him, "[w]ake up son of a bitch, I'm going to kill you." He complied with her direction to stand and responded "Nilda, please, do not start with your nonsense." Torres lunged at Lopez with the knife, saying she was going to kill him, and stabbed his right hand five times. He hit her in the face and took the knife away from her.

4 Torres had often accused Lopez of having an affair with a woman in their building, an allegation Lopez repeatedly denied.

Lopez then went into the living room, holding the knife, and Torres followed. He sat on the sofa and told her to stop fighting with him, telling her "Nilda, please do not continue with this nonsense," and that he "didn't want any more problems from the ones [they] already had." Lopez also reminded her about plans to celebrate Valentine's Day. Torres responded: "go celebrate with the whore from the second floor because from tonight on you're not going to live because I'm going to kill you." When he stood up, Torres told him, "[y]ou're a sucker, you don't have any strength, not even to kill a fly." At that point, Lopez "lost [his] mind" [5] and stabbed her. He only remembered stabbing her six times. At the time, his "head was not in its place. It was not" him, and he "did not want to kill her." Lopez also testified that, unlike previous occasions when Torres threatened him, this time he could not convince her to drop the knife. Lopez thought that "definitely that on this evening she was going to kill" him. He believed that "if [he] did not kill her on this day she was going to kill" him. Lopez testified that unlike the previous occasions when Torres had threatened him, this night was different because "other times [when] she had threatened [him] with a knife in [her] hand, [he] would convince her, by speaking to her, to drop the knife to the floor, that [he] did not want to hurt her." Lopez testified that on this occasion, she would not relinquish the knife, and he thought that [d]efinitely [ ] on this evening she was going to kill [him.]" Lopez testified that he believed that "if [he] did not kill her on this day she was going to kill" him.

5 On cross-examination, Lopez stated that he "lost [his] patience."

***5** After stabbing Torres, Lopez entered the kitchen and dropped the knife. He went next door to his neighbor's apartment and told her to call the police because "[he has] wounded Nilda, and [does] not know if she's dead." He returned to his apartment to wait for the police, leaving the door open so they could enter safely. He knew that "when it has to do with these type of cases, the police come to knock on the door with their pistols in their hands. And the way [he] had [his] head at the moment, if that would have happened, it would have been another tragedy."

Lopez also testified that his chronic asthma causes "mental confusion," and that, when he has "bad moments," his high blood pressure makes breathing difficult. When he was placed in the police car, Lopez "wasn't feeling well [and his] head was bad because it had been two days, three days, that [he] hadn't been able to sleep." At the precinct, he did not have his glasses or asthma inhaler. He was feeling "very bad." His "head was not in the right place" and he "just wanted to leave there as soon as possible." As a result, he responded affirmatively to all of the officers' questions and was unable to read the statement before signing it.

Lopez explained that during the videotaped confession, his "mind was not in the right place," he was half-asleep, and he said "the first thing that came to mind.... [He] said what happened that night but not in the proper manner that [he] was supposed to." He stated that he was not the same person as in the videotape because that man was "pissed off" at Torres for fighting with him: "I'm not that kind of person. The person that was giving those statements there was a nut. It was not me." Eight months later, at the trial in October, his mind was clear and the events leading to the murder had been "playing and playing" in his mind while in jail awaiting trial. He concluded that "the reason why [he] killed [his] wife was because at the moment that she started lunging at [him] with the knife [he] lost it."

Lopez did not contend that he was experiencing extreme emotional disturbance at the time of the killing. He offered no evidence in support of the affirmative defense of extreme emotional disturbance. At the end of the defense's case, trial counsel renewed his motion to dismiss, and Justice Newman denied the motion.

3. Summations

Lopez's lawyer, Ortega, argued that Lopez killed Torres in self-defense, out of fear that she was going to kill him. Torres's death was justified because Lopez had to do something before she killed him; he was in legitimate fear for his safety. Ortega argued that Lopez was in shock, upset, sleep-deprived, and having trouble breathing when he made his written and videotaped confessions, causing him to give incomplete or inaccurate answers to the leading questions. Now that his mind was clear, Lopez testified truthfully that he defended himself in response to the reasonable fear that Torres was going to kill him.

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***6** The People argued Lopez simply lost his patience and murdered Torres. According to the prosecutor, the number and depth of the stab wounds evidenced Lopez's intent to kill. Lopez's videotaped confession showed him to be fully awake, competent, and breathing freely. The only disparities between Lopez's trial testimony and his confession were whether Lopez thought Torres could kill him and whether she followed him, or vice versa, from the bedroom into the living room. The People urged that both details were fabricated to bolster the claim of self-defense. Lopez was the aggressor when he went into the living room and stabbed Torres eleven times, and considering that Torres was completely drunk and had already been disarmed, she could not have posed an imminent danger to Lopez when he killed her.

4. Charge Conference and Jury Charge

At the charging conference, Ortega asked the court to include second degree manslaughter as a lesser included offense of the intentional and depraved indifference murder counts. The Court denied the request, but included a charge on first degree manslaughter, as a lesser included offense to the charge of intentional murder. The Court granted defense counsel's request to give a justification charge, ruling that it would instruct that "each stab wound has to be justified." Lopez's counsel did not object to this language nor did he request a charge on the affirmative defense of EED.

On October 30, 2002, the Court submitted three counts to the jury: second degree murder (intentional and depraved indifference) and first degree manslaughter. With respect to justification, the Court charged the jury as follows:

> The People must establish beyond a reasonable doubt that ... in the encounter in the living room, the defendant was the initial aggressor, that is, the first person to use offensive deadly physical force.... If you find that the defendant was the first person to use deadly physical force, then you do not consider self-defense and ignore the rest of my charge on justification.
>
> ...
>
> The first question you must determine in deciding whether the defendant was legally justified in using deadly physical force in the defense of his person, is whether the defendant reasonably believed that Ms. Torres was using, or was about to use[,] deadly physical force against him.
>
> ...
>
> The second question you must consider in evaluating whether the defendant was justified in using deadly physical force is whether he reasonably believed that his use of deadly physical force was necessary to prevent the attack which he reasonably perceived.
>
> ...
>
> [A]s you apply this justification evaluation, you have to apply it to every single stab wound that the defendant inflicted because a defendant must have to be justified in each and every stab wound separately.
>
> ...
>
> If at some point ... the defendant continued to use deadly force at a time when it was no longer reasonable to believe that the use of deadly physical force was necessary to defend himself, then you must conclude that at that point he was no longer acting in selfdefense.

***7** The court also instructed the jury that it could consider the couple's violent history in determining whether Lopez believed danger was imminent. Defense counsel's only objection to the jury charge was Judge Newman's decision not to submit second degree manslaughter as a lesser included offense.

5. Verdict and Sentence

On October 30, 2002, the jury convicted Lopez of second degree murder (intentional). On December 2, 2002, the Court sentenced Lopez to twenty years to life imprisonment.

B. Appeal to Appellate Division, First Department

On appeal, the Legal Aid Society represented Lopez. Appellate counsel argued that (1) trial counsel was ineffective for failing to pursue an EED defense or object to the "grossly unfair and incorrect justification charge"; and (2) the sentence of twenty years to life was excessive. On January 9, 2007, the First Department unanimously affirmed the conviction. *People v. Lopez,* 36 A.D.3d 431 (1st Dep't 2007). The court held that whether Defendant's claim that his counsel provided ineffective assistance by failing to raise an extreme emotional disturbance defense

and request a jury instruction thereon (See Penal Law 125.25[1][a]) is

> unreviewable on direct appeal because it involves matters outside the record concerning strategic choices, which counsel has had no opportunity to explain (citations omitted). On the existing record, to the extent it permits review, we find that defendants received effective assistance under the state and federal standards. *People v. Benevento,* 91 N.Y.2d 708, 713–4 (1998). *See also Strickland v. Washington,* 466 U.S. 668 (1984).
>
> Defendants' version of events more closely supported a justification defense, which counsel vigorously pursued [6], than the defense of extreme emotional disturbance. *See People v. Cutting,* 210 A.D.2d 791 (1984) lv. Denied 85 N.Y.2d 971 (1985). Moreover, as extreme emotional disturbance defense, upon which a defendant bears the burden of proof would have been weak at best under the facts presented, and there does not appear to have been a reasonable view of the evidence that would have obligated the Court to instruct the jury on that defense. *See People v. Walker,* 64 N.Y.2d 741 (1984). Counsel could have reasonably concluded that an extreme emotional disturbance defense would have confused the jury and detracted from the justification defense. Counsel should also have reasonably concluded that extreme emotional disturbance, a mitigating defense, would have reduced defendant's chance for a complete acquittal. In any event, were we to find that counsel should have employed this defense, we would find that his failure to do so did not cause any prejudice to defendant. *People v. Caban,* 5 N.Y.3d 143, 155–156 (2005).

6 Ortega gave opening and closing statements, thoroughly cross-examined the prosecution's witnesses, objected to three items of evidence, moved for an order of dismissal at the close of the prosecution's case, and successfully convinced Justice Newman to charge justification, as to which the Government had the burden of proof; and to include a charge on the lesser included offense of manslaughter in the first degree.

The First Department also rejected Lopez's argument as to the justification instruction on the grounds that the failure to provide a broader instruction regarding who was the initial aggressor was harmless error, and that the remainder of the charge was legally accurate. Finally, the court found no basis for reducing the sentence. In sum, the Appellate Division held that Lopez had received effective assistance of counsel under state and federal standards with respect to the two arguments raised on appeal: failure to raise the defense of extreme emotional disturbance; and failure to object to the jury charge on justification.

***8** On April 10, 2007, the New York Court of Appeals denied Lopez's leave to appeal. *People v. Lopez,* 8 N.Y.3d 947 (N.Y.2007).

C. Section 440.10 Motion to Vacate Before New York Supreme Court, Bronx County

On June 27, 2008, Lopez filed a N.Y. CPL § 440.10 [7] petition to vacate the judgment of conviction.

7 CPL § 440.10 provides the statutory framework for collateral attacks on judgments of conviction.

1. Lopez's Argument in the 440.10 Proceeding

Lopez's counsel renewed the arguments made on appeal that trial counsel was ineffective for failure (i) to pursue the affirmative defense of EED; and (ii) to object to the court's unbalanced and unfair jury instructions on justification. Lopez's § 440 counsel said he tried to get an explanation from trial counsel, concerning his failure to raise the affirmative defense of EED; but he did not respond. § 440 counsel said that appellate counsel, Jeffrey Richman, had spoken with trial counsel in 2006. According to Richman, trial counsel reportedly said that he did not pursue the affirmative defense of EED because Lopez “was a ‘proud Hispanic man’ and he ‘couldn't go that route’ without Mr. Lopez's help and the aid of a psychiatrist or psychologist.”

Lopez's affidavit claimed that trial counsel told him that their defense would be self defense, and that they would win at trial. Trial counsel never discussed the prospect of having Lopez evaluated by a psychiatrist or psychologist. Lopez asserted that he was not in a good mental state at trial, nevertheless, he realized that trial counsel was failing to put forth effective arguments on his behalf. Finally, Lopez offered a new argument: had he been offered a chance to plead guilty to manslaughter for a lesser sentence, he would have taken that opportunity.

2. The Prosecution's Argument in the 440.10 Proceeding

ADA Wang submitted an affidavit setting forth her conversation with trial counsel. According to Wang, trial counsel believed that the relevant events "more readily comported with a justification defense than the defense of extreme emotional disturbance." Trial counsel is also quoted as discussing both the justification and extreme emotional disturbance defenses with Lopez, resulting in Lopez's "agreement to pursue the justification defense." With respect to Lopez's willingness to enter a manslaughter plea, the District Attorney said that trial counsel sought such a plea, but the prosecutor refused. Trial counsel denied ever telling Lopez's appellate counsel that he rejected the extreme emotional disturbance defense in part because Lopez was a "proud Hispanic man." ADA Wang testified that trial counsel was aware that testimony from a psychiatrist or psychologist was not necessary to argue extreme emotional disturbance.

In addition to this factual submission, the Assistant District Attorney argued that Lopez's ineffective assistance of counsel claim was procedurally barred under C.P.L. § 440.10(2)(a) [8] because it was already decided on the merits on direct appeal, and in any case, the claims were unsubstantiated. [9]

8 CPL § 440.10(2)(a) provides that "the court must deny a motion to vacate a judgment when ... [t]he ground or issue raised upon the motion *was previously determined on the merits upon an appeal from the judgment,* unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue." (emphasis added).

9 The State alleged that the § 440.10 motion was unsubstantiated because Lopez failed to obtain an affidavit from trial counsel regarding why he failed to raise an EED defense. The Defense claimed that they had attempted to procure an affidavit, but trial counsel had not responded to their inquiry. The State also noted that trial counsel provided Lopez a vigorous defense: Mr. Ortega gave opening and closing statements, thoroughly cross-examined all the prosecution's witnesses, objected to three items of evidence, moved for an order of dismissal at the close of the prosecution case, and successfully convinced Justice Newman to charge the defense of justification and the lesser included offense of first degree manslaughter.

3. Decision on the § 440 Motion

***9** Judge Newman rejected Lopez's § 440 motion, holding that the claim of ineffective assistance of counsel issue had been "determined on the merits" by the Appellate Division. Accordingly, Lopez was precluded from raising the same issue anew on his 440.10 motion. Judge Newman determined that since the Appellate Division found that "[o]n the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards," Lopez's claim had been considered on the merits.

Even if the Appellate Division's decision on the affirmative defense of extreme emotional disturbance did not constitute a determination on the merits because that issue involved matters dehors the record, "Lopez's motion is summarily denied pursuant to C.P.L. § 440.30(4)(b) because he did not satisfy his burden of proving the 'absence of strategic or other legitimate explanations for counsel's alleged shortcomings .... through facts which existed or occurred outside the record.' " Judge Newman noted that, as was the case in the Appellate Division, the court's review of Lopez's 440.10 motion was limited to the facts on the record. Given that Lopez failed to include "sworn allegations substantiating or tending to substantiate all the essential facts [for example, including an affidavit by trial counsel attesting to his alleged ignorance of the availability of the EED defense without psychiatric testimony]" the 440.10 motion must be denied. C.P.L. § 440.30(4)(b).

4. Magistrate Judge Peck's Recommendation

Magistrate Judge Peck recognized that the denial of a § 440 motion on procedural grounds is normally an adequate and independent state ground. [10] The First Department held that the ineffective assistance claim was "unreviewable on direct appeal because it involves matters outside the record." (R & R 37). Magistrate Judge Peck reviewed the Second Circuit cases regarding whether denial of a motion pursuant to C.P.L. § 440.30(4)(b) is an "independent and adequate" state procedural bar to habeas review. [11] He found that, in this case, the denial of a motion pursuant to C.P.L. § 440.30(4)(b) constitutes a decision on the merits. *Id.* at 42–43. "Specifically, the Court agrees with the reasoning of Judge Gleeson's decision in *Lou v. Matello,* No. 98–cv–5542, 2001 WL 1152817 43 at *9 n. 9, that because C.P.L. § 440.30 refers

to the procedures for deciding C.P.L. § 440 motions, and C.P.L. § 440.30(4) specifically states that upon considering the merits of the motion, the court may deny it without conducting a hearing if certain conditions exist, that is a merits based decision, not a procedural bar.

10 Procedural default is a "judicially created doctrine that bars federal claims that were not raised in state court as required by state law. In order for procedural default to apply, the state court's rulings must be based on an adequate and independent state law ground rather than on federal law. Federal courts presume the absence of an independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Presiding Over a Capital Case,* Ch. 10, "Federal Habeas Corpus, Prof. Penny J. White § 10.15 (p. 303–) (citing *Harris v. Reed,* 489 U.S. 255, 266 (1989).

11 For cases that find that denial of a motion pursuant to C.P.L. § 440.30(4)(b) is an "independent and adequate" state procedural bar to habeas review, *see e.g, Williams v. McGinnis,* No. 04–cv–1005, 2006 WL 1317041 at* 10 (E.D.N.Y. May 15, 2006) (state court relied on a procedural default rule in denying the petitioner's motion to vacate based on § 440.30(4)(b)); *Marsh v. Ricks,* 02–cv–3449, 2003 WL 145564 at *6–7 & n. 7 (S.D.N.Y. Jan. 17, 2003) ("[B]ecause the denial of a motion to vacate a conviction pursuant to [C.P.L.] § 440.30(4) constitutes reliance on an independent and adequate state law ground, our review of petitioner's claim is barred by this procedural default absent a showing of a valid excuse.") (citing *Roberts v. Scully,* 875 F.Supp. 182, 193 n. 7 (S.D.N.Y.), aff'd, 71 F.3d 406 (2d Cir.1995)); *Ahmed v. Portuondo,* No. 99–cv–5093, 2002 WL 1765584 at *1–2 (E.D .N.Y. July 26, 2002) (Where "trial court, on the CPL § 440 motion, ... relied on the adequate and independent state ground that petitioner failed to support [his] claim with any evidence or sworn affidavits beyond his own," citing C.P.L. § 440.30(4)(d), petitioner's habeas claim "is subject to a procedural bar. For cases that find that denial of a motion pursuant to C.P.L. § 440.30(4)(d) is a decision on the merits and does not constitute a procedural bar to a federal habeas claim, *see Skinner v. Duncan,* 01–cv–6656, 2003 WL 21386032 at *28 (S.D.N.Y. June 17, 2001) (Peck, M.J.) report & rec. adopted, 2005 WL 1633730 (S.D.N.Y. July 11, 2003) (denial of a motion pursuant to C.P.L § 440.30(4) (d) does not constitute a procedural bar to a federal habeas claim); *Garcia v. Portundo,* 104 Fed. Appx. 776, 779 (2d Cir.2004) ("Even aside from the fact that [C.P.L. § 440.30(4)] opens with an explicit reference to 'considering the merits of the motion,' subsection (c) implicitly requires a balancing of the evidence presented by the parties ...").

5. For the Purpose of Lopez's § 440.10 Motion, the Appellate Division's Decision of January 9, 2007 Determined Lopez's Ineffective Assistance Claim on the Merits

Justice Newman held that, for the purpose of Lopez's § 440.10 motion, the Appellate Division determined Lopez's ineffective assistance claim on the merits. The Appellate Division held that the ineffective assistance claim was barred as "unreviewable on direct appeal because it involves matters outside the record"; but continued "on the existing record, to the extent that it permits review, we find that defendant received effective assistance under state and federal standards ... [I]n any event, were we to find that counsel should have employed this defense, we would find that his failure to do so did not cause any prejudice to defendant." *People v. Lopez,* 36 A.D.3d at 432. (See full text at pg 13, *supra.*).

***10** These holdings are a determination of Lopez's ineffective assistance of counsel claim on the merits. *See People v. Alexander,* 6 Misc.3d 1026(A) (N.Y.Sup.Ct.2005) citing *Jones v.. Miller,* No. 03–cv–6993SHSGWG, 2004 WL 1416589 at *9 (S.D.NY) (appellate court's decision addressing defendant-appellant's claim in an "alternative holding" constituted a determination on the merits).

The Court finds that Judge Newman's denial of Lopez's motion to vacate was a determination on the merits. As such, the AEDPA standard of review applies.

D. Habeas Corpus and Federal Hearing

Magistrate Judge Peck directed Mr. Ortega, Lopez's trial counsel, to submit an affidavit explaining why he did not pursue the affirmative defense of extreme emotional disturbance. Mr. Ortega complied. The Magistrate Judge also received affidavits from Lopez's appellate counsel and Lopez's sister. Based on the affidavits, Magistrate Judge Peck conducted a hearing. Mr. Ortega testified, as did Dr. Sanford Drob, an expert in forensic psychology. Dr. Drob could not determine whether Lopez suffered from extreme emotional disturbance at the time of the killing;

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but, nonetheless, he would have recommended pursuing the defense, had he been consulted in 2002.

Magistrate Judge Peck determined that Lopez had not received effective assistance of counsel because Mr. Ortega failed to pursue the affirmative defense of EED, and that the New York courts had unreasonably applied *Strickland v. Washington* in determining that the failure to raise this affirmative defense did not constitute ineffective assistance of counsel. The Magistrate Judge concluded that Mr. Ortega's choice of a justification defense was a poor strategic option which highlighted his ineffectiveness in not pursuing EED as an affirmative defense. But Magistrate Judge Peck found that trial counsel was not ineffective for failure to object to the justification charge. While the charge highlighted that there was no real defense, the charge was correct as a matter of law.

Magistrate Judge Peck recommended granting the writ of habeas corpus and that Lopez either be retried or resentenced for manslaughter (the crime for which he would have been convicted had he established by a preponderance of the evidence that he was experiencing EED when he killed his common law wife by stabbing her eleven times).

If Lopez had successfully established by a preponderance of the evidence the affirmative defense of extreme emotional disturbance, he would be guilty of manslaughter in the first degree, a Class B felony. New York Penal Law § 125.20(2). The sentencing range for a Class B felony is 9 years to 25 years. New York Penal Law § 70.

II. *§ 2254, AS MODIFIED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("AEDPA")*

Under the AEDPA, the United States Supreme Court has repeatedly held that habeas corpus relief is not available, if the State court's decision denying relief is reasonable. Reasonable does not mean the State court is or has to be correct. It does not mean that the habeas court has a better or more insightful view on the appropriate outcome. Even a strong case for relief does not mean that the State's contrary conclusion is unreasonable. In determining what is reasonable the habeas court must be deferential to the State court's determination; and where the claim is one of inefficient assistance of counsel, the habeas court's review must be doubly deferential.

A. AEDPA Standard of Review of State Court Decisions

***11** The habeas corpus statute, as amended by AEDPA, provides:

> "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)(1), (2). "By its terms § 2254(d) bars re-litigation of any claim 'adjudicated on the merits' in state court unless the issue falls within the two limited exceptions." *Harrington v. Richter,* 131 S.Ct. 770, 784 (2011). The Petitioner has the burden of demonstrating the state court's objectively unreasonable application of clearly established federal law. *See Acosta v. Artuz,* 575 F.3d 177, 184 (2d Cir.2009) (citing *Waddington v. Saurasad,* 555 U.S. 179, 190 (2009)). "Clearly established federal law" means definitive holding by the Supreme Court, not Circuit Court or District Court decisions, and certainly not *dicta. Williams v. Taylor,* 120 S.Ct. 1495, 1523 (2000).

Supreme Court jurisprudence interprets the statutory requirement to be highly deferential to "state courts in § 2254(d) habeas cases ." *Cavazos v. Smith,* 132 S.Ct. 2, 5 (2011); *see also Renico v. Lett,* 130 S.Ct. 1855, 1858 (2010) ("The [ ] AEDPA imposes a highly deferential standard for evaluating state-court rulings ... [and] demands that state-court decisions be given the benefit of the doubt."); *see also Hardy v. Cross,* 132 S.Ct. 490, 495 (2011) which raised an issue under the Confrontation Clause as to whether the prior sworn testimony could be used when

a witness was "unavailable" ("the deferential standard of review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken. Under AEDPA, if the state-court decision was reasonable, it cannot be disturbed."); *Richter,* 131 S.Ct. at 786–87 (a petitioner must show that the state courts' ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."). As amended, § 2254 prevents "defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico,* 130 S.Ct. at 1866. This emphasis on deference to state courts "is compelled by 'the broader context of the statute as a whole,' which demonstrates Congress' intent to channel prisoners' claims first to state courts.' " *Cullen,* 131 S.Ct. 1388 at 1392 (quoting *Robinson v. Shell Oil Co.,* 519 U .S. 337, 341 (1997)).

***12** Deference to state courts applies, as well, to the taking of evidence in federal habeas proceedings. § 2254(d)(1) review is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster,* 131 S.Ct. at 1398 (holding that habeas review in federal court "requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.,* the record before the state court.") *see also Cordova Diaz–Brown v. Brown,* No 10–cv–5133, 2011 WL 5121097 at *2 (S.D.N.Y. Oct. 28, 2011) (holding that where petitioner's "exhibits do not form part of the record before the state court ... [the exhibits] cannot be considered on his federal habeas petition.").

B. § 2254 Review is Limited to the Record that was before the State Court, and May Not Include Additional Fact–Finding

Cullen v. Pinholster, supra, addressed the question of whether defense counsel had rendered effective assistance in the penalty phase of a murder trial. At the penalty phase, counsel chose not to call a psychiatrist and instead called only the defendant's mother to demonstrate mitigation. The jury recommended the death penalty. The defendant claimed that counsel was ineffective for failing to adequately investigate and present mitigating evidence during the penalty phase. Such evidence included various school, medical and legal records, family statements, and a different psychiatrist who diagnosed a bipolar mood disorder, as opposed to the original psychiatrist who said that defendant had only an antisocial personality disorder. The California Supreme Court denied defendant's ineffective assistance claim. The District Court, however, held a hearing, heard the same evidence, and based on its consideration of this evidence, granted the habeas corpus petition. The Ninth Circuit affirmed, holding that the California Supreme Court decision involved an unreasonable application of clearly established federal law.

The Supreme Court reversed, holding that 2254 review is limited to the record before the State court which adjudicated the claim on the merits. AEDPA limits the power to grant a habeas writ; and specifies the standard to be used. [12] This standard is "difficult to meet ... because it was meant to be," and is a "highly deferential standard for evaluating State court rulings, which demands that State court decisions be given the benefit of the doubt." *See Richter,* 131 S.Ct. at 786; *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (quoting *Lindh v. Murphy,* 521 U.S. 320, 333, n. 7 (1997)). The petitioner carries the burden of proof. *Woodford,* 537 U.S. at 25. Furthermore, the *Cullen* court held that, since § 2254(b) requires that state prisoners ordinarily exhaust their state remedies before seeking federal relief, "[i]t would be contrary to that purpose to allow a petitioner to overcome an adverse State court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo."* 131 S.Ct. at 1399. *Cullen* holds that "evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a State court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 1400.

12 A § 2254 petition must first exhaust state remedies before seeking federal relief. If there has been an adjudication on the merits, the writ may not be granted unless the petition demonstrates that the State adjudication: (1) resulted in a decision that was contrary to or involved in unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; and (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 proceedings.

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***13** Under the Supreme Court's teachings and holdings, it is the state court record which must be reviewed for error within the scope of § 2254(d), not the new record created in federal court. Indeed, no federal hearing is required. This Court looks to evaluate whether or not the state court—considering only the record before the state court —engaged in an "unreasonable" application of federal law under § 2254, as amended by the AEDPA. There is a clear distinction between being "incorrect" and being "unreasonable." "The question under AEDPA is whether the [state court's] determination was 'an unreasonable application of ... clearly established Federal law,' § 2254(d)(1), not whether it was an incorrect application of that law." *Renico v. Lett,* 130 S.Ct. 1855, 1862 (citing *Williams v. Taylor,* 259 U.S. 362, 410 (2000)). The Supreme Court has found that the latter provides a "substantially higher threshold" for granting a writ of habeas corpus. *Knowles v. Mirzayance,* 129 S.Ct. 1411, 1420 (2009) *quoting* *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007).

The Second Circuit recognizes the impact on its habeas jurisprudence by the Supreme Court's decisions in *Renico* and *Cavazos:* "the AEDPA's standard was meant to be difficult." *Byrd v. Evans,* 420 Fed.Appx. 28, 30 (2d Cir. Mar. 21, 2011). In *Rivera v. Cuomo,* the Second Circuit, on rehearing, reversed its prior decision to grant a writ of habeas corpus [13] "in light of the Supreme Court's guidance in *Cavazos."* 664 F.3d 20 (2d Cir. Dec. 16, 2011). The *Rivera* court reasoned that although evidence of "significantly heightened recklessness" was "slim, at best," the court was unable to find that "the evidence was *so* completely lacking that *no* rational jury" could have found the defendant guilty of depraved indifference murder. 664 F.3d at 22–23 (citing *Cavazos,* 132 S.Ct. at 4–5). Applying the heightened deference standard of *Cavazos* and *Renico,* the Second Circuit found that they had "no choice but to uphold the decision of the state court." 665 F.3d at 22. With this heightened deference in mind, this Court evaluates Lopez's claim of ineffective assistance of counsel.

13 This decision was based on the determination that the state court had unreasonably applied the rule of *Jackson v. Virginia,* 443 U.S. 307 (1979) (that a jury find each element of the crime of depraved indifference murder beyond a reasonable doubt.).

III. *INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD UNDER STRICKLAND*

Under the AEDPA standard of review, the Court must determine whether the state court reasonably applied the Supreme Court's standard for analyzing ineffective assistance of counsel, as set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). This determination is to be made based on the facts on record in the state court proceeding. The *Strickland* standard does not grade counsel's performance, and is not intended "to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S. at 689. In applying *Strickland,* the reviewing Court must resist the temptation to second-guess trial counsel's decisions.

***14** Under *Strickland,* to show ineffective assistance of counsel, petitioner must: (1) show that his counsel's performance fell below an objective standard of reasonableness; and (2) affirmatively prove prejudice arising from counsel's allegedly deficient representation. The Court has stressed that the *Strickland* standard is "rigorous" and difficult to overcome, and that courts should refrain from using hindsight to reconstruct counsel's challenged conduct. *Bell v. Miller,* 500 F.3d 149, 155 (2d Cir.2007) (citing *Strickland,* 466 U.S. at 689)); *see also* *Padilla v. Kentucky,* 130 S.Ct. 1473, 1485 (2010); ("Surmounting *Strickland*' s high bar is never an easy task."). Recognizing the difficulty of overcoming this standard, the Second Circuit has held that the defendant faces a "heavy burden" in establishing ineffective assistance. *Eze v. Sendkowski,* 321 F.3d 110, 112 (2d Cir.2003). Just as the AEDPA mandates deference to state court decisions, ineffective assistance jurisprudence is intended to similarly provide deference to counsel's judgment during prior state court proceedings. Courts must maintain a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ... the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland,* 446 U.S. at 689 (citing *Michel v. Louisiana.,* 350 U.S. 91, 101 (1955)). The "objective standard of reasonableness" is measured under "prevailing professional norms." *Id.* at 688.

Even if trial counsel's representation falls into the narrow range of professional assistance that is below an "objective standard of reasonableness," the petitioner must still demonstrate that ineffective assistance caused him prejudice. Absent a showing of prejudice, a claim

of ineffective assistance cannot succeed. Unless the defendant proves both of these elements—deficient performance and prejudice—a court cannot find that the sentence or conviction "resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." *Id.* at 687. In order to demonstrate prejudice, 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." *Id.* at 669. A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

The Supreme Court has classified federal courts' habeas reviews of ineffective assistance of counsel claims as "doubly deferential," requiring the reviewing court to assess both the reasonableness of trial counsel's legal strategies during trial, as well as the reasonableness of the state appellate court's evaluation of counsel's strategy. *See Yarborough v. Gentry,* 540 U.S. 1, 6 (2003) ("Judicial review of a defense attorney's summation is therefore highly deferential-and doubly deferential when it is conducted through the lens of federal habeas.").

***15** In order to justify habeas relief, Lopez must prove that the New York court unreasonably applied the *Strickland* standard for ineffective assistance of counsel. Petitioner must show that the First Department "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone,* 535 U.S. 685, 698–99 (2002). Since the standard in *Strickland* is a "general standard," the State court "has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance,* 556 U.S. at 112. In analyzing whether or not a state court's application of a rule was "unreasonable," the level of specificity of the rule needs to be taken into consideration. *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."). Given the generality of the *Strickland* standard, a federal court assessing a habeas petition must take into consideration the fact that the State court has significant leeway in reaching outcomes on ineffective assistance of counsel cases. *Id.* at 664.

As previously noted (See footnote 1, *supra*), EED is an affirmative defense, the elements of which defendant must establish by a preponderance of evidence; and if successful, the defense does not result in an acquittal of the murder charge, but rather in a manslaughter conviction. By way of contrast, justification is not an affirmative defense, and the Government must establish beyond a reasonable doubt, that the killing was not in self defense. The Government's failure to prove that the killing was not justified, results in an acquittal.

The trial record reflects the defendant's tumultuous life history with his common law wife, including frequent physical attacks on one another. Protective orders were sought and issued. There was certainly a valid basis for arguing that defendant acted in self defense; and his conduct was justified. At the same time, the EED argument was not a compelling one. Immediately after the killing, Lopez was calm and composed enough to ask a neighbor to call the police. Further, when Lopez returned to his apartment, he left the door open so the police could peacefully enter. He was quietly cooperative with the police, and his calm deportment on the videotaped confession suggest separately and in combination, that he was not extremely emotionally disturbed immediately following the killing. The EED defense may have been a weak one—and in conflict with the chief defense of justification. Further, trial counsel fully participated in the trial and convinced the trial court judge to include a charge on the lesser included offense of manslaughter in the first degree. All of this (and more) was on the record before the Appellate Division—and support its conclusion that counsel was not ineffective.

The question before the Court is not whether the extreme emotional disturbance defense could have been raised at trial, but rather, did the Appellate Division unreasonably apply the *Strickland* standard. [14] The Appellate Division's application of *Strickland* in analyzing and concluding that counsel was not ineffective was reasonable, and Lopez's habeas petition must be denied.

14 While a defense of EED is not necessarily incompatible with a justification defense, and one could suggest there is no downside to lumping the two together, the Supreme Court has never held that "nothing to lose" is a part of the ineffective assistance of counsel claim *Carrion v. Smith,* 644 F.Supp.2d 452, 464 (S.D.N.Y.2009). *See Mirzayance,* 556 U.S. at 122 (holding that "[the Supreme Court] has never established anything akin to the ... 'nothing to lose' standard for evaluating *Strickland* claims.").

IV. *TRIAL COUNSEL'S FAILURE TO OBJECT TO JUSTICE NEWMAN'S JURY INSTRUCTION DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL*

***16** Lopez asserts that trial counsel was ineffective for failing to object to Justice Newman's jury instruction on self defense. Specifically, Lopez argues that Justice Newman's instruction regarding whether it was necessary to use force each and every time Lopez stabbed Torres was an inaccurate statement of the law and that the instruction on who was the initial aggressor was over-broad and effectively took the issue of justification away from the jury. Considering that trial counsel based his entire defense on a theory of justification, Lopez contends that trial counsel's failure to object was unjustifiable and deficient. Lopez also argues that he was prejudiced by trial counsel's failure to object to the erroneous jury instructions.

The Second Circuit has held:

> Counsel's failure to object to a jury instruction (or to request an additional instruction) constitutes unreasonably deficient performance only when the trial court's instruction contained 'clear and previously identified errors.' Conversely, when a trial court's instruction is legally correct as given, the failure to request an additional instruction does not constitute deficient performance.

Aparicio v. Artuz, 269 F.3d 78, 99 (2d Cir.2001) (citations omitted).

Lopez argues that Justice Newman's instruction that the jury must find that " 'each and every stab wound [was] justified' " was erroneous because even if some of the stab wounds were excessive, the fatal wounds inflicted may still have been justified. Justice Newman went on to instruct that: "If at some point during the encounter with Miss Torres ... [Lopez] continued to use deadly force at a time when it was no longer reasonable to believe that the use of deadly force was necessary to defend himself, then [the jury] must conclude that at that point he was no longer [justified]."

Justice Newman's instruction was a correct statement of the law. *See e.g., Davis v. Strack,* 270 F.3d 111, 125 (2d Cir.2001) (Under New York law "[i]f the defendant reasonably believes ... that it is necessary for him to use deadly physical force to defend himself, then the defendant is justified in using deadly physical force against the other person, but only to the extent he reasonably believes necessary to defend himself.") (interpreting N.Y. cases).

Lopez also argues that trial counsel was deficient for failing to object to Justice Newman's instruction on how to determine whether Lopez or Torres was the initial aggressor. Specifically, Lopez argues that the instruction that the People need only prove that he was the initial aggressor as to the encounter in the living room was unduly narrow, and effectively took the issue of justification away from the jury because it did not permit them to consider the events preceding the encounter in the living room. The First Department conceded that "the court should have provided a broader instruction to the jury with regard to its determination of whether defendant or the victim was the initial aggressor," but nevertheless held that the error was harmless. *People v. Lopez,* 36 A.D.3d 431, 432 (1st Dep't 2007), *appeal denied,* 8 N.Y.3d 947, 836 N.Y.S.2d 557 (2007). This Court agrees with the First Department and adopts Magistrate Judge Peck's recommendation that the error, if any, was harmless (*i.e.,* in *Strickland* terms did not prejudice Lopez) in the context of the justification defense, and that, taken as a whole, the state court's jury instruction accurately reflects the law. Accordingly, the Court adopts the R & R insofar as it denies habeas corpus based on the failure to object to the justification charge.

V. *CONCLUSION*

***17** For the foregoing reasons, the Court denies Lopez's petition for a writ of habeas corpus. In view of the Magistrate Judge's Report and Recommendation, however, the Court issues a certificate of appealability, confined to the issue of whether counsel was ineffective for failure to utilize a defense of extreme emotional disturbance. (28 U.S.C. § 2253(c)). The Clerk of the Court is directed to enter judgment and terminate this case.

SO ORDERED.

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

Nicholas TURE, Petitioner,
v.
Steven RACETTE, Superintendent, Clinton Correctional Facility,[1] Respondent.

[1] Steven Racette, Superintendent, Clinton Correctional Facility, is substituted for The Honorable Jerry Scarano, Saratoga County Court. Rule 2(a), Rules Governing Section 2254 Cases in the United States District Courts (petitioner "must name as respondent the state officer who has custody"); FED. R. CIV. P. 25(d).

No. 9:12–cv–01864–JKS.
|
Signed June 25, 2014.
|
Filed June 26, 2014.

Attorneys and Law Firms

Nicholas Ture, Dannemora, NY, pro se.

Paul B. Lyons, New York State Attorney General, New York, NY, for Respondent.

MEMORANDUM DECISION

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

***1** Nicholas Ture, 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. Ture is currently in the custody of the New York State Department of Corrections and Community Supervision and is incarcerated at Clinton Correctional Facility. Respondent has answered, and Ture has not replied.

I. BACKGROUND/PRIOR PROCEEDINGS

On December 1, 2009, Ture was charged with attempted murder in the second degree, assault in the first degree, assault in the second degree, and criminal possession of a weapon in the fourth degree after he repeatedly stabbed his mother one day after being released from county jail. Ture was arraigned and entered a not guilty plea in Saratoga County Court on December 4, 2009. The People requested a competency evaluation to determine whether Ture was fit to stand trial. The court ordered the examination and stayed the proceedings pending the outcome.

At a conference held on March 1, 2010, the court noted that a Criminal Procedure Law ("CPL") § 730.30 competency examination had been performed and that two psychiatrists reported that Ture did not by reason of mental disease or defect lack the capacity to understand the proceedings against him or to assist in his own defense. The court then indicated that it would proceed to a hearing on the matter. The prosecutor informed the court that the People were ready to proceed with a hearing but that she understood that the defense had decided to consent to the issue of capacity and agree with the doctors' evaluations. Counsel for Ture confirmed that the defense would not be contesting Ture's capacity to proceed in the matter. Ture then asked to address the court and stated, "Well, I just wanted to say that, you know, I do love my mother, and I'm sorry this whole thing happened, and I just—you know, I'll do my time." The court then admonished Ture that "the less said, the better."

At the next conference, Ture requested new counsel, and the court denied the request. The court also explained to Ture that the prosecutor had indicated that the People would be willing to accept a plea. The prosecutor stated that the People were willing to accept a guilty plea to attempted murder with a sentence of 20 years. The court also stated that "it's possible in this case that you might be successful in entering a plea of not guilty by reason of mental disease or defect." The court explained the process for doing so, and the prosecutor indicated that the People would not object to such a plea. In response to his question, the court also informed Ture that he had time to consider his options.

On April 21, 2010, the prosecutor stated that the People were offering Ture the opportunity to plead guilty to all counts in the indictment in exchange for a sentence of 15 years' imprisonment. The prosecutor indicated that Ture would also be required to waive his right to appeal. The court additionally informed Ture that a period of post-

release supervision ranging from 21/2 years to 5 years would also be imposed. When asked if he understood the terms of the offer, Ture stated that he did not understand "supervision." The court instructed defense counsel to explain post-release supervision to Ture off the record. Afterwards, the court asked Ture if he understood the entire offer, including post-release supervision; Ture answered in the affirmative. The court then asked Ture if he was in agreement with the terms and Ture responded, "Yes, sir, your Honor."

***2** The court then explained the rights that Ture was giving up by pleading guilty, including the privilege against self-incrimination and his rights to a speedy and public jury trial and to cross-examine and offer witnesses. The court also explained that, as part of the plea agreement, Ture would be required to waive his right to appeal. The court asked Ture whether he understood what that meant, and Ture responded, "Does that mean I can't appeal? Cannot appeal or can appeal?" The court permitted Ture to confer off the record with his attorney. Thereafter, Ture stated that he understood the waiver of the right to appeal. The court additionally warned Ture that the instant offense was a felony and that a future felony conviction could lead to enhanced sentencing because of the instant offense. Ture indicated that he understood. Ture further stated that he understood the court's statement that he could not be forced into pleading guilty but would have to do it freely and voluntarily.

The court then asked Ture, "This morning are you on any kind of drugs or medication or are you suffering from any kind of illness that would make it difficult for you to understand what is being said here?" Ture replied, "No, I'm not." Ture confirmed his intention to enter an *Alford* plea. [2] The prosecution then explained the evidence against Ture, including two knives, three eyewitnesses, the statement of the victim, and photographs of a blood smear on Ture and his clothes. Ture then pled guilty to each of the charges.

2 An *Alford* plea is entered when the defendant "voluntarily, knowingly, and understandingly consent[s] to the imposition of a prison sentence even [though] he is unwilling or unable to admit his participation in the acts constituting the crime." *N. Carolina v. Alford,* 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

On June 17, 2010, Ture appeared with counsel for sentencing. The People requested that the negotiated 15–year sentence be imposed and that an order of protection be issued for the victim. Ture addressed the court and asked for leniency, stating:

> I realize what I have done is terrible. Believe me when I say no one is more sorry than I am..... I want to make it very clear that I honestly did not intentionally mean for this to happen, and I would never hurt her in the right mind. I honestly don't remember attacking her at all. I don't—I blacked out, and I was—I was blacked out for most of the end of last Summer.
>
> On a positive note, my mother has been coming to see me regularly. We've been having good talks, and we've moved on from what has happened, and there are no hard feelings between us. We both agree this was a blackout, and we both agree that it was caused by me not being on my medications for so long. We also feel it could have been prevented. Like she said, we're angry with the Saratoga City Court system. They had sent out a warrant ... to take me to the hospital to be treated. Instead of doing so, they incarcerated me early on a misdemeanor. Judge Wait knew of my condition and knew I needed to be hospitalized. He instead sent me to County Jail for an evaluation, and the doctors didn't help, and I did my 20 days and just got worse. And I was never put on my medicine, and I was then released to my parents in worse condition [sic] I've been in. I committed my act the following morning of being released. And we feel none of this would have happened if I had only been sent to the hospital like the warrant had said.
>
> ***3** .... I've spent the last ten months in the medical unit of the County Jail, two of those months were at Marcy Psychiatric. I've been taking my meds everyday, I've caused no trouble, and I've been doing very well.

The court sentenced Ture to concurrent determinate prison terms of 15 years for the attempted murder and first-degree assault convictions plus an additional 5–year term of postrelease supervision. The court also sentenced Ture to a concurrent determinate term of 5 years' imprisonment plus 3 years of post-release supervision for the second-degree assault conviction and a concurrent 1–year term of imprisonment for the criminal possession of a weapon conviction.

By papers dated January 24, 2011, Ture moved *pro se* to vacate the judgment of conviction pursuant to CPL § 440.10 on the ground that there was newly discovered evidence of his innocence, namely, his untreated mental illness. Ture also claimed that his attorney failed to inform him of his right to testify before the grand jury and that his sentence was harsh and excessive. The County Court denied the motion, finding that the newly-discovered evidence claim was without merit and that his excessive sentence claim was a matter of record and thus not properly subject to collateral review. Ture did not appeal the court's § 440.10 denial.

Through counsel, Ture appealed his conviction, arguing that the trial court should not have accepted Ture's guilty plea in light of the evidence that Ture was not guilty by reason of mental disease or defect. The Appellate Division denied the appeal in a reasoned opinion concluding that "the proof regarding his mental capacity does not establish that he was incompetent." *People v. Ture,* 94 A.D.3d 1163, 941 N.Y.S.2d 530, 530–31 (N.Y.App.Div.2012). Ture sought leave to appeal the denial to the New York Court of Appeals, which was summarily denied on June 7, 2012. *People v. Ture,* 19 N.Y.3d 968, 950 N.Y.S.2d 120, 973 N.E.2d 218 (N.Y.2012).

Ture timely filed a Petition for a Writ of Habeas Corpus to this Court on November 30, 2012.

II. GROUNDS RAISED

In his *pro se* Petition before this Court, Ture raises four grounds for relief. First, Ture argues that he is "[n]ot guilty due to [the] negligence of county jail and Saratoga Court" because he was denied hospitalization and unmedicated when he was released from his prior incarceration. He next argues that his pre-trial counsel was prejudiced against him and told him that he would not assert arguments or raise evidence that challenged his culpability and that his appellate counsel was ineffective for failing to raise the issue of the negligence of the County Jail on appeal and by failing to request oral argument. He additionally argues that he is not guilty of the offense because of mental infirmity. Finally, Ture argues that his sentence was harsh and excessive.

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).

***4** 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).

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). 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).

Ture has not replied to Respondent's answer. The relevant statute provides that "[t]he allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true." 28 U.S.C. § 2248; *see also Carlson v. Landon,* 342 U.S. 524, 530, 72 S.Ct. 525, 96 L.Ed. 547 (1952). Where, as here, there is no traverse filed and no evidence offered to contradict the allegations of the return, the court must accept those allegations as true. *United States ex rel. Catalano v. Shaughnessy,* 197 F.2d 65, 66–67 (2d Cir.1952) (per curiam).

IV. DISCUSSION

A. Exhaustion

Respondent correctly contends that Ture has failed to exhaust all but his third claim. 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). To be deemed exhausted, a claim must have been presented to the highest state court that may consider the issue presented. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). In New York, to invoke one complete round of the State's established appellate process, a criminal defendant must first appeal his or her conviction to the Appellate Division and then seek further review by applying to the Court of Appeals for leave to appeal. *Galdamez v. Keane,* 394 F.3d 68, 74 (2d Cir.2005).

On direct appeal, Ture raised only his claim that the County Court should not have accepted his guilty plea in light of the evidence that Ture was not guilty by reason of mental disease or defect which, construed liberally as discussed below, encompasses the third claim in his Petition. Ture also sought leave to appeal the denial in the New York Court of Appeals, thus completing the exhaustion process. Although Ture raised the remaining claims in his *pro se* CPL § 440.10 motion, Ture did not seek leave to appeal the denial of that motion. Thus, these claims are unexhausted.

***5** With the exception of the ineffective assistance of counsel claim (claim 2), his unexhausted claims are procedurally barred. Because Ture's claims are based on the record, they could have been raised in his direct appeal but were not; consequently, Ture 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, Ture 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).

"[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) (citation omitted); *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), superceded by statute on other grounds, *United States v. Gonzalez–Largo,* No. 07–cv–0014, 2012 WL 3245522, at *2 (D.Nev. Aug.7, 2012). 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). Ture does not claim that cause exists for his procedural default, nor does he assert actual innocence. Because Ture 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).

Ture's unexhausted ineffective assistance of counsel claim is not barred, however, because there is no time limit or number bar in filing writ of error coram nobis applications. *See Smith v. Duncan,* 411 F.3d 340, 347 n. 6 (2d Cir.2005); *Turner v. Sabourin,* 217 F.R.D. 136, 147 (E.D.N.Y.2003). Ture may therefore still exhaust this claim in state court. This Court could stay the Petition and allow Ture to return to state court to satisfy the exhaustion requirement as to the remaining claim. *See Zarvela v.*

Artuz, 254 F.3d 374, 380–83 (2d Cir.2001). However, Ture has not requested that this Court stay and hold his Petition in abeyance. Moreover, the Supreme Court has held that it is an abuse of discretion to stay a mixed petition pending exhaustion where: 1) the petitioner has not shown good cause for failing to exhaust all available state court remedies; and 2) the unexhausted claim is "plainly meritless." *Rhines v. Weber,* 544 U.S. 269, 277, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). In his Petition, Ture provides no reason why he did not seek relief on this claim through a coram nobis application to the state court.

***6** Despite Ture's failure to exhaust the majority of his claims, this Court nonetheless may deny his 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,* 544 U.S. at 277. Accordingly, this Court declines to dismiss these claims solely on exhaustion grounds and will instead reach the merits of the claims as discussed below.

B. Merits

Claims 1 and 3: Not Guilty

In claim 1, Ture argues that he is "[n]ot guilty due to [the] negligence of county jail and Saratoga Court." He alleges that the County Court and Jail's failure to hospitalize and medicate him caused him to attack his mother just 24 hours after he was released from jail. Ture similarly asserts in claim 3 that he is "[n]ot guilty due to mental infirmity." In support of this claim, he states that he "was off medication for a period of twenty days before and during time of attack[,] have diagno[ses] of scitsophrenia [sic] and bipolar, have been diagnosed since the age of sixteen and have been off and on medication for the past seven years." Because Ture alleges that the County Court and Jail's negligence in failing to ensure that he was medicated led to his mental infirmity, the substance of these claims appear to be identical and both attack his guilty plea.

Construing Ture's *pro se* 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 Ture's not guilty claims raise three potential arguments: 1) his plea was involuntary, unknowing, or unintelligent; 2) the trial court should have rejected his plea and instead adjudicated him not guilty due to mental disease or defect; and 3) there was an insufficient basis for the plea.

On direct appeal, the Appellate Division rejected Ture's challenge to his plea, concluding:

> [B]y not moving to withdraw his plea or vacate the judgment of conviction, [Ture] did not preserve his argument[ ] ... that his *Alford* plea was not supported by sufficient record proof. In any event, the record reveals that County Court conducted a thorough plea allocution, [Ture] indicated that he understood and agreed to the sentence, the evidence that he committed the acts was compelling, and the proof regarding his mental capacity does not establish that he was incompetent.

Ture, 941 N.Y.S.2d at 530 (internal citations and quotation marks omitted).

As Respondent notes, Ture's failure to move to withdraw his plea or vacate the judgment of conviction dooms any challenge to his plea on federal habeas review. In order to preserve a claim that a guilty plea was involuntarily made or erroneously accepted, New York courts have held that "a defendant must either move to withdraw the plea under C.P.L. § 220.60(3) or move to vacate the judgment of conviction under C.P.L. § 440.10."[3] *Snitzel v. Murry,* 371 F.Supp.2d 295, 300–01 (W.D.N.Y.2004) (citing New York cases); *see, e.g., People v. Clarke,* 93 N.Y.2d 904, 690 N.Y.S.2d 501, 712 N.E.2d 668, 669 (N.Y.1999); *People v. Lopez,* 71 N.Y.2d 662, 529 N.Y.S.2d 465, 525 N.E.2d 5, 6 (N.Y.1988). It is well settled in this Circuit that this preservation rule provides an adequate and independent state ground on which to deny habeas relief. *See, e.g ., Hunter v. McLaughlin,* No. 04 Civ. 4058, 2008 WL 482848, at *1–4 (S.D.N.Y. Feb. 21, 2008); *Shanks v. Greiner,* No. 01 Civ. 1362, 2001 WL 1568815, at *3–4 (S.D.N.Y. Dec. 10, 2001). Because the Appellate Division rejected Ture's challenge to his plea on independent and adequate state procedural grounds, federal review is barred unless Ture establishes cause for the default and resulting prejudice or that a fundamental miscarriage of justice will result from the Court's failure to review the claim. *See Coleman v.*

Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

3 Section 220.60(3) provides: "At any time before the imposition of a sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment, or a plea of not responsible by reason of mental disease or defect, to withdraw such plea, and in such event the entire indictment, as existed at the time of such plea, is restored." N.Y. CRIM. PROC. LAW § 220.60(3).

***7** Ture fails to establish either of these mitigating factors in this case. Even if he could demonstrate cause, which does not appear from the record, he cannot show prejudice insofar as the arguments underlying the claim are meritless. *See Pettigrew v. Bezio,* No 10–CV–1053, 2012 WL 1714934, at *4 (W.D.N.Y. May 15, 2012) (concluding that a petitioner cannot show actual prejudice where the underlying defaulted claim is meritless); *see also Stepney v. Lopes,* 760 F.2d 40, 45 (2d Cir.1985) (noting that federal habeas relief is unavailable as to procedurally defaulted claims unless both cause and prejudice are demonstrated).

As the appellate court found, the record belies any claim that his guilty plea was involuntary, unknowing, or unintelligent. *Ture,* 941 N.Y.S.2d at 530. The record indicates that, prior to accepting his plea, the trial court informed Ture that "it's possible in this case that you might be successful in entering a plea of not guilty by reason of mental disease or defect." The court explained the process for doing so, and the prosecutor indicated that the People would not object to such a plea. The court also informed Ture that he had time to consider his options. It therefore appears that Ture weighed his options and the risks attendant with each and then entered his *Alford* plea. Ture further indicated that he was pleading freely and voluntarily and that he was not suffering from any illness that would make it difficult for him to understand the proceedings. Solemn declarations in open court carry a strong presumption of verity, and "[t]he subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison,* 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Moreover, any claim that the trial court should not have accepted his *Alford* plea and instead adjudicated him not guilty by reason of mental disease or defect is barred by his guilty plea.[4] *See Bakic v. United States,* 971 F.Supp. 697, 700 (N.D.N.Y.1997) (voluntary guilty plea precludes subsequent collateral attack based on insanity defense); *see also United States v. Bendicks,* 449 F.2d 313, 315 (5th Cir.1971) (insanity defense is non jurisdictional). A defendant who pleads guilty to a charged offense "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *see also Hill v. Lockhart,* 474 U.S. 52, 56–57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). "It is well settled that a defendant's plea of guilty admits all of the elements of a formal criminal charge, and, in the absence of a court-approved reservation of issues for appeal, waives all challenges to the prosecution except those going to the court's jurisdiction." *Hayle v. United States,* 815 F.2d 879, 881 (2d Cir.1987) (internal citation omitted). The later assertion of a defense to the criminal charge which does not challenge the court's jurisdiction is therefore precluded by a guilty plea. *See United States v. Hsu,* 669 F.3d 112, 117–18 (2d Cir.2012) (noting that a defendant ordinarily waives a statute of limitations defense by pleading guilty to an offense).

4 The fact that Ture's plea was made pursuant to *Alford* and not an unqualified guilty plea does not save his claim. *See In re Silmon v. Travis,* 95 N.Y.2d 470, 475, 718 N.Y.S.2d 704, 741 N.E.2d 501 (N.Y.2000) (noting that, under New York law, *Alford* pleas "are no different from other guilty pleas"). Courts within this Circuit have held in § 2254 cases that the *Tollett* "principle applies with equal force where, as here, the accused entered an *Alford* plea." *See, e.g., Kalu v. New York,* No. 08–CV–4984, 2009 WL 7063100, at * 10 (E.D.N.Y. Sept.15, 2009) (collecting cases), *report adopted sub nom, Ndukwe v. New York,* 2010 WL 4386680 (E.D.N.Y. Oct.28, 2010). Other Circuits have come to the same conclusion. *See Fields v. Att'y Gen.,* 956 F.2d 1290, 1294–96 (4th Cir.1992) (applying *Tollett* to *Alford* plea); *Hibbler v. Benedetti,* No. 07–cv00467, 2011 WL 2470516, at *3 n. 5 (D.Nev. June 17, 2011) ("Ninth Circuit law confirms that the *Tollett* and *Hill* waiver and bar rules apply to *Alford* or *nolo contendere* pleas to the same extent as unqualified guilty pleas.").

***8** Furthermore, given the strong evidence against him-including two knives, statements from the victim and eyewitnesses, and the victim's blood on his clothing-there was a sufficient evidentiary basis for his *Alford* plea. *Alford,* 400 U.S. at 37 (there must be a "strong factual basis for the plea" to withstand scrutiny under *Alford*). Ture thus cannot prevail on any challenge to his *Alford* plea based on his claim that he cannot be held culpable for the offense.

Claim 2: Ineffective Assistance of Counsel

Ture next argues that both his pre-trial counsel and appellate counsel rendered ineffective assistance that warrants habeas relief.

a. New York and Strickland Standards on Habeas Review

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, Ture 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)).

***9** 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.

b. Pre–Trial Counsel

Ture contends that his counsel was ineffective because counsel knew the victim and refused to put forth evidence of the County Court and Jail's negligence in order to demonstrate that Ture was not culpable for his actions. But the *Tollett* bar discussed with regard to claim 1, *supra,* also applies to "ineffective assistance claims relating to events prior to the guilty plea." *United States v. Coffin,*

76 F.3d 494, 498 (2d Cir.1996). Therefore, any claim that Ture's counsel failed to raise evidence challenging Ture's culpability is similarly barred by Ture's *Alford* plea.

c. Appellate Counsel

Ture additionally argues that his appellate counsel was ineffective "because he would not raise these issues of negligence by the County Jail and Saratoga Court as a defense" and "did not use his chance of an oral argument."

Because one of the main functions of appellate counsel is to "winnow[ ] out weaker arguments on appeal," *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), counsel is not required to present every nonfrivolous claim on behalf of a defendant appealing his or her conviction, *see Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) ("[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.") (citation omitted); *accord Barnes,* 463 U.S. at 754. To state a claim of ineffective assistance of appellate counsel, a petitioner must show (1) "that his counsel was objectively unreasonable in failing to find arguable issues to appeal" and (2) "a reasonable probability that, but for his counsel's unreasonable failure to" raise an issue on appeal "he would have prevailed on his appeal." *Smith,* 528 U.S. at 285 (citations omitted). "To establish prejudice in the appellate context, a petitioner must demonstrate that there was a reasonable probability that his claim would have been successful before the state's highest court." *Mayo v. Henderson,* 13 F.3d 528, 534 (2d Cir.1994) (citation and internal quotation marks and brackets omitted).

***10** Ture falls far short of meeting these standards. The record indicates that Ture's appellate counsel submitted a well-reasoned and thorough brief arguing that the court should not have accepted Ture's guilty plea in light of the evidence that Ture was not guilty by reason of mental disease or defect. Because Ture had accepted a plea offer and waived his right to appeal, the grounds on which Ture could challenge his conviction were limited. Counsel made the tactical decision to not directly raise the negligence of the County Court and Jail but rather to use those facts to argue that the trial court should have rejected his *Alford* plea and instead adjudicated him not guilty by reason of mental disease or defect. Ture cannot show that appellate counsel's tactical decision was objectively unreasonable, particularly given that, as discussed *supra,* the substances of the claims are substantially identical. Moreover, because Ture's asserted negligence claim is not a jurisdictional or constitutional defense, New York law-like federal law-mandates that Ture forfeited this claim by pleading guilty. *See People v. Parilla,* 8 N.Y.3d 654, 838 N.Y.S.2d 824, 870 N.E.2d 142, 145 (N.Y.2007) (holding that "under a guilty plea, a defendant ... forfeits the right to revive certain claims made prior to the plea" (citation and internal quotation marks omitted)). Thus, Ture cannot demonstrate that the New York Court of Appeal would have found in his favor on this claim even if appellate counsel had directly asserted it.

Ture's assertion that counsel was ineffective for failing to request or participate in oral argument also must fail. Given that appellate counsel drafted a well-reasoned and thorough brief asserting Ture's most viable argument, Ture cannot show that counsel's decision to not partake in oral argument rendered him ineffective. *See, e.g., Vega v. United States,* 261 F.Supp.2d 175, 177 (E.D.N.Y.2003) (denying ineffective assistance of appellate counsel claim where counsel submitted an appellate brief but neglected to request an oral argument because petitioner failed to show that oral argument would have changed the results of his appeal); *see also United States v. Birtle,* 792 F.2d 846, 847–48 (9th Cir.1986) ("The failure of counsel to appear at oral argument or to file a reply brief is not so essential to the fundamental fairness of the appellate process as to warrant application of a per se rule of prejudice."). Accordingly, Ture cannot prevail on any argument asserted in his ineffective assistance of counsel claim.

Claim 4: Harsh and Excessive Sentence

Finally, Ture argues that his sentence is excessive for a first-time felon with no prior violent history. Ture was convicted, upon his guilty plea, of attempted murder and first-degree assault, both of which are class B felonies. *See* N.Y. PENAL LAW §§ 110/125.25(1), 120.10(1). New York law mandates that the sentence imposed for these crimes must be at least 5 years and must not exceed 25 years. *Id.* § 70.02(3)(a). The 15–year sentence imposed upon Ture was thus within the statutory range. Ture was also convicted of second-degree assault, a class D felony, for which New York law requires a sentence that is at least 2 years and does not exceed 7 years. *See* N.Y. PENAL LAW §§ 120.05(2), 70.02(3)(c). The court sentenced Ture to 5 years' imprisonment on this conviction. The court also

sentenced him to 1 year of imprisonment for the criminal possession of a weapon conviction, the maximum sentence allowed under New York law. *See* N.Y. PENAL LAW §§ 265.01(2), 70.15(1). These sentences were all ordered to run concurrently. The court additionally imposed a 5–year term of post-release supervision for the class B felonies and a 3–year term for the class D felonies. *See* N.Y. PENAL LAW §§ 70.45(2)(e),(f).

***11** It is well-settled that an excessive sentence claim may not be raised as grounds for federal habeas corpus relief if the sentence is within the range prescribed by state law. *White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992); *Bellavia v. Fogg,* 613 F.2d 369, 373 (2d Cir.1979) (setting mandatory sentences is solely the province of state legislature); *Hernandez v. Conway,* 485 F.Supp.2d 266, 284 (W.D.N.Y.2007) (excessive sentence claim does not present a federal question cognizable on habeas review where the sentence was within the range prescribed by state law). Because the sentences imposed were within the statutory range prescribed by New York law, Ture cannot prevail on this claim.

V. CONCLUSION

Ture 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 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.

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

Adam Wertman, Petitioner,
v.
Anthony J. Annucci, Acting Commissioner, New York Department of Corrections and Community Supervision, [1] Respondent.

No. 9:15-cv-00941-JKS
|
Signed 05/18/2016

1 Because Wertman has been conditionally released from state prison, Anthony J. Annucci, Acting Commissioner, New York Department of Corrections and Community Supervision, is substituted as Respondent. FED. R. CIV. P. 25(c).

MEMORANDUM DECISION

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

***1** Adam Wertman, a former 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. At the time he filed his Petition and throughout briefing in this case, Wertman was in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS") and incarcerated at Mid-State Correctional Facility. The DOCCS's inmate locator website (http://nysdoccslookup.doccs.ny.gov/, Department ID Number 12-B-0280), indicates that Wertman was conditionally released to parole supervision on April 6, 2016. Wertman has not filed a change of address with this Court. Respondent has answered the Petition, and Wertman has not replied.

I. BACKGROUND/PRIOR PROCEEDINGS

On June 2, 2011, Wertman was charged with first-degree criminal contempt, criminal obstruction of breathing or blood circulation, and second-degree harassment after his on-again/off-again girlfriend informed police that Wertman had beaten and strangled her. Wertman was subsequently indicted on 13 counts of aggravated criminal contempt, 4 counts of criminal obstruction of breathing or blood circulation, and 9 counts of second-degree harassment, stemming from incidents which spanned from January 5, 2011, to May 15, 2011.

On May 4, 2012, Wertman elected to waive his right to a jury trial after the court explained that 8 or 10 prospective jurors might have seen Wertman in restraints as he was led into the courthouse. The court offered to provide an instructive to the jury, but defense counsel informed the court that Wertman now preferred to have a bench trial. During the course of the bench trial, the prosecution presented the testimony of three people, including the victim, a friend who had observed one of the incidents, and an expert in domestic violence. Wertman presented the testimony of his work friend and a friend of his mother's, who both testified that the victim had pursued and harassed Wertman in spite of the 2010 protection order she had against him.

At the conclusion of trial, the court found Wertman guilty of 5 counts of aggravated criminal contempt, 3 counts of obstruction of breathing or blood circulation, and 2 counts of second-degree harassment. The court then adjudicated Wertman a second felony offender and sentenced him to indeterminate prison terms of 2 to 4 years on the contempt counts, 1 year on the obstruction of breathing or blood circulation counts, and 15 days on the harassment counts. The court ordered the sentences to run concurrently and also issued a permanent order of protection.

Through counsel, Wertman appealed his conviction, arguing that: 1) the verdict was against the weight of the evidence; 2) the trial court improperly admitted evidence of his past crimes in violation of *Ventimiglia* and *Molineux*; [2] 3) the trial court's erroneous *Sandoval* [3] ruling deprived him of his right to testify; 4) the trial court erred in refusing to admit his alibi evidence as untimely; and 5) his sentence was harsh and excessive. On February 14, 2014, the Appellate Division issued a reasoned decision unanimously affirming the judgment against Wertman in its entirety. *People v. Wertman*, 980 N.Y.S.2d 688, 691 (N.Y. App Div. 2014). Wertman sought leave to appeal the denial to the Court of Appeals, which was summarily denied on May 12, 2014. *People v. Wertman*, 11 N.E.3d

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726 (N.Y. 2014). Wertman's conviction became final on direct review 90 days later, when his time to file a petition for *certiorari* in the Supreme Court expired on August 12, 2014. *See Jiminez v. Quarterman*, 555 U.S. 113, 119 (2009); *Williams v. Artuz*, 237 F.3d 147, 151 (2d Cir. 2001).

2 *People v. Ventimiglia*, 420 N.E.2d 59 (N.Y. 1981); *People v. Molineux*, 61 N.E. 286 (N.Y. 1901). "*Ventimiglia*" is a shorthand reference to the New York procedure for determining in advance whether evidence of prior crimes is probative for the purpose of showing, *e.g.*, 1) motive, 2) intent, 3) absence of mistake or accident, 4) common scheme or plan, or 5) identity, and for determining whether that probative value outweighs the prejudicial effect.

3 *People v. Sandoval*, 314 N.E.2d 413 (N.Y. 1974) (a shorthand reference to the New York procedure for determining in advance whether evidence of prior crimes is admissible for impeachment purposes in the event the defendant testifies).

***2** Wertman timely filed a *pro se* Petition for a Writ of Habeas Corpus in this Court on June 22, 2015. *See* 28 U.S.C. § 2244(d)(1)(A).

II. GROUNDS RAISED

In his *pro se* Petition before this Court, Wertman asserts four grounds for relief. First, he argues that he was deprived of his right to a jury trial after a number of prospective jurors saw him in shackles (Ground 1). Wertman next contends that his trial and appellate counsel rendered ineffective assistance (Grounds 2, 4). Third, Wertman claims that the prosecution failed to provide him certain *Brady*[4] material (Ground 3a). Finally, Wertman argues that the trial court erroneously admitted evidence of his prior crimes against the victim.

4 *Brady v. Maryland*, 373 U.S. 83 (1963). The term "*Brady*" is a shorthand reference to the rules of mandatory discovery in criminal cases under federal law.

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 (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*, 131 S. Ct. 859, 863 (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 (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 (1990) (presuming that the state court knew and correctly applied state law), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

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 (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 (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 Coleman v. Thompson*, 501 U.S. 722, 740 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989); *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*, 131 S. Ct. 770, 784-85 (2011) (rejecting the argument that a summary disposition was not entitled to § 2254(d) deference); *Jimenez*, 458 F.3d at 145-46. 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 (2003).

***3** Wertman has not replied to Respondent's answer. The relevant statute provides that "[t]he allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true." 28 U.S.C. § 2248; *see also Carlson v. Landon*, 342 U.S. 524, 530 (1952). Where, as here, there is no traverse filed and no evidence offered to contradict the allegations of the return, the court must accept those allegations as true. *United States ex rel. Catalano v. Shaughnessy*, 197 F.2d 65, 66-67 (2d Cir. 1952) (per curiam).

IV. DISCUSSION

A. Mootness

Article III, § 2 of the United States Constitution requires the existence of a case or controversy through all stages of federal judicial proceedings. This means that, throughout the litigation, the petitioner "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citations omitted); *see also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (citation omitted). Thus, a case is moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (internal quotation marks and citations omitted); *Lavin v. United States*, 299 F.3d 123, 128 (2d Cir. 2002). "The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed." *Martin-Trigona v. Shiff,* 702 F.2d 380, 386 (2d Cir. 1983). "[I]f an event occurs during the course of the proceedings or an appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, [the court] ... must dismiss the case" as moot. *United States v. Blackburn*, 461 F.3d 259, 261 (2d Cir. 2006) (citation and internal quotation marks omitted).

As previously mentioned, the record before this Court indicates that Wertman has been conditionally released from prison to parole supervision. However, a petition for habeas corpus relief does not necessarily become moot when the petitioner is released from prison. Rather, the matter will remain a live case or controversy if there remains "some concrete and continuing injury" or "collateral consequence" resulting from the conviction. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). In cases where the petitioner challenges the conviction itself, the Supreme Court "has been willing to *presume* the existence of collateral consequences sufficient to satisfy the case-or-controversy requirement" even if those collateral consequences "are remote and unlikely to occur." *United States v. Probber*, 170 F.3d 345, 348 (2d Cir. 1999) (emphasis omitted) (quoting *Spencer*, 523 U.S. at 8). This presumption of collateral consequences has been justified on the theory that "most criminal convictions do in fact entail adverse collateral legal consequences," including deportation, enhancement of future criminal sentences, and certain civil disabilities such as being barred from holding certain offices, voting in state elections, and serving on a jury. *United States v. Mercurris*, 192 F.3d 290, 293 (2d Cir. 1999) (quoting *Sibron v. New York*, 392 U.S. 40, 54-56 (1968)). Accordingly, because Wertman is still in the custody of the New York DOCCS [5] and, in any event, still subject to collateral consequences of his conviction, Wertman's Petition has not been rendered moot by his release from prison.

5 A prisoner conditionally released on parole supervision remains in the legal custody of the DOCCS until the expiration of his full maximum expiration date. *See* N.Y. Department of Corrections and Community Supervision Website, *Offender Information Data Definitions*, http://www.doccs.ny.gov/calendardatadefinitions.html (noting under "conditional release date" that "[i]f an inmate is conditionally released, he or she will be under parole supervision of some level until his or her term expires (i.e., when the maximum expiration date is reached.")).

B. Exhaustion

***4** Respondent correctly contends that the majority of Wertman's claims are unexhausted and procedurally defaulted. 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 (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 (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). To be deemed exhausted, a claim must also have been presented to the highest state court that may consider the issue presented. *See* *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In New York, to invoke one complete round of the State's established appellate process, a criminal defendant must first appeal his or her conviction to the Appellate Division and then seek further review by applying to the Court of Appeals for leave to appeal. *Galdamez v. Keane*, 394 F.3d 68, 74 (2d Cir. 2005). Further, "when 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) (citation omitted); *see also* *Grey*, 933 F.2d at 121.

As Respondent argues, Wertman did not raise in state court his jury trial, ineffective assistance, and *Brady* claims. Accordingly, these claims are unexhausted. Further, his unexhausted claims are procedurally barred. *See* *Grey v. Hoke*, 933 F.2d 117, 120-21 (2d Cir. 1991). Because Wertman may not now return to state court to exhaust these claims, the claims may be deemed exhausted but procedurally defaulted from habeas review.[6] *See* *Ramirez v. Att'y Gen.*, 280 F.3d 87, 94 (2d Cir. 2001).

6 This Court has the discretion, but is not obligated, to stay these proceedings and hold the unexhausted claims in abeyance pending exhaustion in the state courts. *Day v. McDonough*, 547 U.S. 198, 209 (2006); *Rhines v. Weber*, 544 U.S. 269, 275-76 (2005). Even if Wertman could establish the requisite good cause for failing to exhaust his claims, which does not appear from his filings, *Rhines* would still require that the Court deny his stay request because, as discussed *infra*, the claims are "plainly meritless." *Rhines*, 544 U.S. at 277. Likewise, a stay would be futile because, as discussed *supra*, a New York court would deny the claims as procedurally defaulted.

C. Merits

In any event, even if Wertman had fully exhausted those claims, he still would not be entitled to relief on them. For the reasons discussed below, the Court also denies relief on the merits of his unexhausted claims. *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."). And as further discussed below, the Court further denies relief on the merits of the *Molineux* claim he exhausted in state court.

Ground 1. *Violation of Right to Jury Trial*

Wertman first argues that he was forced to waive a jury trial because some potential jurors saw him in handcuffs and leg irons. The record indicates that, at the beginning of trial, the court explained that 8 or 10 prospective jurors might have seen Wertman in restraints as he was led in to the courthouse. The court offered to provide a curative instruction to the jury, but counsel advised the court that Wertman preferred to have a bench trial because he had "no faith in the jury system."[7] Counsel stated that Wertman had "faith in Your Honor and believes that he'll receive a fair trial only through a non-jury or bench trial." Wertman himself told the court that he preferred a bench trial because a domestic violence march had recently been held, he believed prospective jurors were upset by domestic violence, and he was concerned that the jury would not approve of a tattoo on his hand. Wertman stated, "I just feel like it's a better decision to go this way ... [t]hat way everybody can hear everything and, you know, hopefully the truth will come out."

7 Because Wertman waived jury trial, the record does not indicate that the trial court ascertained whether any jurors had, in fact, seen Wertman in restraints.

***5** It is well-settled that a criminal defendant may waive his constitutional right to a trial by jury if the waiver is "knowing, voluntary, and intelligent." *Marone v. United*

States, 10 F.3d 65, 67-68 (2d Cir. 1993); *see also Patton v. United States*, 281 U.S. 276, 312 (1930) (requiring "express and intelligent consent of the defendant" to waive a jury trial). This decision to waive the right to a jury trial is of such fundamental importance that it cannot be made by counsel; the decision belongs to the defendant alone. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to ... waive a jury").

In determining whether a defendant has knowingly, voluntarily and intelligently consented to waiving the right to a jury trial, the court must consider the specific circumstances of the case. Here, the record demonstrates that Wertman himself wished to avoid a jury trial and was not coerced in any way to waive that right. Thus, Wertman's argument that he did not voluntarily waive his right to a jury trial simply cannot be accepted. Indeed, at no part during the proceedings did he rescind the waiver, nor did he protest his being tried by the court. Wertman's jury trial claim therefore must fail.

Grounds 2, 3. *Ineffective Assistance of Counsel*

Wertman next contends that both trial and appellate counsel rendered ineffective assistance. 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 (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*, 132 S. Ct. 1376, 1385-86 (2012); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Williams*, 529 U.S. at 393-95. Thus, Wertman must show that his counsel's representation were 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 (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*, 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*, 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*, 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*, 429 N.E.2d 400, 405 (N.Y. 1981)).

***6** 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*, 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*, 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.

Wertman's ineffective assistance claims must fail, however, even under the more favorable New York standard. Wertman states that he was "constructively" denied trial counsel when he was unable to pay counsel

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in full[8] and counsel grew hostile towards Wertman. In support, Wertman merely contends that counsel "refused to take several actions such as raising certain objections." But such blanket statement does not identify the alleged defects with sufficient factual detail. "It is well-settled in this Circuit that vague and conclusory allegations that are unsupported by specific factual averments are insufficient to state a viable claim for habeas relief." *See Kimbrough v. Bradt*, 949 F. Supp. 2d 341, 355 (N.D.N.Y. 2013). As such, a claim of ineffective assistance must contain specific factual contentions regarding how counsel was ineffective. *See Hall v. Phillips*, No. 1:04-CV-1514, 2007 WL 2156656, at *13 (E.D.N.Y. July 25, 2007) (the absence of allegations that demonstrate how counsel was ineffective is "fatal to an ineffective assistance claim on habeas" review).

8 As Respondent points out, the record indicates that the court gave Wertman an assigned counsel form, which apparently addressed the non-payment issue.

Likewise, with respect to his claim regarding appellate counsel's performance, Wertman states only that he had a "conflict" with appellate counsel because Wertman had fired him from an appeal on a prior unrelated conviction. Again, Wertman fails to articulate what arguments counsel omitted or actions he otherwise took because of the alleged conflict.[9] Thus, these claims are simply too vague and conclusory to state a proper ground for habeas relief under either *Strickland* prong, and they must be dismissed as meritless. *See, e.g.*, *Powers v. Lord*, 462 F. Supp. 2d 371, 381-82 (W.D.N.Y. 2006) (laying out the general rule that "undetailed and unsubstantiated assertions [about counsel's alleged shortcomings] have consistently been held insufficient to satisfy either *Strickland* prong" (citation omitted)). Accordingly, Wertman is not entitled to relief on his ineffective assistance claims.

9 Notably, the record does not indicate that Wertman brought this "conflict" to the attention of the trial judge or the Appellate Division.

Ground 3. *Brady Violation*

Wertman additionally alleges that the prosecution suppressed evidence in violation of *Brady*. "To establish a *Brady* violation, a petitioner must show that (1) the undisclosed evidence was favorable to him; (2) the evidence was in the state's possession and was suppressed, even if inadvertently; and (3) the defendant was prejudiced as a result of the failure to disclose." *Mack v. Conway*, 476 Fed.Appx. 873, 876 (2d Cir. 2012) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

In support of his claim, Wertman identifies only a videotape that shows footage of Wertman and the victim attending an auction on May 14, 2011, where Wertman pressured the victim to bid on and purchase a rifle. The record indicates that, in her discovery responses, the prosecutor stated that Wertman could view the videotape. At an April 30, 2012 conference, Wertman himself told the court that "[t]here was a video. Shows in the video that everything was fine. Now they don't want to use it. I want to use it." The record therefore reflects that the prosecution disclosed the video, and Wertman himself watched it.

***7** Furthermore, Wertman fails to show that the allegedly-withheld evidence constituted favorable *Brady* material. The victim testified that Wertman assaulted her after the auction, so the video is not exculpatory, and Wertman fails to convincingly articulate how the evidence could have helped his case. Wertman therefore cannot prevail on any claim that the prosecution failed to produce mandatory discovery.

Ground 4. *Erroneous Molineux Ruling*

Finally, Wertman alleges that the trial court erred in admitting evidence of his prior domestic violence crimes against the victim. But Wertman's claim is not cognizable on federal habeas review. *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").

And even if it were cognizable, Wertman would not be entitled to relief because the claim is without merit. Under New York law, it is well-settled that evidence of uncharged crimes or prior bad acts is admissible if it is relevant to

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issues of intent, motive, knowledge, common scheme or plan, or identity. *People v. Long*, 846 N.Y.S.2d 381, 382 (N.Y. App. Div. 2012). This evidence is also admissible to serve as background information or to complete the narrative of the events. *People v. Dennis*, 937 N.Y.S.2d 496, 498 (N.Y. App. Div. 2012). The probative value of the evidence must outweigh the potential prejudice to the defendant, which is determined by the trial court. *People v. Alvino*, 519 N.E.2d 808, 812 (N.Y. 1987).

In this case, as the Supreme Court concluded on direct appeal, the trial court properly admitted the evidence because it served as background information concerning Wertman's relationship with the victim and was relevant to the issue of Wertman's intent. Moreover, because it was a bench trial, the risk was minimized that the evidence of prior instances of domestic violence would be used outside of its limited purpose. Thus, the probative value outweighed any prejudice. For the foregoing reasons, this Court concludes that Wertman is not entitled to habeas relief on this claim.

V. CONCLUSION

Wertman 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 Court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c); *Banks v. Dretke,* 540 U.S. 668, 705 (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.

***8** The Clerk of the Court is to enter judgment accordingly.

All Citations

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

Anthony Buchanan, Petitioner,
v.
P. Chappius, Respondent.

9:15-cv-0407 (LEK)
|
Signed 03/11/2016

DECISION and ORDER

Lawrence E. Kahn, U. S. District Judge

I. INTRODUCTION

***1** Petitioner Anthony Buchanan ("Petitioner") filed a Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, dated March 19, 2015. Dkt. No. 1 ("Petition").[1] He challenges his judgment of conviction, following a jury trial in Albany County Court, of ten counts of drug and weapon possession charges. Id. at 1. Petitioner raises four grounds for habeas relief: (1) that he was denied due process and a fair trial "by the People's eliciting evidence of uncharged drug activity" during the trial; (2) the verdict was not supported by legally sufficient evidence and was against the weight of the evidence; (3) ineffective assistance of trial counsel; and, (4) ineffective assistance of appellate counsel. Id. at 4-5. Respondent opposes the Petition. Dkt. Nos. 7 ("Response"); 7-1, ("Response Memorandum"); 8-1, 8-2 ("State Court Record");[2] 8-3, 8-4 ("Transcript"). For following reasons, the Petition is denied and dismissed.

1 The cited page numbers for the Petition refer to those generated by the Court's electronic filing system ("ECF").

2 The citations to the State Court Records refer to the consecutive pagination, prefixed "SR," found at the top center of each page of those records.

II. BACKGROUND

In August 2001, Petitioner became the target of a police narcotics investigation in the city of Albany, New York. Tr. at 338:6-21. The investigation included surveillance of Petitioner as he went back and forth from 46 Lexington Avenue and 677 Third Street, his suspected residence in Albany, over a period of days. Tr. at 340:2-346:13. After observing Petitioner drive to and from the two locations over the course of the month, police set up fixed surveillance near 46 Lexington Avenue on August 31, 2001. Tr. at 346:11-13. That day, police observed Petitioner entering and exiting the building twice. Tr. at 383:17-386:6. Each time Petitioner exited the building, he was observed holding a plastic bag containing a large off-white chunky substance which Petitioner would then give to a companion, who then placed the substance in his pants. Tr. at 384:25-385:4, 386:1-5. Based on these observations, along with several controlled buys with the assistance of confidential informants, the police obtained and executed a search warrant at both locations. SCR at SR 396-399. The police recovered several weapons and over ten ounces of crack cocaine, among other things. Tr. at 352:4-20, 354:18-25, 431:6-432:22.

An Albany County grand jury returned an indictment charging Petitioner with First Degree Criminal Possession of a Controlled Substance (N.Y. Penal Law § 220.21(1)), Second Degree Criminal Possession of a Controlled Substance (N.Y. Penal Law § 220.18(1)), two counts of Third Degree Criminal Possession of a Controlled Substance (N.Y. Penal Law § 220.16(1)), two counts of Criminally Using Drug Paraphernalia in the Second Degree (N.Y. Penal Law § 220.50(2), (3)), and four counts of Third Degree Criminal Possession of a Weapon (N.Y. Penal Law § 265.02(1), (4)). SCR at SR 51-60.

***2** Petitioner proceeded to trial before a jury in Albany County Court and was convicted of all counts. SCR at SR 49. On July 19, 2002, Petitioner was sentenced as a second felony offender, to an aggregate prison term of 21 years to life. Id. On May 12, 2012, the Appellate Division, Third Department, unanimously affirmed Petitioner's conviction.[3] The New York Court of Appeals denied leave to appeal on December 3, 2013. People v. Buchanan, 944 N.Y.S.2d 378 (App. Div. 2012), lv denied, 22 N.Y.3d 1039 (2013).

3 Petitioner previously filed a habeas petition under 28 U.S.C. § 2254 on October 12, 2010, raising as his sole ground for relief that the delay in processing his direct appeal constituted a denial of due process. Buchanan v. Bezio, No. 9:10-cv-1228 (N.D.N.Y. filed Oct. 14,

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2010), Dkt. No. 1. On February 27, 2012, the district court denied the petition, holding that "the Supreme Court, while recognizing the right to a 'speedy trial,' has not yet recognized a similar right to a 'speedy appeal.'" Id., Dkt. No. 13 at 4 n.13 (citing Barker v. Wingo, 407 U.S. 514 (1972)).

III. DISCUSSION

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas corpus relief with respect to a claim adjudicated on the merits in state court only if, based upon the record before the state court, the state court's decision: (1) 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) 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); Cullen v. Pinholster, 563 U.S. 170, 181 (2011); Premo v. Moore, 562 U.S. 115, 120-21 (2011); Schriro v. Landrigan, 550 U.S. 465, 473 (2007). This standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." Felkner v. Jackson, 562 U.S. 594, 598 (2011) (per curiam) (quoting Renico v. Lett, 559 U.S. 766, 773 (2010)).

The Supreme Court has repeatedly explained that "a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents.'" Nevada v. Jackson, 133 S. Ct. 1990, 1992 (2013) (per curiam) (quoting Harrington v. Richter, 562 U.S. 86, 102 (2011)); see also Metrish v. Lancaster, 133 S. Ct. 1781, 1787 (2013) (explaining that a petitioner in a habeas case premised on § 2254(d)(1) must "show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" (quoting Harrington, 562 U.S. at 103)).

Additionally, the AEDPA foreclosed "using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." Parker v. Matthews, 132 S. Ct. 2148, 2149 (2012) (per curiam) (quoting Renico, 559 U.S. at 779). A state court's findings are not unreasonable under § 2254(d)(2) simply because a federal habeas court reviewing the claim in the first instance would have reached a different conclusion. Wood v. Allen, 558 U.S. 290, 301 (2010). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." Schriro, 550 U.S. at 473.

***3** Federal habeas courts must presume that the state court's factual findings are correct unless a petitioner rebuts that presumption with "clear and convincing evidence." Id. at 473-74 (quoting § 2254(e)(1)). Finally, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits ...." Johnson v. Williams, 133 S. Ct. 1088, 1096 (2013).

B. Ground One – Admission of Uncharged Crimes

Petitioner claims he was denied due process of law and a fair trial when the trial court allowed the prosecution to admit evidence of Petitioner's uncharged drug activities without first obtaining a pre-trial Molineux /Ventimiglia ruling. [4] Pet. at 4. As he did on direct appeal, Petitioner argues that the prejudicial impact of allowing a police officer to testify at trial about his observations of Petitioner's uncharged drug activities "substantially outweighed its probative value." Id. For the following reasons, this claim is denied.

4 People v. Molineux, 168 N.Y. 264 (1901), and People v. Ventimiglia, 52 N.Y.2d 350 (1981), describe the New York procedure for determining in advance of trial whether evidence of uncharged bad acts and/or crimes is admissible for the purpose of showing, e.g., 1) motive, 2) intent, 3) absence of mistake or accident, 4) common scheme or plan, or 5) identity, and for determining whether the probative value outweighs the prejudicial effect.

Prior to trial, the prosecution made a Molineux application seeking to admit as evidence an uncharged drug sale Petitioner allegedly made to a confidential informant on August 31, 2001. SCR at SR 237-49. The trial court denied the request after a Molineux /Ventimiglia hearing.

During the trial, however, Detective Jeffrey Roberts testified regarding his observations while conducting surveillance of Petitioner on August 31, 2001. See Tr. at

373-404. He testified that on that date, he was performing surveillance near 46 Lexington Avenue when he observed Petitioner engage in what appeared to be two separate drug exchanges with a Philip Stanfield ("Stanfield").[5] Tr. at 382:12-386:6. Detective Roberts testified to observing Petitioner and Stanfield enter and exit the building at 46 Lexington Avenue on two occasions. Id. Each time Petitioner exited the building, Detective Roberts saw Petitioner hand Stanfield a plastic bag containing a chunky off-white substance, which Stanfield would then place in his pants. Tr. at 384:25-385:4, 386:1-6. Detective Roberts did not state that he observed any sale between Petitioner and Stanfield, only that he witnessed Petitioner in possession of a white substance. Id. Detective Roberts videotaped these activities, and the video was received into evidence and shown to the jury. Tr. at 387:22-389:19.

5 Stanfield was not a confidential informant, and was arrested along with Petitioner on August 31, 2001, as a result of the police investigation. People v. Stanfield, 777 N.Y.S.2d 546 (App. Div. 2004). Stanfield was charged and convicted of the crime of Criminal Possession of a Controlled Substance in the Third Degree. Id. Although the Appellate Division ruled that Stanfield's conviction was not against the weight of the evidence, it nevertheless remitted the case because the "Supreme Court improperly denied defendant's repeated requests for disclosure of the informant's identity," which was relevant to the issue of whether defendant had possession of the controlled substance. Id. at 548-59. In contrast to the trial court's ruling before Petitioner's trial, the court in Stanfield allowed the police to testify about the controlled buys Stanfield allegedly engaged in with a confidential informant. Id.

***4** Petitioner's counsel moved for a mistrial, arguing that Petitioner was "denied a fair trial" as a result of the admission of Detective Roberts' testimony concerning the uncharged drug activities. Tr. at 412:17-414:22. Although the trial court admonished the prosecution for not including the uncharged acts as part of its Molineux application, Tr. at 416:1-2, the court went on to hold a Molineux /Ventimiglia discussion on the record, and concluded that the uncharged crimes were "inextricably intertwined with the events and investigation that day," and tended to prove Petitioner's knowledge, dominion over the premises, and intent, Tr. at 416:1-418:9. Petitioner's motion for a mistrial was denied. Tr. at 418:9.

The trial court's evidentiary ruling was an exercise of discretion, grounded in state law, and is not properly reviewed by the Court in a habeas proceeding. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1999) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); Sirico v. N.Y. Att'y Gen., No. 12-CV-0358, 2015 WL 3743126, at *7 (E.D.N.Y. June 15, 2015) ("As a threshold matter, Molineux sets forth a state evidentiary rule, not a rule of clearly established federal law, and 'it is not the province of a federal habeas court to re-examine state court determinations of state-law questions."' (quoting Cox v. Bradt, No. 10-CV-9175, 2012 WL 2282508, at *14 (S.D.N.Y. June 15, 2012))); Sudler v. Griffin, No. 12-CV-0367, 2013 WL 4519768, at *3 (N.D.N.Y. Aug. 26, 2013) ("A decision to admit evidence of a defendant's uncharged crimes or other bad acts under People v. Molineux ... constitutes an evidentiary ruling based on state law.").

In any event, Petitioner has not demonstrated that his constitutional right to a fair trial was violated. "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."' Sudler, 2013 WL 4519768, at *3 (quoting Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998)) (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)); see also Evans v. Fischer, 712 F.3d 125, 133-35 (2d Cir. 2013) (holding that a state appellate court's determination that it was harmless error to admit certain hearsay testimony was not an unreasonable application of due process law and did not render petitioner's trail fundamentally unfair).

Here, the Appellate Division held that "it is apparent that the contemporaneous uncharged sales were admissible to establish the intent to sell element under N.Y. Penal Law § 220.16(1), were inextricably interwoven with the drug possession charges and, finally, provided a complete and coherent narrative of the events leading to defendant's arrest." Buchanan, 944 N.Y.S.2d at 382 (internal citations omitted). The Appellate Division "had no quarrel with Supreme Court's determination that the uncharged sales

were highly probative and admissible under one or more of the recognized Molineux exceptions," and was "satisfied that Supreme Court balanced 'the probative value and the need for the evidence against the potential for delay, surprise and prejudice."' Id. (quoting People v. Wilkinson, 892 N.Y.S.2d 535, 540 (App. Div. 2010)). Similarly, the Court is satisfied that the Appellate Division's decision finding the admission of the uncharged crimes did not violate Petitioner's right to a fair trail was not contrary to, or an unreasonable application of Supreme Court precedent. Dowling, 493 U.S. at 352.

C. Ground Two – Weight and Sufficiency of the Evidence

***5** Petitioner argues in Ground Two of his Petition that the verdict was not supported by legally sufficient evidence and was against the weight of the evidence. Pet. at 4. Petitioner raised these claims on direct appeal, and the Appellate Division rejected them. SCR at SR 32-40; Buchanan, 944 N.Y.S.2d at 379. The Appellate Division went on to consider each of the elements of the crimes and found the evidence legally sufficient, and also concluded the verdict was not against the weight of the evidence. Buchanan, 944 N.Y.S.2d at 379-81.

1. Sufficiency of the Evidence

Respondent argues that Petitioner's legal sufficiency claim is procedurally barred by an adequate and independent state law ground. Resp. Mem. at 18-20. The Court agrees.

Federal habeas review of a state court decision is generally prohibited if the state court's rejection of the federal claim rested "on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991); see also Harris v. Reed, 489 U.S. 255, 261-62 (1989). "This rule applies whether the state law ground is substantive or procedural." Coleman, 501 U.S. at 729.

If the state court "explicitly invokes a state procedural bar rule as a separate basis for decision," the federal court is precluded from considering the merits of the federal claims in a habeas petition. Harris, 489 U.S. 255, 264 n.10; see also Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 809 (2d Cir. 2000) (stating that "[t]he state court must have actually relied on the procedural bar as an independent basis for its disposition of the case" in order to bar federal review in a habeas petition). Moreover, if a state court explicitly finds that a petitioner failed to preserve an argument for appellate review, but alternatively, or "in any event," rules the argument is without merit, the procedural bar still applies. Fama, 235 F.3d at 810 n.4. If there is ambiguity, however, such as "when a state court uses language such as '[t]he defendant's remaining contentions are either unpreserved for appellate review or without merit,' the validity of the claim is preserved and is subject to federal review." Id. at 810; see also Doe v. Perez, No. 13-CV-0921, 2015 WL 7444342, at *3 (N.D.N.Y. Oct. 30, 2015), adopted, 2015 WL 7432385 (N.D.N.Y. Nov. 23, 2015).

Under New York Law, challenges to the sufficiency of the evidence must be properly preserved for appellate review. Pursuant to New York's contemporaneous objection rule, "appellate courts will review only those errors of law that are presented at a time and in a manner that reasonably prompted a judge to correct them during criminal proceedings." Downs v. Lape, 657 F.3d 97, 103 (2d Cir. 2011); see N.Y. CRIM. PROC. LAW § 470.05(2) ("For 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."). The Second Circuit has held that "the contemporaneous objection rule is a firmly established and regularly followed New York procedural rule." Downs, 657 F.3d at 104.

Here, the Appellate Division rejected Petitioner's sufficiency of the evidence challenge due to his failure to preserve it. Buchanan, 944 N.Y.S.2d at 380. The Appellate Division specifically stated that Petitioner's "initial claim —that the verdict is not supported by legally sufficient evidence —is unpreserved for our review in light of [Petitioner's] failure to make a particularized motion for dismissal at the close of the People's case." Id. (citing People v. Caston, 874 N.Y.S.2d 623, 625 (App. Div. 2009) ("Because his counsel made only a general motion to dismiss at the close of the People's case, defendant failed to preserve his claim regarding the legal sufficiency of the evidence.")); accord People v. Gray, 86 N.Y.2d 10, 20 (1995).

***6** Since the Appellate Division based its denial of Petitioner's legal sufficiency claim on the contemporaneous objection rule, federal habeas review of the claim is barred by an adequate and independent state ground.[6] This bar to federal review may be lifted, however, if Petitioner can show cause for the default and resulting prejudice, or that the failure to review the claim will result in a "miscarriage of justice," i.e., that he is actually innocent. House v. Bell, 547 U.S. 518, 536-39 (2006); Maples v. Thomas, 132 S.Ct. 912, 922 (2012); Schlup v. Delo, 513 U.S. 298, 327 (1995). To establish cause, Petitioner must show that some objective external factor impeded his ability to comply with the relevant procedural rule. Maples, 132 S.Ct. at 922.

6 Petitioner has not argued the Appellate Division's application of the preservation rule was inadequate to preclude federal habeas review. Nor does the Court find anything in this record to conclude that the Appellate Division's application of the preservation rule in this case was an "exorbitant misapplication" that does not serve a "legitimate state interest." Downs, 657 F.3d at 102 (citing Walker v. Martin, 562 U.S. 307 (2011); Lee v. Kemna, 534 U.S. 362 (2002)); see also Green v. Haggett, No. 13-CV-0016, 2014 WL 3778587, at *5 (N.D.N.Y. July 31, 2014) (listing New York cases applying the preservation rule to parties arguing on appeal that the evidence was legally insufficient).

Petitioner has not alleged or shown cause for the default of his sufficiency claim. Pet. Although Petitioner raises an ineffective assistance of counsel claim in his habeas petition, he does not identify his trial counsel's failure to preserve his sufficiency claim as a basis for that claim. See id.[7] Furthermore, as discussed below, Petitioner's ineffective assistance of trial counsel claim is without merit, and therefore does not serve as "cause" for a procedural default. Murray v. Carrier, 477 U.S. 478, 488-89 (1986). Therefore, having failed to raise or demonstrate cause, the Court need not decide whether Petitioner suffered actual prejudice. Id. at 495-96. Petitioner has also failed to present any new evidence that he is "actually innocent" of the crimes for which he was convicted, and that failure to review this claim would result in a "miscarriage of justice." House, 547 U.S. at 536-39; Schlup, 513 U.S. at 327. Accordingly, Petitioner's legal sufficiency claim is therefore barred from habeas review and is denied and dismissed.[8]

7 The ineffectiveness of counsel for not preserving a claim in state court may be sufficient to show cause for a procedural default, but only when counsel's performance was so ineffective that the representation violated the petitioner's Sixth Amendment right to counsel. Edwards v. Carpenter, 529 U.S. 446, 451 (2000).

8 The Appellate Division considered "the evidence adduced as to each of the elements of the challenged crimes" for which Petitioner was convicted because he also raised a state-law weight of the evidence claim which, unlike sufficiency of the evidence, did not require preservation. Buchanan, 944 N.Y.S.2d at 380. As discussed in section III.C.2, Petitioner's weight of the evidence claim is not cognizable on federal habeas review. However, inasmuch as the Appellate Division ruled that the elements of each crime was proven, that ruling was not contrary to or an unreasonable application of clearly established Supreme Court precedent. Jackson v. Virginia, 443 U.S. 307 (1979).

2. Weight of the Evidence

Petitioner raised his weight of the evidence claim on direct appeal and the Appellate Division rejected it. Buchanan, 944 N.Y.S.2d at 380. To the extent that Petitioner challenges the weight of the evidence supporting his conviction, such argument is grounded in New York's Criminal Procedure Law § 470.15(5), which permits an appellate court in New York 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). Since weight of the evidence claims are grounded in state criminal procedure law, they are not cognizable on federal habeas review. 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"); Swarthout v. Cooke, 562 U.S. 216, 219 (2011) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law."' (quoting Estelle v. McGuire, 502 U.S. 62, 67 (1991))); McKinnon v. Sup't 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."); Clairmont v. Smith, No. 12-CV-1022, 2015 WL 5512832, at *18 (N.D.N.Y.

Sept. 16, 2015) (holding that the petitioner's argument that the verdict was against the weight of the evidence "states a claim only under state law, [and] is not cognizable on habeas corpus"). Petitioner's weight of the evidence claim is therefore denied and dismissed.

D. Grounds Three and Four – Ineffective Assistance of Counsel

***7** Grounds Three and Four of the Petition assert that Petitioner was denied the effective assistance of counsel. Pet. at 5.

In Ground Three, Petitioner maintains his trial counsel was ineffective for not challenging the sufficiency of the search warrant in a Darden hearing, and otherwise not moving to suppress the evidence seized upon execution of the search warrant. Id. The Appellate Division rejected this claim on the merits and, as articulated below, the Court finds the Appellate Division's decision was not contrary to, or an unreasonable application of the Supreme Court precedent set forth in Strickland v. Washington, 466 U.S. 668 (1984).

In Ground Four Petitioner argues that his appellate counsel failed to timely seek leave to pursue a discretionary appeal to the New York State Court of Appeals. Pet. at 5. Petitioner's claim is not cognizable on habeas review and is also denied.

1. Standard of Review

To demonstrate constitutionally ineffective assistance of counsel, a petitioner must show "both deficient performance by counsel and prejudice." Premo v. Moore, 562 U.S. 115, 121 (2011) (quoting Knowles v. Mirzayance, 556 U.S. 111, 122, 129 (2009)); Strickland v. Washington, 466 U.S. 668, 694 (1984). Deficient performance requires a showing that counsel's performance fell below an objective standard of professional reasonableness. Premo, 562 U.S. at 121; Harrington, 562 U.S. at 104. "Strickland does not guarantee perfect representation, only a reasonably competent attorney." Harrington, 562 U.S. at 110 (quoting Strickland, 466 U.S. at 687). A petitioner must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ... [and] that, under the circumstances, the challenged action 'might be considered sound trial strategy."' Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Even assuming a petitioner can establish counsel was deficient, he still must demonstrate prejudice. Id. at 693-94. This requires more than showing "the errors had some conceivable effect on the outcome," but that the counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687, 693.

Meeting this burden is "never an easy task ... [and] establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult." Premo, 131 S. Ct. at 739-40. When reviewing a state court's decision under § 2254, "[t]he question is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." Knowles, 556 U.S. at 123. Federal habeas courts "must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d)" because "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable." Harrington, 562 U.S. at 105. Instead, "the question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. Finally, it is "difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Id. at 111.

2. Ineffective Assistance of Trial Counsel

***8** Petitioner contends his trial counsel was ineffective because his counsel did not request a Darden hearing to assess the reliability of a confidential informant who provided the basis for the search warrant, and otherwise was ineffective in failing to move to suppress the evidence seized upon execution of the warrant. Pet. at 5.

Where, as here, the "defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); see also United States v. Cox, 59 F. App'x 437, 439 (2d Cir. 2003); United States

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v. Tisdale, 195 F.3d 70, 71 (2d Cir. 1999). Furthermore, "[a]lthough a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like [Petitioner's], a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief." Kimmelman, 477 U.S. at 382. A counsel's "failure to file a suppression motion does not constitute per se ineffective assistance of counsel." Id. at 384. Instead, only petitioners who can demonstrate under Strickland that "they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence." Id. at 382; see also Palacios v. Burge, 589 F.3d 556, 561 (2d Cir. 2009).

Finally, a petitioner must do more than show a constitutional violation on habeas review. Because Petitioner's ineffective assistance of counsel claim was rejected by the Appellate Division on the merits, see Buchanan, 944 N.Y.S.2d at 382-83, Petitioner "must also show that the state court's 'application of Strickland was not merely incorrect, but objectively unreasonable."' Palacios, 589 F.3d at 561-62 (quoting Hemstreet v. Greiner, 491 F.3d 84, 89 (2d Cir. 2007)).

As the Appellate Division stated, during the trial "[defense] counsel provided cogent opening and closing statements, made appropriate motions and objections —including a motion for a mistrial—and effectively cross-examined the People's witnesses." Buchanan, 944 N.Y.S.2d at 382. With regard to counsel's alleged ineffectiveness for failing to request a Darden hearing, Petitioner merely restates his claim made on direct appeal that "[f]or reasons that cannot be deemed strategic, the defense attorney never moved for a suppression hearing in a case where the accused was charged with possessing more than six ounces of crack cocain, drug paraphernalia, and guns." Pet. at 5.

Petitioner "has not shown that a meritorious issue existed regarding the confidential informant's identity and reliability such that the trial judge would have found the confidential information unreliable and suppressed the drugs and drug paraphernalia recovered from his bedroom." Anderson v. Philips, No. 03-CV-5192, 2005 WL 1711157, at *6 (E.D.N.Y. July 20, 2005) (citing Kimmelman, 477 U.S. at 375); see Tolliver v. Greiner, No. 02-CV-0570, 2005 WL 2179298, at *8 (N.D.N.Y. Sept. 8, 2005) (holding that defense counsel did not render ineffective assistance by failing to move to suppress evidence obtained pursuant to search warrant; petitioner did not allege any facts in his petition or in state court demonstrating how the affidavit filed in support of the search warrant was untrue or misleading), adopted 2005 WL 2437021 (N.D.N.Y. Sept. 30, 2005). Since Petitioner has not presented any evidence suggesting a Darden hearing would have been successful, his counsel's failure to request such a hearing was not objectively unreasonable. Cf. Tisdale, 195 F.3d at 73-74 ("Trial counsel's failure to bring a meritless suppression motion cannot constitute ineffective assistance."). Accordingly, the Appellate Division's decision rejecting Petitioner's claim of ineffective assistance of trial counsel was not contrary to, or an unreasonable application of Strickland, and Petitioner's third ground for relief is denied and dismissed.

3. Ineffective Assistance of Appellate Counsel

***9** Petitioner argues in Ground Four of his Petition that he was denied the right to effective assistance of appellate counsel. Pet. at 5. Specifically, he claims his appellate counsel failed to timely seek leave to appeal to the New York State Court of Appeals. Id. In opposition, Respondent argues the claim is unexhausted and plainly meritless. Resp. Mem. at 25-26.

A claim of ineffective assistance of appellate counsel is reviewed under the same standard set forth in Strickland. See Smith v. Robbins, 528 U.S. 259, 285 (2000) ("[T]he proper standard for evaluating [a petitioner's] claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in Strickland v. Washington."); Smith v. Murray, 477 U.S. 527, 535-36 (1986) (applying Strickland to claim of appellate error); Chrysler v. Guiney, 806 F.3d 104, 117-18 (2d Cir. 2015). To satisfy the rigorous Strickland standard when reviewing appellate counsel's performance, "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 argument that could be made." Giraldi v. Bartlett, 27 F. App'x 75, 77 (2d Cir. 2001) (quoting Clark v. Stinson, 214 F.3d 315, 322 (2d Cir. 2000)). Petitioner must show that appellate counsel's performance was "outside the wide range of professionally competent assistance," and that there is a "reasonable probability" that, but for the deficiency in performance, the outcome of the proceeding

would have been different. Id. (quoting Strickland, 466 U.S. at 690).

After filing his federal habeas petition, Petitioner filed an application for a writ of error *coram nobis* in the Appellate Division. Dkt. No. 9 ("Motion for Stay"). Petitioner then sought permission to stay the habeas proceedings until his state application was decided. Id. at 3-4. Respondent opposed the Motion for a stay. Dkt. No. 10. On October 15, 2015, the Court denied the request for a stay, holding that Petitioner "failed to establish good cause for not exhausting those claims before seeking federal habeas relief." Dkt. No. 11 ("Decision and Order") at 2-3. Shortly thereafter, on October 22, 2015, the Appellate Division denied Petitioner's application for a writ of error *coram nobis*.[9] On January 19, 2016, the Court of Appeals denied Petitioner's application for leave to appeal the *coram nobis* motion. Therefore, Petitioner's claim of appellate counsel ineffectiveness is now exhausted, and is subject to AEDPA standards of review.

9 The Court takes judicial notice of the Order of the New York State Court of Appeals denying Petitioner's application for leave to appeal the Order of the Appellate Division, Third Department, which denied his application for a writ of error *coram nobis*. See Ariola v. LaClair, No. 08-CV-116, 2014 WL 4966748, at *22 n.2 (N.D.N.Y. Sept. 30, 2014) ("The court also looks to, and takes judicial notice of, matters of public record, including certain documents filed in other courts.").

Petitioner's claim of ineffective assistance relates solely to his appellate counsel's alleged failure to seek leave to pursue a discretionary appeal to the New York State Court of Appeals. Habeas relief, however, is not available for such claims. The Supreme Court has held that a petitioner's "right to counsel is limited to the first appeal as of right," Hernandez v. Greiner, 414 F.3d 266, 269 (2d Cir. 2005) (quoting Evitts v. Lucey, 469 U.S. 387, 394 (1985)), and has also ruled there is no constitutional right to counsel to pursue discretionary appeals. See Chalk v. Kuhlmann, 311 F.3d 525, 528 (2d Cir. 2002) (citing Ross v. Moffitt, 417 U.S. 600, 610-11 (1974)). Furthermore, as relevant here, the Supreme Court specifically held in Wainwright v. Torna, that habeas relief may not be granted based on a claim that a petitioner's counsel failed to timely file an application for discretionary review to the state's highest court. Wainwright, 455 U.S. 586, 587 (1982).

***10** Here, Petitioner's counsel perfected an appeal on his behalf before the Appellate Division. Petitioner had no constitutional right to counsel to pursue further discretionary appellate review. Hernandez, 414 F.3d at 269. Nevertheless, and contrary to Petitioner's claim, his appellate counsel did, in fact, file a late application seeking leave to appeal to the Court of Appeals. SCR at SR 403-08. The record shows the Court of Appeals accepted the application and, on December 30, 2013, denied the application for leave. Id. at SR 409. Even assuming Petitioner had a right to counsel under these circumstances, there is no factual basis in the record for his claim. Therefore, the Appellate Division's decision rejecting his *coram nobis* motion was not contrary to, or an unreasonable application of Strickland, 466 U.S. 668, and Petitioner's Fourth Ground for relief is denied and dismissed.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that the Petition (Dkt. No. 1) is **DENIED and DISMISSED**; and it is further

ORDERED, that no Certificate of Appealability ("COA") shall issue because Petitioner failed to make a "substantial showing of the denial of a constitutional right" as 28 U.S.C. § 2253(c)(2) requires.[10] Any further request for a Certificate of Appealability must be addressed to the Court of Appeals (FED. R. APP. P. 22(b)); and it is further

10 Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); see also 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").

ORDERED, that the Clerk of the Court serve copies of this Decision and Order upon the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

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407 Fed.Appx. 559
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Christopher BOYD, Defendant–Appellant.

No. 09–3520–cr.
|
Jan. 31, 2011.

Appeal from a judgment of the United States District Court for the Western District of New York (Skretny, J.).

***560 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of the district court be **AFFIRMED** in part and **VACATED** in part, and the case **REMANDED** for further proceedings.

Attorneys and Law Firms

Anthony J. Lana, Eoannou, Lana & D'Amico, Buffalo, NY, for Appellant.

Joseph J. Karaszewski, Assistant United States Attorney (Karen Oddo, Law Clerk, on the brief), for William J. Hochul, Jr., United States Attorney for the Western District of New York, Buffalo, NY, for Appellee.

PRESENT: DENNIS JACOBS, Chief Judge, AMALYA L. KEARSE, CHESTER J. STRAUB, Circuit Judges.

SUMMARY ORDER

****1** Defendant-appellant Christopher Boyd appeals from a judgment of conviction entered on August 7, 2009. Pursuant to a plea agreement, Boyd pled guilty to criminal copyright infringement and to filing a false tax return, in violation of 18 U.S.C. § 2319(b)(1), 17 U.S.C. § 506(a)(1)(A), and 26 U.S.C. § 7206(1). He was sentenced to 46 months of incarceration, three years' supervised release, and was ordered to pay over $2 million in restitution. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Boyd argues that his trial counsel's performance was constitutionally ineffective because Boyd was not informed of relevant statutes of limitations, which circumscribed the conduct for which he could be charged. When an ineffective assistance claim is raised on direct appeal, we have three options: "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent [28 U.S.C.] § 2255 petition; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us." *United States v. Hasan,* 586 F.3d 161, 170 (2d Cir.2009) (brackets in original). "[I]n most cases [a habeas claim] is preferable to direct appeal for deciding claims of ineffective-assistance." *Massaro v. United States,* 538 U.S. 500, 504–05, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). However, we have addressed ineffective assistance claims on direct appeal when their resolution is "beyond any doubt" or to do so is "in the interest of justice." *United States v. Matos,* 905 F.2d 30, 32 (2d Cir.1990).

It is in the interest of justice to consider Boyd's claims on direct appeal. Boyd argues in part that he agreed to pay restitution with respect to time-barred conduct without knowing that (absent his consent) the district court could impose restitution only for conduct within the limitations period. *See United States v. Silkowski,* 32 F.3d 682, 688–89 (2d Cir.1994) (interpreting 18 U.S.C. §§ 3663–3664 as limiting restitution to loss caused by "specific conduct forming the basis for the offense of conviction," unless more extensive restitution is agreed to in a plea agreement). Restitution orders cannot be challenged through a habeas petition because a "monetary fine is not a sufficient restraint on liberty to meet the 'in custody' requirement," even if raised in conjunction with a challenge to a sentence of imprisonment. *See Kaminski v. United States,* 339 F.3d 84, 87–88 (2d Cir.2003) (quoting *United States v. Michaud,* 901 F.2d 5, 7 (1st Cir.1990)). To assess the effect on restitution, we must consider Boyd's claims on direct appeal.

[1] There is insufficient record for us to decide Boyd's ineffectiveness claim for the copyright infringement count. We remand to the district court to consider it first, with additional fact-finding on the restitution amount and the representation ***561** of Boyd, including: the timing of the acts of infringement; whether Boyd was aware of the statute of limitations; whether the issue was raised during plea negotiations; and whether Boyd would have insisted

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upon going to trial had he known about the limitations period.

****2** The following considerations bear upon the remand:

First, the court must determine whether Boyd had a valid statute of limitations defense for the offense itself. Criminal copyright infringement under 18 U.S.C. § 2319(b)(1) involves ten or more copies of a protected work during any 180–day period, and has a five-year statute of limitations. *See* 18 U.S.C. § 3282(a). It seems unlikely, albeit possible, that Boyd's infringements all occurred before the limitations period;[1] if Boyd pled guilty to an offense for which he (unknowingly) had a valid affirmative defense, it is likely that his counsel's performance was deficient and that he suffered prejudice, though the performance would not be *per se* deficient. *See United States v. Hansel,* 70 F.3d 6, 8 (2d Cir.1995) (per curiam).[2]

1 The limitations period is the five years before the filing of the information on February 9, 2009. Conduct as early as 180 days before February 9, 2004 may have been chargeable, however, because of the time period inherent in the offense. For example, if the first infringement occurred 180 days before February 9, 2004 and the tenth occurred on February 9, 2004, one could argue that the offense was committed within the limitations period—when it was completed on February 9. The parties can brief the issue on remand if it affects the timeliness of the count.

2 For example, Boyd's counsel may have used the (hypothetically) time-barred copyright count as a negotiating tool to secure a better overall plea deal, by offering excessive restitution (from the time-barred copyright count) to minimize the sentence length (from the timely tax count). The *Hansel* court hinted at such a possibility, but had no occasion to elaborate because the defendant pled guilty without a plea agreement. *Hansel,* 70 F.3d at 8.

Second, the Guidelines range is the same even if some acts were time-barred, because Boyd's infringement was ongoing. Acts that were "part of the same course of conduct or common scheme or plan as the offense of the conviction" are "relevant conduct" that is included in Guidelines calculations, even if the acts occurred prior to the limitations period. *Silkowski,* 32 F.3d at 687–88 (quoting U.S.S.G. § 1B1.3 (a)(2)).

Third, an ineffective assistance claimant who pled guilty must show a reasonable probability that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Other circuits have interpreted *Hill* strictly, reasoning that without a reasonable probability of insistence upon trial, a defendant's claim that he could have negotiated a better plea deal cannot establish the requisite prejudice for an ineffectiveness claim. *See, e.g., Short v. United States,* 471 F.3d 686, 696–97 (6th Cir.2006); *Bethel v. United States,* 458 F.3d 711, 720 (7th Cir.2006). We have not yet considered this "better plea deal" argument, but the record should be developed to determine whether Boyd's claim presents the issue.

[2] Boyd's ineffective assistance claim for the false tax return count has no merit. The statute of limitations for filing a false tax return, in violation of 26 U.S.C. § 7206(1), is six years. *See* 26 U.S.C. § 6531(5). The information was filed on February 9, 2009; it alleged that Boyd filed four false tax returns beginning on or around April 15, 2003; therefore, all returns were filed within the six-year limitations period.

***562** We have considered the remainder of Boyd's contentions on this appeal and have found them to be without merit. Accordingly, the judgment of the district court is **AFFIRMED** for the false tax return count and **VACATED** for the copyright infringement count. The case is **REMANDED** for proceedings consistent with this order.

All Citations

407 Fed.Appx. 559, 2011 WL 285196

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42 Fed.Appx. 488
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals,
Second Circuit.

James DAVIS, Petitioner-Appellant,
v.
Dominic MANTELLO, Respondent-Appellee.

Docket No. 01-2264.
|
May 22, 2002.

State prisoner who was convicted of robbery, assault, and unlawful imprisonment petitioned for writ of habeas corpus. The United States District Court for the Eastern District of New York, Sterling Johnson, Jr., J., denied the petition, and petitioner appealed. The Court of Appeals held that: (1) petitioner's unjustified failure to raise on direct appeal in state court his claim that he was denied the right to testify before the grand jury was a procedural default under state law, and could not be raised in federal habeas proceeding absent any showing of cause and prejudice or a fundamental miscarriage of justice; (2) claim of deficiency in state grand jury proceeding was not cognizable in federal habeas proceeding; and (3) defense counsel was not deficient in failing to request a missing witness charge.

Affirmed.

West Headnotes (3)

[1] **Habeas Corpus**
Direct Review;Appeal or Error
Habeas Corpus
Availability of Remedy Despite Procedural Default or Want of Exhaustion
Habeas Corpus
Cause and Prejudice in General

State postconviction relief movant's unjustified failure to raise on direct appeal in state court his claim that he was denied the right to testify before the grand jury was a procedural default under state law where the claim appeared on the face of the record, and claim could not be raised in federal habeas proceeding absent any showing of cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. N.Y.McKinney's CPL § 440.10.

31 Cases that cite this headnote

[2] **Habeas Corpus**
Grand Jury

Claim of deficiency in state grand jury proceeding was not cognizable in habeas corpus proceeding in federal court.

64 Cases that cite this headnote

[3] **Criminal Law**
Offering Instructions

Defense counsel in prosecution for robbery, assault, and unlawful imprisonment was not deficient in failing to request a missing witness charge where, in all likelihood, the missing witness, who was with a testifying witness throughout the entire duration of the robbery, would not have added any new information if he did testify, and where, in light of compelling evidence against defendant, there was no significant probability that a properly instructed jury would have acquitted defendant even if the court granted the request for a missing witness charge. U.S.C.A. Const.Amend. 6.

6 Cases that cite this headnote

Attorneys and Law Firms

***489** Marsha Taubenhaus, New York, New York, for Petitioner-Appellant.

Howard Goodman, Assistant District Attorney, Kings County (Leonard Joblove, Assistant District Attorney, Kings County, on the brief) for Charles J. Hynes, District Attorney, Kings County, for Respondent-Appellee.

Present OAKES, and KATZMANN, Circuit Judges; and MURTHA, * District Judge.

* The Honorable J. Garvan Murtha, Chief Judge, United States District Court for the District of Vermont, sitting by designation.

Summary Order

****1** UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., *J.*), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Petitioner James Davis and his co-defendant, Terran Vanexel, were accused of robbing a hardware store in Brooklyn, New York on July 12, 1995. After a jury trial in the Supreme Court, Kings County, the petitioner was convicted of three counts of robbery in the first degree, one count of assault in the second degree, and one count of unlawful imprisonment in the first degree. He was sentenced to consecutive terms of imprisonment of seven and one-half to fifteen years for two of the counts of first degree robbery and concurrent sentences for the other crimes. The parties' familiarity with the facts and procedural history of this case is assumed.

This Court reviews a district court's denial of a petition for a writ of habeas corpus *de novo. Fama v. Comm'r of Corr. Servs.,* 235 F.3d 804, 8080 (2d Cir.2000); ***490** *Reyes v. Keane,* 118 F.3d 136, 138 (2d Cir.1997).

[1] We agree with the district court that the petitioner's claim that he was denied the right to testify before the grand jury is procedurally barred pursuant to N.Y.Crim. Proc. Law § 440.10. A motion to vacate a judgment is only available when there are insufficient facts on the record to enable adequate review of the petitioner's claims on direct appeal. N.Y.Crim. Proc. Law § 440.10(2)(c); *see also People v. Cooks,* 67 N.Y.2d 100, 104, 500 N.Y.S.2d 503, 491 N.E.2d 676 (1986). The Supreme Court, Kings County denied the petitioner's motion to vacate his judgment of conviction pursuant to § 440.10, concluding that all of the petitioner's claims, including a claim that he was denied the right to testify before the grand jury, were based upon facts appearing on the record and that the defendant's claims were therefore procedurally barred.

New York appellate courts have consistently considered and rejected a defendant's argument on direct appeal that he was denied the opportunity to testify before the grand jury where the record showed that the defendant failed to timely move to dismiss the indictment or to file his notice of intent to testify before the grand jury with the District Attorney. *See, e.g., People v. Rawles,* 279 A.D.2d 267, 268, 719 N.Y.S.2d 17 (1st Dep't 2001) (holding that motion to dismiss the indictment was properly denied because defendant never filed his request to testify before the grand jury); *People v. Purcell,* 268 A.D.2d 491, 491, 703 N.Y.S.2d 492 (2d Dep't 2000) (holding that defendant's argument that he was denied the opportunity to testify before the grand jury was waived by his failure to timely move to dismiss the indictment); *People v. Beyor,* 272 A.D.2d 929, 930, 708 N.Y.S.2d 535 (4th Dep't 2000) (holding that defendant waived his claim that he was denied the opportunity to appear before the grand jury by failing to move to dismiss the indictment within five days after arraignment); *People v. Nesbett,* 255 A.D.2d 950, 950, 682 N.Y.S.2d 324 (4th Dep't 1998) (holding that defendant's claim that he was denied the right to testify before the grand jury is meritless as he did not serve the District Attorney with notice of intent to testify). These cases demonstrate that the petitioner should have raised his claim on direct appeal rather than in a post-conviction motion to vacate. Moreover, because defense counsel could have raised the argument on direct appeal, but did not, this failure was unjustified. *See People v. Felton,* 239 A.D.2d 120, 121, 657 N.Y.S.2d 34 (1st Dep't 1997). The unjustifiable failure to raise on direct appeal a claim that appears on the face of the record is a procedural default under New York law and therefore constitutes an independent and adequate state ground for the state court's rejection of the petitioner's claim. *Levine v. Comm'r of Corr. Servs.,* 44 F.3d 121, 126 (2d Cir.1995). Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. *See Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Reid v. Senkowski,* 961 F.2d 374, 377 (2d Cir.1992).

****2** **[2]** Moreover, even if this court were able to review the petitioner's claim, his claim would fail on the merits. Claims of deficiencies in state grand jury proceedings are

not cognizable in a habeas corpus proceeding in federal court. *See Lopez v. Riley,* 865 F.2d 30, 32 (2d Cir.1989) (relying on *United States v. Mechanik,* 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986)); *Mirrer v. Smyley,* 703 F.Supp. 10, 11-12 (S.D.N.Y.1989), *aff'd,* ***491** 876 F.2d 890 (2d Cir.1989). [1]

1 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. Even reading petitioner's *pro se* federal habeas petition liberally, we find that it does not assert an ineffective assistance claim in connection with the grand jury proceedings. Moreover, even assuming that the petition did assert such a claim and that petitioner exhausted this claim in the state courts, which is very questionable, it would nevertheless fail on the merits. 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. *See, e.g., Kohler v. Kelly,* 890 F.Supp. 207, 213 (W.D.N.Y.1994) (citing New York cases), *aff'd,* 58 F.3d 58 (2d Cir.1995); *People v. Hunter,* 169 A.D.2d 538, 539, 564 N.Y.S.2d 391 (1st Dep't 1991); *People v. Hamlin,* 153 A.D.2d 644, 544 N.Y.S.2d 859, 860 (2d Dep't 1989).

The petitioner's second claim on appeal is that his trial attorney was ineffective because he failed to request a missing witness charge for Dwayne Williams. Because the state appellate division adjudicated the petitioner's ineffective assistance claim on the merits, *see People v. Davis,* 248 A.D.2d 724, 673 N.Y.S.2d 915 (2d Dep't 1998), we cannot grant his habeas petition unless the adjudication by the state court "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 also Sellan v. Kuhlman,* 261 F.3d 303, 312 (2d Cir.2001). Thus, the issue for this court is whether the state court unreasonably applied the *Strickland* standard. *See Lindstadt v. Keane,* 239 F.3d 191, 198 (2d Cir.2001); *Loliscio v. Goord,* 263 F.3d 178, 193 (2d Cir.2001).

To prove ineffective assistance of counsel, petitioner must show that (1) his counsel's performance was deficient and (2) this deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Bloomer v. United States,* 162 F.3d 187, 192 (2d Cir.1998). To determine whether a counsel's conduct is deficient, 'the court must ... determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' " *Lindstadt,* 239 F.3d at 198-99 (quoting *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052). Prejudice requires showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. The Supreme Court defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.*

[3] A review of the record indicates that trial counsel was not deficient in failing to request a missing witness charge. A party seeking a missing witness charge must demonstrate, among other things, that the witness would provide non-cumulative testimony. *People v. Gonzalez,* 68 N.Y.2d 424, 427, 509 N.Y.S.2d 796, 502 N.E.2d 583 (N.Y.1986). A missing witness charge is not appropriate when the witness's testimony would merely corroborate the testimony of other witnesses. *People v. Keen,* 94 N.Y.2d 533, 539, 707 N.Y.S.2d 380, 728 N.E.2d 979 (N.Y.2000). The state argues that Williams' testimony would not have added anything to the testimony of ***492** Monroe or Stone as Williams and Monroe were together throughout the entire duration of the robbery. Monroe's testimony supports this argument. Contrary to the petitioner's assertions, the record does not show that Monroe and Stone contradicted each other in any significant way. Thus, in all likelihood, Williams would not have added any new information had he testified.

****3** Moreover, the petitioner cannot show that he was prejudiced by his attorney's failure to request the charge. Even if the court had granted the request for a missing witness charge, there is "no significant probability that a properly instructed jury would have acquitted [the] defendant." *People v. Vasquez,* 76 N.Y.2d 722, 725, 557 N.Y.S.2d 873, 557 N.E.2d 109 (N.Y.1990); *People v. Robertson,* 205 A.D.2d 243, 247, 618 N.Y.S.2d 330 (1st Dep't 1994). The testimony of Monroe and Stone provided compelling evidence that the defendant committed the

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crimes with which he was charged. Therefore, the state court did not unreasonably apply *Strickland* in finding that trial counsel's representation did not fall below an objective standard of reasonableness.

We have reviewed all of the appellant's other arguments. We affirm the judgment of the district court.

All Citations

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42 Fed.Appx. 485
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals,
Second Circuit.

Desmond JONES, Petitioner-Appellant, v. D.A. SENKOWSKI, Superintendent, Clinton Correctional Facility, Respondent-Appellee.

Docket No. 00-2145.
|
May 22, 2002.

State prisoner whose conviction of burglary, robbery, and attempted robbery was upheld on appeal, 249 A.D.2d 490, 671 N.Y.S.2d 672, petitioned for writ of habeas corpus. The United States District Court for the Eastern District of New York, Weinstein, J., denied the petition, and petitioner appealed. The Court of Appeals held that petitioner, who failed to assert suggestive identification claim on direct appeal conviction in state court, could not establish cause for such procedural default as required for consideration of the claim in federal habeas court.

Affirmed.

West Headnotes (1)

[1] **Habeas Corpus**
Identity of Facts, Law, and Theory
Habeas Corpus
Cause or Excuse

Habeas petitioner who failed to assert suggestive identification claim on direct appeal from his burglary and robbery conviction in state court could not establish cause for such procedural default as required for consideration of the claim in federal habeas court on ground that state court could still reach merits of claim through motion for writ of error coram nobis in which petitioner would assert ineffective assistance of appellate counsel based on omission of suggestive identification claim; consideration of ineffective assistance claim might require state court to evaluate strength of omitted claim, but its ruling would still be made on the ineffectiveness claim, not on the suggestiveness claim, which would merely be considered as an element of the ineffectiveness claim. 28 U.S.C.A. § 2254(b)(2).

23 Cases that cite this headnote

***485** Appeal from the United States District Court for the Eastern District of New York, Weinstein, J.

Attorneys and Law Firms

Georgia J. Hinde, New York, NY, for Petitioner-Appellant.

Caitlin J. Halligan, Solicitor General, for Eliot Spitzer, Attorney General of the State of New York (Robin A. Forshaw, Sachin S. Pandya, Assistant Solicitors General, of counsel), New York, NY, for Respondent-Appellee.

Present KEARSE, LEVAL, and KATZMANN, Circuit Judges.

SUMMARY ORDER

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

Petitioner appeals from a judgment of the District Court entered on February 10, 2000, based on an order of the same date, denying on the merits his petition for a writ of habeas corpus. For the following reasons, we affirm the judgment of the ***486** District Court on separate grounds. In so doing, we hereby withdraw and vacate our previous opinion in this case.

On June 4, 1996, following a jury trial in the Queens County Supreme Court, petitioner, Desmond Jones, was convicted of multiple counts of burglary, robbery, and attempted robbery stemming from a single incident in which several members of a family were robbed and

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assaulted in their home. He was later sentenced to a total of fifteen years imprisonment. On appeal to the Appellate Division of the New York Supreme Court, Mr. Jones challenged: (1) the State's failure to disclose his post-arrest "mug shot"; (2) certain remarks made by the prosecutor on summation; and (3) the charge given to the jury regarding the reliability of his crime scene identification. The Appellate Division rejected these claims, and the New York Court of Appeals denied leave to appeal. *See People v. Jones,* 249 A.D.2d 490, 671 N.Y.S.2d 672 (2d Dep't), *leave denied* 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565 (1998).

On April 20, 1999, Mr. Jones filed a *pro se* petition for a writ of habeas corpus, alleging the three claims he had brought on direct appeal as well as certain new claims he had not presented to the state courts previously. The District Court denied the petition in full. Despite concluding that petitioner's claims were "without any merit," the District Court nevertheless granted a certificate of appealability as to one of them, namely, petitioner's claim that the circumstances surrounding his crime-scene identification were so suggestive as to constitute a denial of his right to due process. The instant appeal ensued on that claim.

In denying petitioner's suggestive identification claim (as well as the other new claims), the District Court invoked its authority under Title 28, United States Code, Section 2254(b)(2), which provides that "[a]n 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." 28 U.S.C. § 2254(b)(2). It thus appears that the District Court treated the suggestive identification claim as if it were unexhausted. We find, however, that the suggestive identification claim is procedurally barred in state court and is therefore exhausted for purposes of federal habeas review. We further find that petitioner cannot make the required showing of "cause" for his procedural default of his suggestive identification claim.

Federal law states that a habeas petitioner "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." 28 U.S.C. § 2254(c). New York law permits only one request for direct review of a conviction, *see* N.Y. Court Rules § 500.10(a), and here, petitioner failed to bring his suggestive identification claim on direct appeal. Petitioner nevertheless argues that this claim is not procedurally barred in state court because it may be brought through a motion for a writ of error coram nobis.[1] Such a motion, however, has been authorized by New York ***487** courts only for claims of ineffective assistance of appellate counsel. *See People v. Bachert,* 69 N.Y.2d 593, 595-96, 516 N.Y.S.2d 623, 509 N.E.2d 318 (1987) (holding that "a common-law coram nobis proceeding brought in the proper appellate court is the only available and appropriate procedure and forum to review a claim of ineffective assistance of appellate counsel"). *See also Aparicio v. Artuz,* 269 F.3d 78, 87 n. 1 (2d Cir.2001) ("Thus far, [use of the coram nobis proceeding] has been sanctioned by the Court of Appeals only in the context of ineffective assistance of appellate counsel."); *People v. Gordon,* 183 A.D.2d 915, 584 N.Y.S.2d 318, 318 (2d Dep't 1992) (mem.) ("In a criminal action, the writ of error coram nobis lies in [the state appellate court] only to vacate an order determining an appeal on the ground that the defendant was deprived of the effective assistance of appellate counsel.").

1 Following oral argument, the Court twice requested letter briefing from the parties on the question of whether petitioner's suggestive identification was procedurally defaulted. In both submissions, petitioner's counsel in effect disclaimed any intent to bring the suggestive identification claim under Section 440.10 of the New York Criminal Procedure Law. *See* N.Y.Crim. Proc. L. § 440.10(1).

****2** Acknowledging the limitations on the coram nobis proceeding, petitioner contends that a claim of ineffective assistance of appellate counsel may still serve as a vehicle for consideration of the merits of his suggestive identification claim in state court, where the claim of ineffectiveness is premised on appellate counsel's *omission* of the suggestive identification claim. Petitioner argues that the state court will have to reach the merits of the suggestive identification claim to determine whether its omission "fell below an objective standard of reasonableness," and whether there was a "reasonable probability" that the omitted claim would have resulted in a reversal on appeal. *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir.1994) (internal quotations omitted). We have indicated, however, that a claim of ineffective assistance of appellate counsel is "distinct" from the claim whose omission indicates such ineffectiveness. *See Turner v.*

Artuz, 262 F.3d 118, 123 (2d Cir.), *cert. denied,* 534 U.S. 1031, 122 S.Ct. 569, 151 L.Ed.2d 442 (2001). While consideration of petitioner's ineffective assistance claim may require the state court to evaluate the *strength* of the omitted suggestive identification claim, the ruling would still be made on the ineffectiveness claim-not the suggestiveness claim, which would merely be considered as an element of the ineffectiveness claim. As such, the coram nobis proceeding does not afford the petitioner a "right" to raise the "question presented" by his federal habeas petition in state court. To hold otherwise would be to establish that *no* claim that was omitted on direct appeal could be exhausted until such time as the habeas petitioner brought a claim in state court of ineffective assistance premised on the omission. We decline to establish such a rule.

Before a federal habeas court may consider the merits of a procedurally-defaulted claim, the petitioner must demonstrate cause for the default, and prejudice therefrom. *See, e.g., Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Wainwright v. Sykes,* 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). As the Supreme Court has held, "[i]neffective assistance of counsel ... is cause for a procedural default." *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Accordingly, petitioner argues that, even if we find his claim to be procedurally defaulted, we must await adjudication in state court of his ineffective assistance claim before determining whether there was "cause" for his default. This argument, however, is foreclosed by the Supreme Court's decision in *Murray,* where the Court states that "the exhaustion doctrine ... 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 ***488** procedural default." *Id.* at 488-89, 106 S.Ct. 2639 (emphasis added). The Court further explains that "if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available." *Id.* We therefore find that petitioner cannot establish "cause" for the procedural default of his suggestive identification claim on the basis of ineffective assistance of appellate counsel. The District Court, therefore, should not have reached the substantive merits of the suggestive identification claim.[2] Denial of the claim, however, was the appropriate disposition. *See Gonzalez v. Sullivan,* 934 F.2d 419, 420 (2d Cir.1991) (explaining that procedural default without cause "constitute[s] independent and adequate state grounds that prevent federal review of these issues on a habeas corpus application.")

2 We note that "a denial on grounds of procedural default constitutes a disposition on the merits and thus renders a subsequent § 2254 petition ... 'second or successive' for purposes of the AEDPA." *Carter v. United States,* 150 F.3d 202, 205-06 (2d Cir.1998) (per curiam).

****3** We have considered all of defendant's remaining arguments and find them to be without merit. The judgment of the district court is therefore AFFIRMED.

All Citations

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500 Fed.Appx. 12
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals,
Second Circuit.

Eddie RUSH, Petitioner–Appellant,
v.
John B. LEMPKE, Respondent–Appellee.

No. 11–783–pr.
|
Oct. 11, 2012.

Synopsis

Background: Petitioner convicted of, inter alia, first-degree burglary, affirmed at 843 N.Y.S.2d 392, 44 A.D.3d 799, sought a writ of habeas corpus. The United States District Court for the Eastern District of New York, Bianco, J., 2011 WL 477807, denied relief, and petitioner appealed.

[Holding:] The Court of Appeals held that petitioner's claim that his right to self-representation was violated by the trial court's restriction of his movement within the courtroom was barred by procedural default.

Affirmed

West Headnotes (2)

[1] **Habeas Corpus**
Inquiry, advice, warnings, and assistance; waiver

State appellate court's rejection of defendant's self-representation claim was not an unreasonable application of clearly established federal law; his statement that he would proceed pro se “if [he had] to” was not unequivocal, but part of a transparent effort to obtain an adjournment and substitution of counsel. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[2] **Habeas Corpus**
Availability at time of petition
Habeas Corpus
Identity of issues in state and federal courts

Habeas petitioner's claim that his right to self-representation was violated by the trial court's restriction of his movement within the courtroom was barred by procedural default; his brief before state appellate court failed to assert or imply that the trial court's restriction of his movement affected his right to self-representation, and further direct review was no longer available. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(b)(1)(A), (b)(1)(B)(i); McKinney's CPL § 440.10(2)(c).

17 Cases that cite this headnote

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

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, *13 AND DECREED that the judgment of the district court is **AFFIRMED.**

Attorneys and Law Firms

Robert A. Culp, Law Office of Robert A. Culp, Garrison, N.Y., for Petitioner–Appellant.

Joanna Hershey (Tammy J. Smiley, Judith R. Sternberg, on the brief), Assistant District Attorneys, of counsel for Kathleen M. Rice, District Attorney, Nassau County, Mineola, N.Y., for Respondent–Appellee.

Present: ROBERT A. KATZMANN, RICHARD C. WESLEY, and PETER W. HALL, Circuit Judges.

SUMMARY ORDER

****1** Petitioner–Appellant Eddie Rush (“Rush”) appeals from a February 2, 2011 memorandum opinion and order (the “February 2011 Opinion”) of the United States District Court for the Eastern District of New York

(Bianco, *J.*) denying his petition for a writ of *habeas corpus* as untimely and, in the alternative, on the merits. *Rush v. Lempke,* No. 09–CV–3464(JFB), 2011 WL 477807, at *1 (E.D.N.Y. Feb. 2, 2011). In the February 2011 Opinion, the district court denied petitioner a certificate of appealability. *Id.* at *20. However, on August 18, 2011, this Court issued a certificate of appealability on the following issues: whether petitioner was entitled to equitable tolling of the limitations period; whether the commencement of the limitations period was governed by 28 U.S.C. § 2244(d)(1)(B); and whether petitioner's right to self-representation was violated by the court's denial of his initial request to proceed *pro se* on January 10, 2003, and its restriction of his movement within the courtroom. Because we find that neither of Rush's Sixth Amendment claims have merit, we need not address the issues relating to the timeliness of his petition. We assume the parties' familiarity with the underlying facts and procedural history in this case.

This Court reviews the district court's denial of a 28 U.S.C. § 2254 petition *de novo. See Ponnapula v. Spitzer,* 297 F.3d 172, 179 (2d Cir.2002). To determine whether a petitioner is entitled to a writ of *habeas corpus,* federal courts must apply the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d). Accordingly, an application for a writ of *habeas corpus* shall not be granted unless a state court's adjudication on the merits

> (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)(1)–(2); *Williams v. Taylor,* 529 U.S. 362, 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (O'Connor, *J.*) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

[1] First, we consider Rush's claim that the Supreme Court of the State of New York Appellate Division, Second Department, unreasonably applied clearly established federal law when it concluded that the trial court "properly denied his initial request to proceed pro se, as the initial request was only to proceed pro se temporarily until his new counsel arrived ... and was not clear and unequivocal." ***14** *People v. Rush,* 44 A.D.3d 799, 843 N.Y.S.2d 392, 393 (2007). It is well-established that the Sixth Amendment grants a criminal defendant the right to represent himself at trial. *Faretta v. California,* 422 U.S. 806, 819–21, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right "may be exercised by all criminal defendants who knowingly, voluntarily, and unequivocally waive their right to appointed counsel." *Johnstone v. Kelly,* 808 F.2d 214, 216 (2d Cir.1986). "Once asserted, however, the right to self-representation may be waived through conduct indicating that one is vacillating on the issue or has abandoned one's request altogether." *Williams v. Bartlett,* 44 F.3d 95, 100 (2d Cir.1994). "Equivocation, which sometimes refers only to speech, is broader in the context of the Sixth Amendment, and takes into account conduct as well as other expressions of intent." *Id.*

****2** Like the district court, we find that the Appellate Division's rejection of Rush's first self-representation claim was eminently reasonable. Petitioner's initial statement that he would proceed *pro se* "if [he had] to" was not unequivocal, but part of a transparent effort to obtain an adjournment and substitution of counsel. J.A. 62. As soon as it became clear that Rush intended to proceed *pro se* irrespective of whether he would be able to obtain new counsel, the trial court granted his application. *See* J.A. 70–71 ("Just so the record is clear ... up until this point the Court finds there has been no unequivocal waiver on [Rush's] part to go *pro se.* Rather, it was defendant's indication to the Court that he was going to be retaining new counsel."). And, from that point forward, it is undisputed that Rush put on his own defense.

[2] Next, we turn to Rush's allegation that his right to self-representation was violated by the trial court's restriction of his movement within the courtroom. We granted Rush a certificate of appealability as to this claim based on a footnote in the district court's decision, holding that

> [T]o the extent petitioner argues that his shackles impeded him

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> from representing himself because he was not free to move around the courtroom like the prosecutor, that argument is ... without merit because any error committed by the trial judge in preventing petitioner from moving around the courtroom was harmless.

Rush, 2011 WL 477807, at *13 n. 5 (citation omitted). After additional review, however, we find that this claim is exhausted, but procedurally defaulted.

AEDPA provides that federal courts may not grant a petition for *habeas corpus* unless "the applicant has exhausted the remedies available in the courts of the State" or "there is an absence of available State corrective process." 28 U.S.C. § 2254(b)(1)(A), (B)(i). "[E]xhaustion of state remedies requires that [a] petitioner fairly present federal claims to the state courts in order to give the [s]tate 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) (alterations in original and citation omitted). "In order to have fairly presented his federal claim to the state courts the petitioner must have informed the state court of both the factual and the legal premises of the claim he asserts in federal court." *Daye v. Attorney Gen.,* 696 F.2d 186, 191 (2d Cir.1982) (en banc). "If a habeas applicant fails to exhaust state remedies by failing to adequately present his federal claim to the state courts so that the state courts would deem the claim procedurally barred," federal habeas courts "must deem the claim[ ] procedurally defaulted." *Carvajal,* 633 F.3d at 104 (alteration in original).

***15** During his trial, Rush objected that the shackles he was required to wear interfered with his ability to represent himself. J.A. 93–94 (during *voir dire* regarding self-representation, the trial court told Rush that he would remain shackled and Rush responded "Isn't fair to me that I can't be able to walk around."). But in his appeal to the Appellate Division, Rush asked the court only to consider, *inter alia:* (1) if he "[s]hould ... be granted a new trial because, notwithstanding an unequivocal pre-trial request to proceed *pro se,* the County Court summarily denied his *Faretta* request, and thus precluded [h]im from picking his own jury"; and, (2) whether "the County Court abused its discretion, and committed reversible error, when it declined to hold a hearing, at [which] testimony could be taken, on Rush's claimed flight risk, before shackling [h]im during trial, in violation of his Due Process right to a fair trial?" Supp.App. 1055. Significantly, Rush's appellate brief failed to assert or imply that the trial court's restriction of Rush's movement affected his right to self-representation. Thus, the state court was not given an opportunity to review this claim.

****3** Further, Rush cannot return to New York state court to raise this issue. Rush has already directly appealed his conviction to the Appellate Division and applied for review of the Appellate Division's decision by the New York Court of Appeals. Accordingly, under New York law, further direct review is no longer available. The petitioner's failure to raise the claim on direct review also forecloses collateral review in state court. *See Spence v. Superintendent, Great Meadow Corr. Facility,* 219 F.3d 162, 170 (2d Cir.2000) (citing N.Y. Rules of Court, Court of Appeals, § 500.10(a) (McKinney 1999), and N.Y.Crim. Proc. Law § 440.10(2)(c) (McKinney 1994)).

In a Rule 28(j) letter submitted to this Court two days after oral argument, Rush requests that we hold this appeal in abeyance to allow him to file a coram nobis petition in state court. In the petition, he would claim ineffective assistance of state appellate counsel for failure to raise on direct appeal the Sixth Amendment issue before us today. He contends that filing the coram nobis petition in state court would allow this Court to reach the issue subsequently on habeas review.

Rush misconstrues the nature of a coram nobis proceeding. "The only constitutional claim [a petitioner is] permitted to raise in seeking a writ of error coram nobis [is] ineffective assistance of appellate counsel, a claim that is distinct from" the Sixth Amendment claim he raises here. *Turner v. Artuz,* 262 F.3d 118, 123 (2d Cir.2001). Filing a coram nobis petition would not "fairly present[ ] his federal claim to the state courts." *Daye,* 696 F.2d at 191. Consequently, a coram nobis proceeding would not resolve Rush's procedural default.

When a petitioner "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 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 claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S.

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722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Rush makes no demonstration with respect to a potential fundamental miscarriage of justice. The only cause that he identifies for the procedural default is the ineffective assistance of state appellate counsel. However, as he acknowledges in his 28(j) letter, "the exhaustion doctrine ... generally requires that a claim of ineffective ***16** assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray v. Carrier,* 477 U.S. 478, 488–89, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Federal habeas review of Rush's Sixth Amendment claim with respect to the restriction of his movement in the courtroom is therefore barred.

We have considered Rush's remaining arguments and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED.**

All Citations

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60 Fed.Appx. 344
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals,
Second Circuit.

Stanford MURDEN, Petitioner-Appellant,
v.
Christopher ARTUZ, Respondent-Appellee.

Docket No. 02-2024.
|
March 13, 2003.

State prisoner filed petition for writ of habeas corpus. The United States District Court for the Eastern District of New York, Nina Gershon, J., denied petition, and petitioner appealed. The Court of Appeals held that any possible error in admitting petitioner's arson allocution into evidence in his subsequent murder trial was harmless.

Affirmed.

West Headnotes (1)

[1] **Criminal Law**

Acts, Admissions, Declarations, and Confessions of Accused

Any possible error in admitting defendant's arson allocution into evidence in his subsequent murder trial was harmless, even if victim did not die until after arson plea had been entered, and defendant was not advised that his arson allocution could be used against him in subsequent murder trial, where state also admitted videotape of defendant confessing to arson.

4 Cases that cite this headnote

***345** Appeal from a judgment by the United States District Court for the Eastern District of New York (Nina Gershon, Judge).

Attorneys and Law Firms

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Shulamit Rosenblum, Assistant District Attorney (Leondard Joblove, Assistant District Attorney, Charles J. Hines, District Attorney Kings County, on the brief), Brooklyn, NY, for Appellee, of counsel.

Present: MESKILL, CARDAMONE and CABRANES, Circuit Judges.

SUMMARY ORDER

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

Petitioner Stanford Murden appeals the District Court's denial of his petition for habeas corpus brought pursuant to 28 U.S.C. § 2254. In his petition, Murden challenges his conviction in the New York State Supreme Court, Kings County, for murder in the second degree.

On February 5, 1982, Murden pleaded guilty to arson in the second degree. During his plea allocution, he stated that, on July 15, 1981, he started a fire at 306 Montauk Avenue in Brooklyn by setting some clothing on fire in a second floor apartment. On June 8, 1982, Murden was sentenced to a term of imprisonment of seven and one half to fifteen years.

On December 6, 1983, Wendy Kornegay died as a result of severe injuries she suffered two and one half years earlier when she jumped out of a third story window in order to escape the fire set by Murden. After Ms. Kornegay's death, the State charged Murden with two counts of murder in the second degree (one count of felony murder and one count of depraved indifference murder). During Murden's trial on the murder charges, the trial judge permitted the court reporter who had transcribed the proceedings at Murden's plea allocution hearing in the arson case to read the transcript of that allocution into the record. Following trial, the jury convicted Murden of felony murder, and he was sentenced to imprisonment for twenty-five years to life.

Murden filed two motions to vacate the judgment of conviction pursuant to New York Criminal Procedure Law § 440.10. In the second of these two motions, Murden argued, *inter alia,* that his arson plea should not have been admitted into evidence at his murder trial. Specifically, he claimed that this plea was involuntary because the judge, the prosecutor, and his defense attorney all failed to inform him that he could be convicted again for another offense that might arise in the future from the July 15, 1981 fire.

On June 19, 1997, the Supreme Court of King's County denied this motion. The Court stated that, because Murden was not advised that his arson allocution could be used against him in a subsequent murder trial, it "would [ordinarily] feel constrained to ... vacate the judgment" based on the authority of ***346** *People v. Latham,* 234 A.D.2d 864, 652 N.Y.S.2d 328 (3d Dep't 1996), *rev'd on other grounds,* 90 N.Y.2d 795, 666 N.Y.S.2d 557, 689 N.E.2d 527 (1997).[1] The Court did not vacate the judgment, however, because it determined that any error in admitting Murden's prior plea allocution was harmless: Because the State had also admitted into evidence Murden's videotaped confession to the arson, the Court reasoned that the allocution evidence was "merely duplicative" and, therefore, entirely unessential to his murder conviction.

1 The Third Department held in *Latham* that the admission of a defendant's guilty plea to attempted murder at his subsequent murder trial was a direct consequence of his plea and, therefore, the court's failure to advise him of this potential consequence during the allocution rendered the plea allocution inadmissable at his subsequent murder trial. 234 A.D.2d at 864-65.

****2** On April 6, 1998, Murden, acting *pro se* and *in forma pauperis,* filed a petition for habeas corpus in the United States District Court for the Eastern District of New York. His petition raised, *inter alia,* the argument that his prior allocution in the arson case was involuntary and, therefore, improperly admitted into evidence. On September 13, 2001, the District Court denied Murden's petition. *See Murden v. Artuz,* 253 F.Supp.2d 376, 381 (E.D.N.Y. 2001). First, the District Court properly set forth its scope of review: "With respect to the legal question whether the use of petitioner's plea allocution under these circumstances violated his federal constitutional rights, I review [the Supreme Court's] decision only to determine whether it involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." *Id.* at 381 (citing 28 U.S.C. § 2254(d)(1)).

The District Court properly noted that the United States Supreme Court has set forth a Constitutional requirement that guilty pleas be made voluntarily. *Id.* at 380-381 (quoting *Bousley v. United States,* 523 U.S. 614, 619, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)). It recognized, however, that "the Supreme Court has never held that federal due process requires a defendant to be advised that his guilty plea may be used against him in a subsequent criminal prosecution." *Id.* at 381.

The District Court also cited Second Circuit case law making clear that collateral, as opposed to direct, consequences of a guilty plea "need not be explained to the defendant in order to ensure that the plea is voluntary," and that a consequence is collateral unless it is "definite, immediate, and largely automatic." *Id.* at 380-381 (quoting *United States v. Salerno,* 66 F.3d 544, 550-51 (2d Cir.1995) (quoting *United States v. United States Currency,* 895 F.2d 908, 915 (2d Cir.1990))) (internal quotation marks omitted). The District Court concluded that, because the murder charge was contingent upon Wendy Kornegay's death, it was neither a "definite" nor an "automatic" consequence of Murden's plea. *Id.* at 381. Accordingly, the Court determined that, since Murden's arson plea was voluntary under Second Circuit law, the state court's admission of the allocution at his subsequent murder trial could not possibly have constituted an unreasonable application of Supreme Court precedent. *Id.*

The District Court issued a certificate of appealability limited to the question of whether Murden's arson plea was voluntary, and Murden timely appealed on this ground.

***347** We substantially agree with the District Court's analysis of this issue. Moreover, we believe that any possible error in admitting the allocution into evidence during Murden's state murder trial was harmless. *See Arizona v. Fulminante,* 499 U.S. 279, 295, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (holding that the admission of involuntary confessions can constitute harmless error).[2] As the Supreme Court of King's County recognized in its June 19, 1997 denial of Murden's § 440.10 motion, the

allocution transcript was entirely unnecessary to Murden's murder conviction because the State also admitted a videotape of Murden confessing to the arson.

2 We recognize that there is an open question in this Circuit as to what harmless error standard should be used, after the passage of AEDPA, by a federal court reviewing a state court judgment:

> [O]n direct review, a state appellate court may find a constitutional error harmless only if it is harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Prior to the passage of AEDPA, federal habeas courts reviewing state harmlessness determinations employed a standard less demanding than *Chapman,* asking whether an error " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). After AEDPA, the question arises whether a federal habeas court should continue to apply *Brecht* or determine instead whether the state court's decision was "contrary to, or involved an unreasonable application of" *Chapman.* 28 U.S.C. § 2254(d)(1).

Noble v. Kelly, 246 F.3d 93, 101-02 n. 5 (2d Cir.), *cert denied,* 534 U.S. 886, 122 S.Ct. 197, 151 L.Ed.2d 139 (2001). But we need not decide this issue here because any possible error in this case was harmless under either of the standards discussed in *Noble. See, e.g., Sanchez v. Duncan,* 282 F.3d 78, 82 n. 2 (2d Cir.2002).

****3** For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

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