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

Michael ORTIZ, pro se, Petitioner,
v.
Philip D. HEATH, Superintendent of Sing
Sing Correctional Facility, Respondent.

No. 10–CV–1492 (KAM).
|
April 6, 2011.

Attorneys and Law Firms

Michael Ortiz, Ossining, NY, pro se.

Howard Barry Goodman, Brooklyn, NY, Kings County District Attorneys Office, for Respondent.

MEMORANDUM & ORDER

MATSUMOTO, District Judge.

***1** Pro se petitioner Michael Ortiz ("petitioner") is incarcerated pursuant to a judgment of conviction for Manslaughter in the First Degree imposed in Supreme Court, Kings County. (*See* ECF No. 1, Petition ("Pet.").) Alleging that his state custody violates his federal and constitutional rights, petitioner seeks relief by means of a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254. Now before the court is petitioner's motion to withdraw the petition, return to state court and exhaust his unexhausted claims, and then file a second habeas petition. The court construes petitioner's "stay petition," as discussed below, as a motion to amend the petition as well as an application to invoke the stay-and-abeyance procedure. (*See* ECF No. 6, Motion for a Stay ("Pet'r Stay Mem."); 9, Opposition to Petitioner's Motion for a Stay ("Resp. Stay Opp."); 10, Reply to Respondent's Opposition to Petitioner's Request for a Stay ("Pet'r Reply Mem.").) For the reasons that follow, petitioner's motions to amend and stay the petition are denied, and the petition is denied in its entirety.

BACKGROUND

Petitioner's conviction and sentence, and hence, this petition, stem from the January 25, 2004 death of Edward Santos ("Santos") from four stab wounds. In connection with Santos' death, petitioner was arrested and charged with two counts of Murder in the Second Degree (N.Y. Penal Law § 125.25[1], 125.25[2]) and Criminal Possession of a Weapon in the Fourth Degree (N.Y. Penal Law § 265.01[2]). (*See* ECF No. 4, Affirmation of Howard B. Goodman in Opposition to Petition for a Writ of Habeas Corpus dated 7/7/10 ("Goodman Affirm.") at ¶ 5.)

I. The Trial

Petitioner's case was tried to a jury in Supreme Court, Kings County. (*See generally* ECF No. 4 Exs. 1–8, Trial Transcript 1–713.) At trial, the prosecution presented two eyewitnesses who described an attack on Santos on the night of his death. (*See id.*) In addition, the prosecution introduced testimony from investigating law enforcement officers and a medical examiner, and the defense called one witness. (*See id.*)

Eyewitness Jose Manual Britto ("Britto"), a livery cab driver, testified that as he was driving his car in Brooklyn shortly before 1:00 a.m. on January 25, 2004, he witnessed the victim, later identified as Santos, being attacked by a group of ten to twelve people. (Tr. 540, 557, 559, 566–67.) Although it was dark, Britto testified that the scene was illuminated by streetlights and his headlights and that as he passed by, he observed the victim on the ground and the faces of some of the attackers, including the face of one man near the victim who took something in his hand and wrapped it in what appeared to be a shirt. (*Id.* at 540–42, 545, 567, 570–73, 572, 581–85.) After turning his car around and passing back by the scene, Britto testified that he screamed and honked his horn and the group dispersed. (*See id.* at 542.)

***2** Eyewitness Larry Petrano ("Petrano") also testified that he observed the same incident from his third floor apartment window until the attackers scattered and the victim staggered down the street and collapsed. (*Id.* at 446–48, 451–52, 454, 456–59.) Petrano also testified that he saw a taxicab stop at the scene for a matter of seconds before continuing on. (*Id.* at 455.)

The testimony at trial showed that nearly seven months after Santos' death, Britto identified petitioner in a lineup as one of the individuals that assaulted Santos, and specifically, the individual whom he had seen wrap an unknown object into what appeared to be a shirt. (*See id.* at 544.) At the trial two years later, however, Britto was unable to identify petitioner Ortiz. (*See id.* at 545). Petrano viewed the same lineup containing petitioner but did not identify anyone. (*Id.* at 368, 408–09, 451–52, 468–71.)

In addition to the eyewitness testimony, the prosecution presented evidence from the investigating New York City Police officers who responded to the scene and discovered Stantos lying bloody and unconscious on the ground. (*See id.* at 313–16.) The officers testified that Santos was immediately taken to the hospital where he died later that night. (*Id.* at 314–16, 321.) The responding officers further testified that earlier that evening, they had responded to a radio call of an assault in progress which involved Santos and another man, Danny Lugo ("Lugo"). (*Id.* at 281–84, 287–88, 294–97, 300, 311–12, 322–26, 345.) However, when the officers arrived at the scene, the altercation was over and, after citing Santos and Lugo for minor infractions, Santos was escorted outside the building. (*Id.*)

The prosecution also presented testimony from the investigating New York City Police Department detective, Kevin Buell ("Detective Buell"), who testified that in August 2004, nearly seven months after Santos' death, Buell interviewed petitioner in connection with the murder. (*Id.* 354–56, 393–94, 399, 426.) Detective Buell testified that when questioned about Santos' murder, petitioner gave several contradictory accounts. According to Detective Buell, first petitioner asserted that petitioner was in Florida on the night of Santos' death (*id.* at 359–60) and later petitioner made a written statement that petitioner was in fact at the scene that night but was observing from across the street and saw someone using a knife, and that petitioner left the area and returned to find Santos on the ground injured (*id.* at 362). Eventually, after being informed several days later that an eyewitness had identified petitioner in a lineup, petitioner made oral, written, and videotaped statements to the effect that the eyewitness had likely identified petitioner because petitioner, in fact, had been at the scene and had tried to break up the fight involving Santos and another individual named Jason Roman ("Roman"). (*Id.* at 372–75, 434–38.) In his written and videotaped statements, petitioner further stated that he then left the scene when things were calm only to return later to find Santos injured and officers on the scene. (*Id.*)

*3 According to Detective Buell, petitioner identified Roman as the individual Santos was arguing with in a photograph of Roman provided by Detective Buell. (*Id.* at 376.) The prosecution then introduced evidence that Roman was incarcerated in a New York State prison at the time of Santos' death on January 25, 2004. (*Id.* at 497–98.)

Finally, medical examiner Dr. Carolyn Kappen also testified at trial on behalf of the prosecution. (*Id.* at 512–24.) Dr. Kappen stated that the autopsy revealed the cause of Santos' death to be four stab wounds to the chest, and that she believed the murder weapon was a "very long, narrow-type object" such as a screwdriver or icepick. (*Id.* at 512–14, 519–21.)

At the conclusion of the prosecution case, the defense called a single witness, Stephanie Perez ("Perez"), the girlfriend of the deceased. (*Id.* at 596–618.) Perez testified that the evening of Santos' murder, Santos had come to see Perez where she was staying at a friend's apartment. (*Id.* at 599.) Because Perez had been arguing with Santos, however, she did not want to see Santos and she asked Lugo, who was also staying at the apartment, to tell Santos that Perez was not there. (*Id.* at 598–602.) This led to verbal fighting between Santos and Lugo through the apartment door. (*Id.* at 602.) Perez testified that she then saw Lugo take an unknown number of kitchen knives from the kitchen and try to open up the apartment's fire escape window, and that Lugo told Perez that "he was going to stab that mother f* * *er," referring to Santos. (*Id.* at 602–03.) According to Perez, Lugo then left the apartment with the knives, and she heard the two fighting and wrestling in the hallway through the apartment door. (*Id.* at 614–15.) Perez further testified that Lugo returned to the apartment with the knives a short time later, after the police were called to the scene of the fight and issued Lugo and Santos tickets for minor infractions. (*Id.* at 603–05.)

II. Conviction and Sentence

At the conclusion of the trial, the court submitted for the jury's consideration charges of Murder in the Second Degree and Manslaughter in the First Degree, and the jury convicted petitioner of Manslaughter in the First Degree (N.Y. Penal Law § 125.20[1]). (*Id.* at 677–80,

708–10; *see also* Goodman Affirm. at ¶ 6.) Petitioner was sentenced on June 13, 2006 to fifteen years' imprisonment and five years post-release supervision and is currently incarcerated pursuant to this sentence. (Goodman Affirm. at ¶¶ 6–7, 11.)

III. Post–Trial Appeals in State Court

Petitioner was appointed new counsel for his direct appeal to the Appellate Division, Second Department, and appealed his conviction to that court on grounds that: (1) his conviction was against the weight of the evidence as the State had failed to prove his guilt beyond a reasonable doubt, and (2) the sentence imposed was excessive. (Pet. at ¶¶ 9, 16; Goodman Affirm. at ¶ 8.) The Second Department affirmed petitioner's conviction on April 28, 2009, and petitioner's subsequent application for leave to appeal to the New York Court of Appeals was denied on August 12, 2009. *See People v. Ortiz,* 61 A.D.3d 1003, 880 N.Y.S.2d 77 (N.Y.App. Div.2d Dep't 2009); *People v. Ortiz,* 13 N.Y.3d 748, 886 N.Y.S.2d 102, 914 N.E.2d 1020 (2009).

*4 Ninety days later, in November 2009, when petitioner's time for filing a petition for a writ of certiorari expired, petitioner's conviction became final—and the one year statute of limitations for filing a habeas petition thus began to run. *See* 28 U.S.C. § 2244(d)(1) (applying a one-year period of limitation to habeas petitions running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"); *see also Williams v. Artuz,* 237 F.3d 147, 151 (2d Cir.2001) (concluding that "direct review" as used in Section 2244(d)(1)(A) "includes direct review by the United States Supreme Court via writ of certiorari, and that the limitations period for state prisoners therefore begins to run only after the denial of certiorari or the expiration of time for seeking certiorari"). The one-year habeas statute of limitations in this case therefore ran from November 12, 2009 until November 11, 2010.

IV. The Instant Petition

On March 31, 2010, petitioner timely filed the instant petition for habeas corpus. (*See generally* Pet.) In his petition, petitioner sought relief on the same two grounds raised on direct appeal in state court: (1) that the conviction was against the weight of the evidence in violation of petitioner's Fourteenth Amendment rights, and (2) that petitioner's sentence was excessive in violation of petitioner's Eighth Amendment rights. (*See id.*) In response to this court's order to show cause (*see* ECF No. 2, Order dated 4/7/10), Respondent Philip D. Heath ("respondent") filed his responsive pleading to the petition on July 7, 2010 (*see* ECF No. 4, Response to Order to Show Cause ("Resp.Pet.Opp.")).

On July 17, 2010, still within the one-year statute of limitations period for his habeas claims, petitioner filed a letter motion seeking a stay of the petition in order to allow petitioner to return to State court and exhaust certain additional claims. [1] (*See* Pet'r Stay Mem.) Respondent opposed petitioner's motion for a stay, arguing that petitioner had failed to show good cause why his claims were not previously exhausted in state court, and failed adequately to articulate his claims and show that such claims were "not meritless." (*See* Resp. Opp. Mem.)

Petitioner then filed a reply and attached a copy of a motion to vacate his sentence which he indicated was ready for filing in state court pursuant to New York Criminal Procedure Law Section 440.10 ("proposed 440 Motion"). (*See* Pet'r Reply Mem.; *see also* ECF No. 10–2, Pet'r 440 Mot.) In his proposed 440 Motion, petitioner seeks to raise before the state court additional, previously unexhausted claims of: (1) ineffective assistance of trial counsel based upon counsel's alleged failure to (i) investigate the crime, (ii) prepare and effectively cross-examine a defense witness, (iii) timely object to the trial court's failure to swear the court interpreter, and (iv) timely object to various forms of prosecutorial misconduct including the prosecutor's inflammatory and prejudicial opening and summation arguments and the prosecutor's use of false testimony; and (2) actual innocence. (*See id.*) Further, petitioner alleges cause for his failure to previously exhaust these additional claims in state court on the basis of his "being unschooled in legal intricacies" and his "complete reliance on his assigned court's counsel." (*Id.*)

DISCUSSION

*5 Although his original petition contains only exhausted claims, petitioner moves to stay his petition in order to return to state court and exhaust the additional, unexhausted claims. (*See* Pet'r Stay Mem.)

Mindful that a *pro se* litigant's filings must be construed "liberally" and "interpret[ed] [so as] to raise the strongest arguments that they suggest," *Pabon v. Wright,* 459 F.3d 241, 248 (2d Cir.2006) (internal quotation omitted), this court construes petitioner's July 17, 2010 and subsequent submission as a motion to amend his petition to add the previously unexhausted claims. Because such amendment would then result in a so-called "mixed petition" of both exhausted and unexhausted claims, the court further construes the filings as a motion to stay this proceeding on that mixed petition until petitioner completes his exhaustion of his additional claims in the New York courts. These separate motions are discussed in turn.

I. Motion to Amend

A. Legal Standard

A motion to amend a habeas petition is governed by Federal Rule of Civil Procedure 15 ("Rule 15"). *Littlejohn v. Artuz,* 271 F.3d 360, 363 (2d Cir.2001) (citing Fed.R.Civ.P. 15(a)); 28 U.S.C. § 2242 (habeas corpus petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions"). Under Rule 15, a party may amend once as of right within certain time frames, or upon consent of the opposing party or leave of the court. *See* Fed.R.Civ.P. 15(a). Courts must "freely give" leave to amend where justice requires. Fed.R.Civ.P. 15(a)(2). This is especially true in the context of a *pro se* filing, such as the one here, which the Second Circuit has emphasized "is to be read liberally" and should not be dismissed without being granted "leave to amend at least once when a liberal reading of the [filing] gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir.2000).

Leave to amend may be appropriately denied where amendment would be futile. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Futility of a proposed amendment is established where "the proposed claim could not withstand a motion to dismiss" for failure to state a claim upon which relief may be granted. *Lucente v. Int'l Bus. Machs. Corp.,* 310 F.3d 243, 258 (2d Cir.2002). Yet district courts "nonetheless retain the discretion" to deny leave to amend when necessary "to thwart tactics that are dilatory, unfairly prejudicial or otherwise abusive." *See Littlejohn,* 271 F.3d at 363 (citing *Davis,* 371 U.S. at 182).

B. Application

Here, the relevant timeframes having passed, and absent the consent of respondent, petitioner may only amend the petition with leave of the court. *See* Fed.R.Civ.P. 15. In considering the propriety of an amendment, the court notes first, that the record here is devoid of evidence of undue delay, bad faith, or dilatory motive on the part of petitioner. *See Littlejohn,* 271 F.3d at 363. Indeed, petitioner filed his first motion to stay the petition in July 2010, well before the one-year statute of limitations period for timely filing a habeas claim expired in November 2010. The dispositive issue on whether leave to amend should be granted is thus whether amendment would be futile. The court has considered petitioner's proposed additional claims of ineffective assistance of counsel and his free-standing claim of actual innocence in turn, and for the reasons that follow, the court finds that amendment would be futile.

1. Procedural Default of Petitioner's On–the–Record Ineffective Assistance of Trial Counsel Claims

*6 Petitioner's proposed ineffective assistance of trial counsel claim contains several claims which are now procedurally barred because petitioner failed to raise the claims on direct appeal in state court, despite a sufficient record to do so.

i. Legal Standard

Generally, a state prisoner seeking federal habeas review must first exhaust available state court remedies. *See* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus ... shall not be granted unless ... the applicant has exhausted the remedies available in the courts of the State ...."). This exhaustion requirement for federal habeas review is premised upon "interests of comity and federalism [which] dictate that state courts must have the first opportunity to decide a petitioner's claims." *See Rhines v. Weber,* 544 U.S. 269, 273, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005).

In order to satisfy the exhaustion requirement, a habeas petitioner must give the state courts a fair opportunity to review the federal claim and correct any alleged error. *Daye v. Attorney Gen. of State of N.Y.,* 696 F.2d 186, 191 (2d Cir.1982) (en banc). Thus, the exhaustion requirement is satisfied if a petitioner has "fairly presented" his claim in each appropriate state court and "informed the state court

of both the factual and the legal premises of the claim he asserts in federal court." *Jones v. Keane,* 329 F.3d 290, 295 (2d Cir.2003) (internal citation omitted).

Further, because the exhaustion requirement "refers only to remedies still available at the time of the federal petition, it is [also deemed] satisfied if it is clear that the habeas petitioner's claims are now procedurally barred under state law." *Coleman v. Netherland,* 518 U.S. 152, 161, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (internal citations and quotations omitted); *see also Perez v. Greiner,* 296 F.3d 123, 124 n. 2 (2d Cir.2002) ("A petition is unexhausted only if the petitioner can still receive the relief he seeks from the state system." Thus, where petitioner "no longer had the option of proceeding in state court," "it was clearly proper to deem his claims exhausted for purposes of federal habeas review.").

Where a procedural bar gives rise to exhaustion, however, it also "provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim." *Netherland,* 518 U.S. at 162; *see also Jimenez v. Walker,* 458 F.3d 130, 145 (2d Cir.2006) (federal "habeas relief is foreclosed provided that the independent state procedural bar is adequate to support the judgment" and two exceptions not shown). "For a procedurally defaulted claim to escape this fate, the petitioner must show cause for the default and prejudice, or demonstrate that failure to consider the claim will result in a miscarriage of justice, (i.e., the petitioner is actually innocent)." *Aparicio v. Artuz,* 269 F.3d 78, 90 (2d Cir.2001) (*citing Coleman v. Thompson,* 501 U.S. 722, 748–50, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

ii. Application

a. Procedural Bars Under New York Law for On–the–Record Claims Not Raised on Direct Appeal

*7 Under New York law, a defendant is "entitled to one (and only one) appeal to the Appellate Division and one request for leave to appeal to the Court of Appeals." *Aparicio,* 269 F.3d at 91 (*citing* N.Y.Crim. Proc. Law § 450.10(1); N.Y. Court R. § 500.10(a)). In addition to direct appeal, New York also permits defendants to collaterally attack their convictions through a motion to vacate judgment under New York Criminal Procedure Law Section 440 .10 ("440 Motion"). *See* N.Y.Crim. Proc. Law § 440.10.

Such collateral relief is unavailable, however, where a defendant "unjustifiably failed to raise the issue on direct appeal." *See Aparicio,* 269 F.3d at 91 (*citing* N.Y.Crim. Proc. Law § 440.10(2)(c)[2]); *see also Jones,* 329 F.3d at 296 ("failure to have raised the claim on direct review now forecloses further collateral review in state court") (citing N.Y.Crim. Proc. Law § 440.10(2)(c)). Thus, "New York law requires a state court to deny a motion to vacate a judgment based on a constitutional violation where the defendant unjustifiably failed to argue the constitutional violation on direct appeal despite a sufficient record" to do so. *Sweet v. Bennett,* 353 F.3d 135, 139 (2d Cir.2003). Where a New York court denies a collateral attack on a conviction pursuant to Section 440.10(2)(c), the Second Circuit has expressly found that the denial constitutes an independent and adequate state law procedural bar for federal habeas review. *See Murden v. Artuz,* 497 F.3d 178, 196 (2d Cir.2007) ("Where the basis for a claim of ineffective assistance of counsel is well established in the trial record, a state court's reliance on [440.10] subsection 2(c) provides an independent and adequate procedural bar to federal habeas review.").

Under this standard, New York courts routinely deny 440 motions on ineffective assistance of counsel claims where the claim is grounded in the trial record but the defendant failed to raise the claim on direct appeal. *See, e.g., Washington v. Ercole,* No. 08–cv–4835, 2009 U.S. Dist. LEXIS 50120, at *5, 2009 WL 1663667 (E.D.N.Y. Jun. 15, 2009) (collecting cases). New York courts also recognize, however, "that some ineffective assistance claims 'are not demonstrable on the main record' and are more appropriate for collateral or post-conviction attack, which can develop the necessary evidentiary record." *Sweet,* 353 F.3d at 139 (internal citation omitted).

b. Petitioner's Procedural Bar Under New York Law and Procedural Default of Federal Habeas Review

Here, petitioner has already pursued and completed the process of direct appeal under New York law, but failed to raise any ineffective assistance of trial counsel claims on his direct appeal. *See People v. Ortiz,* 61 A.D.3d 1003, 880 N.Y.S.2d 77 (N.Y.App. Div.2d Dep't 2009); *People v. Ortiz,* 13 N.Y.3d 748, 886 N.Y.S.2d 102, 914 N.E.2d 1020 (2009). Petitioner now seeks to raise previously unexhausted habeas claims premised upon trial counsel's on-the-record alleged failures to provide

effective assistance. (*See generally* Pet'r Reply Mem.) Specifically, petitioner claims on-the-record that trial counsel was ineffective for failing to: (1) effectively cross-examine a defense witness, (2) timely object to the court's failure to swear the court interpreter, and (3) timely object to various forms of prosecutorial misconduct including the prosecutor's inflammatory and prejudicial opening and summation arguments and the prosecutor's use of false testimony. (*See id.*)

***8** Because each of these claims is based upon trial counsel's on-the-record conduct, however, and because petitioner has shown no need for an evidentiary hearing to develop the record with respect to these claims, each claim could have been raised on direct appeal, which petitioner failed to do. *See Sweet,* 353 F.3d at 140 (finding "alleged error that is the basis for [petitioner's] ineffectiveness claim [regarding charges] was particularly well-established in the trial record" and noting no apparent reason "that appellate counsel would have needed a new evidentiary hearing to develop this claim"). Accordingly, petitioner can no longer obtain review of these ineffective assistance claims from the New York Court of Appeals. *See* N.Y.Crim. Proc. L. § 440.10(2)(c); *see also* Sweet, 353 F.3d at 139–40 (finding ineffective assistance claim procedurally barred and "procedurally defaulted for purposes of federal habeas review as well" where petitioner "unjustifiably failed to argue" the claim "on direct appeal despite a sufficient record, and consequently waived the claim under § 440.10(2)(c)").

Accordingly, because petitioner's on-the-record ineffective assistance of counsel claim would now be denied by New York courts pursuant to Section 440.10(2)(c), and because such a denial would constitute an independent and adequate state procedural bar, petitioner's on-the-record ineffective assistance claims are deemed exhausted but procedurally defaulted from federal habeas review unless petitioner can meet one of two available exceptions. *See Sweet,* 353 F.3d at 139–40.

c. Whether to Excuse Petitioner's Procedural Default

"As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates 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). Alternatively, petitioner may overcome the procedural bar by showing that "failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman,* 501 U.S. at 750 (internal quotation omitted). The fundamental miscarriage of justice exception requires a showing of actual innocence based upon "new evidence" that would make it "more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt." *House,* 547 U.S. at 537. Petitioner fails to make either showing to excuse his default.

First, the court liberally construes petitioner's motion for a stay to assert "cause" for the procedural default on the basis of ineffective assistance of appellate counsel. (*See* Pet'r Reply Mem. at ¶ 7 (noting petitioner's "complete reliance on his assigned court's counsel").) To the extent petitioner's motion can be construed to assert such 'cause,' any claim of ineffective assistance of appellate counsel is unexhausted, but not procedurally defaulted because it could still be raised in state court in an application for a writ of error *coram nobis. See Disimone v. Phillips,* 461 F.3d 181, 191 (challenge to appellate counsel effectiveness in New York can be accomplished through petitioning for a writ of error *coram nobis*) (*citing Sweet,* 353 F.3d at 141 n. 7 *and People v. Bachert,* 69 N.Y.2d 593, 598–99, 516 N.Y.S.2d 623, 509 N.E.2d 318 (N.Y.1987)).

***9** However, "ineffective assistance of appellate counsel claims cannot constitute 'cause' for procedural default unless first presented in state court as an independent constitutional claim." *Disimone,* 461 F.3d at 191 (*citing Edwards v. Carpenter,* 529 U.S. 446, 451–52, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) and *Sweet,* 353 F.3d at 141 n. 7). Moreover, the court notes that here, petitioner was counseled by a different attorney on appeal and, further, that in the habeas context, "[s]trategic choices [by appellate counsel], such as deciding which issues to raise on appeal, made after thorough investigation of the law and facts[,] ... are virtually unchallengeable." *Brunson v. Tracy,* 378 F.Supp.2d 100, 112 (E.D.N.Y.2005) (internal quotation omitted); *see also Strickland v. Washington,* 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (noting "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"). Petitioner therefore fails to make a showing of cause and prejudice for his default. *Cf. House,* 547 U.S. at 536 (petitioner may overcome state court default by showing "cause for the default and prejudice from the asserted error").

Second, petitioner "makes a free standing claim of innocence" on the basis of the ineffective assistance of counsel claims he also raises and further asserts that he "was convicted of a crime he did not commit." (Pet'r Reply Mem. at 14.) These bare assertions plainly fail to introduce any required "new evidence" and are therefore insufficient to meet the "actual innocence" standard. *See House,* 547 U.S. at 537; *see also Murden,* 497 F.3d at 194 ("Actual innocence requires not legal innocence but factual innocence.") (internal quotation omitted). Petitioner therefore further fails to show "actual innocence" to excuse the default. *Cf. Aparicio,* 269 F.3d at 91 (absent a showing of "cause for the default plus prejudice," a "procedural default can only be cured by a showing of ... actual innocence").

In sum, because no state remedies remain available to petitioner, his unexhausted claims of ineffective assistance of counsel based upon counsel's on-the-record conduct are deemed exhausted and procedurally defaulted from federal review. Further, petitioner cannot overcome this procedural bar because he fails to demonstrate the required cause and prejudice or miscarriage of justice. *See Aparicio,* 269 F.3d at 91 ("procedural default can only be cured by a showing of cause for the default plus prejudice, or a showing of actual innocence"). Amendment of the petition to add these claims would therefore be futile.

2. Petitioner's Remaining Ineffective Assistance of Trial Counsel Claims

In addition to the on-the-record ineffective assistance of counsel claims discussed above, petitioner also seeks to amend the petition to add previously unexhausted claims that are not in the record, of ineffective assistance of trial counsel based upon counsel's alleged failure to: (1) investigate the crime by interviewing the emergency medical technicians who treated the victim Santos or eyewitness Petrano, (2) prepare defense witness Perez; and (3) to object to the prosecutor's use of false testimony. Each of these claims involves counsel's off-the-record conduct, and therefore each constitutes an appropriate basis for a collateral attack under New York law. Indeed, as noted above, "New York courts have held that some ineffective assistance claims 'are not demonstrable on the main record' and are more appropriate for collateral or post-conviction attack, which can develop the necessary evidentiary record." *Sweet,* 353 F.3d at 139 (internal quotation omitted); *see also People v. Brown,* 45 N.Y.2d 852, 854, 410 N.Y.S.2d 287, 382 N.E.2d 1149 (N.Y.1978) (in some cases it would be "essential[ ] that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10").

***10** Further, because collateral review of a criminal judgment pursuant to New York Criminal Procedure Law Section 440.10 ("Section 440.10") is available "[a]t any time after the entry of judgment," though unexhausted, petitioner's ineffective assistance claims premised upon off-the-record conduct are not procedurally barred. *See Caballero v. Keane,* 42 F.3d 738, 740–41 (2d Cir.1994) (petitioner's failure "to avail himself of an important New York procedure for airing his ineffective assistance of counsel claim—a post-trial motion to vacate judgment"—left available "an unexhausted state procedure for considering" petitioner's ineffective assistance of counsel claim") (citing N.Y. C.P.L. § 440 .10). Yet, now allowing petitioner to amend the petition to add these claims and then return to state court in order to exhaust these claims would be futile because each of petitioner's remaining, off-the-record ineffective assistance of counsel claims appear to be plainly meritless.

i. Legal Standard

In order to establish a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must meet the familiar two-prong test set forth by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Williams v. Taylor,* 529 U.S. 362, 390–91, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Specifically, a defendant must show that both (1) counsel's performance "fell below an objective standard of reasonableness" (the "performance prong"); and (2) that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (the "prejudice prong"). *Strickland,* 466 U.S. at 686–95.

Under the performance prong of this standard, a court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see also United States v. Helgesen,* 669 F.2d 69, 72 (2d Cir .), *cert. denied,* 456 U.S. 929, 102 S.Ct. 1978, 72 L.Ed.2d 445 (1982) ("Trial advocacy is an art, and the advocate must be given some latitude in deciding upon an appropriate trial strategy."). Further, under the prejudice prong, "[t]he benchmark ... must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," *Strickland,* 466 U.S. at 686, such that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt" *Henry v. Poole,* 409 F.3d 48, 63–64 (2d Cir.2005) (quoting *Strickland,* 466 U.S. at 695). Thus, even objectively unreasonable errors on the part of counsel will not result in the setting aside of a judgment in a criminal proceeding if the errors can be shown to have had no effect on the judgment. *Strickland,* 466 U.S. at 691.

ii. Application

Because petitioner cannot meet the two *Strickland* prongs on any of his additional proposed ineffective assistance claims, the claims appear meritless.

***11** First, petitioner seeks to raise an ineffective assistance claim in connection with trial counsel's alleged failure to investigate the crime by interviewing Petrano, the individual who observed the scene from his third floor window and later waited with the victim for medical personnel, or the emergency medical technicians ("EMTs") who treated the victim Santos. (Pet'r 440 Mot. at 13–14.) Specifically, petitioner contends that "there was a smokescreen ... with respect to Mr. Pastrano [sic] and very possibly the E.M.S. workers" and faults trial counsel for failing to investigate and elicit testimony regarding "what happened when Mr. Pastrano [sic] was helping with the victim and what did the victim told him with regard to who was responsible for [Santos'] beating and ultimately, death." (*Id.*)

While failure to conduct adequate pre-trial investigation may serve as the basis for a claim of ineffective assistance of counsel under *Strickland,* "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690–91. Further, to successfully assert an ineffective assistance of counsel claim on the basis of a failure to investigate, "a petitioner must do more than make vague, conclusory, or speculative claims as to what evidence could have been produced by further investigation." *Taylor v. Poole,* 07 Civ. 6318(RJH)(GWG), 2009 U.S. Dist. LEXIS 76316, at *39–41, 2009 WL 2634724 (S.D.N.Y. Aug. 27, 2009) (collecting cases). Indeed, "[c]ourts 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." *McCarthy v. United States,* No. 02 Civ. 9082(LAK), 2004 U.S. Dist. LEXIS 705, at *53, 2004 WL 136371 (S.D.N.Y. Jan. 23, 2004) (citations omitted). Thus, "where a petitioner claims that counsel should have investigated potential witnesses, the petitioner must demonstrate that the witnesses would have testified at trial and explain the expected nature of the witnesses' testimony." *See Taylor,* 2009 U.S. Dist. LEXIS 76316, at *42–43, 2009 WL 2634724 (collecting cases).

Here, asserting simply that there was a "smokescreen," petitioner has provided no indication of the evidence that he believes might have been uncovered by further investigation from Petrano and the medical professionals. Moreover, Petrano did testify at trial and was subject to cross-examination. (*See, e.g.* Tr. at 452–73.) During that cross-examination, Petrano testified that Santos did not speak to him (or to another woman named Cathy, whom Petrano identified as Santos' girlfriend,) while they waited for the ambulance to arrive. (*Id.* at 463–65.) Petrano's testimony negates petitioner's speculation that further investigation by trial counsel would have revealed that Santos shared exculpatory information about his attackers with Petrano while they awaited the ambulance.

***12** Further, petitioner provides no indication as to whether the medical professionals who treated Santos would have appeared at trial and, if so, what potentially exculpatory evidence they could have provided. This showing is insufficient to make out a claim of ineffective assistance based on failure to investigate. *See Carneglia v. United States,* No. 03–CV–6388 (ADS), 2006 U.S. Dist. LEXIS 2933, at *11, 2006 WL 148908 (E.D.N.Y. Jan. 18, 2006) (denying petitioner's ineffective assistance of counsel claim based upon failure to investigate where "petitioner has not provided affidavits from the potential witnesses nor any assurance they would have appeared at trial had counsel interviewed them"). Absent any information about what the medical workers could have provided, there is no reason to believe that counsel did not consider and reject the possibility of interviewing the workers. *See, e.g., Curry v. Burge,* No. 03 Civ. 0901(LAK), 2004 U.S. Dist. LEXIS 23095, at *116, 2004 WL 2601681 (S.D.N.Y. Nov. 17, 2004) (Conclusory claims "give no indication as to what exculpatory evidence a proper investigation would have revealed, or how such evidence would have benefitted [petitioner's] case. There is also no way to know that trial counsel did not consider

investigating these claims but simply rejected them as being unpromising."). Petitioner's ineffective assistance of counsel claim based upon counsel's failure to investigate is therefore unsupported.

Second, petitioner faults trial counsel for counsel's alleged failure to prepare and effectively examine defense witness Perez. (*See* Pet'r 440 Mot. at 6–8.) Specifically, petitioner claims that trial counsel met with Perez for only ten minutes prior to her testimony, and failed to elicit testimony from Perez regarding: (i) Lugo telling Perez that Lugo was going to stab Santos; (ii) that Lugo punched Santos in the face during the altercation between the two; (iii) that people in the hallway where the fight between Lugo and Santos occurred "had to stop Lugo from cutting" Santos; (iv) that after the incident Lugo demanded Santos's phone number and said that he was going to call Santos to "see if this sh* * is going to jump off"; and (v) that Lugo gave Perez a quarter the next day to call Santos's house to see what happened but told Perez not to call right away for fear that she might "make it obvious." (*Id.*)

As discussed above, petitioner's claim regarding the effectiveness of counsel's examination of Perez is an on-the-record claim which is now procedurally barred in state court and procedurally defaulted from federal habeas review. Moreover, several of the points petitioner faults counsel for failing to elicit from Perez were, in fact, elicited both on direct examination by defense counsel and cross-examination by the prosecutor. For example, Perez testified that (i) Lugo told Perez that Lugo was going to stab Santos (Tr. 602–03), and (ii) Lugo punched Santos in the face during the altercation between the two (*Id.* at 614–15). Moreover, because Perez testified that she was in the apartment with the door closed while Lugo and Santos fought (*id.*), there is no evidence that Perez had personal knowledge of whether people in the hallway stopped Lugo from stabbing Santos and, as such, that issue was not a proper subject for examination. Moreover, even assuming —contrary to controlling presumptions—that counsel's failure to elicit testimony from Perez regarding Lugo's involvement in two phone calls to Santos was not based on counsel's strategic choice, there is no basis in the trial record from which to conclude that testimony on these points, had it been elicited, would have altered the jury's determination.

***13** On this record, and in light of the strong presumption of reasonableness which attaches to counsel's strategic decisions, it appears that petitioner could not meet either the performance or prejudice prongs under *Strickland* and, as such, his ineffective assistance of counsel claim on the basis of trial counsel's failure to effectively prepare and examine defense witness Perez is meritless. *See Strickland,* 466 U.S. at 689 (noting "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

Finally, petitioner faults trial counsel for counsel's alleged failure to object to the prosecutor's use of false testimony by Detective Buell. (*See* Pet'r 440 Mot. at 9–11.) "It is common ground that to challenge a conviction because of a prosecutor's knowing use of false testimony, a defendant must establish that (1) there was false testimony; (2) the Government knew or should have known that the testimony was false; and (3) there was 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *United States v. Helmsley,* 985 F.2d 1202, 1205–06 (2d Cir.1993) (*quoting United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)); *see also Shih Wei Su v. Filion,* 335 F.3d 119, 127 (2d Cir.2003) (finding in habeas context that court must apply test "defined by the Supreme Court in *Agurs*").

Here, petitioner has failed to make a showing under any one of these factors. Thus, petitioner offers no new evidence or affidavits to suggest that Detective Buell's testimony was false or that the prosecution knew that the detective's testimony was false. Further, petitioner fails to provide "any reasonable likelihood" to conclude that such testimony by Detective Buell, even if false, "could have affected the judgment of the jury." *See Helmsley,* 985 F.2d at 1205–06 (internal quotation omitted). Accordingly, petitioner's proposed ineffective assistance claim based upon trial counsel's failure to object to the prosecutor's knowing use of false testimony is meritless, as the failure to preserve a meritless claim cannot constitute ineffective assistance.

Accordingly, because each of petitioner's additional, off-the-record ineffective assistance of counsel claims lack merit, it would be futile to allow petitioner to amend the petition to add these claims so that he might stay the petition and return to state court to exhaust the additional claims.

3. Actual Innocence Claim

Finally, petitioner apparently seeks to amend the petition to add and then exhaust an actual innocence claim. A showing of actual innocence, however, serves merely as a gateway to the airing of a petitioner's defaulted constitutional claims and is not itself cognizable in habeas as a free-standing claim. *See Herrera v. Collins,* 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) ("[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). This arises from the fact that a habeas court is, in short, concerned " 'not [with] the petitioners' innocence or guilt but solely [with] the question whether their constitutional rights have been preserved.' " *Id. (quoting Moore v. Dempsey,* 261 U.S. 86, 87–88, 43 S.Ct. 265, 67 L.Ed. 543 (1923)).

***14** Because, as discussed above, absent any newly discovered evidence, petitioner's bare assertions of actual innocence fail to meet the actual innocence standard as set forth by the Supreme Court. Moreover, petitioner's claim of actual innocence appears to be unsupported by the record, and because the actual innocence claim itself cannot be a free-standing basis for federal habeas review, the actual innocence claim is plainly meritless and amendment of the petition to add such a claim would be futile.

Accordingly, because each of petitioner's proposed amendments would be futile, the motion to amend the petition is denied in its entirety.

II. Motion to Stay

The court need not address the motion to stay the petition because, without amendment, the petition now contains only exhausted claims, and the stay-and-abeyance procedure applies only to petitions which contain unexhausted claims. As explained below, even assuming that amendment of the petition was not futile and the court granted petitioner's request to amend the petition to include unexhausted claims, petitioner has failed to demonstrate a sufficient basis for invoking a stay.

A. Legal Standard

In light of the total exhaustion requirement for federal habeas review discussed above, a district court faced with a habeas petition containing unexhausted claims generally has three options. First, the court may dismiss the unexhausted claims without prejudice. *See Rhines,* 544 U.S. at 273, 274. Second, if the unexhausted claim is plainly meritless, the court may deny the claim on the merits notwithstanding the petitioner's failure to exhaust. *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."); *see also Rhines,* 544 U.S. at 277 ("[T]he district court would abuse its discretion if it were to grant [petitioner] a stay when his unexhausted claims are plainly meritless"). Third, where an unexhausted claim is contained in a petition along with exhausted claims, a district court may either invite the petitioner to delete the unexhausted claims and proceed with only the exhausted claims, or, in order to avoid foreclosing federal review of the unexhausted claims, under "limited circumstances" the court may "stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims." *Rhines,* 544 U.S. at 275, 277–78.

In order to invoke the so-called "stay-and-abeyance" procedure for a mixed habeas petition, a district court must first ensure that certain criteria are met. *See id.* at 277–78 ("stay and abeyance should be available only in limited circumstances"). Specifically, the court must ensure that: (1) good cause exists for the petitioner's failure to exhaust his claims in state court; (2) the unexhausted claims are not "plainly meritless," and (3) the petitioner has not engaged in intentionally dilatory litigation tactics. *See id.*

B. Application

***15** Here, there is no evidence that petitioner has engaged in intentionally dilatory litigation tactics, however, petitioner cannot meet the remaining criteria required to qualify for a stay because he does not show "good cause" for his previous failure to exhaust his claims or that his claims are not "plainly meritless." *See id.*

First, petitioner does not show "good cause" for his failure to exhaust these claims in state court. Petitioner asserts "good cause" based on the fact that he is "unschooled in legal intricacies" and his concomitant "complete reliance on his assigned court's counsel." (Pet'r Stay Mem. at 2 ¶

7.) The Supreme Court has not defined "good cause," and while some courts have found "good cause" to exist where a petitioner received ineffective assistance of appellate counsel, those cases have generally involved situations where the same counsel represented petitioner during trial and on appeal because "it is reasonable to conclude that an appellate attorney will not claim his own ineffective assistance of counsel." *See, e.g., Martinez v. Artus,* No. 06–CV–5401 (ERK), 2010 U.S. Dist. LEXIS 40553, at *12, 2010 WL 1692454 (E.D.N.Y. Apr. 26, 2010).

Here, petitioner was represented by new counsel on appeal, and therefore there is reason to believe that counsel would have raised a potentially meritorious ineffective assistance claim on appeal if one had existed. As discussed above, however, the proposed ineffective assistance claims petitioner now seeks to raise are meritless. Given that an appellate attorney need not bring every potential non-frivolous claim in order to meet the *Strickland* performance prong, failure to raise a plainly meritless claim, as here, cannot be ineffective assistance of counsel. *See Smith v. Robbins,* 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (appellate counsel may appropriately "select among" potential non-frivolous claims "to maximize the likelihood of success of appeal") (citing *Jones v. Barnes,* 463 U.S. 745, 750–54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)); *see also Smith v. Murray,* 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) ("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.") (quoting *Barnes,* 463 U.S. at 751–752). Accordingly, there does not appear to be a basis for concluding that petitioner's appellate counsel was ineffective for failing to raise the claims addressed above, which the court finds to be meritless, and petitioner therefore fails to show the required "good cause" for his failure to exhaust the claims in state court. *See Rhines,* 544 U.S. at 277–78.

Moreover, even presuming good cause was established, a court may not grant a stay when the petitioner's claims are "plainly meritless." *See id.* As discussed at length above, petitioner has failed to show that the unexhausted claims are not "plainly meritless," indeed, it appears that further review of these claims in state court is either procedurally barred or would be futile. *See id.* It would therefore be an abuse of discretion to stay the petition to allow petitioner to exhaust his additional claims. *See id.* at 277.

***16** Accordingly, even if the court granted petitioner's request to amend the petition to add the proposed unexhausted claims, petitioner's request to stay the resulting mixed petition would be denied. *See* 28 U.S.C. § 2254(b)(2); *see also Rhines,* 544 U .S. at 277.

III. The Instant Petition

Having denied petitioner's requests to amend and stay the petition, remaining before the court is petitioner's original habeas petition which indisputably contains only exhausted claims which were previously adjudicated on the merits in the state courts.

Under the deferential standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1214 (1996), a federal court may grant habeas relief with respect to a federal claim adjudicated on the merits in state court only if the adjudication of the claim resulted in a decision that was either: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," [3] or (2) "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).

A state court's decision is "contrary to" clearly established Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the] 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." *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision is an "unreasonable application" of federal law "if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The Supreme Court has emphasized that the reasonableness inquiry is an objective rather than subjective one. *Id.* at 409–10. Therefore, "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" in order to warrant federal habeas relief. *Id.* at 411.

A. Claim Based on Legal Insufficiency of the Evidence

Petitioner seeks habeas relief on the grounds that the evidence at trial was legally insufficient to support his conviction for first degree manslaughter on the grounds that the prosecution did not prove beyond a reasonable doubt that petitioner participated in the attack on Santos. (Pet. at 6.) There is no dispute that petitioner exhausted this claim and that the state courts denied the claim on the merits. Because petitioner cannot show that the state courts unreasonably applied the governing legal standards in adjudicating this claim, however, the claim must be denied.

Petitioner further seeks to argue that his conviction was against the weight of the evidence (*id.*), but because this claim is not a proper basis for federal habeas review, it is denied.

1. Legal Standard

*17 Under the deferential AEDPA standard of review discussed above, where a state court has adjudicated a claim of legal insufficiency on the merits, the sole inquiry on federal habeas review is whether the state court unreasonably applied the governing standard for legal insufficiency claims set forth in *Jackson v. Virginia,* 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *See Policano v. Herbert,* 507 F.3d 111, 115–116 (2d Cir.2007) ("[I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 ... the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.") (*citing Jackson,* 443 U.S. at 324). Under that standard, a reviewing court must consider the evidence in the light "most favorable to the prosecution" *Einaugler v. Supreme Court of the State of New York,* 109 F.3d 836, 840 (2d Cir.1997), and the conviction must be upheld if *"any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319 (emphasis in original). "[A] petitioner bears a very heavy burden in convincing a federal habeas court to grant a petition on the grounds of insufficiency of the evidence." *Fama v. Comm'r of Corr. Servs.,* 235 F.3d 804, 811 (2d Cir.2000). Further, in considering the sufficiency of the evidence for a state conviction, "[a] federal court must look to state law to determine the elements of the crime." *Quartararo v. Hanslmaier,* 186 F.3d 91, 97 (2d Cir.1999) (citations omitted).

2. Application

Under New York law, a person commits Manslaughter in the First Degree when, "with intent to cause serious physical injury to another person, he causes the death of such person or of a third person[.]" N.Y. Penal Law § 125.20(1). Further, New York law provides that a person can be held criminally liable for an offense when, "acting with the mental culpability required for the commission" of the offense, that person *inter alia,* "intentionally aids" another in commission of an offense. N.Y. Penal Law § 20.00.

Here, construing the evidence in the light most favorable to the prosecution, and drawing all reasonable inferences therefrom, a rational jury could have concluded that petitioner was guilty of assaulting Santos with the intent to cause Santos "serious physical injury," and thereby caused Santos' death in violation of New York Penal Law Section 125.20(1). Specifically, a rational jury could have credited eyewitness Britto's identification of petitioner as an individual who was punching Santos in the head and who was a member of the group assaulting Santos and the individual whom Britto observed wrapping an object in what appeared to be a shirt. This testimony, coupled with the testimony of the medical examiner that Santos died of multiple stab wounds likely inflicted by a long sharp object, could lead a reasonable juror to conclude beyond a reasonable doubt that petitioner was one of the individuals who, acting in concert with others, attacked Santos, thus causing Santos' death and making petitioner guilty of first-degree manslaughter under New York law. *See People v. Modesto,* 262 A.D.2d 586, 586, 693 N.Y.S.2d 61 (N.Y.App. Div.2d Dep't 1999) (finding evidence legally sufficient to support a first-degree manslaughter conviction where defendant was one of group of gang members who "perpetrated a vicious fatal assault" on the victim, despite fact that defendant was not "among the assailants using knives or ice picks"). Further, a rational juror could have drawn an inference of guilt from petitioner's inconsistent stories upon questioning by Detective Buell, as well as his incorrect implication of Roman as an individual involved in the crime. Because the record evidence reveals that a rational juror could have concluded petitioner's guilt beyond a reasonable doubt under the *Jackson* standard, there is no basis to

conclude that the New York courts unreasonably applied the *Jackson* standard. *See Williams,* 529 U.S. at 411.

*18 Moreover, to the extent petitioner raises a claim that the verdict was against the weight of the evidence, the claim asserts only an error of state law which is not a basis for federal habeas review. *See McKinnon v. Sup't, Great Meadow Corr. Facility,* 355 Fed. Appx. 469, 475 (2d Cir.2009) ("the argument that a verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus, and as a matter of federal constitutional law a jury's verdict may only be overturned if the evidence is insufficient to permit any rational juror to find guilt beyond a reasonable doubt") (*citing Jackson,* 443 U.S. at 324 *and Policano,* 507 F.3d at 116) (additional internal citations omitted).

Accordingly, petitioner's sufficiency and weight of the evidence claims are denied.

B. Excessive Sentence

Petitioner claims that his sentence is excessive and further appears to claim that the sentence is vindictive in retaliation for his rejection of a pre-trial plea offer. (Pet. at 7.) The excessive sentence claim is not a proper basis for federal habeas review and petitioner's vindictive sentencing claim is unexhausted, procedurally defaulted, and in any event, plainly meritless.

1. Legal Standard

It is well-settled that no federal constitutional issue is raised where the term of a challenged sentence falls within the range prescribed by state law. *See White v. Keane,* 969 F.2d 1381, 1383 (2d Cir.1992) (affirming dismissal of petition for habeas relief where petitioner challenged as "cruel and unusual" a sentence within the range prescribed by state law). An enhanced sentence that is "motivated by actual vindictiveness towards the defendant for having exercised his guaranteed rights" violates due process, however, and thus serves as the proper basis for federal habeas review. *See Morales v. Miller,* 41 F.Supp.2d 364, 380 (E.D.N.Y.1999) (*quoting Wasman v. United States,* 468 U.S. 559, 568, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984)).

2. Application

Here, petitioner does not dispute that his fifteen year sentence for first degree manslaughter fell within the range prescribed by New York Penal Law for a Class B violent felony offense. *See* N.Y. Penal Law §§ 70.02(1)(a), (2)(a), (3)(a), 125.20 (offense of first degree manslaughter requires determinate prison term of between five and twenty-five years). Because petitioner's sentence fell within the range prescribed by state law, his excessive sentence claim does not raise a federal constitutional issue and, therefore, is not a proper basis for habeas relief. Accordingly, petitioner's Eighth Amendment claim is denied. *See Keane,* 969 F.2d at 1383.

Moreover, to the extent petitioner for the first time attempts to raise a claim of vindictiveness in connection with his sentence, this claim is unexhausted because he failed to raise it on direct appeal, and, for the reasons discussed at length above, this claim is now procedurally barred from review in state court pursuant to New York Criminal Procedure Law Section 440.10. *See* N.Y.Crim. Proc. L. § 440.10(2)(c); *see also Aparicio,* 269 F.3d at 89–90. This claim is therefore deemed exhausted but procedurally barred from federal habeas review because petitioner does not show cause and prejudice for the default or that a miscarriage of justice would result from this court's failure to hear the claim. *See Aparicio,* 269 F.3d at 90.

*19 Moreover, upon the record before the court, petitioner has failed to show good cause for his failure to previously exhaust this claim and it appears plainly meritless. Consequently, there is no basis to stay the petition to allow petitioner to return to state court to exhaust this claim.

Accordingly, to the extent petitioner seeks federal habeas relief on the basis of an unexhausted vindictiveness at sentencing claim, the claim is deemed exhausted but procedurally barred and thus denied on the basis of petitioner's procedural default, or alternatively, denied on the merits pursuant to § 2254(b)(2), notwithstanding the failure of petitioner to exhaust state remedies. *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."); *see also Rhines,* 544 U.S. at 277 ("[T]he district court would abuse its discretion if it were to grant [petitioner] a stay when his unexhausted claims are plainly meritless").

CONCLUSION

For the foregoing reasons, the motion to amend the petition, the motion to stay the petition, and the application for writ of habeas corpus are each denied in their entirety. Because petitioner has not made a substantial showing of the denial of any constitutional right, the court will not issue a certificate of appealability. 28 U.S.C. § 2253; *Lozada v. United States,* 107 F.3d 1011, 1017 (2d Cir.1997), abrogated on other grounds, *United States v. Perez,* 129 F.3d 255, 259–60 (2d Cir.1997) (discussing the standard for issuing a certificate of appealability). The court certifies, pursuant to 28 U.S.C. § 1915(a), that any appeal from this judgment denying the petition would not be taken in good faith. *Coppedge v. United States,* 369 U.S. 438, 444, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

The Clerk of the Court is respectfully requested to dismiss the petition, enter judgment in favor of respondent, and to close this case. Respondent shall serve a copy of this Memorandum and Order upon petitioner and file a declaration of service by April 8, 2011.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1331509

Footnotes

1 Specifically, petitioner asserted that "some" of the unexhausted claims petitioner wished to pursue in state court included: (1) the prosecutor's use of false testimony; (2) actual innocence; (3) improper summation; and (4) ineffective assistance of trial counsel. (*See* Pet'r Stay Mem. at 1–2.)

2 New York Criminal Procedure Law Section 440.10(2)(c) provides, in relevant part, that a

> 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 during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

3 Federal courts may also consider the decisions of inferior federal courts as "helpful amplifications of Supreme Court precedent," in "evaluating whether the state court's application of the law was reasonable." *Matteo v. Sup't,* 171 F.3d 877, 890 (3d Cir.1999) (en banc); *see also Bohan v. Kuhlmann,* 234 F.Supp.2d 231, 248 n. 10 (S.D.N.Y.2002) (a district court is not required to disregard a Circuit court's interpretation of "clearly established Federal law, as determined by the Supreme Court"); *Shiwlochan v. Portuondo,* 345 F.Supp.2d 242, 263 (E.D.N.Y.2004) (same).

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

Ricardo JIMENEZ, Petitioner,
v.
Harold GRAHAM, Respondent.

No. 11–CV–6468 (JPO).
|
Dec. 14, 2011.

MEMORANDUM AND ORDER

J. PAUL OETKEN, District Judge.

*1 Petitioner Ricardo Jimenez ("Jimenez" or "Petitioner") seeks to amend a September 9, 2011 petition for a writ of habeas corpus that he brought pursuant to 28 U.S.C. § 2254. Alternatively, he seeks a stay of federal habeas proceedings so that he may exhaust certain claims in state court. Respondent Harold Graham, through the Office of the District Attorney, Bronx County, "takes no position regarding petitioner's motion to stay the petition" but argues that "Petitioner's motion to amend ... is premature." (Dkt. 11 at 2.)

For the reasons set forth below, the amendment is allowed, and the proposed amended petition is accepted as the current operative pleading. However, while it appears that Petitioner intends his amended petition to raise new claims currently pending in state court, the amended petition does not contain any grounds that are substantially different from those in his original complaint. Accordingly, the proceedings in this Court are hereby stayed pending the conclusion of the state-court proceedings, after which Petitioner may amend his federal habeas petition to properly raise any timely claims exhausted by the state-court proceedings.

I. Timeliness

A federal court may issue a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2254, if "the state-court adjudication resulted in a decision that (1) 'was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States.' " *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000) (quoting 28 U.S.C. § 2254) (O'Connor, J., concurring, writing for the majority in this part) (omissions in original).

However, 28 U.S.C. § 2254 provides that "a[ny] person in custody pursuant to the judgment of a State court" must first exhaust all available remedies in state court before pursuing federal habeas review. 28 U.S.C. § 2254(b)(1)(A). Moreover, habeas petitions brought under 28 U.S.C. § 2254 must generally be filed not later than one year after the completion of state-court direct review. 28 U.S.C. § 2244(d)(1)(A). Direct review is typically complete upon the expiration of the 90–day period in which any petition for writ of certiorari to the U.S. Supreme Court may be filed. *Williams v. Artuz,* 237 F.3d 147, 151 (2d Cir.2001). The deadline for filing a petition for federal habeas relief may be tolled, however, by certain proceedings in state court. *Fernandez v. Artuz,* 402 F.3d 111, 112–15 (2d Cir.2005).

After his judgment of conviction for murder in the second degree was affirmed by the Appellate Division of the New York Supreme Court, *People v. Jimenez,* 71 A.D.3d 483, 896 N.Y.S.2d 69 (1st Dep't 2010), Jimenez was denied leave to appeal by the New York Court of Appeals on June 30, 2010. *People v. Jiminez,* 15 N.Y.3d 752, 906 N.Y.S.2d 824, 933 N.E.2d 223 (2010). Therefore, Jimenez's judgment of conviction became final within the meaning of AEDPA on September 28, 2010, leaving him one year thereafter to file any federal habeas petition.

*2 However, Jimenez's time to file a federal habeas petition appears to be tolled by pending state-court proceedings. Jimenez's proposed amended petition (Dkt. 8 at 4, 13) states that a motion to vacate the judgment against Jimenez (the "Motion") was filed pursuant to New York Criminal Procedure Law ("C.P.L.") § 440.10 on September 23, 2011, in Bronx County Supreme Court and remains pending there. Under New York state law, a § 440.10 motion to vacate a judgment may be filed "[a]t any time after the entry of a judgment, [in] the court in which it was entered," generally on off-the-record grounds that could not have been raised on direct appeal. N.Y. C.P.L. § 440 .10. Assuming Petitioner has properly filed this § 440.10 Motion, the habeas corpus statute of limitations is

tolled beginning from the date petitioner gave the motion to prison officials for mailing, pending the outcome of the state-court proceedings. *Fernandez v. Artuz,* 402 F.3d 111, 112–15 (2d Cir.2005). In any case, his original petition of September 9, 2011, was timely.

II. Jimenez's Original Petition and Proposed Amendment

In his original petition, Jimenez enumerated four grounds of error: (1) that his conviction was against the weight of the evidence; (2) that the trial court erred in refusing to instruct the jury on a justification that the actual perpetrator was provoked; (3) that the prosecutor at trial engaged in misconduct by misrepresenting the record and urging the jury to draw unsupported inferences; and (4) that the seventeen-year period between the crime and Jimenez's indictment violates due process. (Dkt. 2 at 6–12.) All four of these claims have already been exhausted on direct appeal. *See Jimenez,* 71 A.D.3d at 483–84 (rejecting Jimenez's claims on appeal).

In a letter[1] dated October 24, 2011, Jimenez writes that he wishes to amend his petition "as a result of petitioner[']s inadvertently filing his current petition *minus* the claims filed in his *pending* collateral motion before the Bronx Supreme Court." (Dkt. 10 at 1 (emphasis in original)). Petitioner alternatively seeks a " 'stay' of the proceedings [so that he might] exhaust unexhausted state court claims ...." *Id.*

Motions to amend habeas petitions are governed by Federal Rule of Civil Procedure 15(a). *Littlejohn v. Artuz,* 271 F.3d 360, 363 (2d Cir.2001). Rule 15(a) provides that "[a] party may amend its pleading once as a matter of course within: ... (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed.R.Civ.P. 15(a)(1). Here, the Court issued an order on October 5, 2011, directing the government to respond to Jimenez's petition. The government has not yet done so. As such, Jimenez may amend his petition as a matter of course. The Court therefore accepts Jimenez's amended petition (Dkt.8) as the current operative pleading.

A. Jimenez's Intention to Add New Grounds to his Petition

*3 Jimenez's amended petition does not add any new grounds for requesting a writ of habeas corpus. In the amended petition, Jimenez lists four grounds that are substantially identical to the four grounds presented in his original petition. *Id.* at 6–12. The key difference between the two petitions is that the amended petition describes Jimenez's § 440.10 Motion as "arguing the 'People failed to disclose Brady and Rosario material, Trial counsel was ineffective, and petitioner is actually innocent of the crimes charged.' " *Compare* Dkt. 1 *with* Dkt. 8 at 13. While Jimenez's letter of October 24, 2011, is not entirely clear as to his intentions, it appears to indicate that Jimenez intends to include in his amended petition the claims raised in his § 440.10 Motion. (Dkt. 10 at 1.)

The new claims that Jimenez appears intent on raising are not exhausted, and thus, the Court could not grant relief on them even if they were raised in Jimenez's amended petition. 28 U.S.C. § 2254(b)(1)(A). However, "[d]istrict courts ... have authority to issue stays where such a stay would be a proper exercise of discretion." *Rhines v. Weber,* 544 U.S. 269, 276, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005) (citation omitted). Under Rhines, a court may properly exercise this discretion by staying a petition when a petitioner seeks to raise unexhausted claims,[2] assuming that there is good cause for the petitioner's failure to exhaust those claims in state court and that the unexhausted claims are not "plainly meritless." *Id.* at 277.

Such a stay should not be of indefinite duration, however, and "district courts should place reasonable time limits on a petitioner's trip to state court and back." *Rhines,* 544 U.S. at 277–78; *see also Zarvela,* 254 F.3d at 381 (stating that if a district court stays a habeas petition for exhaustion of claims in state court, the court "should explicitly condition the stay on the prisoner's pursuing state court remedies within a brief interval ... and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed").

B. Propriety of a Stay in these Proceedings

Here, Jimenez apparently intends to raise unexhausted claims, currently pending in state court, that the prosecution "failed to disclose Brady and Rosario material, Trial counsel was ineffective, and petitioner is actually innocent of the crimes charged." (Dkt. 8 at 13.) Though Jimenez has not yet properly raised these claims for federal habeas review, the Court must review them now to the extent necessary to evaluate the propriety of issuing a stay of these proceedings. A stay is proper so long

as Jimenez had good cause for not having exhausted at least one new claim, which is not plainly meritless. *Rhines,* 544 U.S. at 277. As explained below, the Court concludes that Jimenez had good cause for not exhausting his *Brady* claim and that that *Brady* claim is not plainly meritless. A stay of these proceedings is therefore appropriate. Having so concluded, the Court does not reach or evaluate any of Jimenez's other new claims.

1. Jimenez Has Good Cause for Failure to Exhaust his *Brady* Claim

***4** It appears that Jimenez has good cause for not having exhausted his *Brady* claim because, his submissions state, these claims are based on evidence newly uncovered by the New York Office of Appellate Defender's Reinvestigation Project. (Petitioner's Affirmation in Support of Motion to Vacate Judgment ("Affirmation")[3] at ¶¶ 61–62.) Jimenez could not have earlier exhausted a claim based on evidence of which he was unaware. This fact satisfies the good cause requirement for a stay under Rhines.

2. Jimenez's *Brady* Claim Is not Plainly Merit less

Nor is Jimenez's *Brady* claim plainly meritless. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), established that prosecutorial suppression of evidence favorable to a defendant violates due process if the evidence is material to guilt or punishment, regardless of the prosecution's good or bad faith. *Id.* at 87. For suppression to constitute a *Brady* violation, three requirements must be met: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Prejudice occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

The Supreme Court has also clarified that the duty to disclose such evidence applies even without a request by the accused. *United States v. Agurs,* 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Moreover, Brady does not require that the prosecutor personally know of the evidence not provided to the accused; prosecutors have a duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 432, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). While the government generally need not turn over evidence of which the defense knew or should have known, *United States v. Torres,* 719 F.2d 549 (2d Cir.1983), suppression of a prosecution witness's criminal history and further evidence of untruthfulness may qualify as a *Brady* violation. *See Crivens v. Roth,* 172 F.3d 991, 998 (7th Cir.1999); *United States v. Perdomo,* 929 F.2d 967, 973 (3d Cir.1991).

Jimenez has apparently asserted in pending state-court proceedings that certain omissions in materials provided by the prosecution before trial constitute *Brady* violations. Specifically, Jimenez asserts that, despite a request from Jimenez's trial counsel for information concerning prosecution witnesses' prior convictions and other bad acts, the prosecution suppressed evidence with impeachment value concerning two of the three witnesses who identified Jimenez at trial as the killer. (Affirmation at ¶¶ 61–76; Affirmation of Patrick L. Bruno ("Bruno Affirmation")[4] at ¶ 2.)

***5** As to one of these witnesses, Kevin Morrissey, the prosecution failed to inform Jimenez's counsel of three federal convictions for fraud, conspiracy, and counterfeiting as well as "numerous violations of supervised release." (Affirmation at ¶ 64.) Further, while the prosecution did disclose that several cases were then pending against Morrissey in New York state courts, the prosecution did not disclose to the defense that Morrissey's court records indicated that he suffers from "Schizophrenia, Undifferentiated Type." *Id.* at ¶¶ 63, 65. Finally, the prosecution failed to disclose to the defense certain benefits that Morrissey hoped to gain in exchange for his testimony against Jimenez. *Id.* at ¶ 66.

Concerning the second witness, Andrew O'Brien, Jimenez has apparently asserted in state court that the prosecution failed to alert the defense to O'Brien's prominence in "the 'Poison Clan,' a violent criminal syndicate responsible for drug trafficking and murders from Brooklyn to Virginia." *Id.* at ¶ 68. While the prosecution did disclose O'Brien's conviction for criminal possession of a weapon, the prosecution did not disclose that O'Brien had violated his probation after that offense by shooting two people or that O'Brien was later convicted a second time for criminal possession of a weapon. *Id.* at ¶ 69. Nor did

the prosecution notify Jimenez of other bad acts allegedly committed by O'Brien: marijuana sales, his own use of narcotics, and involvement in various plans for killings related to the drug trade. *Id.* at ¶ 69, 71. Jimenez asserts that the above information relating to Morrissey and O'Brien "was known, if not to the individual Assistant District Attorney, to the members of law enforcement involved in the investigation of Mr. Jimenez's case. *See Kyles v. Whitley,* 514 U.S. 419, 437–38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)." (Affirmation at ¶ 75.)

The evidence that Jimenez claims was suppressed by the prosecution may meet the three requirements of a *Brady* violation. Upon full briefing, the Court may find that the evidence is favorable to Jimenez as impeaching of two important witnesses against him and that the prosecution's omissions constitute suppression as discussed in *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490. Jimenez will have the greatest challenge showing that prejudice resulted from such suppression or, in other words, showing "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The weight of the putatively suppressed evidence here is somewhat diminished because some of it is similar to other information that the prosecution did disclose. However, Jimenez may put forward a *Brady* claim, not plainly meritless, that the evidence withheld here was favorable to Jimenez, suppressed by the state, and resulted in prejudice.

Because Jimenez has good cause for having failed to exhaust his *Brady* claim in state court and because that claim is not plainly meritless, a stay of these proceedings is appropriate under *Rhines v. Weber,* 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440.

III. Conclusion

***6** For the foregoing reasons, it is hereby

ORDERED that Jimenez's proposed amended petition is accepted for filing as an amended petition.

IT IS FURTHER ORDERED that Jimenez's petition is stayed and held in abeyance pending state-court review of his unexhausted claims. The respondent need not answer the petition at this time. Jimenez shall, within thirty (30) days after the state court renders its final decision, make an application by letter to this Court in order to restore this action to the Court's calendar. Also within thirty (30) days after the state court renders its final decision, Jimenez may submit a new amended petition that properly raises any timely claims exhausted by the state-court proceedings. Upon receipt of Jimenez's letter application for the petition's restoration to the Court's calendar, and assuming all of Jimenez's claims were properly exhausted, the Court will then issue a scheduling order directing the respondent to answer the petition.

Jimenez is hereby notified that, if he does not make an application by letter to this Court within thirty (30) days following the completion of state-court review, this petition may be dismissed as not timely under *Rhines* and *Zarvela.* Petitioner is further advised that, if this petition were to be dismissed, any subsequent petition that he files in federal court may be dismissed as time-barred under 28 U.S.C. § 2244(d) and/or treated as a second or successive petition under 28 U.S.C. § 2244(b).

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 6287999

Footnotes

1 Jimenez's letter is addressed to the Clerk of Court; in the future, Petitioner should send documents to the Pro Se Office. While the Court does not have a record of receiving Petitioner's letter directly, the Court received an emailed copy from Respondent's counsel on November 22, 2011.

2 Rhines deals specifically with a "mixed" petition, *i.e.,* a "petition containing some claims that have been exhausted in the state courts and some that have not." 544 U.S. at 271. However, the logic of Rhines applies to cases where, as here, a petitioner seeks to add unexhausted claims to an otherwise fully exhausted petition. As explained in *Rhines,* a district court's authority to issue stays is circumscribed by AEDPA only insofar as a stay would contravene AEDPA's purposes of "reduc [ing] delays in the execution of state and federal criminal sentences, particularly in capital cases," "reduc[ing] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in

which to seek federal habeas review," and "encourag[ing] petitioners to seek relief from state courts in the first instance." *Id.* at 276. Here, the petitioner remains in state custody and does not face the death penalty. Moreover, Petitioner is pursuing his unexhausted claims in state court. Thus, a stay in this case would not contravene the purposes of AEDPA as delineated by *Rhines.*

3 This Affirmation is included as Exhibit A to Jimenez's letter of October 24, 2011. (Dkt.10.)

4 This Affirmation of Patrick L. Bruno is included as Exhibit A within Exhibit B to Jimenez's letter of October 24, 2011. (Dkt.10.)

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

Artemio CASTELLANOS, Petitioner,
v.
Robert KIRKPATRICK, Superintendent,
Wende Correctional Facility, Respondents.

No. 10–CV–5075 (MKB).
|
July 16, 2013.

Attorneys and Law Firms

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Douglas R. Noll, Andrew Fukuda, Mineola, NY, for Respondent.

MEMORANDUM & ORDER

MARGO K. BRODIE, District Judge.

*1 Petitioner Artemio Castellanos brings the above-captioned habeas corpus petition pursuant to 28 U.S.C. § 2254, in which he alleges that he is being held in state custody in violation of his federal constitutional rights. Petitioner's claim arises from a judgment of conviction after a jury trial for one count of criminal sexual act in the first degree and one count of sexual abuse in the first degree in the New York County Court, Nassau County. Petitioner was sentenced to a determinate term of 25 years on the first count, to run concurrently with a term of seven years on the second count. Petitioner appealed his conviction to the New York Appellate Division, Second Department, claiming that: (1) his conviction was against the weight of the evidence; (2) his confession was coerced and should have been suppressed; (3) the trial court abused its discretion in permitting the six-year-old complainant to testify; (4) the trial court erroneously obstructed the testimony of multiple witnesses; (5) the trial court's erroneous instructions and failure to issue necessary charges to the jury individually and cumulatively influenced the verdict; (6) the trial court erred in allowing testimony about the complainant's statements; and (7) he was denied his right to a showing of probable cause for his arrest. The Appellate Division rejected Petitioner's claims and affirmed his conviction. *People v. Castellanos,* 65 A.D.3d 555, 884 N.Y.S.2d 126 (App.Div.2009). The New York Court of Appeals denied leave to appeal. *People v. Castellanos,* 13 N.Y.3d 858, 891 N.Y.S.2d 693, 920 N.E.2d 98 (2009).

On June 10, 2013, Petitioner moved for "for an order granting petitioner leave to amend his petition for habeas corpus, for a stay to hold the petition in abeyance pending resolution of his motion to vacate his judgment pursuant to N.Y. Criminal Procedure Law § 440.10 in New York state court, and for reconsideration of his prior motion seeking discovery in this Court, or any similar relief as the Court may deem just and proper." (Pet'r Notice of Motion, Docket Entry No. 15.) In a letter dated June 25, 2013, Respondent consented to Petitioner's request to amend the petition and to hold the petition in abeyance. (Resp't June 25 Letter, Docket Entry No. 16.) Respondent also notified the Court that he intended to oppose Petitioner's § 440.10 motion in state court, suggesting that the Court could review Petitioner's discovery request after the resolution of the state court proceedings. (*Id.*) For the reasons set forth below, the Court grants Petitioner's motion for a stay and holds the petition in abeyance pending the resolution of Petitioner's motion to vacate his judgment. The Court denies Petitioner's motion for discovery, without prejudice to renew, after the completion of the state court proceeding. [1]

I. Stay and Abeyance

Amendment of the petition by Petitioner to include an unexhausted claim pursuant to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), transforms the petition into a mixed petition, which can be stayed and held in abeyance. *Adams v. Artus,* No. 09–CV–1941, 2012 WL 1077451, at *12 (E.D.N.Y. Feb. 24, 2012) ("Where a habeas petition is mixed, containing both exhausted and unexhausted claims, the petition could be stayed and held in abeyance so that the petitioner can present his unexhausted claims to the state court and return to federal court with a perfected petition.") (citing *Rhines v. Weber,* 544 U.S. 269, 277–78, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005)), *adopted by,* 2012 WL 1078343 (E.D.N.Y. Mar.30, 2012). A stay should be granted only if "the district court determines that there was good cause for

the petitioner's failure to exhaust his claims first in state court." *Rhines,* 544 U.S.at 277. "[T]he district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." *Id.* A stay should not be granted where a petitioner has engaged in "abusive litigation tactics or intentional delay." *Id.* at 278.

***2** "The Supreme Court and the Second Circuit have yet to define what constitutes 'good cause' under *Rhines." Henry v. Lee,* No. 12–CV–5483, 2013 WL 1909415, at *6 (E.D.N.Y. May 8, 2013). Courts have found good cause where the wording of a state court decision caused a petitioner " 'reasonable confusion' about his claims and their viability," *id.* at *7, where a petitioner learned of an eyewitness shortly before filing his habeas petition but was unable to locate the witness again until after filing, *see Spurgeon v. Lee,* No. 11–CV–00600, 2011 WL 1303315, at *2 (E.D.N.Y. Mar. 31, 2011), and where a *pro se* petitioner was unaware of the procedure for raising an ineffective assistance of counsel claim in the state, *Rolle v. West,* No. 05–CV–591, 2006 WL 2009101, at *2 (E.D.N.Y. July 17, 2006). *But see Ortiz v. Heath,* No. 10CV 1492, 2011 WL 1331509, at *15 (E.D.N.Y. April 6, 2011) (rejecting a claim on similar grounds); *Madrid v. Ercole,* No. 08–CV–4397, 2012 WL 6061004, at *2 (E.D.N.Y. Dec.6, 2012) (same); *Ramdeo v. Phillips,* No. 04–CV–1157, 2006 WL 297462, *7 (E.D.N.Y. Feb. 8, 2006) (same). Courts have rejected claims arguing that petitioner only recently discovered that an argument was not raised on appeal, *Antoine v. Martuscello,* No. 11–CV–00088, 2012 WL 5289535, at *1 (E.D.N.Y. Oct. 22, 2012), and where a petitioner had failed to pursue state remedies in the two years that he had been aware of them, *Spells v. Lee,* No. 11–CV–1680, 2012 WL 3027865, at *6 (E.D .N.Y. July 23, 2012).

Here Petitioner argues that he was both unaware of the alleged *Brady* materials at issue prior to his habeas claim and that there had been no clear case law directly on point until two recent decisions. (Pet'r Mem., Docket Entry No. 15, at 32.) Petitioner cites two cases: *Milke v. Ryan,* 711 F.3d 998 (9th Cir.2013), decided in March 2013, where the Ninth Circuit found that failure to disclose an interrogating officer's suspension for sexual misconduct and findings that the officer had lied under oath constituted a *Brady* violation, and *People v. Garrett,* 106 A.D.3d 929, 964 N.Y.S.2d 652 (App.Div.2013), decided in May 2013, where the Appellate Division found that a civil suit against the detective who procured a defendant's contested confession is *Brady* material if the district attorney's office is aware of the suit. Petitioner argues that only after these cases had been decided and Petitioner had become aware of civil suits and investigations of Detective Trujillo could Petitioner have sought relief in state court.

The nature of a *Brady* claim, predicated on failure to disclose material information, makes it particularly suitable for a finding of good cause. *See Jimenez v. Graham,* No. 11–CV6468, 2011 WL 6287999, at *4 (S.D.N.Y. Dec.14, 2011) (finding that a petitioner had good cause for his failure to exhaust a *Brady* claim made based on newly uncovered evidence). Here, Petitioner has shown good cause. In light of *Milke* and *Garrett,* Petitioner's argument that details regarding four civil suits against Detective Trujillo and six internal affairs investigations constituted *Brady* material is not plainly meritless. (Pet'r Mem ., Docket Entry No. 15, at 13–14.) There is no suggestion that Petitioner has engaged in abusive litigation tactics or intentional delay. Petitioner's request for a stay to hold the petition in abeyance pending resolution of his motion to vacate his judgment pursuant to N.Y. Criminal Procedure Law § 440.10 in New York state court is granted.

II. Discovery Request

***3** "[A] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley,* 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); *see also Drake v. Portuondo,* 321 F.3d 338, 346 (2d Cir.2003). "Rather, discovery is only allowed if the district court, acting in its discretion, finds 'good cause' to allow it." *Beatty v. Greiner,* 50 F. App'x 494, 496 (2d Cir.2002). " '[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is .... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.' " *Bracy,* 520 U.S. at 908–09 (alteration in original) (quoting *Harris v. Nelson,* 394 U.S. 286, 300, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969)).

Petitioner seeks discovery to develop facts showing that he is entitled to federal habeas relief under his existing Sixth Amendment claim and his new *Brady* claim. (Pet'r Mem., Docket Entry No. 15, at 37–38.) With respect to the Sixth Amendment claim, Petitioner has not shown how developing the facts would entitle him to relief. "Where there has been an adjudication on the merits in the state

court proceeding, review under § 2254(d)(1) does not permit consideration of new evidence in an evidentiary hearing before the federal habeas court, and review is limited to the record that was before the state court that adjudicated the claim on the merits." *Assadourian v. Brown,* 493 F. App'x 223, 224 (2d Cir.2012) (citing *Cullen v. Pinholster,* ——U.S. ——, ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011)).

With respect to the *Brady* claim, granting the discovery request could be premature. *See United States v. Schwamborn,* No. 01–CR–416 S–6, 2010 WL 3926055, at *1 (E.D.N.Y. Oct. 4, 2010) (denying request for discovery based on speculation that the sentence of a not-yetsentenced co-defendant would "be significantly lower than the sentence imposed on him and that the disparity will be a ground for relief"); *Harnett v. Conway,* No. 08–CV–1061, 2009 WL 4729950, at *2 (S.D.N.Y. Dec. 10, 2009) (denying discovery request for documents related to ongoing state court proceedings). Several courts have suggested that discovery should not be permitted on unexhausted claims. *See Calderon v. U.S. Dist. Court for the E. Dist. of Cal. (Sacramento),* 113 F.3d 149, 149 (9th Cir.1997) ("In light of the concession by petitioner that his federal habeas petition contains unexhausted claims that must be dismissed or pursued in state court before they may be included in the federal habeas petition, discovery at this time is inappropriate."); *Calderon v. U.S. District Court,* 98 F.3d 1102, 1106 (9th Cir.1996) ("[A]ny right to federal discovery presupposes the presentation of an unexhausted federal claim, because a federal habeas petitioner is required to exhaust available state remedies as to each of the grounds raised in the petition."); *Grizzle v. Horel,* No. 07–CV–4845, 2009 WL 1107778, at * 1 (N.D.Cal. Apr. 23, 2009) ("[A] petitioner cannot avail himself to Rule 6 discovery until he has filed a federal habeas petition on an exhausted claim."). *But see High v. Nevens,* No. 11–CV00891, 2013 WL 1292694, at *6 (D.Nev. Mar. 29, 2013) ("The Ninth Circuit's *Gonzalez* [*v. Wong,* 667 F.3d 965 (9th Cir.2011)] decision instead would suggest that there is no such inflexible requirement that it must be conclusively established beforehand that a federal claim is fully exhausted before federal habeas discovery may be allowed.").

***4** The Court denies Petitioner's motion for discovery, without prejudice to renew, after Petitioner has availed himself of the opportunity to pursue his claim in state court, and can demonstrate that the state "did not provide him with an adequate opportunity to develop the record." *Nunez v. Greiner,* No. 02–CV–0732, 2004 WL 307264, at *2 (S.D.N.Y. Feb. 13, 2004).

III. Conclusion

For the foregoing reasons, the Court grants Petitioner's motion for a stay and holds the petition in abeyance pending the resolution of his motion to vacate his judgment. The Court denies Petitioner's motion for discovery, without prejudice to renew.

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2013 WL 3777126

Footnotes

1 The Court granted Petitioner's motion to amend the petition on July 16, 2013.