W.D.N.Y.
16-cv-568
Arcara, J.
McCarthy, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of December, two thousand eighteen.

Present:

Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Rafael Agosto,

Petitioner-Appellant,

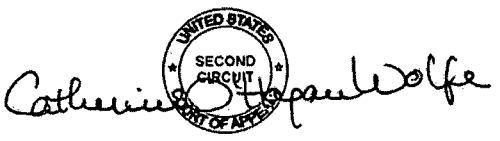
v. 18-1626

Christopher Miller, Superintendent, Great Meadow Correctional Facility,

Respondent-Appellee.

Appellant, pro se, moves for leave to proceed in forma pauperis and to compel the deputy superintendent of the facility where he is incarcerated to provide photocopies of the documentary evidence of his imprisonment. This Court construes Appellant's notice of appeal as a request for a certificate of appealability. Fed. R. App. P. 22(b)(2). Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



24-0F-56

United States District Court
WESTERN DISTRICT OF NEW YORK

RAFAEL AGOSTO

v.

CHRISTOPHER MILLER

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 16-CV-568A

☒ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that the Court adopts Magistrate Judge McCarthy's proposed findings and recommendations; that the application for writ of habeas corpus is Denied; that no certificate of appealability shall issue and that an appeal from this order would not be taken in good faith.

Date: April 27, 2018

MARY C. LOEWENGUTH
CLERK OF COURT

By: s/Suzanne Grunzweig
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RAFAEL AGOSTO,

Petitioner,

v.

CHRISTOPHER MILLER, Superintendent,
Great Meadow Correctional Facility,

Respondent.

DECISION AND ORDER
16-CV-568-A

This *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254 filed by petitioner Rafael Agosto was referred to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. § 636(b)(1)(B) for proposed findings of fact and recommendations for its disposition. Petitioner Agosto collaterally attacks his criminal conviction and imprisonment for Promoting Prison Contraband in the First Degree in violation of New York Penal Law § 205.25(2). For the reasons that follow, the Court adopts a Report and Recommendation (Dkt. No. 36) of the Magistrate Judge, and the petition for a writ of habeas corpus is denied.

Petitioner Agosto's prison-contraband conviction was entered in Chemung County Supreme Court based upon conduct of the petitioner while he was imprisoned at the Elmira Correctional Facility for murder, assault, and weapons-possession convictions. Petitioner argues that the Chemung County Supreme Court lacked jurisdiction because he was wrongfully convicted of the earlier crimes, and was therefore unconstitutionally imprisoned at the Elmira Correctional Facility in Chemung County. He also claims that he had been transferred to the Elmira Correctional Facility

44-0F-56.

from another jail outside that county contrary to law governing his jail placement at the time he was caught with the contraband.

Petitioner Agosto raises additional arguments that a state-court habeas corpus proceeding under Article 70 of the New York Civil Practice Law and Rules that he filed in Chemung County, and that denied a collateral attack on the earlier murder, assault, and weapons-possession convictions, was entered without subject matter jurisdiction because it was filed in the wrong venue. Finally, petitioner Agosto argues that this Court lacks subject matter jurisdiction over his § 2254 petition.

On January 16, 2018, Magistrate Judge McCarthy filed a Report and Recommendation (Dkt. No. 36) recommending that the habeas corpus petition be denied. Petitioner Agosto filed timely objections (Dkt. No. 40), as well as numerous other submissions to support his objections and to preserve arguments he has made in this and other proceedings.

Pursuant to 28 U.S.C. §636(b)(1), the Court makes a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. The Court has given the *pro se* objections of petitioner Agosto the strongest interpretation in his favor that the objections suggest. *See e.g.*, *Soto v. Walker*, 44 F.3d 169, 173 (2d Cir. 1995).

Upon *de novo* review, and after considering the parties' arguments, the Court hereby adopts Magistrate Judge McCarthy's proposed findings and recommendations, and the application for a writ of habeas corpus under 28 U.S.C. § 2254 is denied.

Petitioner Agosto has only advanced arguments that misconstrue applicable law[1]. He has made no substantial showing of a denial of a constitutional right, and no certificate of appealability shall issue. The Court certifies, pursuant to 28 U.S.C. § 1915(a), that an appeal from this order would not be taken in good faith. *Coppedge v. United States*, 369 U.S. 438 (1962).

IT IS SO ORDERED.

Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: April 18, 2018

[1] For example, petitioner confuses venue requirements applicable to his Article 70 special proceeding, which he waived if he commenced the proceeding in Chemung County while detained elsewhere in New York, *see e.g.*, *People v. Stewart*, 83 A.D.2d 713 (3d Dep't 1981), with the requirements of subject matter jurisdiction, which can never be waived. *See e.g.*, *Editorial Photocolor Archives v. Granger Collection*, 61 N.Y.2d 517, 523 (1984).

46-OF-56.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RAFAEL AGOSTO,

Petitioner,

REPORT AND RECOMMENDATION

v.

16-CV-00568-RJA-JJM

CHRISTORPHER MILLER, Superintendent, Great Meadow Correctional Facility,

Respondent.

Before me is petitioner Rafael Agosto's, *pro se*, petition [1][1] seeking a writ of *habeas corpus* pursuant to 28 U.S.C. §2254.

BACKGROUND

Petitioner is challenging his June 6, 2012 conviction in Chemung County Court for promoting prison contraband in the first degree (New York Penal Law ("NYPL") §205.25(2)). He was indicted on April 14, 2011 for possessing a "toothbrush handle sharpened to a point" between his buttocks in the Elmira Correctional Facility on December 13, 2010. State Court Record [19-2], pp.11-16.

The record reflects that prior to the June 6, 2012 conviction, petitioner had at least two prior convictions. On January 14, 1986, petitioner was convicted by a jury for criminal possession of a weapon in the third degree and criminal possession of a controlled substance in

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[1] Bracketed references are to the CM/ECF docket entries.

the seventh degree in the Supreme Court, Kings County ("1986 conviction").[2] *See* People v. Agosto, 140 A.D.2d 353, 353 (1988), *aff'd*, 73 N.Y.2d 963 (1989). On March 24, 1995 petitioner was convicted after a jury trial in Bronx County Supreme Court ("1995 conviction"), on two counts of murder in the second degree (NYPL §125.25), assault in the first degree (NYPL §120.10), and criminal possession of a weapon in the second degree (NYPL §265.03). With respect to that conviction, petitioner was sentenced to consecutive terms of 25 years to life and 20 years to life on the murder convictions, five to 15 years on the assault conviction, and a concurrent term of five to 15 years on the weapon possession conviction. People v. Agosto, 248 A.D.2d 301, (1st Dep't 1998) *lv. denied*, People v. Agosto, 92 N.Y.2d 892 (1998); *see also*, State Court Record [19-2], pp.1, 5, 8, 10.[3]

At the time of the December 13, 2010 incident, petitioner was incarcerated with respect to his sentence on the 1995 conviction. On September 29, 2011, after his indictment but prior to the trial on the contraband charge, petitioner filed a *pro se* petition in Chemung County Court under Article 78 of the New York Civil Practice Law and Rules ("CPLR"), seeking a writ of prohibition to bar his prosecution on the contraband charge on the grounds that he "was never [previously] convicted of any crimes". Id. at 129-46. Petitioner's claim that he was not convicted of any prior crime is based upon the fact that he did not receive a copy of his prior certificate of conviction in response to Freedom of Information Law ("FOIL") requests. Id. at 2-9. Based on the lack of a response to his FOIL requests, petitioner theorized that the Chemung County

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[2] Petitioner uses "1985" in his petition and other submissions as the date of this conviction. However, the record reflects that the judgment was rendered on January 14, 1986. *See* People v. Agosto, 140 A.D.2d 353 (1988).

[3] It should be noted that petitioner is seeking habeas corpus relief with respect to his 2012 contraband conviction. The relief sought, if granted, would not affect his 1995 convictions, the sentence from which he is currently still serving.

prosecutor would be unable to establish petitioner's prior conviction, and that he was thus "under false imprisonment" at the time of the December 13, 2011 incident. *See* Id. at 129-46. Therefore, according to petitioner, the Chemung County Court lacked subject-matter jurisdiction to try him for promoting prison contraband. Id.

On April 24, 2012, New York State Supreme Court Justice Molly Reynolds Fitzgerald denied the Article 78 petition, reasoning that, "the errors alleged by Defendant (petitioner) were correctable on criminal appeal and were not of a nature permitted in an extraordinary writ proceeding". Id. at 193-96. Justice Fitzgerald further held that

> "[b]eing a person confined in a detention facility is an element of the charge for which the People of the State of New York have the burden of proving. However, it is not a jurisdictional requirement. More importantly, even though petitioner was unable to obtain documents through his limited FOIL requests, does not mean the respondent is unable to obtain and provide appropriate proof".

Id. at 195.

On May 9, 2012, petitioner appealed that decision to the Appellate Division, Third Department, titled "People v. Agosto". Id. at 198-202. On June 7, 2012, the Third Department sent a letter to petitioner requesting clarification of the title of the case being appealed, stating that their records indicated the proper title of the case involving the decision by Justice Fitzgerald to be "Matter of Agosto v. County Court, Chemung County". Id. at 203-04.

After a jury trial in Chemung County Court on June 6, 2012, petitioner was convicted and sentenced (*in absentia*) as a second felony offender to two and one half to five years of incarceration, to run consecutively to his original 1995 sentence ("2012 conviction"). Id. at 123. Petitioner filed a Notice of Appeal on June 26, 2012 in Chemung County Supreme Court. Id. at 124-28. The record does not reflect that this appeal was ever perfected.

On July 10, 2012, after his conviction, petitioner responded to the Third Department's June 7, 2012 letter by filing a petition for a *writ of mandamus* naming Judge Fitzgerald as the defendant. Id. at 207-20; State Court Record [19-3], p.1. The Third Department treated this not as a direct appeal, but rather as a *mandamus* action, and summarily denied it on January 14, 2014. Agosto v. Fitzgerald, 2014 WL 184564 (3d Dep't 2014); State Court Record [19-3], p.75. The Court of Appeals denied petitioner's application for leave to appeal the denial of the *writ of mandamus*. Agosto v. Fitzgerald, 22 N.Y.3d 1171 (2014).

On September 27, 2012, petitioner requested a reconstruction hearing from the New York Supreme Court, Bronx County, to determine "what happened" in his 1995 case, so that he could use that information in his appeal from the 2012 conviction, and the Article 78 proceeding. People v. Agosto, 2012 WL 4477615, *1 (Bronx Co. Sup. Ct. 2012)). The court stated "that notices of appeal were filed in both matters originating in Chemung County, but in neither case has appeal been perfected". Agosto, 2012 WL 4477615, *2 (emphasis added). It was noted that in 1995 petitioner was convicted of two counts of murder in the second degree, assault in the first degree, and criminal possession of a weapon in the second degree, and that his conviction was unanimously upheld on appeal. Id. at *1 (*citing People v.* Agosto, 248 A.D.2d 301 (1st Dep't. 1998), *appeal den'd*, 92 N.Y.2d 892 (1998)). The court rejected petitioner's assertion that the Certificate of Disposition and other documents relied upon to demonstrate his 1995 conviction were forgeries, and found that even though petitioner "was unable to obtain his documents through his limited [FOIL] requests . . . [that] does not mean Chemung prosecutors were unable to obtain and provide the Court with appropriate proof for trial and sentencing purposes in their case against [petitioner]". Id. at *3. The court determined that petitioner had failed to demonstrate that a reconstruction hearing was warranted, noting that petitioner was not

appealing his 1995 conviction, but instead intended to use the reconstruction hearing for "unrelated matters" and had "already prosecuted his appeal" with respect to the 1995 conviction. Id. at *2-3. On June 11, 2013, the First Department denied leave to appeal (People v. Agosto, 2013 WL 2476782 (1st Dep't 2013)), as did the New York Court of Appeals on August 20, 2013. People v. Agosto, 21 N.Y.3d 1040 (2013).

On May 28, 2013, petitioner filed a state court petition for *habeas corpus* relief in Chemung County Supreme Court pursuant to CPLR Article 70. State Court Record [19-3], pp.96-140. In that petition, petitioner alleged: (1) that he was never convicted on the 1995 offenses because his FOIL requests revealed no evidence of such a conviction; (2) the documents establishing the 1995 conviction were forgeries; (3) the record of conviction of someone else ("another Rafael Agosto") was used against him in the 2012 contraband criminal trial; (4) there was no basis to detain him in a correctional facility and he could therefore not be legally prosecuted for possessing prison contraband; (5) there was no agreement between the mayor of New York City and the New York State Department of Corrections and Community Supervision ("DOCCS") to transfer petitioner to Elmira Correctional Facility and therefore the Chemung County Court lacked subject-matter jurisdiction over his criminal action. Id. at pp.99-104.

On November 21, 2013, the state court denied petitioner's *habeas* petition, stating that the allegations by petitioner "do not establish grounds for habeas relief because these allegations should have been raised on direct appeal or by collateral motion before the court that rendered the judgment of conviction". State Court Record [19-5], p.32. That order was affirmed by the Third Department. *See* People ex rel. Agosto v. Chappius, 129 A.D.3d 1407 (3d Dep't 2015), *rearg denied*, 2015 WL 9598208 (3d Dep't 2015); State Court Record [19-5], pp.52-55. On November 23, 2015, the New York Court of Appeals dismissed petitioner's application for

leave to appeal of the denial of his petition for *habeas corpus* relief on the ground that "the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution". People *ex rel.* Agosto v. Chappius, 26 N.Y.3d 1049 (2015), *rearg denied*, 26 N.Y.3d 1127 (2016); State Court Record [19-5], pp.57-59.

ANALYSIS

A. Timeliness

Respondent concedes that the petition is timely. [18] p.4 of 29.

B. Exhaustion

In the interest of comity and in keeping with the requirements of 28 U.S.C. §2254(b), federal courts will not consider a constitutional challenge that has not first been "fairly presented" to the state courts. *See* Cornell v. Kirkpatrick, 665 F.3d 369, 375 (2d Cir.2011); Jackson v. Conway, 763 F.3d 115, 133 (2d Cir.2014). A state prisoner seeking federal *habeas corpus* review must first exhaust his available state remedies with respect to the issues raised in the federal *habeas* petition. Rose v. Lundy, 455 U.S. 509 (1982). Petitioner bears the burden of proving exhaustion. Thornton v. Smith, 2015 WL 9581820, *10 (E.D.N.Y. 2015).

To meet this requirement, the petitioner must have raised the question in a state court and put the state appellate court on notice that a federal constitutional claim was at issue. "Passage through the state courts, in and of itself, is not sufficient." Picard v. Connor, 404 U.S. 270, 275 (1971). To provide the State with the necessary "opportunity", the prisoner must fairly present his claim in each appropriate state court (including a state supreme court with powers of discretionary review), alerting that court to the federal nature of the claim and giving the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round

of the State's established appellate review process". O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). "Specifically, [petitioner] must have set forth in state court all of the essential factual allegations asserted in his federal petition; if material factual allegations were omitted, the state court has not had a fair opportunity to rule on the claim". Dave v. Attorney General of the State of New York, 696 F.2d 186, 191–92 (2d Cir.1982).

The claims raised in this petition were raised in one or more of petitioner's various state court proceedings; however, due to the convoluted procedural history it is unclear whether those claims were ever fully exhausted. In any event, pursuant to 28 U.S.C. §2254(b)(2), I find it appropriate to address the merits of this petition.

C. Standard of Review

Where a habeas petitioner challenges a state court conviction, the federal district court reviews the state court's decisions under a deferential standard:

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

28 U.S.C. §2254(d)(1)-(2).

A state court decision is "contrary to" clearly established federal law if "the state court reached a conclusion of law that directly contradicts a holding of the Supreme Court" or, "when presented with 'facts that are materially indistinguishable from a relevant Supreme Court precedent,'" the State court arrived at an opposite result. Evans v. Fischer, 712 F.3d 125, 132 (2d Cir. 2013) (*quoting* Williams v. Taylor, 529 U.S. 362, 405 (2000)). A state court decision is an

"unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case". Williams, 529 U.S. at 413. A federal court may only "issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents". Harrington v. Richter, 562 U.S. 86, 102 (2011).

Federal courts, when deciding whether a state court has made an unreasonable determination of facts, must presume that the facts determined by State courts are correct; therefore, the petitioner has the burden to rebut the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. §2254(e)(1). A "state court's finding might represent an unreasonable determination of the facts where . . . reasonable minds could not disagree that the trial court misapprehended or misstated material aspects of the record in making its finding, or where the court ignored highly probative and material evidence". Cardoza v. Rock, 731 F.3d 169, 178 (2d Cir. 2013). However, "even if the standard . . . is met, the petitioner still bears the ultimate burden of proving by a preponderance of the evidence that his constitutional rights have been violated". Id.

D. Petitioner's Claims

Petitioner states nine grounds for relief in his federal *habeas corpus* petition, which can be grouped as follows:

> (A) claims that the Chemung County Court and District Attorney's Office lacked jurisdiction because he "was never convicted [of] or sentenced to a crime prior to the [contraband charge]" (Petition [1], pp.11-12, 14, 15 [Counts 1, 3, and 4]);

(B) the Chemung County District Attorney's Office and the Chemung County Court officials forged documents or used documents relating to another Rafeal Agosto as evidence of his 1995 conviction (Id. at pp.16-17 [Counts 5 and 6]);

(C) there was "no agreement ever made between the mayor of New York City and the commissioner of the New York State Department of Correctional Services authorizing or approving the transfer of petitioner to a state correctional facility" which was necessary because he "was never convicted [of] or sentenced to a crime prior to the [contraband charge]"(Id. at pp.12-13 [Count 2]);

(D) the court that denied his state habeas corpus petition lacked jurisdiction because petitioner was incarcerated in Franklin County, and not at Chemung County at the time of the decision (Id. at p.18, [Count 7]); and

(E) the denial of his state habeas corpus petition "denied the petitioner of his Constitutional right of a writ of *habeas corpus*" (Id. at pp.19-20, 21 [Counts 8 and 9]).

Absence of Jurisdiction Claims

Counts one, two, three, four, five, and six of the petition are all based on the theory that because petitioner did not receive a copy of his 1995 certificate of conviction in response to his FOIL requests, the Chemung prosecutor was unable to establish petitioner's prior conviction, petitioner was "under false imprisonment" at the Elmira Correctional Facility at the time of the incident, and the Chemung County Court lacked subject-matter jurisdiction to try him for promoting prison contraband. State Court Record [19-2], pp.2-4, 6-7, 9 of 220.

The elements of promoting prison contraband in the first degree are: (1) being a person confined in a detention facility, (2) who knowingly and unlawfully makes, obtains or possesses (3) any dangerous contraband. NYPL §205.25(2). Petitioner has not challenged any of these elements. Nor has he established that the prosecution was obligated to prove the validity of the underlying conviction in order to convict him of promoting prison contraband.

In any event, petitioner's subject-matter jurisdiction claims are based on alleged violations of state law. "[E]rrors of state law cannot be repackaged as federal errors simply by

citing the Due Process Clause". DiGuglielmo v. Smith, 366 F.3d 130, 136 (2d Cir. 2004) (*quoting* Johnson v. Rosemeyer, 117 F.3d 104, 110 (3d Cir. 1997)). The Supreme Court has determined that "federal *habeas corpus* relief does not lie for errors of state law". Estelle v. McGuire, 502 U.S. 62, 67 (1992). "This rule applies in full force to state jurisdictional statutes". Nieves v. Artuz, 1999 WL 1489145, *4 (S.D.N.Y. 1999).

Moreover, the record reflects sufficient evidence of petitioner's 1995 conviction. The record includes copies of the Sentencing and Commitment Order (State Court Record [19-2], p.1), and three separate Certificates of Deposition of Indictment from Bronx County Supreme Court. Id. at pp.5, 8, 10). The fact that the certificate of conviction was not produced in response to his FOIL requests is not a basis for federal habeas relief. *See* McClain v. Bradt, 2013 WL 3207456, *3 (N.D.N.Y. 2013) ("Concerning Petitioner's claim that the lower court failed to issue a certificate of conviction . . . and that, therefore, the sentence and commitment order issued were invalid, . . . the failure to obey a state procedural law is not an appropriate subject for federal *habeas* review").

In Counts five and six, petitioner also alleges that the Chemung County District Attorney's Office and Chemung County Court officials used forged documents or used records of "another Rafael Agosto" to prove his prior convictions. Other than his self-serving and conclusory allegations, petitioner fails to present any evidence to substantiate this claim, or to otherwise rebut the presumption of regularity that attaches to documents produced by public officers. Latif v. Obama, 666 F.3d 746, 748 (D.C. Cir. 2011) (The presumption [of regularity] applies to government-produced documents no less than to other official acts").[4]

[4] Petitioner's argument, asserted in 2010 and thereafter, that more than15 years earlier he was arrested, tried, convicted and has been incarcerated since 1995 because he was mistaken for another man with the same name lacks plausibility. It should be noted that this claim of misidentification did not appear to have been presented by

Petitioner's argument that a specific agreement between the Mayor of New York City and the Commissioner of DOCCS was required in order to transfer petitioner from one state correctional facility to another is also misplaced. In support of this claim, petitioner cites New York Correction Law, Article 5: Coordinated Use of State and Local Correctional Institutions, §§91(1), (2), (3)(E) and 92(1), (2). *See i.e.* Petitioner's Memorandum of Law [1-1], p. 5 of 13. However, these statutes are not applicable to petitioner's incarceration. Article 5, §§90(1) and (2) state that the purpose of the statutory scheme was to provide correctional programs for persons who receive sentences of imprisonment with terms of one year or less, and to provide "a method of relieving space pressures in correctional institutions operated by local government". These statutes do not operate as a limitation on DOCCS ability to transfer inmates between correctional facilities.

Upon his conviction in 1995, petitioner was remanded to DOCCS custody to serve his sentence. State Court Record [19-2], p.1 of 220. *See* NYPL §70.20 ("[W]hen an indeterminate or determinate sentence of imprisonment is imposed, the court shall commit the defendant to the custody of [DOCCS] for the term of his or her sentence and until released in accordance with the law"). "[I]t is well settled that an inmate has no right to select the correctional facility in which he or she is housed and the Commissioner of Correctional Services retains broad discretion to coordinate inmate transfers". Lugo v. Goord, 853 N.Y.S.2d 747, 748 (3d Dep't. 2008), *lv. denied*, 861 N.Y.S.2d 274 (2008); *see* N.Y. Correction Law §23(1).

Finally, petitioner's assertion of a lack of agreement between the Mayor of New York City and DOCCS regarding his transfer between correctional facilities does not invoke any constitutional due process or liberty issues.

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petitioner to the New York State, Supreme Court, Appellate Division, First Department upon his direct appeal of that conviction. See People v. Agosto, 248 A.D.2d. 301 (1st Dept. 1998).

> "The Constitution does not . . . guarantee that the convicted prisoner will be placed in any particular prison, if, as is likely, the State has more than one correctional institution. The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause . . . [t]he conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons".

Meachum v. Fano, 427 U.S. 215, 224 (1976).

Petitioner's allegations in Counts one through six do not warrant habeas corpus relief.

Claims Relating to State *Habeas* Proceeding

The allegations in Counts seven, eight and nine concern petitioner's state habeas corpus petition. In Count seven, petitioner argues that the court located in Chemung County lacked jurisdiction to decide his petition because he was incarcerated in Franklin County at the time of the decision. Petition [1], p. 18. It is undisputed that petitioner filed his state *habeas corpus* petition in the Chemung County court. State Court Record [19-3], pp.95-140. It is well-established that by choosing to file a petition in a certain court or district, a petitioner consents to that court or district's jurisdiction. *See* Apostolou v. Mann Bracken, LLC, 2009 WL 1312927, *6 (D.N.J. 2009) (*quoting* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) that "[p]laintiffs may consent to jurisdiction in any forum" and finding "[t]his is indeed the case here -- Plaintiffs have consented to this Court's jurisdiction by filing their action in New Jersey"). Further, as respondent argues, "[a]ssuming, *arguendo*, that petitioner filed the state petition in the wrong court, and that the court thus lacked jurisdiction, it would simply mean that the petition was meritless. In other words, as respondent points out, petitioner is asserting that his own state *habeas* petition should have been dismissed for lack of jurisdiction". Respondent's

Memorandum of Law [18], p.12. Petitioner's argument that the Chemung County Court lacked jurisdiction because he was physically located in Franklin County at the time the Chemung County Court issued its decision over his state *habeas corpus* petition does not invalidate that court's determination or present a basis for federal *habeas* relief.

Finally, petitioner's arguments in Counts eight and nine raise the same claim; that denying petitioner's state *habeas corpus* petition violated petitioner's Constitutional right to a writ of *habeas corpus*. Petitioner argues that his right to a writ of *habeas corpus* was violated because he "was not allow[ed] to use such venue (writ of *habeas corpus*) at his [sic] court to challenge the validity of the conviction". Petition [1-1], pp.7-8. However, petitioner was permitted to use his constitutional right to a writ of *habeas corpus* to challenge his conviction, as evidenced by his state *habeas* proceedings. *See* People ex rel. Agosto v. Chappius, 129 A.D.3d 1407 (3d Dep't 2015), *lv denied*, 26 N.Y.3d 1049 (2015). In any event, "infirmities in state habeas proceedings do *not* constitute grounds for relief in federal court". Beazley v. Johnson, 242 F.3d 248, 271 (5th Cir. 2001) (emphasis in original).

CONCLUSION

For these reasons, I recommend that the writ of *habeas corpus* petition [1] be denied. Unless otherwise ordered by District Judge Richard Arcara, any objections to this Report and Recommendation must be filed with the clerk of this court by February 2, 2018. Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". Wesolek v. Canadair Ltd., 838 F. 2d 55, 58 (2d Cir. 1988); Thomas v. Arn, 474 U.S. 140, 155 (1985).

Moreover, the district judge will ordinarily refuse to consider de novo arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co., 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection . . . supported by legal authority", and must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objections.

Dated: January 16, 2018

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.