S.D.N.Y.–W.P.
13-cv-2873
Roman, J.
Davison, 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 8th day of August, two thousand nineteen.

Present:

Robert A. Katzmann,
Chief Judge,
Rosemary S. Pooler,
Michael H. Park,
Circuit Judges.

Stanley Brewer,

Petitioner-Appellant,

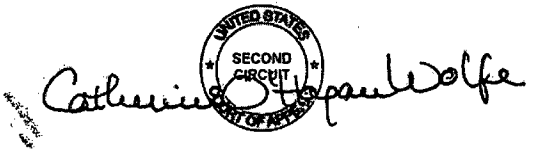
v. 19-104

Robert F. Cunningham,
Superintendent Fishkill Correctional Facility,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability and for summary reversal. 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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STANLEY BREWER,

Petitioner,

-against-

ROBERT CUNNINGHAM, Superintendent, Fishkill Correctional Facility,

Respondent.[1]

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REPORT AND RECOMMENDATION

13 Civ. 2873 (NSR) (PED)

TO THE HONORABLE NELSON STEPHEN ROMÁN, United States District Judge:

I. INTRODUCTION

Between December 14, 2005 and January 19, 2006, petitioner, Stanley Brewer[2] ("petitioner" or "defendant") and his co-defendant Eric Cruz, (collectively, "defendants"), committed multiple home burglaries in multiple jurisdictions, including, White Plains, New Rochelle, and Yonkers, among others throughout Westchester County, New York, and New York, New York. A Westchester County jury convicted petitioner of burglary in the second degree (ten counts), and criminal possession of stolen property in the fifth degree (two counts). He was sentenced on August 2, 2007 to ten concurrent terms of imprisonment of fifteen years for

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[1] Although the Petition indicates that petitioner is incarcerated at Eastern Correctional Facility, the DOCCS inmate locator (nysdoccslookup.doccs.ny.gov) notes that he is currently incarcerated at Fishkill Correctional Facility. Thus, Robert Cunningham, Superintendent of Fishkill Correctional Facility, is substituted as respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. The Clerk of the Court shall amend the caption to reflect the substitution.

[2] Even though petitioner provided a New York State interim driver's license with the name "Sedrick Watson" at the time of his arrest, T. 531, petitioner was indicted under the name "Stanley Brewer" with "Stanley Watson" and "Sedrick Watson" listed as aliases. Ex. 1, Indictment.

the burglary counts, with two terms of one year imprisonment for the criminal possession of stolen property counts, to be followed by five years' post-release supervision. Petitioner is currently incarcerated at Fishkill Correctional Facility in Beacon, New York. Dkt. 26.

Presently before this Court is petitioner's *pro se* Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Dkt. 1. This petition is before me pursuant to an Order of Reference dated September 16, 2013. Dkt. 8. For the reasons set forth below, I respectfully recommend that the Court deny the petition in its entirety.

II. BACKGROUND[3]

A. Pre-Trial Hearings

By omnibus motion dated June 3, 2006, petitioner moved, *inter alia*, for the suppression of tangible property found on his person and in Cruz's car because he was purportedly arrested without probable cause. In a decision and order dated July 25, 2006, the Westchester County Court (DiBella, J.) granted petitioner's application to the extent that a *Mapp/Dunaway* hearing was ordered. Ex. 2, Decision and Order on Omnibus Motion. The petitioner's branch of the motion to suppress physical evidence obtained from Cruz's car was denied. *Id.* at 2-3. The court stated that, even assuming petitioner had standing to challenge the search, the search was conducted pursuant to a properly issued search warrant. *Id.* The joint pre-trial hearings were held from November 6, and 8, 2006, in Westchester County Supreme Court, Westchester County (Adler, J.). Ex. 3. Eight police officers testified. Petitioner presented no evidence.

On November 13, 2006, the Supreme Court of Westchester County (Adler, J.) denied

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[3] Unless otherwise indicated, the information within this section is gleaned from the instant petition, Dkt. 1, respondent's Affidavit in Opposition to Petition for Writ of *Habeas Corpus* ("R. Aff."), Dkt. 16, and respondent's Memorandum of Law and Exhibits ("R. Opp."), Dkt. 16. Exhibits to R. Opp. Hereinafter referred to as "Ex."

petitioner's motion to suppress identification testimony, statements, and physical evidence. Ex. 3, Decision and Order on Probable Cause Hearing. With regard to probable cause, the court found that "[b]ased on the photograph received by Officer Miedreich and his observations of the defendants, he had, at a minimum, a common-law right of inquiry which ripened into probable cause to arrest them once the jewelry, currency and cameras were recovered from defendants." The court found, in addition, that Cruz's "patently false responses to Officer Gordon's inquiry as to why he was in the area clearly raised the level of suspicion to probable cause." *Id.*

B. Evidence Adduced at Trial

Between December 14, 2005 and January 19, 2006, petitioner and his co-defendant, Eric Cruz, committed multiple home burglaries in multiple jurisdictions — White Plains, New Rochelle, and Yonkers, among others — throughout Westchester County, New York and New York City. Defendants targeted apartment buildings, gaining entry by picking the locks to the entrances of the buildings and the front doors of interior apartments. Once inside a dwelling, they jammed the lock with a broken key or another metal object to prevent entry by the homeowner during the commission of the crime. The apartment burglaries were so pervasive in Westchester County that a specialized police task force including the White Plains Police Department was established in January 2006 to investigate and apprehend the burglars, who had been captured on film by surveillance cameras located inside the victimized apartment buildings. Still photographs of the two burglars were made from the videos and distributed by the task force to patrol units throughout the county.

1. The Burglaries

On December 14, 2005, at approximately 7:30 p.m., Detective Brian Connolly of the White Plains Police Department, was assigned a burglary investigation at an apartment located at

30 Windsor Terrace, White Plains, New York. T. 455-56.[4] Detective Connolly responded to the address and interviewed the owner Michael Kane. T. 457. Michael Kane had left for work that morning around 7:30 a.m. and returned at approximately 6:30 p.m. T. 634-35. Kane found a broken key in the apartment door lock. T. 458, 635, 639. When he entered his apartment he found the bedrooms were ransacked and a bedroom window leading to the fire escape was wide open. T. 457, 642.

Among the stolen items were an Apple iPod with "Happy Birthday, Love Josie" inscribed on the back, a red duffle gym bag, and a plastic jar containing a few thousand dollars in change and dollar bills. T. 461-62, 644-47.

While reviewing the building's video surveillance equipment, which records the stairwells and the elevator bank on each floor of the building, Kane observed two men coming up the stairwell from the first floor and turning left towards his apartment at approximately 12:00 p.m. T. 637-38. He saw them leaving about fifteen minutes later with his roommate's red bag. T. 638.

On January 3, 2006, Lisa LaBelle left her apartment at One Georgia Avenue, Bronxville, New York at approximately 7:30 a.m. to go to work. T. 872, 874. When she returned at 9:30 p.m., she discovered that her apartment was ransacked and that the kitchen window, which leads to a fire escape, was open. T. 874-76. Numerous pieces of her jewelry and her cell phone were missing. T. 876-79.

Detective Christopher Deering of the City of Yonkers Police Department responded to the LaBelle burglary. During the investigation, Detective Deering discovered a piece of a broken

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[4] Numerical reference preceded by "T." refer to the pages of the trial transcripts.

key in the top deadbolt of the apartment door and that a call had been made at 3:40 p.m. the day of the burglary from LaBelle's stolen cell phone to J & B Auto Repair Shop in Brooklyn. T. 879-80, 994, 998, 1175, 1173. LaBelle had never had any dealings with that car repair shop. T. 890.

On January 3, 2006, Robert Oswald of 411 Bronx River Road, Yonkers, New York left to go to work at approximately 7:00 a.m. T. 1061-62. When he returned home he realized that there was a key broken off in the apartment door lock. T. 1063. Oswald noticed that a small gold cross and chain that he kept in a box on his desk, cash, camera flash cards, and a Panama Jack watch were also gone. T. 1064-65.

On January 4, 2006, Rolando Irrizarry, a superintendent at 541 Pelham Road, New Rochelle, New York, provided the police with a video surveillance tape taken in the apartment building that day. T. 1316-17, 1325. At 11:10 a.m., the video depicted tenant Mr. Lambiase and his daughter waiting for the school bus in the front of the building. T. 1344, 1369-70. At 11:11 a.m., two persons approached the lobby area, which can only be entered by using a key or being buzzed into the building. T. 1345. At 11:13 a.m. the men entered the building and at 11:26 a.m. Lambiase re-entered the building. T. 1346. When Lambiase tried to open his apartment door, he felt a push to shut it closed from inside the apartment. T. 1371-72. Lambiase pushed it open again and two black men ran out of his apartment. T. 1373. He recognized the men, petitioner and Cruz, as the same two who entered the building while he was waiting for the school bus. T. 1373-74. Later a broken key was discovered in the door lock. T. 1377-78. Money and jewelry were taken from the apartment. T. 1379.

On January 6, 2006, at approximately 11:15 a.m., Martin O'Malley answered a knock at his apartment door at 279 North Broadway in Yonkers, New York, to a black man with short

cropped hair, later identified as Cruz. T. 1146-47. Cruz asked, "Is John here?" T. 1149-50. O'Malley responded, "No." Cruz turned and walked away. T. 1149-50. Shortly thereafter, O'Malley heard raised voices, doors banging and two sets of footsteps running down the stairs. T. 1150-51.

At the time, Chalyce Clayton was lying down in her bedroom in her apartment on the same floor as O'Malley when she was awakened by a noise. T. 1219-20. She observed the back side of a black man wearing jeans, a pair of tan Timberland-like boots and a long-sleeved shirt in her bedroom reaching across the dresser. T. 1220-21, 1234. Clayton screamed and the man ran out of the apartment and down the stairwell. T. 1221. Clayton looked out of the window and saw the man and another black male running up the street. T. 1221-22. The Yonkers police arrived shortly thereafter and discovered a broken key in the lock. T. 1225.

On the same day at approximately 6:30 a.m., Nebuchadrezzaer Alday and his wife left their apartment at 25 Sunnyside Drive in Yonkers for work. T. 1241-42. When they returned home around 9:30 p.m., they discovered a problem with the lock and that their fire escape window was wide open. T. 1243-44. Among the items missing from the apartment were Mr. Alday's Tag Heur watch, his wife's diamond earrings, a pendant inscribed in Egyptian, and two sets of wedding bands. T. 1247-48.

Video surveillance tapes taken from 279 North Broadway and 25 Sunnyside Drive depicted the same two black males wearing identical clothing. T. 1002-03, 1059, 1098-110. One of the men, identified as petitioner, has a distinctive hairstyle and a thin mustache goatee, which were visible in both video tapes. T. 1113-14. The other individual was identified as Cruz. T. 1105-07. The videotape taken at 279 North Broadway showed the men in the building at approximately 11:15 a.m. T. 1200. Clayton identified one of the two men in the still photos as

wearing the same clothes and boots as the man standing in her bedroom. T. 1227, 1237-39.

On January 11, 2006, caregiver Leslie Wardell cleaned up her elderly client's apartment at 525 Bronxville Road, Yonkers, New York, while he was hospitalized. T. 1435-36. Two days later, when she returned to retrieve some items for her client, the door would not open; Wardell pulled out a piece of a key from the keyhole. T. 1438-39. The apartment was a mess and cold. The police were called. T. 1441.

On January 17, 2006 at approximately 1:00 p.m., Peter Tochiano was stepping out of his shower in his fifth floor apartment at 632 Palmer Road in Yonkers when the doorbell rang. T. 955. Tochiano opened the door and stuck his head out towards the elevator and saw a black man, about 6 feet tall, with short black hair and a thin black goatee, who he later identified in court as petitioner. T. 955-58. Torchiano asked if he could help him with something and the man responded that he was looking for someone. T. 956-57.

Lynn Futterman lived in an apartment in Tochiano's building, left for work at 11:30 a.m. and returned home at 1:30 p.m. T. 1263. The lock was jammed and her apartment was ransacked. T. 1264, 1266. Jewelry valued at approximately $8,000 was missing. T. 1267-68.

On January 19, 2006, the police learned that another burglary had been committed at 15 Lake Street in White Plains, New York. The resident, upon returning home, had found a metal object jammed into her front door lock preventing entry, her apartment ransacked and various assorted items stolen. T. 767. The resident later identified her missing jewelry inside a Tiffany charm box, Romanian money, and her cell phone at the White Plains Police Department. T. 773-79.

2. The Investigation and Petitioner's Arrest

On January 13, 2006, Detective Brian Hembury of the White Plains Police Department

held a multi-jurisdictional meeting where informational fliers were disseminated among various police departments, including Yonkers and New Rochelle, T, 818-19, regarding the several burglaries that had taken place starting in December 2005 in White Plains, New York. T. 846.

A couple days later, Police Officer Josef Miedreich of the White Plains Police Department who had reviewed the file pertaining to the Windsor Terrace burglary, was assigned to a burglary surveillance detail, T. 819, to look for the two burglary suspects depicted in the photographs in the file, which he carried in the car with him that day. T. 517-18, 585, 819-20. At 2:00 p.m. that day, he was patrolling a residential area of White Plains in an unmarked police car when he observed two males, petitioner and Cruz, walking towards him. T. 519-21. Each fit the description of the suspects depicted in the surveillance photos. T. 520-21. Officer Miedreich broadcast a description of the men over the police radio and turned his vehicle around to follow the men. T. 522. Petitioner and Cruz continued walking but changed direction several times, looking nervously at the car. T. 523-24. The officer eventually parked and approached petitioner and Cruz in front of 44 North Broadway, White Plains, as they were walking southbound on North Broadway, asking to talk to them. T. 528. He asked them where they were headed Cruz replied toward their car, and pointed north when asked where the car was parked. The officer asked why they were walking in the opposite direction of the car's location, Cruz responded that they were lost. T. 528-29.

Around the same time, Keith Lawson, who worked at the apartment building at 10 Lake Street, White Plains, New York, approached and identified petitioner and Cruz as having been inside that apartment building just before the police arrived. T. 700-03, 705-06, 708, 710. Officer Miedreich asked them for identification and Cruz produced a Georgia driver's license with his name. T. 531. As petitioner reached in his back pocket to take out his wallet, Officer

Michael Perry and Detective Kevin Donnelly of the White Plains Police Department observed a silver watch fall out of the back right pocket even though petitioner was wearing another watch on his wrist. T. 595, 744-45. Petitioner displayed a New York State interim non-photo driver's license with the name Sedrick Watson. T. 531. Petitioner was handcuffed by Detective Donnelly, T. 748, and Officer Perry asked him if he would consent to a search; petitioner consented. T. 595. During the search of petitioner, Officer Perry found two more watches in petitioner's back pocket, a digital camera in his front pocket, a Tiffany's charm, a jewelry bag, a little girl's hair band, a white sock and a black glove. T. 595-97, 601, 746. Eighteen items were removed from petitioner's person, photographed and inventoried. T. 942. The officer searched Cruz and found a gray jewelry box with earrings, a large roll of Romanian money and several other items. T. 730-31. Twenty items were removed from Cruz's person, photographed and inventoried. T. 942.

After investigating defendants, police canvased the apartment building at 10 Lake Street and other apartment buildings in the area and discovered that a burglary had been committed at 10 Lake Street. Again, a key had been broken off in the lock. T. 734.

At the White Plains Police Department, the residents of the apartment later identified their gold chains, watches, voice recorder and jewelry box, which had been recovered from Cruz's person, and their daughter's hair band, and son's sock, which had been recovered from petitioner. T. 794-97.

Cruz's vehicle parked in front of 50 North Broadway, was impounded and brought back to police headquarters. T. 466-67. Upon obtaining a warrant, a search of the car was conducted. T. 469. Paperwork in the car bore Cruz's name and the name Sedrick Watson. T. 499-500, 503-04. A receipt from Home Depot in Yonkers dated January 19, 2006 with the time of 11:15 a.m.

T. 505-06. In the center console, the officers found numerous keys, a thin metal strip and torque wrench. T. 471, 483. Other stolen items, including flash cards and a PC card adapter were found under the driver's sweat. Photographs depicting Yonkers resident Robert Oswald's family vacation in Florida were found on one of the flash cards. T. 473, 841, 843, 1068-69. A red canvas bag containing a lot of change and a mini hacksaw were discovered in the trunk of the car. T. 474, 486. A jewelry bag labeled "H. Stern." T. 486.

A business card for J &B Auto Repair were also found. T. 505. Jorge Batista, owner of the repair shop, had a business relationship with petitioner and Cruz for six years fixing their cars. T. 978-80.

Detective Deering from the Yonkers Police Department took a Home Depot receipt recovered from Cruz' car back to the Yonkers store and determined from the SKU that the item was an eight inch flathead screw driver. T. 1016-18. Officer Peter Martin examined the pry marks found on the interior wooden foyer door at 15 Lake Street and observed that the ridges on the pry marks were consistent with the ridge pattern on the screw driver. T. 1525-28.

At 5:00 p.m., Cruz was read his *Miranda* rights and agreed to speak to the detective. T. 823-26. Detective Hembury interviewed Cruz who told the detective that he lived at 2458 Nostrand Avenue in Brooklyn and was looking to rent an apartment in White Plains without a real estate agent, which is why he was in the lobby of 10 Lake Street and had talked to a white male about available apartments. T. 823, 827. When asked about the foreign currency found in his possession, Cruz answered that it was pesos his friend gave him in anticipation of a trip to the Dominican Republic. T. 828-29.

Pursuant to a warrant, Cruz's apartment in Brooklyn, New York was searched. T. 544-45. Tax papers with petitioner's name were located in the apartment as well as an iPod inscribed

with "Happy Birthday, Love Josie," which was later identified by Michael Kane. T. 546-47, 650-51. Robert Oswald's Panama Jack watch and foreign currency (Pakistani, Israeli and Euros) were also recovered, as well as burglar tools and a book entitled, "Lock Picking for Spies, Cops and Locksmiths." T. 562, 556-57, 1023-24, 1067.

On January 25, 2006, Detective Vincent Tilson of the City of Yonkers Police Department was notified that a right-handed black wool glove with grips, which did not belong to the elderly resident of the apartment burglarized at 525 Bronxville Road, was found inside a bedroom dresser. T. 1126-27, 1462, 1469-70, 1161. The niece of the elderly resident had gone to White Plains Police Department to identify recovered property and noticed the left-handed black glove with grips recovered from petitioner's person matched the one in the dresser. T. 1165-66, 1466-68, 1470-71. Money had been taken from the drawer where the glove was found. T. 1465-66. Cruz, who provided a buccal swab, was not excluded as a DNA contributor to a stain found on the glove; there were fifteen alleles in the glove which matched his DNA profile, which represented a 1 in 7,163 chance. T. 1503-09.

C. Direct Appeal

Petitioner (by and through counsel) timely appealed his conviction to the Appellate Division, Second Department on the following grounds: (1) the trial court erred by not suppressing the physical evidence recovered from the warrantless arrest and the subsequent searches; (2) the trial court erred by allowing Cruz's attorney to represent Cruz despite the existence of an actual conflict of interest; (3) the prosecutor's closing argument improperly bolstered the credibility of police and improperly served as direct testimony. Ex. 7, Brief for Appellant dated October 18, 2009.

By Decision and Order dated May 25, 2010, the Second Department affirmed petitioner's

judgment of conviction. Ex. 9, *People v. Brewer*, 73 A.D.3d 1199 (2d Dep't 2010). The Appellate Division specifically held: "Contrary to the defendant's contention, his arrest was supported by probable cause and, therefore, that branch of his motion which was to suppress physical evidence was properly denied. Police Officer Josef Miedreich testified at the hearing that when he saw the defendant and the codefendant walking in the area where numerous residential burglaries had been occurring, he recognized them from their depiction in a wanted poster and still photographs taken form surveillance video footage in buildings where the burglaries occurred, giving him, at a minimum, a common-law right of inquiry." *Id.* The Court further held that defendant's arguments concerning a conflict of interest and ineffective assistance of counsel are based on matter dehors the record and, therefore, could not be reviewed on direct appeal. *Id.*

Petitioner, by and through counsel, timely submitted an application for leave to appeal to the New York Court of Appeals, wherein he argued that (i) trial and appellate courts incorrectly applied the standards for determining probable cause; (ii) removing the resulting improperly admitted evidence requires a finding that the remaining evidence was insufficient to support petitioner's conviction; and (iii) the trial an intermediate appellate courts incorrectly applied the restriction of considering matters "dehors the record." Ex. 10, Certificate Denying Leave. Opposing counsel attached copies of the briefs filed in the Appellate Division to their letter opposing petitioner's request for leave. *Id.* The Court of Appeals denied petitioner leave to appeal on September 17, 2010. *Id.* Petitioner did not seek a writ of *certiorari* to the United States Supreme Court.

D. Collateral Proceedings

On or about December 18, 2006, petitioner and co-defendant Cruz jointly filed a Notice

of Motion to Vacate the judgment of conviction under C.P.L. §§ 330.30, 440.10, on the grounds that (1) the judgement was procured by duress, misrepresentation or fraud on the part of the prosecution; (2) material evidence adduced at trial was false; (3) new evidence has been discovered which could not have been produced by the defendants at trial with due diligence; and (4) the verdict and judgment was obtained in violation of the petitioner's constitutional rights. Ex. 4, Joint Motion to set aside the verdict and/or judgment under C.P.L. §§ 330.30, 440.10. Petitioner and Cruz alleged that the newly discovered evidence of another individual, Jorge Guzman who was separately arrested in March 2006 and charged with burglaries using the same "pick lock" method of entry, would have changed the verdict. *Id.* Defendants attached a March 26, 2006 article, which stated that Jorge Guzman "may be responsible for 25 to 30 burglaries in the City of New Rochelle." Ex. 5, Journal News Article dated March 28, 2006.

The court held that petitioner's C.P.L. § 440.10 motion was premature because the defendant had not yet been sentenced. *See* Ex. 6, Decision and Order dated July 19, 2007.[5] Petitioner's initial § 440.10 motion was denied as meritless and the petitioner filed leave to appeal the ineffectiveness of trial and judicial bias claims. By supplemental motion to the court, petitioner and Cruz added an additional claim for ineffective assistance of counsel. The court (Adler, J.) relieved Cruz's counsel from the Legal Aid Society on January 22, 2007 and assigned Janet Gandolfo, Esquire to represent him. There is no copy of this motion in the record but it is referenced in the court's decision and order as being dated January 18, 2007.

By decision and order entered on July 19, 2007, the Supreme Court of Westchester County denied petitioner's post-verdict motions finding that petitioner's claim of ineffective

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[5] By notice of motion dated January 15, 2007, defense counsel adopted petitioner's

assistance of counsel was based on factual assertions outside the record and therefore not cognizable as a ground to set aside the verdict under C.P.L. § 330.30. Ex. 6, Decision and Order dated July 19, 2007.

Around January 31, 2011, petitioner filed a C.P.L. § 440.10 motion seeking to vacate the judgment of conviction. Petitioner and co-defendant Cruz submitted a joint motion claiming the following: (i) Cruz's trial counsel, the Legal Aid Society, was also representing Jorge Guzman, the aforementioned individual reported as the suspect in other burglaries, and was, thus, ineffective with respect to Cruz because of an actual conflict of interest, and counsel's failure to address Cruz's request for an investigation into the similarities of Jorge Guzman's burglaries[6]; (ii) petitioner suffered prejudice because of his co-defendant's counsel's conflict; and (iii) prosecutorial misconduct in knowingly withholding information from the jury pertaining to Jorge Guzman. Ex. 11, Joint C.P.L. § 440.10 Motion. Petitioner's supplemental motion contained claims of prosecutorial misconduct in allowing perjured testimony, judicial bias, and ineffective assistance of his trial counsel, but was missing necessary pages. Ex. 13, Westchester County District Attorney's Office Letter dated February 8, 2011.

On or about February 22, 2011, petitioner filed an entirely new notice of motion, titled "Writ of Error Coram Nobis" alleging (i) ineffective assistance of his trial counsel, based upon, *inter alia*, failure to prepare, ineffective cross examination of the People's witnesses and failure to object to discrepancies between a police officer witness's grand jury and trial testimony; (ii)

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pro se motion.

[6] Jorge Guzman pled guilty to both burglaries as charged by Superior Court Informations 06-0625 and 06-0575. On February 8, 2007, Guzman was sentenced, as a second violent felony offender, to two concurrent determinate terms of imprisonment of 7.5 year with 5 years of post-release supervision.

prosecutorial misconduct and (iii) judicial bias. Exs. 14-16.

On January 9, 2012, by Decision and Order, the Westchester County Court (Colangelo, J.) denied petitioner's claims in their entirety, including petitioner's ineffective assistance of counsel and "false evidence" prosecutorial misconduct claims. Ex. 17.

Petitioner's application for leave to appeal the January 9, 2012 Decision and Order was denied by the Second Department on May 18, 2012 (Sgori, J.). Ex. 19, Denial of Leave to Appeal. In his leave application, petitioner addressed only the ineffective assistance of trial counsel and the judicial bias claims. Ex. 20, Application for Leave to Appeal; Ex. 21, Affirmation in Opposition for Leave to Appeal; Ex. 22, Reply to Affirmation. Petitioner moved the Appellate Division for reargument of the denial of his motion for leave to appeal. Ex. 23, Motion to Re-Argue. It was denied on September 21, 2012. Ex. 24, Denial. In a letter to the Chief Clerk, Court of Appeals, dated October 30, 2012, petitioner stated that he had not received the Second Department decision, but was informed by the law library clerks that it had appeared in the October 1, 2012 issue of the New York Law Journal as denied. Petitioner sought leave to appeal the decision. The Court of Appeals acknowledged receipt of this letter and advised petitioner to send a copy of the Second Department's Order when he received it. On March 22, 2013, the court dismissed petitioner's application for leave because the order was not appealable under C.P.L. § 450.90(1). Ex. 25, Order Dismissing Leave to Appeal Motion to Re-argue.

E. The Instant Petition

Petitioner timely filed the instant Petition for a Writ of Habeas Corpus on or about April 26, 2013, wherein he seeks habeas review of the following claims: (1) the trial court erred by finding probable cause because it was inconsistent with *Mapp v. Ohio* and thus all evidence was

obtained in violation of the Fourth Amendment; (2) the trial court erred by allowing the prosecution to use false evidence, perjured testimony, and illegally obtained evidence found on the petitioner against him; (3) the trial court erred by allowing the prosecution to suppress exculpatory information; and (4) petitioner was deprived of effective assistance of counsel "by proxy" because of his co-defendant's counsel's conflict of interest. Dkt. 1.

III. LEGAL STANDARDS

"Habeas review is an extraordinary remedy." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (citing *Reed v. Farley*, 512 U.S. 339, 354 (1994)). Before a federal district court may review the merits of a state criminal judgment in a *habeas corpus* action, the court must first determine whether the petitioner has complied with the procedural requirements set forth in 28 U.S.C. §§ 2244 and 2254. If there has been procedural compliance with these statutes, the court must then determine the appropriate standard of review applicable to the petitioner's claim(s) in accordance with § 2254(d). The procedural and substantive standards applicable to *habeas* review, which were substantially modified by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), are summarized below.

A. Timeliness Requirement

A federal *habeas corpus* petition is subject to AEDPA's strict, one-year statute of limitations. *See* 28 U.S.C. § 2244(d). The statute provides four different potential starting points for the limitations period, and specifies that the latest of these shall apply. *See id.* § 2244(d)(1). Under the statute, the limitation period is tolled only during the pendency of a properly filed application for State post-conviction relief, or other collateral review, with respect to the judgment to be challenged by the petition. *See id.* § 2244(d)(2). The statute reads as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
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> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (d)(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id. § 2244(d).

The one-year limitation period is subject to equitable tolling, which is warranted when a petitioner has shown "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way' and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2262 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). In the Second Circuit, equitable tolling is confined to "rare and exceptional circumstance[s]," *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam) (internal quotation omitted), which have "prevented [the petitioner] from filing his petition on time," *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (internal quotation marks and emphasis omitted). The applicant for equitable tolling must "demonstrate a causal relationship between the extraordinary circumstances on

which the claim for equitable tolling rests and the lateness of his filing – a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances." *Valverde*, 224 F.3d at 134.

B. Exhaustion Requirement

A federal court may not grant *habeas* relief unless the petitioner has first exhausted his claims in state court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see* 28 U.S.C. § 2254(b)(1) ("[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant"); *id.* § 2254(c) (the petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented"). The exhaustion requirement promotes interests in comity and federalism by demanding that state courts have the first opportunity to decide a petitioner's claims. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

To exhaust a federal claim, the petitioner must have "fairly present[ed] his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim," and thus "giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotation marks and citations omitted). "Because non-constitutional claims are not cognizable in federal habeas corpus proceedings, a habeas petition

must put state courts on notice that they are to decide federal constitutional claims." *Petrucelli v. Coombe*, 735 F.2d 684, 687 (2d Cir. 1984) (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982)). Such notice requires that the petitioner "apprise the highest state court of both the factual and legal premises of the federal claims ultimately asserted in the habeas petition." *Galdamez v. Keane*, 394 F.3d 68, 73 (2d Cir. 2005) (internal citation omitted). A claim may be "fairly presented" to the state courts therefore, even if the petitioner has not cited "chapter and verse of the Constitution," in one of several ways:

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

Daye v. Attorney Gen. of State of N.Y., 696 F.2d 186, 194 (2d Cir. 1982). A *habeas* petitioner who fails to meet a state's requirements to exhaust a claim will be barred from asserting that claim in federal court. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

However, "[f]or exhaustion purposes, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997) (internal quotation omitted). "In such a case, a petitioner no longer has 'remedies available in the courts of the State' within the meaning of 28 U.S.C. § 2254(b)." *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991). Such a procedurally barred claim may be deemed exhausted by a federal *habeas* court. *See, e.g., Reyes*, 118 F.3d at 139. However, absent a showing of either "cause for the procedural default and prejudice attributable thereto," *Harris v. Reed*, 489 U.S. 255, 262 (1989), or "actual innocence," *Schlup v. Delo*, 513 U.S. 298 (1995), the petitioner's claim will remain

unreviewable by a federal court.

Finally, notwithstanding the procedure described above, a federal court may yet exercise its discretion to review and deny a mixed petition containing both exhausted and unexhausted claims, if those unexhausted claims are "plainly meritless." *Rhines v. Weber*, 544 U.S. 269, 277 (2005); *see* 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."); *Padilla v. Keane*, 331 F. Supp.2d 209, 216 (S.D.N.Y. 2004) (interests in judicial economy warrant the dismissal of meritless, unexhausted claims).

C. Procedural Default

Even where an exhausted and timely *habeas* claim is raised, comity and federalism demand that a federal court abstain from its review when the last-reasoned state court opinion to address the claim relied upon "an adequate and independent finding of a procedural default" to deny it. *Harris*, 489 U.S. at 262; *see also Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Levine v. Comm'r of Corr. Servs.*, 44 F.3d 121, 126 (2d Cir. 1995).

A state court decision will be "independent" when it "'fairly appears" to rest primarily on state law. *Jimenez v. Walker*, 458 F.3d 130, 138 (2d Cir. 2006) (citing *Colman*, 501 U.S. at 740). A decision will be "adequate" if it is "'firmly established and regularly followed' by the state in question." *Garcia v. Lewis*, 188 F.3d 71, 77 (2d Cir. 1999) (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)).

D. AEDPA Standard of Review

Before a federal court can determine whether a petitioner is entitled to federal *habeas*

relief, the court must determine the proper standard of review under AEDPA for each of the petitioner's claims. 28 U.S.C. § 2254(d)(1)-(2). This statute "modifie[d] the role of federal habeas corpus courts in reviewing petitions filed by state prisoners," and imposed a more exacting standard of review. *Williams v. Taylor*, 529 U.S. 362, 402 (2000). For petitions filed after AEDPA became effective, federal courts must apply the following standard to cases in which the state court adjudicated on the merits of the claim:

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

§ 2254(d)(1)-(2). The deferential AEDPA standard of review will be triggered when the state court has both adjudicated the federal claim "on the merits," and reduced its disposition to judgment. *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001).

Under the first prong, a state court decision is contrary to federal law only if it "arrives at a conclusion opposite to that reached by the [the Supreme Court] on a question of law or if [it] decides a case differently than [the Supreme Court] on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. A decision involves an "unreasonable application" of Supreme Court precedent if the state court "identifies the correct governing legal rule from the Supreme Court cases but unreasonably applies it to the facts of the particular state prisoner's case," or if it "either unreasonably extends a legal principle from [Supreme Court] precedent to a

new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407.

Under the second prong of AEDPA, the factual findings of state courts are presumed to be correct. 28 U.S.C. § 2254(e)(1); *see Nelson v. Walker*, 121 F.3d 828, 833 (2d Cir. 1997). The petitioner must rebut this presumption by "clear and convincing evidence." § 2254(e)(1).

IV. ANALYSIS

Petitioner argues that he is entitled to habeas review for four reasons: (i) the trial court's finding of probable cause was inconsistent with *Mapp v. Ohio* and thereby violated his constitutional rights under the Fourth amendment; (ii) the trial court erred in allowing the prosecution to knowingly use false evidence, including perjured testimony at petitioner's trial; (iii) the trial court erred in allowing the prosecution to suppress exculpatory information about the arrest of Jorge Guzman for similarly-styled burglaries; and (iv) he received ineffective assistance of counsel "by proxy" because of his co-defendant's counsel's conflict of interest.

Respondent contends that under *Stone v. Powell*, 428 U.S. 465 (1976) petitioner's probable cause claim is not cognizable for habeas review. With respect to the remaining three claims, responded contends that these claims are unexhausted but should be deemed exhausted, procedurally barred or denied on the merits under 28 U.S.C. § 2254(b)(2).

A. Probable Cause

Petitioner argues that the lower courts finding of probable cause was inconsistent with *Mapp v. Ohio* and violated his constitutional rights under the Fourth and Fifth amendments.[7]

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[7] Although petitioner claims that his Fifth Amendment rights were violated, he does not present any argument in support of that claim and did not present any such argument to the

Respondent contends that under *Stone v. Powell*, 428 U.S. 465 (1976) petitioner's claim is not cognizable for habeas review.

Where the State has provided "an opportunity for full and fair litigation of a Fourth Amendment claim," federal courts may not review such habeas claims. *Stone*, 428 U.S. at 494. The Second Circuit has held:

> [F]ourth amendment claims in habeas petitions would be undertaken in only one of two instances: (a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process.

Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977), *cert. denied*, 434 U.S. 1038 (1978); *see also Graham Costello*, 299 F.3d 129, 134 (2d Cir. 2002) ("[O]nce it is established that a petitioner has had an opportunity to litigate his or her Fourth Amendment claim (whether or not he or she took advantage of the state's procedure), the [state] court's denial of the claim is a conclusive determination that the claim will never present a valid basis for federal habeas relief."). Since New York provides defendants with adequate procedures to redress Fourth Amendment violations, *Capellan v. Riley*, 975 F.2d 67, 70 n.l (2d Cir. 1992) (citing *Gates*, 568 F.2d at 840) ("[F]ederal courts have approved New York's procedure for litigating Fourth Amendment claims. . . ."); *Daily v. New York*, 388 F. Supp. 2d 238, 249 (S.D.N.Y. 2005) (New York "clearly has provided. . . the necessary corrective procedures" to redress alleged Fourth Amendment violations), this Court may only review petitioner's claims if he demonstrates that there was an

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state courts. As a result, I construe this claim to raise the Fourth Amendment violation he raised on direct appeal.

"unconscionable breakdown" in these corrective mechanisms.

In the instant case, the petitioner does not argue and the facts fail to reveal an unconscionable breakdown in the corrective process necessitating habeas review. A combined *Mapp/Dunaway* hearing was held on November 6 and 8, 2006 after petitioner had filed a written motion to suppress. Ex. 3, Westchester County Supreme Court Decision and Order on Probable Cause Hearing dated November 13, 2006 (Adler. J.). Thereafter, the court issued a written decision detailing its findings of fact and conclusions of law and found that the police had probable cause to arrest petitioner. *Id.* According to the court, based upon the surveillance tape photographs and his observations of the defendants, the officer had, at a minimum, a common-law right of inquiry. *Id.* at 16. After Cruz's "patently false responses" to an assisting officer's inquiry and the watch that fell out of the petitioner's pocket, this right of inquiry "clearly raised the level of suspicion to probable cause." *Id.*

In addition to the comprehensive review of petitioner's claim at the trial level, petitioner's Fourth Amendment claim was also reviewed by the Appellate Division, that court found the claim to be without merit for the same reasons. The court stated:

> Contrary to the defendant's contention, his arrest was supported by probable cause and, therefore, that branch of his motion which was to suppress physical evidence was properly denied. Police Officer Josef Miedreich testified at the hearing that when he saw the defendant and the codefendant walking in the area where numerous residential burglaries had been occurring, he recognized them from their depiction in a wanted poster and still photographs taken from surveillance video footage in buildings where the burglaries had occurred, giving him, at a minimum, a common-law right of inquiry. When Officer Miedreich approached them, his suspicions were further aroused when, in response to his question as to where they

> were headed, the codefendant said they were going to his car, but then pointed in the direction opposite the one in which they had been headed. Other police officers then arrived at the scene, and in response to a request for identification, the defendant reached into his back pocket, and the officers observed a watch fall out of his pocket, despite the fact that he was wearing a watch on his wrist. At that point the police had probable cause to believe that the defendant and the codefendant were the burglars.

Ex. 9, *People v. Brewer*, 73 A.D.3d 1199, 1200 (2d Dept. 2010) (citations omitted).

Both the trial court and the Appellate Division, thus, fully considered and rejected petitioner's Fourth Amendment claim as meritless. The petitioner has thereby utilized New York's procedure for litigating Fourth Amendment claims and may not now gain federal review of his claim.

Since petitioner was provided with and took advantage of multiple forums to vindicate his Fourth Amendment rights, there was no unconscionable breakdown in the corrective process. *Benton v. Brown*, 537 F. Supp. 2d 584, 591 (S.D.N.Y. 2008) (no unconscionable breakdown because petitioner's claims were reviewed in pre-trial hearing and on appeal). Accordingly, I respectfully recommend that petitioner's Fourth Amendment claim be denied.

B. Prosecutorial Misconduct

Petitioner contends that he is entitled to habeas review because there was prosecutorial misconduct during his trial. P. Mem. at 5. Specifically, petitioner raises two independent prosecutorial misconduct claims: (i) the prosecution knowingly used false evidence, including perjured testimony at petitioner's trial; and (ii) the prosecution suppressed exculpatory information about the arrest of Jorge Guzman for similarly-styled burglaries. *Id.* Respondent argues that petitioner's prosecutorial misconduct claims are unexhausted but should be deemed

exhausted, procedurally barred or denied on the merits under 28 U.S.C. § 2254(b)(2). R. Opp. at 7-23.

a. Exhaustion

A federal court may not grant *habeas* relief unless the petitioner has first exhausted his claims in state court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see* 28 U.S.C. § 2254(b)(1). The exhaustion requirement promotes interests in comity and federalism by demanding that state courts have the first opportunity to decide a petitioner's claims. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). To exhaust a federal claim, the petitioner must have "fairly present[ed] his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim," and thus "giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotation marks and citations omitted).

i. Prosecutorial Misconduct: False Evidence

Here, petitioner raised his "false evidence" prosecutorial misconduct claim in his supplemental C.P.L. § 440.10 motion, Ex. 12, Motion to Vacate the Judgment under §§ 440.10(b)-(d), 440.10(f), 440.10(h),[8] and in a follow up submission to the state trial court framed as a petition for writ of error *coram nobis*. Ex. 14, Motion under "Title M Writ of Error Coram Nobis to Vacate Judgment [sic] and Sentence as illegal and a Violation of Petitioners [sic] Constitutional Right under the 6th and 14th Amendment." The court denied this claim finding

[8] The court determined this submission was incomplete and granted petitioner another opportunity to file a complete copy of this motion. Ex. 13, Westchester County District

that Defendant Brewer "failed to submit documentation to support his contentions that the prosecutor, at trial, knowingly allowed false testimony or that the judgment was procured by duress, misrepresentation or fraud, on the part of the prosecutor." Ex. 17, Decision and Order dated January 9, 2012. Petitioner did not seek leave to appeal to the Appellate Division for further review of this claim. Ex. 20, Motion for Leave to Appeal under C.P.L. § 460.15. Although petitioner alluded to the false evidence portion of petitioner's prosecutorial misconduct claims in his subsequent Motion to Re-Argue Leave to Appeal, he did not present the claim in the body of his motion. Ex. 23, Motion to Re-Argue Leave to Appeal title 22 N.Y.C.R.R. § 670.6(a). Petitioner's half-hearted attempt to raise this issue for the first time in the question presented section of a motion to reargue leave to appeal does not constitute the fair presentation of this issue before the state court. *Marsh v. Ricks*, No. 02 Civ. 3449, 2003 U.S. Dist. LEXIS 692, at *25, n.10 (S.D.N.Y. January 16, 2003) (quoting C.P.L.R. § 2221(d)(2) ("a motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered in the prior motion.'")). Therefore, this claim is unexhausted.

ii. Prosecutorial Misconduct: Suppression of Evidence

Petitioner also raised a prosecutorial misconduct claim relating to the suppression of allegedly exculpatory evidence — evidence that another man, Jorge Guzman, was arrested for similarly styled burglaries — in a C.P.L. § 440.10 joint-motion submitted with co-defendant Cruz. Ex. 11, Joint-Motion to Vacate the Judgment under C.P.L. §§ 440.10(b)-(d), 440.10(h). The court decided this claim on the merits. Ex. 18, Decision and Order dated January 4, 2012.

Attorney's Office Letter dated February 8, 2011.

Petitioner did not seek leave to appeal to the Appellate Division for further review of this claim. Therefore, this claim is also unexhausted.

b. Procedural Default

A *habeas* petitioner who fails to meet a state's requirements to exhaust a claim will be barred from asserting that claim in federal court, *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000), however, "[f]or exhaustion purposes, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997) (internal quotation omitted). "In such a case, a petitioner no longer has 'remedies available in the courts of the State' within the meaning of 28 U.S.C. § 2254(b)." *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991). Such a procedurally barred claim may be "deemed" exhausted by a federal *habeas* court. *See, e.g., Reyes*, 118 F.3d at 139.

Petitioner's prosecutorial misconduct claims are unexhausted because he failed to raise them in his application for leave to appeal. Nevertheless, those claims are "deemed exhausted" because they are now procedurally barred under state law. *See St. Helen v. Senkowski*, 374 F.3d 181, 183 (2d Cir. 2004). Petitioner cannot now seek leave to appeal those claims in the Court of Appeals because New York Criminal Procedure Law § 460.10 provides a 30-day limitation for an appeal of the denial of a C.P.L. § 440.10 motion. Since petitioner's C.P.L. § 440.10 motions were denied in January 2012, the time to seek leave to appeal from the denial of petitioner's CPL § 440.10 motions has long since passed. *See* C.P.L. § 460.10(4) (to appeal the denial of a § 440.10 motion, a defendant must apply for leave to appeal within 30 days of being served with the decision to be appealed); *Castillo v. Hodges*, No. 01 Civ. 2172, 2004 U.S. Dist. LEXIS 5077,

at *11-16 (S.D.N.Y. Mar. 29, 2004) (Because petitioner failed to appeal the denial of his 440.10 motion, the claims raised therein are deemed exhausted and procedurally forfeited); *Marino v. Miller*, No. 97 Civ. 2001, 2002 U.S. Dist. LEXIS 16310, at *28 (E.D.N.Y. Aug. 22, 2002) ("At this point, if [petitioner] were to seek leave appeal to the Appellate Division, his application would be denied as time-barred [as he missed the deadline to appeal] ... [and] "[t]hus, his claim is deemed exhausted"); *Thomas v. Greiner*, 111 F. Supp. 2d 271, 277-78 (S.D.N.Y. 2000) ("[I]f the lapse of a clear time limit such as the one in CPL § 460.10(4) does not provide grounds for a federal court to find exhaustion and a resulting procedural bar, it is hard to imagine a state rule that ever could until the state courts had ruled – the theory would be that state remedies are never exhausted because a petitioner can always request relief from the state court, even if it is virtually certain the state court would not grant it."). Moreover, petitioner has not alleged any "improper conduct, inability to communicate, or other facts" to support a motion to extend the time limit pursuant to C.P.L. § 460.30. Petitioner also makes no showing of cause or prejudice to overcome the procedural bar to bringing his prosecutorial misconduct claims now. Absent a showing of either "cause for the procedural default and prejudice attributable thereto," *Harris v. Reed*, 489 U.S. 255, 262 (1989), or "actual innocence," *Schlup v. Delo*, 513 U.S. 298 (1995), petitioner's claims remain unreviewable by a federal court.

Since it would be futile for petitioner to raise either of his prosecutorial misconduct claims in state court now, I respectfully recommend that the Court find that petitioner's claims are deemed exhausted and procedurally barred.

c. Plainly Meritless

In the alternative, even if the Court finds that the petitioner may still exhaust the remedies

available in state courts, I respectfully recommend that the Court find that petitioner's prosecutorial misconduct claims are plainly meritless and should be denied. *Rhines v. Weber*, 544 U.S. 269, 277 (2005); *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."); *Padilla v. Keane*, 331 F. Supp.2d 209, 216 (S.D.N.Y. 2004) (interests in judicial economy warrant the dismissal of meritless, unexhausted claims). Petitioner raises two independent prosecutorial misconduct claims: (i) the prosecution knowingly used false evidence, including perjured testimony at petitioner's trial; and (ii) the prosecution suppressed exculpatory information about the arrest of Jorge Guzman for similarly-styled burglaries. Both are plainly meritless and should be denied further review.

i. Prosecutorial Misconduct: False Evidence

Petitioner argues that the prosecution knowingly used false evidence and perjured testimony during the trial and pre-trial proceedings. P. Mem. at 5. Although the petitioner does not specifically cite the allegedly "false evidence" used by the prosecution use at trial in his petition, petitioner's motion to vacate the judgment under C.P.L. § 440.10 asserts four occasions when the prosecution knowingly allowed "perjured" testimony at trial. Ex. 12, Motion to Vacate Judgment under §§ 440.10(b)-(d), 440.10(f), 440.10(h). *First*, petitioner argued that the prosecution knowingly allowed Officer Miedreich to falsely testify before a grand jury that the inventory list included property or paperwork belonging to Stanley Brewer. *Second*, petitioner argued that the prosecution knowingly allowed Detective Caiati to falsely testify that he was the one that conducted the search of 2458 Nostrand Avenue even though Detective Deering's testified that *he* searched 2458 Nostrand Avenue. *Third*, petitioner argued that the prosecution

knowingly allowed Officer Miedreich to falsely testify that he had seen defendants in the security footage from 30 Windsor Terrace even though he later testified he had only seen the "stills" of the security footage. *Fourth*, petitioner argued that the prosecution knowingly allowed Peggy Gill to falsely testify before the grand jury that there was money in a drawer even though she later testified at trial that there was no money in that drawer. *Id.* The state court adjudicated these claims on the merits and found that "Defendant Brewer has failed to submit documentation to support his contentions that the prosecutor, at trial, knowingly allowed false testimony." Ex. 17, Decision and Order dated January 9, 2012.

Petitioner must establish that "the prosecution knew, or should have known, of the perjury," and that there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Drake v. Portuondo*, 321 F.3d 338 (2d Cir. 2002) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)); *Sanders v. Sullivan*, 863 F.2d 218, 225-26 (2d Cir. 1988) (perjured testimony must be of "extraordinary nature" to trigger a due process violation; it must "leave the court with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted"). Perjury is established by showing that the witness "knowingly and willingly" gave "materially false" testimony. *See* 18 U.S.C. § 1001(a)(2); *see also United States v. Salameh*, 54 F. Supp. 2d 236, 261-62 (S.D.N.Y. 1999). Petitioner bears the burden of demonstrating perjury by a preponderance of evidence. *Anekwe v. Phillips*, No. 05 Civ. 2184, 2007 U.S. Dist. LEXIS 101352, at *19-20 (E.D.N.Y. May 31, 2007) (quoting *Ortega v. Duncan*, 333 F.3d 102, 106-07 (2d Cir. 2003)).

In his C.P.L. § 440.10 motion, petitioner lists the alleged perjury and summarily concludes that the prosecutor "should have known" that his witnesses lied. Ex. 12, Motion to

Vacate Judgment under §§ 440.10(b)-(d), 440.10(f), 440.10(h). In his petition, petition simply concludes that the prosecution's witnesses testimony was "knowingly false" without identifying which witnesses or what testimony he is referring to. Dkt. 1. But merely pointing out inconsistencies is insufficient to support an allegation of perjury. *See United States v. Monteleone*, 257 F.3d 210 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 1946 (2002); *United States v. Gambino*, 59 F.3d 353, 365 (2d Cir. 1995) ("[E]ven a direct conflict in testimony does not in itself constitute perjury"); *Moore v. Greiner*, 02 Civ. 6122, 2005 U.S. Dist. LEXIS 24184, at *44-45 (S.D.N.Y. Oct. 19, 2005) ("[I]nconsistencies between a witness's statements before a grand jury and at trial do not warrant the inference that the prosecutor knowingly used false testimony."). Even construing the petition in the light most favorable to petitioner, the petition suggests no basis supporting petitioner's conclusory allegation that the prosecution knew or should have known of the perjury or his theory of how this allegedly perjured testimony would have altered the verdict. There was substantial evidence implicating petitioner in the crime, so subtle inconsistencies in the prosecution witnesses' testimony were immaterial and do not amount to perjury. Petitioner's conclusory list of allegedly perjured testimony is simply not enough to justify granting the extraordinary habeas remedy.

Accordingly, I recommend that the Court find that this claim is plainly meritless.

ii. Prosecutorial Misconduct: Suppression of Evidence

Petitioner's claim that his due process was violated because the prosecution "manipulated the paperwork to show that other suspects arrested was [sic] not responsible for the crimes" is also plainly meritless. P. Mem. at 5. I interpret this claim to be a recitation of the *Brady v. Maryland*, 373 U.S. 83 (1963) claim raised in petitioner's C.P.L. § 440.10 motion in which

petitioner argued that the prosecution suppressed information about the arrest of Jorge Guzman for similarly styled burglaries. Ex. 11, Joint Motion at 16-18. The state court denied this claim in a Decision and Order dated January 4, 2012, Ex. 18, and found that petitioner failed to demonstrate that the evidence at issue is favorable to him, that such evidence was suppressed by the state, either willfully or inadvertently, or that prejudice ensued. Notably, the court found that the information about Jorge Guzman was not exculpatory information and that "the People are not required to provide true *Brady* material when the defendant knew of or should reasonably have known of the evidence." Ex. 18, Decision and Order dated January 4, 2012 at 5-6.

"'There are three components of a true *Brady* violation: 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.'" *Poventud v. City of New York*, 750 F.3d 121, 133-34 (2d Cir. 2012) (citing *United States v. Rivas*, 377 F.3d 195, 199 (2d Cir. 2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999))). To establish prejudice, a plaintiff must show materiality:

> The touchstone of materiality is a reasonable probability of a different result ... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but *whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.*

Poventud v. City of New York, 750 F.3d 121, 133-34 (2d Cir. 2012) (quoting *Leka v. Portuondo*, 257 F.3d 89, 104 (2d Cir. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (alterations omitted; emphasis added)).

Petitioner's concession here that he knew about Jorge Guzman's arrest, Ex. 11, Joint

C.P.L. § 440.10 Motion at 15 ("Although the defendants was [sic] aware of the other man's arrest, the defendant would not have known that Mr. Guzman was being represented by the Legal Aid Society ...."), is fatal to his claim that the prosecution suppressed this allegedly critical piece of exculpatory information. *See Poventud v. City of New York*, 750 F.3d 121, 133-34 (2d Cir. 2012). Evidence is not considered to have been suppressed under *Brady* "if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence." *United States v. Payne*, 63 F.3d 12000, 1208 (2d Cir. 1995) (internal quotation marks and citations omitted). Since petitioner knew of Jorge Guzman's arrest, petitioner's counsel could have presented evidence of Jorge Guzman's arrest for similarly styled burglaries. Even if petitioner had not known about Guzman's arrest, prejudice would not have ensued because Jorge Guzman's arrest was immaterial in the face of such overwhelming evidence, *i.e.*, victims' identification of petitioner as the burglar, security footage of petitioner at the locations of the burglaries around the time the burglaries took place, and the stolen items found on his person. Notably, Jorge Guzman is a light-skinned Hispanic man who was also caught on surveillance footage during the commission of his burglaries while petitioner is an African American man with a distinctive hairstyle and a thin mustache goatee, memorable characteristics, which were visible in at least two of the surveillance videos. T. 1113-14. It is hard to imagine how the evidence of Jorge Guzman's arrest would have undermined the surveillance video footage of petitioner and co-defendant Cruz, two African American males identified by numerous victims and found with the fruits of their burglaries on their persons immediately following the commission of one of their burglaries.

Because evidence concerning Jorge Guzman's arrest would not undermine confidence in

the verdict against petitioner, I respectfully recommend that the Court find that petitioner's claim of prosecutorial misconduct through the suppression of evidence is plainly meritless and should be denied.

C. Ineffective Assistance of Counsel

Petitioner also argues that he is entitled to habeas review because he received ineffective assistance of counsel "by proxy" because of his co-defendant's counsel's conflict of interest. P. Mem. at 6. In particular, petitioner contends that his trial counsel was ineffective because his trial was consolidated with that of co-defendant Cruz, whose counsel, Mr. Zappo, represented Jorge Guzman, another suspect of similarly styled burglaries and as a result his counsel failed to put forth the arrest of Jorge Guzman as a defense, and thereby "led the press and co-counsel to believe that petitioner was the only people [sic] arrested for such burglaries." P. Mem. at 6. Petitioner also characterizes the alleged conflict of interest between co-defendant Cruz's representation of Cruz and his representation of Jorge Guzman as having tainted his own representation because of an alleged "spillover effect." P. Mem. at 9. Respondent argues that petitioner's ineffective assistance of counsel claim is meritless and unexhausted because petitioner did not seek leave to appeal the denial of his C.P.L. § 440.10 motion on this ground. R. Opp. at 25.

a. Exhaustion and Procedural Default

A federal court may only grant habeas relief after a petitioner has exhausted his state remedies. *See Cullen v. Pinholster*, 563 U.S. 170, 208 (2011). In the context of a C.P.L. § 440.10 petition, exhaustion requires that the petitioner seek leave to appeal to the Appellate Division, and that the petitioner identify for the Appellate Division "the issues on which the

application is based." *Santos v. Payant*, No. 04 Civ. 8705, 2005 U.S. Dist. LEXIS 37830, at *11-12 (S.D.N.Y. Dec. 29, 2005) (citing *Galdamez v. Keane,* 394 F.3d 68, 74 (2d Cir. 2005) (quoting New York Court Rules § 500.10(a) (McKinney 1999) (internal quotation omitted)). While petitioner need not discuss each relevant claim in depth, nor even explicitly name each issue upon which review is sought, the total exclusion of an issue from an application for leave eliminates that claim from review. *Id.* (citing *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991))

Petitioner raised his ineffective assistance of counsel claim in a C.P.L. §§ 330.30, 440.10 motion, Ex. 4, C.P.L. §§ 330.30, 440.10 Motion to set aside the verdict and/or vacate the judgment of conviction at 3-4. The court decided that this claim was based on matters dehors the record and thus could not be reviewed. Ex. 6, Decision and Order dated July 19, 2007. Petitioner appealed the lower court's decision and the Appellate Division similarly held that defendant's argument concerning a conflict of interest and ineffective assistance of counsel are based on "matter [sic] dehors the record and, therefore, cannot be reviewed on direct appeal." Ex. 9, Decision and Order of the Appellate Division, Second Judicial Department at 2. Petitioner raised this claim again on his application for leave to appeal which was denied on September 17, 2010. Ex. 10, Certificate Denying Leave. Petitioner also raised this issue in a C.P.L. § 440.10 motion. Ex. 11, C.P.L. § 440.10 Motion. Petitioner then filed a supplemental C.P.L. § 440.10 motion, Ex. 12, P. Supplemental C.P.L. § 440.10 motion, which the court determined was incomplete. Petitioner was granted another opportunity to file a complete copy of his supplemental motion. Ex. 13, Westchester County District Attorney's Office Letter dated February 8, 2011. On February 23, 2011, petitioner filed an entirely new notice of motion titled, "Writ of Error Coram Nobis" wherein petitioner renewed his ineffective assistance of counsel

claim. Ex. 14, Aff. in Support of Writ of Error Coram Nobis.

On January 9, 2012, the court found there was no conflict of interest and held that:

> Brewer was actually represented by his own and conceitedly [sic] unconflicted attorney, Kim Frohlinger, Esq., and Defendant Brewer has made no allegation that his counsel had any conflict that prevented Brewer's defense from presenting evidence of Jorge Guzman's arrest for burglaries similar in nature to those he was convicted of, and suggesting to the jury that Guzman and not he, committed said crimes.

Ex. 17, Westchester County Court Decision and Order dated January 9, 2012 at 2.

> Since he was represented by his own attorney, there can be no conflict of interest asserted as a valid ground for relief under CPL 440.10, and he lacks standing to assert such claim on behalf of co-defendant Cruz.

Id. at 2-3.

> Aside from Brewer's lack of standing to assert a conflict of interest based upon Legal Aid's representation of another burglary suspect, such factor had no bearing upon the representation provided by his own attorney, Kim Frohlinger, Esq.

Id. at 3.

Petitioner did not seek leave to appeal the denial of his C.P.L. § 440.10 motion on this ground. Ex. 20, Motion for Leave to Appeal under C.P.L. § 460.15. Because he failed to raise them in his application for leave to appeal, petitioner's ineffective assistance of counsel claim is unexhausted. Since petitioner's C.P.L. § 440.10 motions were denied in January 2012, the time to seek leave to appeal from the denial of petitioner's C.P.L. § 440.10 motions has passed. *See* C.P.L. § 460.10(4) (to appeal the denial of a § 440.10 motion, a defendant must apply for leave to appeal within 30 days of being served with the decision to be appealed). Thus, those claims are procedurally barred under state law and "deemed exhausted." *See St. Helen v. Senkowski,*

374 F.3d 181, 183 (2d Cir. 2004). Because of the petitioner's failure to exhaust the claims properly, petitioner's ineffective assistance of counsel claims are procedurally defaulted for habeas purposes and deemed exhausted. *Galdamez v. Keane*, 394 F.3d 68, 74 (2d Cir. 2005). Since petitioner has not alleged any "improper conduct, inability to communicate, or other facts" to support a motion to extend the time limit pursuant to C.P.L. § 460.30 nor made any showing of cause for the procedural default or prejudice, or actually innocence. *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Schlup v. Delo*, 513 U.S. 298 (1995), I respectfully recommend that the Court find that petitioner's claim is not entitled to federal review.

Accordingly, petitioner's third claim is unexhausted, procedurally barred, therefore deemed exhausted and should be denied.

b. Plainly Meritless

In the alternative, even if the Court finds that the petitioner may still exhaust the remedies available in state courts, I respectfully recommend that the Court find that petitioner's ineffective assistance of counsel claim is plainly meritless and should therefore still be denied.

In order to establish his claim of ineffective assistance of trial counsel, petitioner must demonstrate: (1) that his attorney's performance "fell below an objective standard of reasonableness" and (2) that there is a "reasonable probability" that, but for counsel's error, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001). In considering whether counsel's performance was deficient under *Strickland*'s first prong, decisions by trial counsel that "fall squarely within the ambit of trial

strategy ... if reasonably made," cannot give rise to a claim of ineffectiveness. *United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987). Moreover, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005) (quoting *Strickland*, 466 U.S. at 690). The second prong focuses on prejudice to the petitioner. A habeas petitioner bears the burden of establishing *both* deficient performance and prejudice. *See Greiner*, 417 F.3d at 319. Thus, "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

Here, petitioner argues that co-defendant Cruz's trial counsel's representation of Guzman constituted a conflict of interest which in turn led to a denial of effective assistance of counsel in because co-defendant Cruz's counsel's representation of Jorge Guzman precluded his own trial counsel from eliciting evidence which would have been exculpatory.[9] Petitioner here does not actually allege that his trial counsel had a conflict of interest. Rather, he makes the novel argument that his co-defendant's counsel had the conflict of interest but does not cite any federal authority which would allow a petitioner to bring an ineffective assistance of counsel claim based on a different (here, co-defendant's counsel) counsel's purported ineffectiveness. But even assuming *arguendo* that petitioner's counsel's performance was somehow deficient under *Strickland*'s first prong, petitioner fails to demonstrate that he was prejudiced by his counsel's

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[9] Petitioner contends that the facts and circumstances surrounding burglaries Jorge Guzman was arrested for were so similar to the burglaries petitioner was charged for that a viable defense at trial would have been that it was Jorge Guzman, and not the defendants, who committed the offenses charged in the indictment.

failure to use the defense of Jorge Guzman's arrest. Indeed, in denying this claim, the Appellate Division noted the overwhelming evidence connecting petitioner to the burglaries he was charged for:

> It bears reiteration ... that there was overwhelming evidence linking Brewer and Cruz to the burglaries of which they were convicted. Brewer was identified by witnesses in person and on surveillance tapes, and unique items were found on his person, which were identified as having been stolen during the burglaries. In light of evidence linking Brewer to these crimes, as well as the distinguishable and unique physical characteristics of the alleged suspect, Jorge Guzman, no attorney would reasonably believe that Guzman was a viable suspect in the burglaries committed by Cruz and Brewer. Direct evidence connected Defendant Brewer to each of his burglaries, not the least of which was three watches, a digital camera, a Tiffany charm, jewelry bag, little girl's hair band, white sock and a black glove all identified as stolen during the burglaries.

Ex. 17, Decision and Order at 3. Since petitioner failed to show how he was prejudiced, petitioner's ineffective assistance of counsel claim is plainly meritless.

Accordingly, I respectfully recommend that the Court find that petitioner's third claim is unexhausted, procedurally barred, and therefore, not cognizable on federal habeas review.

V. CONCLUSION

For the reasons set forth above, I conclude — and respectfully recommend that the Court should conclude—that the instant petition for a writ of habeas corpus should be denied in its entirety. Further, because reasonable jurists would not find it debatable that petitioner has failed to demonstrate by a substantial showing that he was denied a constitutional right, I recommend that no certificate of appealability be issued. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

Dated: February 8, 2018
White Plains, New York

Respectfully Submitted,

PAUL E. DAVISON, U.S.M.J.

NOTICE

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days, plus an additional three (3) days, or a total of seventeen (17) days, from service of this Report and Recommendation to serve and file written objections. *See also* Fed. R. Civ. P. 6(a), (b), (d). Such objections, if any, along with any responses to the objections, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of the Hon. Nelson S. Román, at the Hon. Charles L. Brieant, Jr. Federal Building and United States Courthouse, 300 Quarropas Street, White Plains, New York 10601, and to the chambers of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered. *See Caidor v. Onondaga County*,

517 F.3d 601, 604 (2d Cir. 2008).

Requests for extensions of time to file objections must be made to Judge Román.

A copy of this Report and Recommendation has been mailed to:

Stanley Brewer, 07A4537
Fishkill Correctional Facility
P.O. Box 1245
Beacon, NY 12508

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

STANLEY BREWER,

Petitioner,

-against-

ROBERT CUNNINGHAM, Superintendent, Fishkill Correctional Facility,

Respondent.

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13 Civ. 2873 (NSR)

ORDER ADOPTING REPORT AND RECOMMENDATION

NELSON S. ROMAN, United States District Judge:

Before the Court is a Report and Recommendation ("R & R")[1] issued by Magistrate Judge Paul E. Davison ("MJ Davison") on February 8, 2018, pursuant to 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), recommending that the petition[2] of Stanley Brewer ("Petitioner"), by Writ of Habeas Corpus, challenging his convictions for ten counts of burglary in the second degree and two counts of criminal possession of stolen property in the fifth degree, be denied in its entirety.

Petitioner timely objected to the R & R. Petitioner primarily raises four objections: following a Mapp/Dunaway hearing, the trial court wrongfully denied his motion to suppress evidence; during his trial, the government proffered perjured testimony of law enforcement witness (prosecutorial misconduct); ineffective assistance of counsel; and judicial misconduct. For the following reasons, the Court adopts the legal analysis and conclusions of MJ Davison's R & R in its entirety. Accordingly, Petitioner's Writ of Habeas Corpus is DENIED and petition is DISMISSED.

BACKGROUND

The Court presumes familiarity with the factual and procedural background of this case, the underlying criminal proceeding, and Petitioner's collateral state challenges.

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[1] ECF No. 28, Magistrate Judge Paul E. Davison Report and Recommendation.
[2] See ECF No. 1, Petition Writ of Habeas Corpus.

Petitioner and his co-defendant, Eric Cruz ("Cruz"), were prosecuted by the Westchester County District Attorney's Office, in a twenty-four count indictment, for committing multiple residential burglaries in Westchester County from on or about December 14, 2005 through January 19, 2006. Petitioner and co-defendant Cruz purportedly targeted residential apartment buildings, picked the locks of the main front doors of the buildings and the apartment doors. Upon gaining entrance to an apartment, they jammed the lock to the door with a broken key or metal object. Although the various police departments involved did not initially know the identities of the individuals involved in the burglaries, they compiled surveillance videos and photos, and intelligence bulletins.

Petitioner was arrested on or about January 19, 2006, when White Plains Police Officer Josef Miedreich ("P.O. Miedreich") observed him and Cruz in the vicinity of North Broadway and Lake Street fitting the descriptions of the persons depicted in the burglary surveillance photos. The arrest location was also within close proximity to one of the burglaries. Petitioner and Cruz were wearing similar clothing to those depicted in the surveillance photos. After detaining Petitioner and Cruz, officers discovered they were in possession of a jewelry box, jewelry, currency and foreign currency, alleged proceeds of a burglary.

Petitioner was indicted on or about March 31, 2006 and charged with aiding, abetting and acting in concert with Cruz in twenty-three burglaries and related crimes. Petitioner sought to suppress evidence obtained at or about the time of his arrest. By decision issued by New York State Supreme Court Judge Robert DiBella ("Judge DiBella"), dated July 25, 2006, the matter was set down for, *inter alia*, a *Mapp/Dunaway* hearing. The *Mapp/Dunaway* hearing was conducted by Judge Lester Adler ("Judge Adler"). Approximately eight police officers testified at the hearing. Petitioner presented no evidence. Following the hearing, Judge Adler, in a written decision dated November 13, 2006, denied Petitioner's motion to suppress.

Judge Adler determined Petitioner was lawfully stopped upon P.O. Miedreich observing that Petitioner and Cruz matched the description of two individuals depicted in a photograph generated from surveillance videos in connection with the investigation of a burglary in the immediate area. P.O. Meidreich noted that as he drove his marked vehicle by the Petitioner and Cruz, they changed their direction three times and they continued to look over their shoulders in the direction of his marked patrol vehicle. Based upon the photographs and his observations of Petitioner and Cruz, P.O. Miedreich had at a minimum a common law right of inquiry. The situation slowly matured into probable cause to arrest upon the recovery of jewelry, currency and other items.

Soon after stopping the Petitioner and Cruz, P.O. Miedreich was joined by Detectives Kevin Donnelly ("Det. Donnelly") and Matthew Kittelstad, and Police Officers Michael Perry ("P.O. Perry") and Michael Gordon ("P.O. Gordon"). The officers similarly recognized the Petitioner and Cruz as fitting the description of the individuals depicted in several burglary related surveillance photographs. P.O. Perry asked Petitioner for identification. As Petitioner reached into his right rear pants pocket to retrieve his wallet, a watch fell to the ground. P.O. Perry not only noticed the watch on the ground but also noticed that Petitioner was wearing another watch on his wrist. With the consent of the Petitioner, P.O. Perry searched and discovered several items from Petitioner's person, including three watches, cameras, a Tiffany green bag, and a black bag containing coins.

As P.O. Perry spoke to Petitioner, P.O. Gordon spoke to Cruz. Cruz stated he was in the area looking for an apartment but did not have any pre-arranged appointments, was knocking on doors to see if apartments were available, and incorrectly identified Petitioner as his brother. Upon searching Cruz, officers recovered a green jewelry box and a large sum of foreign currency. While the officers were talking to the Petitioner and Cruz, Keith Lawson ("Lawson"), the superintendent of a nearby Lake Street apartment building, identified Petitioner and Cruz as two individuals who were inside his

apartment building. Petitioner and Cruz were not known to be residents of the building. The identification by Lawson was deemed witness initiated and not subject to police suggestiveness.

Petitioner and Cruz were placed in custody and taken to the White Plains Police Department headquarters ("WP Headquarters"). At WP Headquarters, Detective Brian Hembury ("Det. Hembury") met with Cruz. After being read *Miranda* warnings and acknowledging his rights,[3] Cruz admitted to participating in a burglary in the White Plains area. Det. Hembury aslo met with Petitioner and read him *Miranda* warnings. In response, Petitioner informed he did not want to make a statement until such time as he was given an opportunity to first speak with Cruz.

From the moment Petitioner and Cruz were detained and transported to WP Headquarters, police departments in the adjoining areas were being notified and asked to search their records for prior reports of burglaries, and to try to find witnesses to those burglaries. In addition, search warrants were in the process of being worked on and drafted. Detective Vincent Tilson ("Det. Tilson"), of the Yonkers Police Department, went to the WP Headquarters where he meet Petitioner and Cruz. Det. Tilson recognized them as two individuals involved in a Yonkers burglary as seen on a surveillance video. Detective Christopher Deering ("Det. Deering"), of the Yonkers Police Department, also identified Petitioner and Cruz as individuals involved in a Yonkers burglary from photographs he obtained and observed from surveillance cameras. Thereafter, Det. Deering obtained a search warrant for Cruz's home. Det. Deering obtained several items, including a safe, from Cruz's home. As Det. Deering was carrying the safe past Petitioner and Cruz, he overheard Petitioner tell Cruz, "they got the safe." Petitioner's statement, "they got the safe," was deemed a spontaneous statement and not the result of custodial interrogation.

[3] Cruz signed a card wherein he acknowledged receiving and understanding his *Miranda* warnings.

After Petitioner was detained on January 19, 2006, several police officers conducted multiple photo arrays wherein Petitioner was identified by civilian witnesses as an individual seen at or near the scene of a burglary. While Petitioner argued that the identification procedures were impermissible, the court determined they were not unduly suggestive. The court noted the arrays consisted of photographs of individuals similar in age and general appearance of the Petitioner. The Court also found the officers who conducted the photo array identifications acted reasonably and proper. There was no evidence to suggest the procedures were improperly conducted or unduly suggestive.

Regarding statements made by Petitioner to police, the court determined statements made by Petitioner to P.O. Miedreich during his investigatory inquiry did not constitute custodial interrogation and not subject to suppression.[4] The statement made by both Petitioner and Cruz while in the holding cell regarding the safe was not prompted by police inquiry or by an act designed to elicit a remark nor a response. The statement was therefore not subject to suppression. The Court also determined that Petitioner's statement to Det. Hembury, while at WP Headquarters, that his name was Sedrick Watson and that he did not want to make a statement or speak to the police until he was given an opportunity to first speak to Cruz, was made voluntarily, knowingly and intelligently after being appraised of and waiving his right against self-incrimination, and his right to counsel.

Petitioner and co-defendant Cruz were tried before a jury in New York State Supreme Court, Westchester County. The trial was conducted over the course of several days. Among the residential premises burglarized were: 30 Windsor Terrace, White Plains, NY; 1 Georgia Avenue, Bronxville, NY; 411 Bronx River Road, Yonkers, NY; 541 Pelham Road, New Rochelle, NY; 279 North Broadway, Yonkers, NY; 25 Sunnyside Drive, Yonkers, NY; 525 Bronxville Road, Yonkers, NY: 632 Palmer Road, Yonkers, NY; and 15 Lake Street, White Plains, NY.

[4] Petitioner stated to P.O. Miedreich that he and Cruz were from the Bronx and were lost. The statement contradicted what Cruz told police.

The prosecution presented in excess of twelve witnesses, video surveillance footage and photos, and physical evidence concerning approximately nine burglaries in and about Westchester County. The eyewitnesses included individuals who placed the Petitioner and /or Cruz at or in the immediate vicinity of the burglary sites. Along with physical evidence recovered from Petitioner and co-defendant, evidence related to the burglaries was recovered pursuant to a search warrant from Cruz's apartment. Although Petitioner and Cruz were charged with twenty-four burglary counts, at the conclusion of the trial only ten burglary counts were submitted to the jury. After deliberating, Petitioner and Cruz were convicted of ten counts of Burglary in the Second Degree and two counts of Criminal Possession of Stolen Property in the Fifth Degree.[5]

Petitioner and co-defendant appealed their convictions to the New York State Supreme Court, Appellate Division, Second Judicial Department ("Appellate Division"). In an opinion, dated May 18, 2012, their appeal was denied. Petitioner and co-defendant sought leave to appeal to the New York State Court of Appeals, the state's highest court.[6] Leave to appeal was denied on September 17, 2010.

In his petition, Petitioner raises many of the same issues and similar arguments asserted in his post-conviction motions and in his counseled brief to the Appellate Division. Petitioner sough to vacate his conviction on the basis that: (1) the trial court erred by finding probable cause because the court's ruling was inconsistent with *Mapp v. Ohio* and thus all evidence was obtained in violation of the Fourth Amendment; (2) the trial court erred by allowing the prosecution to introduce at trial false evidence,

[5] Following their conviction , Petitioner and co-defendant filed motions to vacate their conviction pursuant to NYS C.P.L §§ 330 and 440 on the grounds of, *inter alia*, the judgment was obtained by duress, misrepresentation and or fraud by the prosecution, false evidence was presented at trial, new evidence was discovered post-trial which could not have obtained through due diligence prior to trial, the convictions were obtained in violation of defendants constitutional rights, prosecutorial misconduct and ineffective assistance of counsel. Petitioner and co-defendant's post-trial motions seeking to vacate their convictions were denied. See, State Trial Court Record.

[6] On Direct Appeal, Petitioner argued that the trial court erred by not suppressing the physical evidence recovered from the warrantless arrest and the subsequent searches; the trial court erred by allowing Cruz's attorney to represent Cruz despite the existence of an alleged conflict of interest; and, the prosecutor's closing argument improperly bolstered the credibility of police and improperly served as direct testimony. Each of Petitioner's contentions were denied. See State Court Appellate Record.

perjured testimony, and illegally obtained evidence from the Petitioner's person; (3) the trial court erred by allowing the prosecution to suppress exculpatory information; and (4) petitioner was deprived of effective assistance of counsel "by proxy" because of his co-defendant's counsel's conflict of interest.[7] *(See* Petitioner's Memorandum of Law). Many of the arguments raised were previously rejected by the trial and the appellate courts.

On February 8, 2018, MJ Davison issued an R & R recommending that this Court deny the petition for a Writ of Habeas Corpus. MJ Davison found: the lower court's finding of probable cause was consistent with *Mapp v. Ohio* and established federal law; allegations of prosecutorial misconduct were unsupported and thus meritless, not properly exhausted and procedurally barred; and Petitioner's claim of ineffective assistance of counsel was meritless, procedurally barred under state law and deemed exhausted. On February 28, 2018, Petitioner filed timely objections to the R & R.

STANDARD OF REVIEW

A magistrate judge may "hear a pretrial matter dispositive of a claim or defense" if so designated by a district court. See Fed. R. Civ. P. 72(b)(1); accord 28 U.S.C. § 636(b)(1)(B). In such a case, the magistrate judge "must enter a recommended disposition, including, if appropriate, proposed findings of fact." Fed. R. Civ. P. 72(b)(1); accord 28 U.S.C. § 636(b)(1). Where a magistrate judge issues a report and recommendation, the following statute applies:

> [w]ithin fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(2), (3). However, "[t]o accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need

[7] Petitioner claims that counsel for co-defendant Cruz also represented an individual, Jorge Guzman, in another criminal action, who was accused of committing similar burglaries in the Bronx and Westchester County. Petitioner asserts that counsel's dual representation of Cruz and Jorge Guzman constituted a conflict in Petitioner's case.

only satisfy itself that there is no clear error on the face of the record." *Wilds v. United Parcel Serv., Inc.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003) (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985)); accord *Caidor v. Onondaga County*, 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision.") (quoting *Small v. Sec. of HHS*, 892 F.2d 15, 16 (2d Cir. 1989)); see also Fed. R. Civ. P. 72 advisory committee note (1983 Addition, Subdivision (b)) ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.").

To the extent a party makes specific objections to an R & R, those objections must be reviewed *de novo*. 28 U.S.C. 636(b)(1); Fed. R. Civ. P. 72(b); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). In *de novo* review, a district court must consider the "[r]eport, the record, applicable legal authorities, along with Plaintiff's and Defendant's objections and replies." *Diaz v. Girdich*, No. 04-cv-5061, 2007 U.S. Dist. LEXIS 4592, at *2 (S.D.N.Y. Jan. 23, 2007) (internal quotation marks omitted). But to the extent "a petition makes only general and conclusory objections . . . or simply reiterates the original arguments, the district court will review the report and recommendations strictly for clear error." *Harris v. Burge*, No. 04-cv-5066, 2008 U.S. Dist. LEXIS 22981, at *18 (S.D.N.Y. Mar. 25, 2008). The distinction turns on whether a litigant's claims are "clearly aimed at particular findings in the magistrate's proposal" or are a means to take a "'second bite at the apple' by simply relitigating a prior argument." *Singleton v. Davis*, No. 03-cv-1446, 2007 U.S. Dist. LEXIS 3958, at *2 (S.D.N.Y. Jan. 18, 2007) (citation omitted).

DISCUSSION

In his objection to the R & R, Petitioner merely attempts to rehash the same contentions raised in his petition and previously before the appellate state courts. Petitioner makes general and conclusory objections without indicating which determinations of MJ Davison were erroneous or not

supported in law. Thus, based upon a review for clear error, the Court finds no clear error and adopts the findings and conclusions contained within the R & R.

To the extent Petitioner makes specific objections to the R & R, the Court undertakes *de novo* review.

Probable Cause

Petitioner contends that the trial court erred by finding probable cause because it was inconsistent with *Mapp v. Ohio* and thus all evidence was obtained in violation of the Fourth Amendment. *(See* MJ Davison R & R at 15.) The Second Circuit has held:

> [F]ourth amendment claims in habeas petitions would be undertaken in only one of two instances: (a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process.

Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977). New York provides adequate procedures to redress Fourth Amendment violations; therefore, Petitioner's claims are reviewed only if he demonstrates that there was an "unconscionable breakdown" in corrective mechanisms. MJ Davison found that Petitioner utilized New York's procedure for litigating Fourth Amendment claims and took advantage of multiple forums. *(See* MJ Davison R & R at 22-25.) Both the trial court and the Appellate Division fully considered and rejected Petitioner's probable cause claims. *(Id.)* MJ Davison found that there was no unconscionable breakdown in the corrective process, thus Petitioner is not entitled to federal review of his claim. Moreover, it is the Court's finding that the state courts' probable cause determinations were consistent with existing federal law.

Prosecutorial Misconduct

Petitioner contends that he is entitled to habeas relief because there was prosecutorial misconduct during his trial. *(See* MJ Davison R & R at 25.) Specifically, Petitioner contends that the prosecution used false evidence, perjured testimony, and illegally obtained evidence found on the

Petitioner. *(Id.)* Furthermore, the prosecution purportedly suppressed exculpatory information about the arrest of Jorge Guzman who was prosecuted for similarly-styled burglaries. *(Id.)*

It is well settled that a federal court may not grant habeas relief unless the petitioner has first exhausted his or her claims in state court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b)(1). A review of the record indicates Petitioner made similar claims of prosecutorial misconduct at the trial court level. The record further reflects that Petitioner did not allege prosecutorial misconduct on direct appeal to the intermediate appellate state court level. Thus, in accordance with *O'Sullivan*, the claim was not properly exhausted.

In the R & R, MJ Davison similarly found Petitioner's prosecutorial misconduct claims to be unexhausted and therefore barred from federal review.[8] *(Id.* at 25-35.) Furthermore, Petitioner's claim of prosecutorial misconduct is framed in conclusory fashion and no evidence has been proffered in support of the claim. Lastly, as MJ Davison found, the Petitioner did not allege any facts to support a motion to extend the time limit nor made any showing of cause or prejudice to overcome the procedural bar. *(Id.)* This Court adopts the legal analysis and conclusion of the R & R, and deems the claim meritless.

Ineffective Assistance of Counsel

Petitioner contends that he was deprived of effective assistance of counsel "by proxy" because of his co-defendant's counsel's perceived conflict of interest. *(Id.* at 35.) He alleges his trial counsel was ineffective because he was tried alongside co-defendant Cruz, whose counsel, Mr. Zappo, represented Jorge Guzman, a person accused of and prosecuted for committing similarly

[8] In circumstances where a petitioner fails to exhaust his claims in state court, but the state court would find those claims procedurally barred if petitioner were to subsequently pursue them, the claims are procedurally defaulted from federal habeas review. See *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); See also *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997) ("For exhaustion purposes federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred.") (internal quotations omitted). A procedurally barred claim may be deemed exhausted by a federal habeas court. See, e.g., *Reyes*, 118 F.3d at 139.

styled burglaries. Petitioner further alleged that his defense was tainted because of an alleged "spillover effect."

Petitioner raised similar ineffective assistance of counsel claims before the state trial and appellate court. The Appellate Division held that Petitioner's arguments concerning an alleged conflict of interest and ineffective assistance of counsel are "based on matter dehors the record and, therefore, cannot be reviewed on direct appeal." *People v. Brewer*, 73 AD3d 1199 (2d Dept. 2010) citing *People v. Finch*, 279 A.D.2d 588 (2d Dept. 2001); *People v. Joseph*, 266 A.D.2d 237 (2d Dept. 1999). The claims were rejected as meritless by both courts.

In February 2011, Petitioner filed a subsequent motion entitled "Writ of Error Coram Nobis" wherein he sought to renew his motion for ineffective assistance of counsel claim. The trial court once again denied Petitioner's motion. The court determined, *inter alia*, the claim was raised untimely and therefore procedurally barred, and lacking in merit. *(Id.* at 35- 40.) Furthermore, MJ Davison found that Petitioner did not allege any facts to support a motion to extend the time limit nor made any showing of cause or prejudice to overcome the procedural bar. *(Id.)* This Court agrees.

CONCLUSION

For the reasons stated above, the Court adopts MJ Davison's R & R analysis and conclusions of law in its entirety. The Petition for a Writ of Habeas Corpus is DENIED. The Court respectfully directs the Clerk of Court to enter Judgment consistent with the R & R (dismissing the petition), to mail a copy of this Order and subsequent judgment of dismissal to Petitioner at the last address listed on ECF, and to show proof of service on the docket.

As Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not be issued. *See* 28 U.S.C. § 2253(c)(2); *Love v. McCray,* 413 F.3d 192, 195 (2d Cir. 2005); *Lozada v. United States,* 107 F.3d 1011, 1017 (2d Cir. 1997), *abrogated on other grounds by United States v. Perez,* 129 F.3d 225, 259-60 (2d Cir. 1997). The Court certifies

pursuant to 18 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States,* 369 U.S. 438, 444-45 (1962).

Dated: December 20, 2018
White Plains, New York

SO ORDERED,

Nelson S. Román
United States District Judge, SDNY

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