No. _____

IN THE

Supreme Court of the United States

WILLIAM REYES,

Petitioner,

v.

SUPERINTENDENT ROBERT E. ERCOLE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 21, 2020

QUESTION PRESENTED

Is a defendant deprived of his right to due process of law when he would not have been convicted had perjury not been introduced at his trial?

In this action brought pursuant to 28 United States Code ("U.S.C.") §2254, the District Court found that the complaining witness, the sole individual other than Petitioner who knew whether a sexual encounter between the two of them was rape or consensual, committed perjury at trial. The District Court also concluded that had the perjury not been admitted at Petitioner's state-court trial, there was a reasonable likelihood that he would not have been convicted. Nevertheless, the District Court denied relief because there was no evidence that the prosecution knew (or should have known) that the testimony was false. 16a-14a, 15a-16a. The Second Circuit affirmed, agreeing with the District Court that there was no clearly established law of this Court that the New York State court had applied unreasonably. As a result, there was no basis for relief under the deferential standard of review set forth in 28 U.S.C. 2254(d)(1). 1a-2a.

The question presented is whether a conviction that was obtained based on perjury violates due process, even absent a showing that the prosecution knew or should have known that the testimony was false.

STATEMENT OF RELATED PROCEEDINGS

- *William Reyes v. Superintendent Robert E. Ercole,* No. 18-1126, 785 Fed. App'x 26 (2d Cir. Nov. 25, 2019)(Decision affirming District Court's denial of petition for writ of habeas corpus).

- *William Reyes v. Superintendent Robert E. Ercole,* No. 06-civ-5525 (SHS), 2018 W.L. 1517204 (S.D.N.Y. Mar. 27, 2018)(Opinion & Order of the District Court denying petition for writ of habeas corpus).

- *People of the State of New York v. William Reyes*, No. M-438, 4258/02 (App. Div. 1st Dept. Mar. 5, 2015)(Certificate of the Supreme Court of the States of New York, Appellate Division: First Department denying leave to appeal denial of motion to vacate conviction).

- *People of the State of New York v. William Reyes*, No. 4958/02 (New York Sup. Ct. Dec. 23, 2013)(Order of the Supreme Court of the State of New York, denying motion to vacate conviction on ground of ineffective assistance of counsel).

- *People of the State of New York v. William Reyes*, No. 4958/02 (New York Sup. Ct. July 16, 2013)(Order of the Supreme Court of the State of New York denying motion to vacate conviction on grounds of actual innocence and due process violation by admission of perjury and granting hearing on claim of ineffective assistance of counsel).

- *William Reyes v. Superintendent Robert E. Ercole*, No. 06-civ-5525 (SHS), 2011 W.L. 1560800 (S.D.N.Y. Apr. 25, 2011)(Memorandum Opinion & Order of the District Court Southern District of New York denying request for evidentiary hearing).

- *William Reyes v. Superintendent Robert E. Ercole*, No. 09-1510-pr (2d Cir. Nov. 19, 2009)(Order of the United States Court of Appeals for the Second Circuit on motion for certificate of appealability remanding to the District Court for additional fact finding).

- *William Reyes v. Superintendent Robert E. Ercole*, No. 06-civ-5524 (SHS), 2009 WL 790104 (S.D.N.Y. Mar. 25, 2009)(Order of the District Court Southern District of New York adopting Magistrate Judge's Report and Recommendation and denying petition for writ of habeas corpus).

- *William Reyes v. Superintendent Robert E. Ercole*, No. 06-civ-5524(SHS)(KNF), 2009 WL 790104 (S.D.N.Y. Mar. 25, 2009) (Report and Recommendation of Southern District of New York Magistrate Judge

recommending that the District Court Southern District of New York deny petition for writ of habeas corpus).

- *William Reyes v. Superintendent Robert E. Ercole*, No. 06-civ-5525(SHS)(KNF), 2009 WL 2971471 (July 31, 2008)(Memorandum and Order of Magistrate Judge Southern District of New York denying request to stay petition and granting permission to amend petition).

- *People of the State of New York v. William Reyes*, No. 4958/02 (New York Sup. Ct. July 5, 2006)(Order of the Supreme Court of the State of New York denying motion to vacate plea pursuant to New York Criminal Procedure Law 440.10).

- *People of the State of New York v. William Reyes*, 5 N.Y.3d 768, 801 N.Y.S.2d 262, 834 N.E.2d 1272 (2005)(Order of the New York State Court of Appeals, denying leave to appeal).

- *People of the State of New York v. William Reyes*, 17 A.D.3d 205, 206, 794 N.Y.S.2d 14, 15 (App. Div. 1st Dept. 2005)(Decision of the Supreme Court of the State of New York, Appellate Division: First Department affirming conviction).

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PETITION FOR A WRIT OF CERTIORARI

William Reyes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in Case No. 18-1126-cr.

OPINIONS OF THE COURTS BELOW

This case was before the United States Court of Appeals for the Second Circuit twice. The Circuit Court's final decision affirming the denial of a writ of habeas corpus, which forms the basis for this petition, was issued as a summary order on November 25, 2019. Appendix ("A") at 1a. The summary order has no official citation. The unofficial citation is *Reyes v. Ercole*, 785 Fed. App'x. 26 (2d Cir. November 25, 2019.) *Id.* The District Court's opinion and order has no official citation. The unofficial citation is *Reyes v. Ercole*, 06-civ-5525 (SHS), 2018 W.L. 1517204 (S.D.N.Y. Mar. 27, 2018). 1a.

The Second Circuit had previously remanded the case to the United States District Court for the Southern District of New York for additional fact finding. 31a. That order was not reported. The District Court's initial order denying the petition has no official citation. The unofficial citation is *Reyes v. Ercole*, 06-civ-5525 (SHS), 2009 W.L. 790104 (S.D.N.Y. Mar. 25, 2009). 33a.

JURISDICTION

On November 25, 2019, the United States Court of Appeals for the Second Circuit issued a summary order affirming the judgement of the District Court, denying William Reyes's petition for a writ of habeas corpus under 28 U.S.C. §2254.

1a. This Court has jurisdiction to decide this petition pursuant to 28 U.S.C. §1254 (1), which provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows: "No person shall be ... deprived of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

For eighty-five years this Court has recognized that a conviction secured by the knowing use of perjury is fundamentally unfair. *Mooney v. Holohan*, 294 U.S. 103, 110 (1935). In such circumstance reversal is virtually automatic. If there is any reasonable likelihood that the tainted evidence could have affected the outcome, the conviction cannot stand. *United States v. Agurs*, 427 U.S. 97, 103-04 (1976). This remedy is imposed not to punish "society for misdeeds of prosecutor" but to avoid "an unfair trial of the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In spite of the prudential underpinnings for this rule, courts in this country routinely uphold convictions tainted by perjury because defendants are unable to demonstrate that prosecutors did something wrong – that they knew or should have known that

testimony that was vital to a conviction was false. Petitioner's conviction is one such case.

The History of the Case

On July 11 2003, Petitioner William Reyes was convicted in New York State Supreme Court of one count of rape in the first degree and two counts of sexual assault in the first degree in violation of New York Penal Law Sections 130.35(1) and 130.65(1), respectively.[1] His conviction was based on the testimony of the complainant who claimed that Petitioner had forcibly raped her at a concession stand at the tour boat company where they both worked. No one else witnessed the encounter, and Petitioner testified that he and the complainant had had consensual sex.

Following a trial by jury, Petitioner was convicted on all counts. He unsuccessfully challenged his conviction on direct appeal in the New York state courts.

After his conviction became final, Petitioner brought a collateral proceeding in New York State Supreme Court pursuant to New York Criminal Procedure Section Law 440.10. He argued, *inter alia*, that newly discovered evidence demonstrated that the complainant had committed perjury at trial in violation of his right to due process under the New York State and United States Constitutions. The court denied the motion in an order dated July 5, 2006. 70a. The court found Petitioner's arguments

[1]Petitioner has served his term of incarceration but remains subject to supervision on parole.

meritless for two reasons: He had not been diligent in uncovering the evidence, and the information he claimed showed that the complainant had committed perjury was not material because it did not prove that he was innocent but was "merely impeachment material." 74a, 75a-77a.

The Habeas Petition and Subsequent Proceedings

On July 21, 2006, Petitioner filed a *pro se* application for a writ of habeas corpus pursuant to 28 U.S.C. §2254. 59a. Counsel was appointed on April 16, 2008. Through an amended petition filed by counsel, Petitioner challenged his conviction in federal court on several grounds, including that his right to due process had been violated by the admission of perjury at his trial. The New York state 440 court's decision to the contrary had involved an unreasonable application of clearly established federal law.

The Magistrate Judge recommended that the writ be denied, finding that even assuming that the prosecution had knowingly offered perjured testimony there was no reasonable likelihood that the testimony affected the judgment of the jury. 50a. The state court's determination that the evidence was not material did not involve an unreasonable application of clearly established federal law as determined by this Court. The District Court, adopting the Magistrate Judge's Report and Recommendation, denied the petition on March 25, 2009. 57a.

Petitioner moved for a certificate of appealability. The United States Court of Appeals for the Second Circuit granted the application for the purpose of remanding the case to the District Court for additional fact finding. Relevant to this petition, the

Second Circuit ordered the District Court to determine whether perjury was admitted at trial, whether the prosecutor knew or should have known of the evidence suggesting perjury and whether Petitioner waived his claim by failing to exercise due diligence to uncover the evidence in time for trial or direct appeal. 31a-32a.

On remand to the District Court, Petitioner sought a stay of the proceedings to return to state court to file a second motion to vacate his conviction. In that action he challenged his conviction on three grounds: that he was actually innocent, that perjury had been admitted at his trial in violation of his right to due process and that his trial counsel had been ineffective for failing to uncover evidence that demonstrated his innocence. 17a.

The convictions Petitioner challenges arose from his employment at the Circle Line in Manhattan during June and part of July 2002. Petitioner supervised the employees who worked at a concession stand on the pier where the company docked its boats. Petitioner testified at his trial that the he had a consensual sexual encounter with the complainant, who was someone he supervised. He met her on her first day of work while he trained her. They engaged in friendly conversation about personal matters, developed a physical attraction over the next few days and had consensual sex. 7a, 17a.

The prosecution claimed that Petitioner lured the complainant to a remote location on the pier where they worked, forcibly raped her and then returned to work. This scenario presented a problem for the state: Why would Petitioner rape someone who could easily identify him to the police? The prosecution sought to explain this by

eliciting testimony that the complainant had been sexually abused by her father. The prosecutor argued to the jury that as a result of her mistreatment by her father, the complainant was less likely than most victims to report a rape. Although Petitioner did not know about her background, the prosecutor claimed that as soon as Petitioner met her he had an intuition that she was the kind of person he could victimize with impunity.

At trial the complainant testified that Petitioner talked "fresh" to her. On a subsequent day he grabbed her cheeks and kissed her. 9a. She had no sexual interest in him at all and didn't like what happened. 11a. She testified that while she didn't complain to the bosses at the Circle Line she did make a contemporaneous report of what had happened to a social worker at the group home where she lived. 9a.

The prosecution argued to the jury that Petitioner, seeing that the complainant hadn't done anything to stop his initial advances, felt free to proceed with his plan. Having gotten away with kissing her, he believed could get away with raping her also. He found an excuse to order her to come with him to a location that was shielded from the rest of the work site. Urns for coffee, tea and hot water were missing from the concession stand. He ordered her to go with him to retrieve the items. Once they were away from the rest of the employees, he raped her.

In support of his second motion to vacate his conviction in state court, Petitioner offered six affidavits, including one from Tyesha Burroughs. Ms. Burroughs had been a resident in the same group home where the complainant resided when she was purportedly raped. Ms. Burroughs stated in her affidavit that

she was close friends with the complainant at that time. The two both lived in the same group home and worked together at the Circle Line. Ms. Burroughs affirmed that immediately preceding the supposed rape the complainant had said she thought Petitioner was "hot." 19a. Later Ms. Burroughs learned that the complainant was alleging that Petitioner raped her. Ms. Burroughs didn't believe the accusations. She knew the complainant was interested in Petitioner, and the complainant frequently made up stories. In her affidavit, Ms. Burroughs described confronting the complainant: If she had been raped she should call the police. Ms. Burroughs affirmed in her affidavit that the complainant responded that she wasn't going to call the police just yet, but she was "going to sue their asses, though."[2] 19a.

The New York State Supreme Court rejected Petitioner's claims that the affidavit he submitted established actual innocence or that the complaining witness had committed perjury. 21a. However, the court granted an evidentiary hearing to determine whether trial counsel had provided ineffective assistance. 22a.

At the hearing on his motion to vacate his conviction, Petitioner called four of the individuals who had signed affidavits. Three of the witnesses contradicted the complainant's version of events. Charise Pearson, a social worker at the group home where the complainant then resided, testified that the complainant had not reported to her that she had been sexually harassed at work. Had she made such an

[2]At trial, the complaint denied that she intended to sue Circle Line. However, after the state prosecution was concluded, the complainant did sue Circle Line's parent company and received a settlement for an undisclosed amount.

accusation, protocols in place at the home would have required Ms. Pearson to file a report about the incident. 9a.

Barbara Womack had worked at the concession stand in July of 2003 with Petitioner and the complainant. Consistent with what Ms. Burroughs had said in her affidavit, Ms. Womack testified that the complainant had been attracted to Petitioner. 19a. She "gawked" over him and gossiped with other young women at the concession stand stating that she "would do him a minute." On the day of the supposed rape, the urns used to store brewed coffee, hot water for tea and decaffeinated coffee were missing. Several employees, including Petitioner and the complainant, were together when there was a transmission over a walkie-talkie that advised them that the missing service items might be on a boat. The complainant volunteered to go along with Petitioner to get to them. Contrary to the complainant's testimony at trial, he did not order her to do so. 11a.

Rosalie Davis, who also worked at the group home where the complainant lived in 2003, testified at the hearing. Ms. Davis described a confrontation between Ms. Burroughs and the complainant. Ms. Burroughs accused the complainant of lying about the rape: Burroughs said, "You know he didn't rape you." The complainant did not deny the accusation.

Petitioner also called Delphina Cruz. Ms. Cruz had been employed as a social worker at the Children's Aid Society in New York. In addition, she had worked for a member of the New York City Council. Until 2005, Ms. Cruz had been married to the complainant's grandfather. At the complainant's request, she came to live with Ms.

Cruz and her family in 2001. The complainant bristled at any rules Ms. Cruz sought to impose. Ms. Cruz described a series of incidents that followed. The complainant said she had drugged her mother and threatened to do the same to Ms. Cruz. After one disagreement with Ms. Cruz, the complainant set fire to Ms. Cruz's bedroom.[3] Ultimately, the complainant made false allegations about Ms. Cruz to the Administration of Children's Services. She claimed that Ms. Cruz had refused to feed her and had charged the complainant's boyfriend hundreds of dollars a week to permit the complainant to live with Ms. Cruz. The accusations had proven problematic for Ms. Cruz's employment. She was prohibited from working with children. Ms. Cruz also testified that the complainant had made false allegation of sexual impropriety against others.

The prosecution called the complainant as a witness at the 440 hearing. Initially she contradicted her trial testimony that she told Charise Pearson that Petitioner had kissed her the day before raping her. 9a. On cross-examination she repeated that Petitioner had kissed her but claimed that she could not recall whether she had ever told prosecutors about reporting the unwanted touching to Ms. Pearson. In response to a question posed by the court, the complainant said that she did not remember telling anyone about the kiss. It was possible she had. 9a.

[3]At trial the complainant testified on direct examination that she had been involved in an incident at a group home during which a mattress had been set on fire. However, she denied having set the fire. Others had done it, and she had merely been present. After records related to the incident were disclosed, the prosecution had to recall the complaint. She admitted that she had been the one who set the fire. She had committed perjury by claiming otherwise because she wanted the jury to believe her.

The state court denied Petitioner's motion to vacate his conviction on the ground of ineffective assistance of counsel. The court made no explicit findings with respect the credibility of the hearing witnesses or the Burroughs affidavit. Rather, the court concluded that it was not unreasonable for trial counsel not to have interviewed the witnesses. 29a. There would have been no basis to infer that the employees of the group home or Ms. Cruz would have had evidence relevant to Petitioner's defense. *Id.* The Circle Line employees, including Ms. Womack, had been instructed not to discuss the case under penalty of being fired and therefore likely would not have been cooperative. 26a-27a. The court also dismissed the significance of the evidence that the complainant had been sexually attracted to Petitioner and that the complainant had volunteered to go retrieve the missing service items: Had Ms. Womack given such testimony "it would have supported defendant's claim that the sex that occurred was consensual, but only weakly and indirectly." 27a.

Petitioner returned to the District Court and asked for the stay to be lifted. In supplemental briefing, Petitioner argued, *inter alia*, on the basis of the evidence adduced in the 440 proceeding that the complainant had committed perjury. The District Court agreed that the complainant's testimony on three topics was deliberately false: Her testimony that she had reported to someone at the group home that Petitioner had forcibly kissed her was false. ("Subsequently adduced evidence suggests that [the complainant] did not in fact report the kiss at the time.") 9a. Her testimony that she had not volunteered to accompany Petitioner down the pier to look for the missing urns was false. ("The preponderance of the evidence suggests the most

likely explanation for the discrepancy between the accounts of [the complainant and Petitioner] is that [complainant] lied.") 11a. Her testimony that she was not attracted to Petitioner was false. ("Though the Court cannot know [the complainant's] mind with certainty, the evidence of her previous statements and behavior suggests that she perjured herself when she testified that was never attracted to [Petitioner].") 12a.

The District Court also concluded that there was a reasonable likelihood that the false testimony could have affected the judgment of the jury. 14a. Although none of the perjury went "directly to the ultimate issue of [Petitioner's] guilt or innocence, the false testimony touches on enough issues of importance" that it was "reasonable to suppose that [the perjury] could have swayed the result at trial." 14a.

The District Court nevertheless denied relief on the basis of this Court's precedent, which "dictates that even the intentional admission of materially false testimony does not make out a claim for a due process violation if the perjury was not known to the prosecution." *Id.* Since Petitioner had not demonstrated that the prosecution knew or should have known that the testimony was false, the state court had not unreasonably applied controlling federal law in denying the 440 motion.

The District Court granted a certificate of appealability on the perjury issue. The Second Circuit affirmed. In doing so, the Circuit Court rejected Petitioner's argument that the state court had not adjudicated his perjury claim on the merit. 2a. Because the claim had been adjudicated on the merits, the Second Circuit concluded that the District Court had correctly reasoned that the state court decision had to be upheld unless it was contrary to or involved an unreasonable application of clearly

established federal law as determined by this Court. *Id.* The Second Circuit further agreed with the District Court's finding that the state court correctly applied the standard articulated by this Court: Due process is violated by the admission of perjury at trial only if the prosecution knew or should have known of the perjury. *Id.*, *citing United States v. Agurs*, 427 U.S. at 103.

Since Petitioner had not provided evidence that the prosecution knew or should have known of the perjury, the Second Circuit upheld the District Court's denial of the petition. Petitioner had demonstrated that perjury that was material to the verdict had been admitted at his trial. The complainant lied at trial when she testified that she was not attracted to him. She had lied at trial when she testified that she had reported the purported unwanted kiss that according to the prosecution had been a test for whether he could rape her with impunity. She had lied at trial when she testified that he had not volunteered to accompany Petitioner to a remote location of the pier where the sexual encounter had occurred. She had lied about all these key aspects of the prosecution's case. Nevertheless, relief was not warranted.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN UNRESOLVED AND FREQUENTLY RECURRING ISSUE THAT PROFOUNDLY AFFECTS THE FAIR ADMINISTRATION OF JUSTICE

There can be little debate that when perjury is admitted at a trial, and the false testimony meets some degree of materiality, a strong possibility exists that the truth-finding function of a trial will be impaired and due process will be violated. This Court's cases have long acknowledged this fact. *See Mooney v. Holohan*, 294 U.S. at

110 (knowing use of perjury is "as inconsistent with the rudimentary demands of justice as is the obtaining of a result by intimidation."); *Mesarosh v. United States*, 352 U.S. 1, 9, 13-14 (1956)(the "dignity of the United States Government will not permit" a conviction based on perjury); *See also*, Avi Weisman, *Percoco Highlights Pre-Verdict Remedies For False Testimony*, LAW 360 (March 28, 2018)("Few would dispute that the government's reliance on false testimony in a criminal trial is a fundamental corruption of the truth-seeking mission and debases the criminal justice system.").

Empirical evidence also demonstrates the truth of the proposition that the introduction of perjury creates an unacceptable risk that an innocent person will be convicted. For example, statistics available through the National Registry of Exoneration, a joint project of the University of California Irvine Newkirk Center for Science & Society, the University of Michigan Law School and Michigan State University College of Law, document 2557 exonerations in criminal cases from 1989 to the present. Of that number, approximately 1492 convictions (58%) were obtained in part through the use perjury or because of false accusations.[4]

In spite of the obvious significance to the criminal justice system of ensuring that convictions not be based on perjured testimony, this Court has not clearly resolved whether due process is violated by a prosecutor's *unknowingly* use of perjury

[4]The Registry defines its mission as follows: THE MISSION OF THE NATIONAL REGISTRY OF EXONERATIONS is to provide comprehensive information on exonerations of innocent criminal defendants in order to prevent future false convictions by learning from past errors. https://law.umich.edu/special/exoneration/Pages/about.aspx.

at trial. *See Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006)("The Supreme Court has not yet addressed the issue of whether a due process violation occurs if a conviction is based on perjured testimony which was unknown to the prosecution at the time of trial."). This Court's cases in this area provide inconsistent guidance on how this question should be resolved.

The line of cases addressing the significance of the admission of perjury in a criminal trial began in 1935 with this Court's conclusion in *Mooney v, Holohan*, 294 U.S. at 110, that the prosecutions knowing use of perjury, which formed the sole basis for conviction, violated due process.

Two decades later in *Mesarosh v. United States*, 352 U.S. at 9, the Court vacated petitioners' convictions because perjury *might* have been admitted at their trial even though the prosecution did not know that the testimony was false when it was offered. The petitioners in *Mesarosh* were convicted of conspiring to overthrow the government. The Third Circuit affirmed the convictions, and this Court granted certiorari. Before the case was heard, the government discovered that one of its seven trial witnesses had testified falsely at other proceedings. While the government did not concede that the witness had committed perjury at petitioners' trial it nevertheless argued that given the circumstances the case should be remanded to the District Court for additional fact finding. Petitioners sought a new trial.

This Court agreed that a new trial was warranted even though there was no indication that the government had behaved improperly in any way. The relevant inquiry was not the conduct (or knowledge) of the government but the reliability of

the convictions. Since the witness's credibility had been "wholly discredited" the convictions were "tainted, and there [could] be no other just result than to accord petitioners a new trial." *Id.* at 9.

In a related context, this Court's focus in *Brady v. Maryland*, 373 U.S. at 87, was similarly on whether a defendant had received a fair trial rather than on whether the prosecution had behaved improperly. *Brady* did not concern the admission of perjury. Rather, the prosecutor in *Brady* refused to turn over information the defense requested that would have supported his plea for leniency in his capital trial. This Court reversed *Brady's* conviction, holding that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* The Court noted that the principle that had motivated its decision in *Mooney v. Holohan* was "not punishment for misdeeds of a prosecutor but avoidance of unfair trial to the accused."

This Court continued to apply the same analysis in *Giglio v. United States*, 404 U.S. 150 (1972). In *Giglio* a government witness, the defendant's co-conspirator, testified falsely at trial that he had received no promises in exchange for his cooperation. In fact, the initial Assistant United States Attorney who handled the case had told the witness that if he testified before the grand jury and at trial, he would not be prosecuted for his participation in the offense. The government attorney who tried the case apparently was unaware of the promise and did nothing to correct the false testimony. Giglio learned of the perjury after his conviction and sought a

new trial. This Court reversed the conviction. The fact that the trial prosecutor did not know that the witness's testimony was false was irrelevant. The witness's testimony was key to the government's ability to obtain a conviction. His "credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 155.

After *Brady* and *Giglio* it seemed clear that the admission of perjury at a defendant's trial violated due process if the evidence was sufficiently important to the verdict, irrespective of whether the prosecuting authority knew the evidence was false. Due process was also violated if the prosecution inadvertently or otherwise withheld material evidence. This Court's decision in *United States v. Agurs*, 427 U.S. 97 (1976), muddied the waters.[5]

Agurs, like *Brady*, involved a prosecutor's failure to disclose potentially exculpatory evidence to the defense. Linda Agurs stabbed James Sewell to death. At trial, she argued that Sewell had originally attacked her with the knife. She had stabbed him in self-defense. After her conviction, Agurs discovered that Sewell had a prior criminal record that would have shown his violent character. She sought on new trial, arguing that the prosecution's failure to disclose that evidence violated her right

[5]See Ann Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116:2 PENN. STATE L. REV. (2011) ("Poulin")(concluding that in *United States v. Agurs,* 427 U.S. 97 (1976), this Court equated the materiality requirement for both false-testimony and non-disclosure cases in disregard of *Giglio v. United States*, 405 U.S. 150 (1967), leading to a requirement unsupported by prior case law that a defendant must demonstrate "a high level of government knowledge "to obtain relief in a false-testimony case.

to due process. The District Court rejected the government's argument that it had no duty to disclose the evidence unless the defense requested the information. However, the court found the prior conviction didn't add anything to the defense that was not already apparent from the uncontradicted evidence, including the fact that Sewell carried two knives on the night of his death.

The Ninth Circuit reversed. Although there had been no misconduct on the part of the prosecutor, a new trial was required because the jury "might have returned a different verdict if the evidence had been received." *Id.* at 102. Finding that the Circuit Court's decision represented "a significant departure from this Court's prior holdings", this Court reversed. *Id.* at 103.

The specific issue this Court resolved in *Agurs* was whether the prosecution has a duty to disclose exculpatory material to the defense and, if so, what standard of materiality gives rise to that duty. *Id.* at 105. However, in resolving that question, this Court characterized *Mooney* as a non-disclosure case and the *Mooney* line of cases as involving perjured testimony of which the prosecution "knew or should have known." By so doing, the Court blurred the lines between the *Mooney* line of case (admission of perjury) and the *Brady* line of cases (the undisclosed evidence demonstrates that the prosecutor's case incudes perjured testimony and that the prosecutor suppressed evidence favorable to the accused upon request). Subsequently, courts, including the Second Circuit have cited *Agurs* for the proposition that due process is not violated by the admission of perjury, even if it is essential to the verdict, unless the prosecution knew or should have known that the

testimony was false. *Reyes v. Ercole*, 758 Fed. App'x at 27. There is no clear case law from this Court that contradict that reading of *Agurs*, which is inconsistent with this Court's holdings in *Mesarosh* and *Giglio*.

As this Court stated more than 60 years ago in *Mesarosh v. United States,* the government "of a strong and free nation does not need convictions based upon [perjury]. It cannot afford to abide with them. *Mesarosh*, 352 U.S. at 14. The lack of a specific holding by this Court that due process is violated by the admission of perjury that is material to the verdict even if the prosecution does not know of the falsity of the evidence creates an unacceptable risk that such conviction will continue to occur.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 21, 2020

Respectfully submitted,

_____/s/_____
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APPENDIX

785 Fed.Appx. 26 (Mem)
This case was not selected for publication in West's Federal Reporter.

United States Court of Appeals, Second Circuit.

William REYES, Petitioner–Appellant,
v.
Superintendent Robert E. ERCOLE, Respondent–Appellee.

No. 18-1126
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November 25, 2019

Appeal from a judgment of the United States District Court for the Southern District of New York (Stein, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment is **AFFIRMED**.

Attorneys and Law Firms

For Appellant: Stephanie M. Carvlin, Law Office of Stephanie M. Carvlin, New York, NY

For Appellee: Lisa Ellen Fleischmann, Assistant Attorney General of Counsel (Nikki Kowalski, Deputy Solicitor General for Criminal Matters, on the brief), for Barbara D. Underwood, Attorney General for the State of New York, New York, NY

PRESENT: ROBERT D. SACK, PETER W. HALL, JOSEPH F. BIANCO, Circuit Judges.

SUMMARY ORDER

Petitioner–Appellant William Reyes appeals from a judgment of the U.S. District Court for the Southern District of New York (Stein, *J.*), entered March 26, 2018, denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Reyes claimed that the admission of perjury at his state court trial violated his right to due process. We assume the parties' familiarity with the underlying facts and procedural history.

"We review a district court's legal conclusions in denying a habeas petition *de novo* and its factual findings for clear error." *Drake v. Portuondo*, 553 F.3d 230, 239 (2d Cir. 2009) ("*Drake II*"). "Under the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), a federal habeas court must apply a deferential standard of review to 'any claim that was adjudicated on the merits in State court.' " *Drake v. Portuondo*, 321 F.3d 338, 343 (2d Cir. 2003) ("*Drake I*") (quoting 28 U.S.C. § 2254(d)).

" 'Adjudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001). We presume that a state court adjudicates a state prisoner's federal claim on the merits when there is no "clear and express statement of reliance on a state procedural bar" or other ground. *Jimenez v. Walker*, 458 F.3d 130, 145 (2d Cir. 2006); *see also Parker v. Ercole*, 666 F.3d 830, 834 (2d Cir. 2012) (citing *Jimenez* for the proposition that "absent a clear and express statement of reliance on a state procedural bar, we presume that a cursory state court decision rests on the merits of the federal ***27** claim" (brackets and quotation marks omitted)).

Regarding Reyes' perjury claim, the state court held:

> The claim that the prosecutor knowingly utilized perjured testimony to obtain his conviction may be dismissed out of hand. Assuming for the sake of argument that Ms. Martinez testified falsely, defendant provides no basis to believe that the prosecutor was aware or had reason to know that she did so.

J. App'x 1573. Reyes argues that the state court did not decide his perjury claim on the merits because the court did not decide whether the complaining witness committed perjury. We disagree. There is nothing in the state court decision to suggest that the court rejected Reyes' perjury claim on the basis of a procedural bar or alternate ground. *See, e.g.*, *Ortega v. Duncan*, 333 F.3d 102, 105-06 (2d Cir. 2003) (holding no AEDPA deference where state court rejected a perjury claim on the alternate ground that the issues surrounding potentially perjured testimony would not lead the jury to reach a different verdict in a new trial because of a new witness testimony). The state court rejected Reyes' perjury claim because Reyes did not prove one of the requisite elements of a due process claim in this context (that the prosecutor had, or should have had, knowledge that Martinez testified falsely). Because the state court did not resolve the element of whether perjury occurred, we do not presume that finding to be correct, but we still consider the perjury claim to have been resolved on the merits. *See Channer v. Brooks*, 320 F.3d 188, 195 (2d Cir. 2003) (per curiam) ("[W]here a state court does not resolve a question of fact, no presumption of correctness can possibly attach with respect to that issue.").

Faced with a state court decision on the merits, we apply AEDPA's deferential standard. Under this standard, no federal habeas relief is available unless the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[Clearly established Federal law] refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Here, the state court rejected Reyes' perjury claim because, as noted above, the "defendant provide[d] no basis to believe that the prosecutor was aware or had reason to know" that Martinez testified falsely. This is the standard the Supreme Court articulated in *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) ("[T]he prosecution knew, or should have known, of the perjury...."). [1] The District Court determined that these findings were reasonable, and Reyes does not appeal this issue. *Reyes v. Ercole*, No. 06-CV-5525 (SHS), 2018 WL 1517204, at *13 (S.D.N.Y. Mar. 27, 2018). Applying AEDPA's deferential standard, therefore, no federal habeas relief is available to Reyes.

[1] In a prior case, we suggested that the "should have known" piece of the *Agurs* standard is dictum and, therefore, not clearly established Supreme Court precedent. *Drake I*, 321 F.3d at 345; *see also Drake II*, 553 F.3d at 240. We decline to address that issue here as it is not necessary to resolve this appeal.

We have reviewed Reyes' remaining arguments and find them to be without merit. The judgment of the District Court is **AFFIRMED**.

All Citations

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

William REYES, Petitioner,
v.
Superintendent ERCOLE, Respondent.

06-Cv-5525 (SHS)
|
Signed 03/26/2018
|
Filed 03/27/2018

Attorneys and Law Firms

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OPINION & ORDER

SIDNEY H. STEIN, U.S. District Judge

***1** Petitioner William Reyes was convicted of rape and sexual abuse in New York state court in 2003 and sentenced to eighteen years in prison. He filed this petition in 2006 pursuant to 28 U.S.C. § 2254. After this Court denied the petition in 2009, the U.S. Court of Appeals for the Second Circuit granted Reyes a certificate of appealability for the limited purpose of remanding the case for further consideration of the merits of two of petitioner's claims, which alleged due process violations resulting from (1) perjury at trial and (2) withholding of exculpatory evidence in disregard of *Brady v. Maryland*, 373 U.S. 83 (1963). The Second Circuit also directed the Court to make factual findings on three matters relevant to those claims.

For the reasons set forth below, the Court denies Reyes' petition with respect to both remaining claims, but grants a certificate of appealability as to the perjury claim.

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I. Background

In the summer of 2002, petitioner William Reyes was working as a manager at the concession stand of Circle Line Cruises, a sightseeing boat company in Manhattan. He was twenty-nine years old and the father of two young daughters. Jane Martinez was a seventeen-year-old high school student with an infant son, living at Catholic Guardian Society Home, a group home for young mothers. Martinez began working at the Circle Line concession stand, under Reyes' supervision, on June 27, 2002. (*See* Trial Transcript ("Tr."), Doc. 9 at 34–38, 41–45, 348–57, 372–73, 406–07.)

***2** According to Martinez, Reyes forcibly raped her on a boat at the Circle Line pier on July 2, 2002, her fourth day on the job. Petitioner insists the sex was consensual. (*Id.* at 52–74, 352–68.) After a jury trial in New York Supreme Court, New York County (Justice Bernard Fried presiding), at which both Reyes and Martinez testified, Reyes was convicted of rape in the first degree and two counts of sexual abuse in the first degree. (*Id.* at 555–58.) He was sentenced to eighteen years in prison. (Sentencing Transcript, addendum to Doc. 9 at 29.)

After an unsuccessful direct appeal,[1] Reyes moved *pro se* to vacate his conviction in state court based on newly discovered evidence pursuant to New York Criminal Procedure Law § 440.10(1)(g). (*See* Notice of First 440 Motion, Doc. 7 Ex. G.) Petitioner's new evidence consisted of an affidavit from Barbara Womack, a Circle Line employee contacted by Reyes' wife after the trial, and an internal investigative report or "timeline" prepared by FLIK International, Circle Line's parent company, in the aftermath of the 2002 incident. Reyes came into possession of the FLIK Report in 2004 from discovery produced in another litigation—a civil lawsuit filed by Martinez against several defendants, which apparently ended in settlement. (*See* Pet.'s Statement of Facts, Doc. 3 ¶¶ 8, 49, 57–58 & n.8.) He argued that the new evidence supported his account of the July 2 incident in various ways.

[1] *See People v. Reyes*, 17 A.D.3d 205 (1st Dep't 2005); *People v. Reyes*, 5 N.Y.3d 768 (2005).

Petitioner's Section 440 petition was denied without a hearing by Justice Ruth Pickholz of the New York Supreme Court, New York County. In a July 2006 order, Justice Pickholz reasoned that Reyes failed to exercise due diligence to uncover the report in time for trial and, further, that none of his newly proffered evidence was material or likely to change the verdict. (2006 Pickholz Order, Doc. 7 Ex. I.) The Appellate Division, First Department, denied him leave to appeal the decision. (Certificate Denying Leave, Doc. 7 Ex. L.)

Reyes filed a petition pursuant to 28 U.S.C. § 2254 in 2006, seeking a writ of habeas corpus on the basis of six claimed violations of his constitutional rights.[2] (Original 2254 Petition, Doc. 1.) The petition was referred to Magistrate Judge Kevin N. Fox, who appointed Stephanie M. Carvlin, Esq., as CJA counsel for petitioner in 2008.

[2] Petitioner argued that

> his confinement by the State of New York is unlawful because (1) his conviction was against the weight of the evidence and thus violated due process, (2) newly discovered exculpatory evidence demonstrates that his right to due process and a fair trial were denied when the prosecution's witness committed perjury, (3) the prosecutor violated the Fourteenth Amendment by failing to disclose the exculpatory evidence, (4) the trial court improperly admitted evidence of the victim's emotional response to the rape and prior history of sexual abuse into the record, (5) prosecutorial misconduct during jury selection deprived him of a fair trial by an impartial jury, and (6) his trial counsel provided ineffective assistance.

Reyes v. Ercole, No. 06-CV-5525, 2009 WL 790104, at *1 (S.D.N.Y. Mar. 25, 2009). Of these six claims, four are no longer at issue, after this Court denied relief and the Second Circuit declined to grant a certificate of appealability with respect to them.

Reyes then filed an amended petition; in 2009, this Court adopted the Report and Recommendation of Judge Fox to deny the petition and declined to grant a certificate of appealability. *Reyes v. Ercole*, No. 06-CV-5525, 2009 WL 790104, at *1 (S.D.N.Y. Mar. 25, 2009). Reyes moved for a certificate of appealability in the U.S. Court of Appeals for the Second Circuit. The Second Circuit granted his motion for the limited purpose of remanding the case for further consideration of two of petitioner's claims—based on alleged perjury and *Brady* violations—and otherwise denied the motion and dismissed the appeal. (Mandate, Doc. 38.)

***3** The Second Circuit's 2009 mandate directed this Court to make factual findings on three separate questions. Based on the decision of the United States Supreme Court in *Cullen v. Pinholster* that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," 563 U.S. 170, 181 (2011), this Court declined petitioner's subsequent request for an evidentiary hearing on remand. *Reyes v. Ercole*, No. 06-CV-5525, 2011 WL 1560800, at *2 (S.D.N.Y. Apr. 25, 2011).

This Court stayed this action for more than four years at the request of petitioner's counsel—from January 13, 2011, until April 22, 2015—to allow Carvlin and her investigator, Joseph Dwyer, to investigate further and to seek additional relief in New York state court. (*See* Endorsed Letters, Docs. 50 & 70.) During that time, petitioner filed a second Section 440 petition in New York state court, which was adjudicated and denied by Justice Pickholz. (*See* Notice of Second 440 Motion, Doc. 78 Ex. 1.) That petition advanced three claims—perjury, actual innocence, and ineffective assistance of counsel—on the basis of a series of affidavits from newly contacted witnesses who had not testified at trial. For reasons addressed in relevant detail below, Justice Pickholz denied the first two claims in a July 2013 order and the third in a December 2013 order, after hearing testimony from several witnesses over three days in October and December 2013. (*See* 2013 Pickholz Pre-Hearing Order, Doc. 78 Ex. 4; 2013 Pickholz Post-Hearing Order, Doc. 78 Ex. 6; Oct. 2013 Transcript ("H.") & Dec. 2013 Transcript ("H2"), Doc. 71 Ex. C.) The Appellate Division, First Department, subsequently denied Reyes' request for leave to appeal that decision. (*See* 4/21/15 Letter, Doc. 70.)

II. Discussion

A. Legal Standard

Reyes carries a heavy burden on this petition. The governing statute, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (internal quotation omitted). Pursuant to 28 U.S.C. § 2254(d), as amended by AEDPA:

> 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.

In Section 2254(d)(1), "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' ... refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A state court decision is "contrary to" those holdings if it "applies a rule that contradicts the governing law," or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Court's] precedent"; the decision constitutes an "unreasonable application" if it "identifies the correct governing legal rule ... but unreasonably applies it to the facts of the particular state prisoner's case," or "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 405–07. In sum, for the writ to issue, "[t]he state court decision must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (internal quotation omitted).

***4** The threshold for establishing an "an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), is also very high. Relief cannot be granted if "reasonable minds reviewing the record might disagree about the finding in question." *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (internal quotation and alteration omitted). In addition, in this Circuit a "federal habeas court must assume that all factual determinations made by the state court were correct unless the petitioner rebuts those findings by clear and convincing evidence," pursuant to 28 U.S.C. § 2254(e)(1). *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 120 (2d Cir. 2015).[3]

[3] According to Section 2254(e)(1):

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

These highly deferential standards apply here because Reyes' claims were adjudicated on the merits in state court.

As recounted above, over the course of petitioner's two Section 440 petitions, the New York County Supreme Court, Justice Pickholz, considered and rejected Reyes' arguments in a series of three detailed and substantive orders, and the Appellate Division, First Department, denied leave to appeal from those decisions. This Court therefore "looks through" those summary orders to Justice Pickholz's "reasoned state judgment," to which it must defer. *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991).

However, as to specific factual questions on which "the state court in this case explicitly refused to make any factual finding," no deference can attach. *Ortega v. Duncan*, 333 F.3d 102, 106 (2d Cir. 2003) (citing *Channer v. Brooks*, 320 F.3d 188, 195 (2d Cir. 2003) (per curiam)). On such matters, petitioner bears only the normal background burden of proof by a preponderance of the evidence. *Id.*; *see also Epps v. Poole*, 687 F.3d 46, 50 (2d Cir. 2012). The Court must also take care to defer to any factual findings implicitly made by the state court. *Channer*, 320 F.3d at 195.

B. Petitioner's Due Process Claim Based on Perjured Testimony Is Denied.

On the first claim remanded for further consideration by this Court, Reyes contends that the admission of perjury at trial violated his constitutional right to due process. The Supreme Court "has consistently held that a conviction obtained by the knowing use of perjured testimony ... must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976).[4] That principle "does not cease to apply merely because the false testimony goes only to the credibility of the witness"; indeed, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

[4] The Second Circuit's mandate instructed this Court to determine "whether the prosecution knew, *or should have known*, of the perjury." (Mandate at 2 (emphasis added).) The Court will accordingly consider the constructive as well as actual knowledge of the prosecution at trial.
Reyes also contends that he may obtain relief, even without proving that the prosecution had constructive knowledge of the perjury, "if the testimony was material and the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *United States v. Ferguson*, 676 F.3d 260, 282 n.19 (2d Cir. 2011) (internal quotation and alteration omitted). That additional ground for relief is found only in Circuit precedents arising from direct appeal of a district court decision, and hence is not "clearly established federal law" applicable to this case. *See Channer v. Brooks*, 320 F.3d 188, 196 (2d Cir. 2003) (per curiam).

***5** To adjudicate this claim, the Court must determine "(1) whether false testimony was introduced, (2) whether that testimony either was or should have been known to the prosecution to be false, ... and ([3]) whether the false testimony was prejudicial in the sense defined by the Supreme Court in *Agurs*." *Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003).[5] Perjury is committed when a witness "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

[5] Per *Shih Wei Su*, it must also be decided whether the perjury "went uncorrected." *Id.* In this case, however, respondent does not contest the fact that none of the five alleged discrepancies identified by petitioner was discovered or corrected at trial.

Finally, in this Circuit, "at least for purposes of a collateral attack, a defendant is normally required to exercise due diligence in gathering and using information to rebut a lying prosecution witness." *Shih Wei Su*, 335 F.3d at 127.

For the reasons that follow, although petitioner shows the admission of some perjured testimony at his trial, he has failed to meet at least one of the additional requirements to obtain relief on this claim.

1. Some, but Not All, of the Alleged Inconsistencies Were Likely the Result of Perjury.

Petitioner proffers evidence purportedly showing that his due process rights were violated when "Ms. Martinez intentionally provided false testimony at Mr. Reyes' trial on five material issues." (Pet.'s Suppl. Mem., Doc. 71 at 5.) In adjudicating this claim on the merits, Justice Pickholz expressly declined to reach the question whether

Martinez had in fact perjured herself. Instead, "[a]ssuming for the sake of argument that Ms. Martinez testified falsely," the state court denied the claim on the independently sufficient ground that the prosecution lacked knowledge of the evidence at issue, as addressed below. (2013 Pickholz Pre-Hearing Order at 5.) This Court took much the same tack in its 2009 order denying Reyes' habeas petition. *Reyes v. Ercole*, No. 06-CV-5525, 2009 WL 790104, at *6 (S.D.N.Y. Mar. 25, 2009).

However, the Second Circuit has directed that:

> On remand, the district court should make factual findings as to ... *whether the alleged inconsistencies were likely the result of perjury* or, alternatively, could have resulted from the Appellant's and the victim's differing memories of the relevant events, the victim's incorrect, but not perjured, recollection, or a difference of opinion as to the information requested—e.g., what constitutes a "personal" conversation.

(Mandate at 2 (emphasis added).) Because there was no state court finding on this issue, it is left to this Court's *de novo* review whether petitioner has shown the admission of perjury by a preponderance of the evidence. *See Channer v. Brooks*, 320 F.3d 188, 195 (2d Cir. 2003) (per curiam) ("[W]here a state court does not resolve a question of fact, no presumption of correctness can possibly attach with respect to that issue."); *Ortega v. Duncan*, 333 F.3d 102, 106 (2d Cir. 2003); *Black v. Rock*, 103 F. Supp. 3d 305, 317 (E.D.N.Y. 2015).

The state court did, however, make one finding of relevance here. In adjudicating another claim, Justice Pickholz found that Barbara Womack's subsequent testimony—that Martinez was attracted to Reyes and volunteered to accompany him to the boat on July 2—"would have supported defendant's claim that the sex that occurred on the boat was consensual," had Womack testified at trial. (2013 Pickholz Post-Hearing Order at 3.) Although Justice Pickholz added that she did not think the effect of this support would be great, her endorsement of the testimony suggests that she made an implicit finding of Womack's credibility, which this Court cannot disturb except in accordance with the strictures of Section 2254.

***6** With these standards in mind, the Court will consider each of Reyes' allegations in turn.

a. Martinez Did Not Commit Perjury by Testifying that She Had No Personal Conversations with Reyes.

First, Reyes contends that Martinez perjured herself by testifying that did not have any "personal" conversations with him before the day of the rape. (Pet.'s Suppl. Mem. at 5–8.) Her account differed markedly from Reyes' narrative. Reyes testified that he spent Martinez's first day at work training her and speaking with her about numerous personal topics, including their respective relationships, and that the two got to know each other in the days before a consensual sexual encounter. (Tr. at 353–59; 405–09.) The key portion of Martinez's trial testimony on direct examination reads as follows:

> Q [ADA Candace McLaren]: What day of work did you meet the defendant?
>
> A [Martinez]: The second day.
>
> Q: And on that day, did you have any extensive conversations with him?
>
> A: No.
>
> Q: Did you talk to him about anything personal?
>
> A: No.
>
> Q: Did you talk to him about your relationship with your boyfriend?
>
> A: No.
>
> Q: Did you talk to him about your son?
>
> A: No.
>
> Q: Did you talk to him about how you were looking for a relationship with a responsible individual?
>
> A: No.
>
> Q: Did you hear him talk to you about his relationships?
>
> A: No.
>
> Q: Did he talk to you about his girl friend?
>
> A: No.

> Q: Did he talk to you about his children?
>
> A: No.
>
> Q: Did he talk to you about any relationship problems he was having?
>
> A: No.

(*Id.* at 441–42.)

According to the FLIK Report, however, Martinez previously told an agent of her employer that she and Reyes had indeed discussed topics plausibly deemed "personal":

> Jane began by stating that when she first started at the Circle Line, William asked her about herself, where she lived etc. Jane responded to all his questions with the correct answers. Just a day or so after she started working, Jane said William asked her where she had gotten a hickey that was on her neck. Jane responded that it was from her boyfriend. She said William then replied to her, "Well you're not allowed to have one unless I give it to you". Jane then explained how a day or so later, William asked Jane if her boyfriend could help him move something into a van off duty. Jane said she agreed and her boyfriend helped.

(FLIK Report, Doc. 71 Ex. B at 4–5.) The interactions involving the hickey and the van are also corroborated by interview notes produced to Reyes by the prosecution pursuant to *People v. Rosario*, 9 N.Y.2d 286 (1961).[6] (*See* Doc. 71 Exs. F & G.)

[6] Reyes also testified about the incident involving the van, although—oddly but of no evident relevance here—he reported it was Martinez's brother, not her boyfriend, who provided him assistance. (Tr. at 409.)

This evidence casts doubt on the accuracy of Martinez's trial testimony denying any personal conversations with Reyes. But petitioner has not shown by a preponderance of the evidence that the discrepancy is the result of perjury, as opposed to "inaccurate testimony due to confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

***7** First of all, none of the specific denials by Martinez, as limned above, are directly contradicted by the subsequently discovered evidence. For instance, it would be a stretch to characterize petitioner's inquiry into the source of a hickey on Martinez's neck as a conversation "about her relationship with her boyfriend."[7] Moreover, one of petitioner's new pieces of evidence arguably bolsters Martinez's narrative of their interactions, and undermines his own, on a key point. Reyes testified at trial that he talked to Martinez from the beginning about his relationships with his girlfriend and his wife, (Tr. at 358–59), but the affidavit of Tyesha Burroughs, a fellow resident of the group home, represents that "[s]oon after Jane started working at the Circle Line, ... Jane asked me whether I knew if William had a girlfriend or wife." (Burroughs Aff., Doc. 71 Ex. J ¶ 6.) The asking of the question to Burroughs suggests that Reyes had not already told Martinez the answer. It is possible, of course, that Reyes had told her the answer and she was attempting to corroborate his information through a third party.

[7] Petitioner also makes much of a passage in the FLIK Report suggesting that Reyes may have known Martinez's home address: "When asked if William knew where Jane lived she said yes not only the neighborhood in which she lived but also the address of her home." (FLIK Report at 5.) Petitioner would have the Court infer from this that the two must have talked at some length to exchange such specific personal information. But Martinez herself offered a plausible alternative explanation in a pretrial hearing before Justice Fried, suggesting that Reyes knew where she lived "[b]ecause he was my manager and he had a hold of my application." (Tr. at 11.)

More broadly, the language of the catch-all inquiry that opened the line of questioning on this topic at trial—"Did you talk to him about anything personal?"—is ambiguous enough that Martinez may honestly have considered its scope not to include matters such as the introductory information she provided at the start of her employment, or the communications involved in arranging to help Reyes move an item into his van. *Cf. United States v. Kerik*, 615 F. Supp. 2d 256, 273–74 (S.D.N.Y. 2009) (the question "whether there was anything embarrassing that [the defendant] would not want the public to know about" was phrased at such a "level of abstraction" as to "render[ ] the term 'embarrassing' fundamentally ambiguous," and hence could not support a perjury charge).

On the one hand, petitioner seems correct to say that "talking about receiving a hickey from one's boyfriend clearly falls into the ambit of personal," however the term is defined. (Pet.'s Suppl. Mem. at 8.) But it is possible that Martinez didn't consider this exchange—in which her only participation was to answer a question from Reyes—to count as *her* talking about something personal. It is also possible, and even likely, that she innocently forgot about this single personal comment when asked a broad question on the stand. After all, she had previously testified that Reyes was "fresh" and "too loose" with her, "act[ing] like

he knew me for a long time." (Tr. at 49.) That testimony suggests that Martinez had no intention of concealing from the jury the fact that she had at least some arguably "personal" interactions with Reyes at work. "Differences in recollection do not constitute perjury," *United States v. Josephberg*, 562 F.3d 478, 494 (2d Cir. 2009), and petitioner has not met his burden to show that Martinez's statements on this subject were willfully false.

b. Martinez Committed Perjury By Testifying that She Told Someone at the Group Home that Reyes Kissed Her Against Her Will.

Second, petitioner argues that Martinez falsely testified that she had told Charise Pearson—a "mentor" or counselor at the group home where Martinez lived in 2002—that Reyes kissed Martinez against her will on one of her first three days working at Circle Line. (Pet.'s Suppl. Mem. at 8–11.) The *Rosario* material indicates that Martinez repeated this claim—that she informed Pearson of the nonconsensual kiss on the day it occurred—in at least four interviews with prosecutors and police officers, including NYPD Detective Lissette Sassok, prior to Reyes' trial.[8] By Reyes' account, the kiss was consensual and initiated by Martinez, not him. (Tr. at 416.) Martinez's contrary characterization of the incident—as buttressed by the assertion that she made a contemporaneous complaint to an acquaintance—arguably supported the prosecution's argument that Reyes "targeted" Martinez as a victim after identifying her as someone he believed he could "take advantage of." (*Id.* at 489, 491.)

[8] *See* Doc. 71 Ex. E ("D grabs cw's cheeks, kisses her, leaves. Told Ms. Cherise."); Ex. F ("He grabbed her & kissed her and she kicked him. She told Counselor Ms. Sherise what happened."); Ex. G ("grabbed face & kissed on mouth.... counselor → Ms. Cherise → told being harassed that night."); Ex. H ("The c/w Ms. Jane also states that on Thursday 6/27/02 she started to be harassed by the subject, he grabbed her and kissed her and she kicked him. When she got home she told Ms. Sherise what happened.").
Sassok testified at trial and confirmed that Martinez told her that Reyes had kissed Martinez on June 27, 2002. (Tr. at 277.) Sassok did not, however, testify as to whether Martinez told her that Martinez had relayed the same information to Pearson on the day of the kiss.

***8** Subsequently adduced evidence suggests that Martinez did not in fact report the kiss at the time. Pearson, the group home counselor, did not testify at trial, but she later testified—in a 2012 affidavit and again in person at the October 2013 hearing—that Martinez never told her about an unwanted kiss. Pearson further testified that her job protocols would have required her to report to a supervisor if any of the group home's young residents had made any such allegation of sexual harassment at work. (Pearson Aff., Doc. 71 Ex. D ¶¶ 8, 10; H. at 35–36.) At the December 2013 hearing, Martinez testified that she did *not* tell Pearson about the kiss, (H2 at 7–8, 17–18), and in fact did not tell "anyone" about it. When pressed by Justice Pickholz on the latter assertion, Martinez retreated somewhat, as shown in context below:

> Q [Carvlin]: Did you testify at the trial of this case that you told Cherise Pearson that Mr. Reyes kissed you?
>
> MR. HAMMER: Objection, judge.
>
> THE COURT [Justice Pickholz]: Did Mr. Reyes kiss you?
>
> THE WITNESS [Martinez]: Yes.
>
> THE COURT: He kissed you the day before this incident?
>
> THE WITNESS: Yes.
>
> THE COURT: Okay.
>
> Q: And did you tell Cherise Pearson that he kissed you?
>
> MR. HAMMER: Judge, this has been asked [and] answered.
>
> THE COURT: Did you tell anybody that he kissed you?
>
> THE WITNESS: *No, I don't remember telling anyone that.*
>
> THE COURT: You might have?
>
> THE WITNESS: *Might have, but I don't remember.*

(*Id.* at 22 (emphases added).)

Martinez most likely perjured herself on this topic at trial, although not in the precise manner alleged by petitioner. Two portions of her trial testimony touch on the subject. First, on direct examination, the assistant district attorney asked Martinez if, "when [she] went home that evening," she told "anyone at the group home" about the kiss. Martinez answered "yes" three times. (Tr. at 51–52.)

Second, on cross, Martinez was specifically asked about

what she told Pearson, but only in the context of a question about what she later told Sassok:

> Q [Ralph Cherchian, Reyes' defense counsel at trial]: So did you not tell Detective Sassok that it was June 27th Thursday that William allegedly grabbed you and kissed you?
>
> A [Martinez]: No.
>
> Q: *Did you tell [Sassok]* that when you got home you told Sharice what happened?
>
> A: Yes, not what happened. About the kiss, yes.

(*Id.* at 137 (emphasis added).) Petitioner's counsel then moved on to another topic of cross-examination.

Reyes now focuses on the latter exchange, framing the issue as whether Martinez falsely "testified at trial that the day Mr. Reyes kissed her she told Ms. Charise [Pearson], one of the staff members at the Catholic Guardian Home, about what had happened." (Pet.'s Suppl. Mem. at 8.) The problem for petitioner is that Martinez never said on the witness stand at trial that she had told Pearson about the kiss—perhaps because the question by petitioner's trial counsel was poorly formed. By all accounts, Martinez's trial testimony on cross—that she had told Sassok that she had told Pearson about the kiss—was literally accurate. A "complaint follow up" report completed by Sassok states that Martinez did tell Sassok that "[w]hen she got home she told Ms. Sherise what happened." (Doc. 71 Ex. H.) Martinez's truthful testimony as to what she told Sassok, even if "arguably misleading" by implication, is not perjury. *Bronston v. United States*, 409 U.S. 352, 353 (1973); *cf. United States v. Lighte*, 782 F.2d 367, 374 (2d Cir. 1986) ("When a witness testifies that 'A' is a fact, and then is asked if he has testified that 'A' is a fact, and he says yes, such response is truthful, regardless of whether 'A' is a fact.... Because these answers are literally true, they obviously cannot support a perjury charge.").

On the other hand, Martinez's more general testimony on direct—that she told some unspecified person about the kiss—appears perjurious. The sum of the evidence clearly suggests that Martinez repeatedly lied to Sassok and other government officials in pretrial interviews when she claimed to have told Pearson about the kiss. There is no reason to doubt the veracity of Pearson's later sworn testimony and affidavit to the effect that Pearson was never told about any kiss. Pearson never met Reyes; she bore no evident grievance against his alleged victim and indeed testified that she liked and had a "rapport" with Martinez, whom she considered intelligent and a good mother. (Pearson Aff. ¶ 5; H. at 35–38.) And after hearing this testimony years later, Martinez contradicted her previous statements both at and prior to trial, stating variously that she did not tell anyone about the kiss or that she "might have" but couldn't recall. (H2 at 7–8, 18–22.)

***9** It is possible to construct innocuous explanations for Martinez's trial testimony on direct examination. She may have told someone else at the group home, besides Pearson, and then forgotten not only that person's name but also the entire interaction by the time of the 2013 hearing ten years later. Or perhaps Martinez did tell Pearson, but both Martinez and Pearson have since forgotten that event so completely that they were both willing to testify under oath in 2013 that it never occurred.

But no evidence supports such chains of conjecture and speculation. The most likely reason that Martinez now says she did not tell anyone about the kiss at the time is that in fact she did not. Her pretrial statements on this topic—which was of obvious interest to government investigators—are loaded with inconsistencies and likely falsehoods. As noted, the *Rosario* evidence indicates that Martinez claimed in four separate interviews that she reported the kiss to Pearson. In one of those interviews, Martinez added that she also reported it to her boyfriend (but "told him not to do anything") and to Burroughs, a "friend who live[d] w/ her" at the group home. (Doc. 71 Ex. G.) But in another interview, Martinez claimed that she did *not* tell her boyfriend, because she was "scared of [his] reaction." (Doc. 71 Ex. E.) And although Burroughs did not testify at the 2013 hearing, Burroughs submitted an affidavit detailing her interactions with Martinez in 2002, which includes no mention of any such report of a kiss. (*See* Burroughs Aff. ¶¶ 6–15.)

No other candidate has been identified as the person at the group home whom Martinez testified she told about the kiss. The preponderance of the evidence now suggests that Martinez falsely testified at trial that she reported the kiss to someone at her group home.

c. Martinez Committed Perjury by Testifying that She Did Not Volunteer to Accompany Reyes to the Boat.

Third, petitioner avers that Martinez perjured herself when she stated at trial that Reyes had ordered her to go to the boat where the alleged rape took place. (Pet.'s Suppl. Mem. at 11–14.) The parties agree that on the morning of July 2, 2002, a supervisor radioed Reyes at the concession stand and instructed him to recover several large coffee urns from "Boat Ten" on the pier. Martinez testified that Reyes "told

[her] to go to boat ten," a location unfamiliar to her and which she required directions to reach, and then followed her to the boat, where he raped her. (Tr. at 55–59.) By contrast, Reyes testified that Martinez volunteered to accompany him—"[s]he said she would help me," after hearing the radio message—and that they went to the pier together. (*Id.* at 366.)

Subsequently adduced eyewitness testimony favors Reyes' account over Martinez's. Barbara Womack was a cashier at the Circle Line concession stand in the summer of 2002 and on July 2 in particular. She testified in her 2005 and 2012 affidavits that on that date, she "was present when William Reyes asked for a volunteer from the staff to go to the Circle Line boats to retrieve coffee urns that were missing from one of the stands," after which "Jane Martinez volunteered to go with Mr. Reyes to look for the missing coffee urns." Reyes then "led the way" to the boats, while "Ms. Martinez followed behind him." (Womack 2012 Aff., Doc. 71 Ex. I ¶¶ 8–12; *see also* Womack 2005 Aff., Doc. 78 Ex. 12 ¶ 3.) Womack attested to the same series of events at the 2013 hearing. (H. at 8–9.)

The preponderance of the evidence suggests the most likely explanation for the discrepancy between the accounts of Martinez and Reyes is that Martinez lied. In counterargument, respondent mounts two relevant attacks on Womack's credibility. (Resp't's Suppl. Mem., Doc. 78 at 38–41.) First, in a separate portion of her 2012 affidavit, Womack stated that, upon returning from the boat, Martinez "did not seem to be distressed or upset. She demonstrated no unusual emotion. Her clothing was not disarranged or disheveled." (Womack 2012 Aff. ¶ 14; *see also* H. at 10.) But that account was contradicted by the trial testimony of another Circle Line employee and eyewitness, Sylina King, that Martinez "looked sad, her eyes were red, her cheeks was red, her hair was kind of messed up, her shirt was tucked out of her pants." (Tr. at 168.) Second, Womack was convicted of two crimes—involving a forged instrument and a drug sale—in the mid-1990s. (H. at 28.)

***10** These objections do not provide sufficient grounds to disregard Womack's testimony in its own right, let alone to disturb an implicit credibility finding already made by the state court, as described above. The characterization of Martinez's appearance and emotional state is of course a matter of interpretation, and in any event not directly relevant to the eyewitness testimony on the issue of whether she volunteered to accompany Reyes to Boat Ten. And two unrelated criminal convictions, both at least sixteen years old, do not comprise a compelling reason to disregard the testimony of a disinterested witness who had no interactions with either of the parties since the time they worked together briefly in 2002.

In sum, Womack's eyewitness testimony moves the needle sufficiently to make it more likely than not that Martinez's contrary account of her trip to the boat constituted intentionally false testimony.

d. Martinez Committed Perjury by Testifying that She Was Not Attracted to Reyes.

Fourth, petitioner alleges that Martinez falsely testified by repeatedly answering "no" when asked at trial whether she "f[ound] him attractive" or was "sexually attracted to the defendant" at any point during the time they worked together. (Pet.'s Suppl. Mem. at 14–16 (quoting Tr. at 442–43).) At trial, Reyes portrayed their relationship as one based on mutual attraction and flirtation, leading up to consensual intercourse instead of rape, and Martinez's denials of any attraction undercut that defense.

Two witnesses have subsequently provided statements calling Martinez's account into question. Womack testified in her 2012 affidavit and at the 2013 hearing that she observed "more than one" occasion on which Martinez, speaking to a female coworker, expressed romantic or sexual interest in Reyes. Womack recounted witnessing Martinez and her interlocutor "gawking over" Reyes, describing him as "cute" or "hot," representing that they "would do him" (i.e., have sex with him) "in a minute." (H. at 5–6, 20–23; Womack 2012 Aff. ¶ 7.) Burroughs stated in her affidavit that Martinez expressed a feeling that Reyes was "hot" and that "she wanted to become involved with William sexually," asking "whether [Burroughs] knew if William had a girlfriend or wife." (Burroughs Aff. ¶¶ 6, 12, 14.) Womack and Burroughs both also asserted that they had observed Martinez "flirting" with Reyes on July 2, the day of the alleged rape. (*Id.* ¶ 13; Womack 2012 Aff. ¶ 9.)

Respondent now contends that the behavior witnessed by Womack and Burroughs amounts to "a display of teenage bravado, at most," and the language attributed to Martinez "does not necessarily evidence a genuine sexual attraction." (Resp't's Suppl. Mem. at 42.) The "necessarily" in this sentence gives the game away. Although Martinez's subjective experience of attraction is of course not a matter that any proof could resolve with absolute certainty, the preponderance of the evidence now suggests that her testimony on this point was intentionally false. Petitioner has produced multiple witnesses who observed Martinez stating the opposite of what she testified

to at trial, and acting consistently with her out-of-court statements, both in and out of Reyes' presence.[9]

[9] Respondent also objects that Womack failed to address these incidents in her first affidavit in 2005. (Resp't's Suppl. Mem. at 13, 39–40.) But Womack's two affidavits do not contradict each other, and no dark purpose need be inferred from the first document's omission of these particular details—which are relevant to, but by no means dispositive of, Reyes' guilt or innocence.

Respondent's contrary "bravado" theory rests on mere speculation rather than any countervailing evidence. It arguably offers a plausible alternative justification for Martinez's behavior at Circle Line, to which several employees have ascribed a sexualized and unprofessional workplace atmosphere in the summer of 2002.[10] Less clear is how well it explains her repetition of similar statements in the privacy of her own home, to Burroughs. More fundamentally, the bravado hypothesis stands sharply at odds with the theory of the case presented at trial by the prosecution, which painted Martinez as a "very quiet introverted girl" with "low self esteem," specifically targeted by Reyes as an easy victim for that reason. (*See, e.g.*, Tr. at 404–05, 489–91, 505.[11]) Notably, in her 2013 hearing testimony, Martinez did not make any such attempt to rationalize away the purported sexual comments, but flatly denied making them in the first place. (H2 at 7.)

[10] See, for instance, the account givens by Womack, grill cook Willie Leverman, and cashier Tania Santiago according to the FLIK Report:

> When asked if she had ever witnessed or heard of any inappropriate behavior, [Womack] stated employees make different comments, but they are in a joking fashion. She stated that William Reyes was a "little on the perverted side". Barbara explained a situation where an employee who works on the Caliente station was standing around not busy while the rest of the employees were very busy. Barbara asked William [at the] time why that employee wasn't doing anything; she said William replied to her "because she has thunder thighs and a big butt she doesn't have to do anything".
>
> ...
>
> When asked if he had ever witnessed William make any inappropriate comments to Jane, Willie replied no more to Jane than anyone else. Willie also stated that he was aware of a relationship that was going on between Carlos and another employee who worked at the Pier Stand. Willie then explained that there was a lot of inappropriate discussion going on related to this relationship.
>
> ...
>
> [Tania] replied that she was aware of gossiping that has been going on regarding sexual matters among employees on the boats. When asked between or among whom, she replied it was between Carlos and a woman (she could not remember her name) who was no longer employed at the Pier Stand. When asked about the details of this, Tania stated that the woman told the employees about her sexual relationship with Carlos. Carlos later told Tania that this woman was spreading untrue rumors about their relationship.

(FLIK Report at 4, 7.)

[11] For example, the prosecution's summation included the following argument:

> I submit to you, that rapists choose their victims very carefully. They rarely strike at random. And they look for people who they think they can take advantage of, people who appear to have low self esteem, people who appear to be vulnerable, people who aren't likely to be believed. And I submit to you, ladies and gentlemen, that the defendant, William Reyes, would have been hard pressed to find anyone more vulnerable, more withdrawn, more susceptible than Jane Martinez.

(*Id.* at 489.)

***11** Though the Court cannot know Martinez's mind with certainty, the evidence of her previous statements and behavior suggests that she perjured herself when she testified that she was never attracted to Reyes.

e. Martinez Did Not Commit Perjury by Testifying that She Was Unable to Use Her Cell Phone in the Group Home.

Fifth and finally, petitioner submits that Martinez perjured herself by testifying that she was unable to use her cell phone in the group home where she resided at the time of the alleged rape. (Pet.'s Suppl. Mem. at 16.) This question bears (if rather remotely) on the veracity of Martinez's account of her interactions with Serita Godby, one of three prompt-outcry witnesses who testified for the prosecution. (Tr. at 180–202; *see also* Pretrial Transcript, Doc. 8 at 17–24.) Martinez spoke to Godby by phone the evening after the rape, but waited until they met in person, the next morning, to tell her what had happened. Martinez testified that the reason for this delay was that the group home's landline phone was in a public area that would not have allowed her privacy during her conversation. (Tr. at 86, 140.) Although she admitted that she had a cell phone and

a private bedroom of her own, Martinez testified that she could not have used the cell phone to talk privately with Godby that evening, for two reasons:

> Q [Cherchian]: So in fact if you wanted to discuss it with Serita you could have gone into your room and closed the door and used your cell phone?
>
> A [Martinez]: No.
>
> Q: You are saying you could not have?
>
> A: No, because at the home we are not allowed to have cell phones and there is no reception in my area.
>
> Q: You are saying that you could not use your cell phone?
>
> A: No.
>
> Q: You had never used it?
>
> A: No, not in my home, there is no signal.
>
> Q: Did you try on that evening?
>
> A: No.

(*Id.* at 141.)

In a 2012 affidavit, Rosalie Davis—a counselor at the group home in 2002—contradicted much of this testimony. Davis confirmed that the group home's rules prohibited the residents from using cell phones, although they were permitted to possess them. Nevertheless, according to Davis, the residents, "including Ms. Martinez, often used their cell phones while on the premises of the Home," and "[t]here was no difficulty with cell phone reception at the Catholic Guardian Home." (Davis Aff., Doc. 71 Ex. K ¶¶ 14–15.) Davis testified to the same facts at the 2013 hearing. (H. at 47–48.)

These statements cast doubt on the truthfulness of Martinez's testimony here. But Davis's own credibility is undermined by the fact that on the witness stand, she disavowed another, highly significant portion of her own sworn affidavit, where she claimed to have witnessed a social worker "quizz[ing]" Martinez "about whether she had in fact been raped or whether this was another story she was making up." (Davis Aff. ¶ 12.) In fact, as Davis admitted at the 2013 hearing, she was not even in the room during Martinez's conversation with the social worker. (H. at 49–53.) None of the possible explanations for the presence of this blatant falsehood in her affidavit—whether she told the lie herself and then changed her story, or whether it was inserted into her affidavit at the behest of petitioner's unscrupulous investigator, Joseph Dwyer,[12] without her bothering to read the document—gives great reason for confidence in the remainder of Davis's testimony.

[12] In 2014, the United States charged Dwyer with bribery and conspiracy to pay New York City police to access private witness information; the U.S. District Court for the Eastern District of New York then posted a public notice announcing his suspension from practice before that court. (Notice, Doc. 78 Ex. 10.) Dwyer pleaded guilty to one count of conspiracy to bribe a local government employee in 2016 and was sentenced to five years of probation. *See United States v. Dwyer*, No. 15-CR-385 (S.D.N.Y. 2016).

***12** Additionally, there is at least some ambiguity as to the meaning of Martinez's statement at trial that there was no reception "in my area" or "in my home." (Tr. at 141.) It is possible that Martinez meant that the signal was bad in her private room, as opposed to the public areas of the home—an interpretation that is at least not expressly contradicted by Davis's testimony. Between these reasons for uncertainty and the equipoise of Martinez's word against Davis's, the preponderance of the evidence does not show that Martinez's testimony regarding her cell phone was perjury.

2. There Is a Reasonable Likelihood that the False Testimony Could Have Affected the Judgment of the Jury.

A showing of perjury at trial does not, without more, establish a due process violation. Petitioner must also show a "reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added).

The state court did not decide this question. Instead, as noted, Justice Pickholz denied the perjury claim "out of hand" for failure to show the separate necessary element of knowledge on the part of the prosecution.[13] (2013 Pickholz Pre-Hearing Order at 5.)

[13] Justice Pickholz did find definitively that the evidence in the FLIK Report was "not of the type that would change the outcome of the trial, or not material to the issues at trial," (2006 Pickholz Order at 6; *see also id.* at 9–10), and that Womack's testimony as to ancillary matters such as the size of the coffee urns "would not have had

> a material effect on the outcome of the trial," (2013 Pickholz Post-Hearing Order at 4). These findings have no bearing here, however, because as described none of that evidence suggests likely perjury.

Justice Pickholz made a somewhat related finding in the course of dismissing petitioner's claim for ineffective assistance of counsel, which is no longer before this Court. Applying the prejudice prong of *Strickland v. Washington*—which requires a defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would have* been different," 466 U.S. 668, 694 (1984) (emphasis added)—the state court found it "not reasonably probable to believe" that the new witnesses' testimony, "alone or in conjunction with the other evidence that the defense presented at trial, *would have* resulted in a different outcome." (2013 Pickholz Post-Hearing Order at 5–6 (emphasis added).)

That finding—though it is due all proper deference under AEDPA—does not govern the analogous element of Reyes' perjury claim, for which "[t]he standard for setting aside a conviction ... is less demanding than it is in the case of ineffective assistance of counsel." *United States v. Tarricone*, 11 F.3d 24, 27 (2d Cir. 1993), *withdrawn and superseded on other grounds*, 21 F.3d 474 (2d Cir. 1994). Would is not could. *See, e.g.*, *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) ("[Defendant] need not show that he more likely than not would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to undermine confidence in the verdict." (internal quotations and citation omitted)).

Indeed, the "could have" materiality bar is so low that it has been said to make relief "virtually automatic" upon a showing that the prosecution knowingly used perjury at trial. *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (internal quotation omitted). This is because "once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, 'might' have acquitted." *United States v. Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975).

***13** Petitioner has met this burden by a preponderance of the evidence. It is true that Martinez's credibility at trial had already been impeached, most notably when she admitted to lying on the witness stand by denying her responsibility for an incident in which she and other teenagers had set fire to a mattress. (Tr. at 40–41; 456–58.) But "the presence of other impeaching material available to the jury" does not preclude the reasonable likelihood that the newly uncovered perjury could have changed the verdict; the exposure of additional lies "could have created a sufficient doubt in the minds of enough jurors to affect the result." *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975). Though none of the perjury goes directly to the ultimate issue of Reyes' guilt or innocence, the false testimony touches on enough issues of importance that it is reasonable to suppose that it could have swayed the result at trial.

3. However, the Prosecution Did Not Know, Nor Should It Have Known, of the Evidence Suggesting Perjury at Trial.

Supreme Court precedent dictates that even the intentional admission of materially false testimony does not make out a claim for a due process violation if the perjury was not known to the prosecution. The Second Circuit has thus directed this Court to make a factual finding as to "whether the prosecution knew or should have known of the evidence suggesting perjury at trial." (Mandate at 2.) Fatally to petitioner's claim, the answer is no.

With respect to the FLIK Report, Justice Pickholz reasonably found in 2006 that "there is no reason to believe that the prosecution was in possession or control of the timeline [i.e., the FLIK Report], or that it even had actual or constructive knowledge of the document," which was created by a third party—FLIK—and only later divulged to Reyes in a separate litigation. (2006 Pickholz Order at 10 (citation omitted).) The state court reasonably reached the same conclusion in 2013 as to the affidavits newly produced from witnesses who did not testify at trial and were not contacted at the time by either the defense or the prosecution.[14] (2013 Pickholz Pre-Hearing Order at 5.)

[14] The state court did not expressly make the same finding as to the testimony of the witnesses at the 2013 hearing. But the same analysis applies to that testimony, which largely repeated and did not materially augment the evidence in the affidavits, as excerpted extensively above.

Petitioner does not contest those findings; he now concedes, as he must, that "[t]here is no basis for concluding that the prosecution knew or should have known about" the vast majority of the evidence arrayed above. (Pet.'s Suppl. Mem. at 27.) The only evidence he now argues that the prosecution knew or should have known about is the *Rosario* material allegedly indicating

personal conversations between Martinez and Reyes. (*Id.* at 26–27.) But as discussed, that evidence does not show perjury by Martinez on this point.

The knowledge requirement thus puts petitioner's claim in a difficult spot: he concedes that the prosecution had no actual or constructive knowledge of what evidence *does* suggest perjury, and the only evidence the state did know about does *not* show that Martinez perjured herself.

4. Petitioner Did Not Waive his Claim by Failing to Uncover, Through Due Diligence, the Evidence Suggesting Perjury in Time for Trial or Direct Appeal.

The prosecution's ignorance at trial of any of the evidence now suggesting perjury suffices to defeat petitioner's claim. However, the Second Circuit has directed this Court to make an additional factual finding as to "whether Appellant waived the claim by failing to uncover, through due diligence, the evidence in time for trial or direct appeal." (Mandate at 2.) A defendant can overcome this barrier "by showing that the claim is based on newly discovered evidence that could not reasonably have been discovered before." *United States v. Helmsley*, 985 F.2d 1202, 1206 (2d Cir. 1993).

***14** Petitioner has met his burden here. As analyzed above, the evidence suggesting that Martinez likely perjured herself comes from affidavits submitted by Womack, Pearson, and Burroughs, as well as live testimony by the first two of these witnesses in 2013. In dismissing petitioner's separate claim for ineffective assistance of counsel, Justice Pickholz reasonably found that Reyes' trial counsel conducted an effective investigation into potential witnesses and could not be faulted for failing to adduce testimony from these individuals at the time. (2013 Pickholz Post-Hearing Order at 2–3, 5–6.) It appears from Womack's testimony that she and other Circle Line employees were indeed approached after the incident by a private investigator for the defense, who "came offering us a card saying he wanted information on what happened."[15] (H. at 10.) But Womack refused to speak with him because she was ordered not to by her supervisor, and threatened with firing if she did. (*Id.* at 10–11; Womack 2005 Aff. ¶ 4; Womack 2012 Aff. ¶ 17.) Under these circumstances, it does not appear that reasonable further efforts by defense counsel would have made a difference in securing Womack's testimony. And as Justice Pickholz reasonably observed, "few attorneys would have considered that Charise Pearson ... who[ ] worked at the Catholic Guardian Home, might provide testimony that was favorable to the defense," given that she was not a witness to "any of the events at the pier." (2013 Pickholz Post-Hearing Order at 5.)

15 Because Womack did not speak to the private investigator, she was unable to confirm who had hired him. (H. at 10–11.) But as Justice Pickholz found, "[i]t seems certain that the investigator was employed by the defense," given that he was apparently working independently of the police. (2013 Pickholz Post-Hearing Order at 3 & n.1.)

Justice Pickholz did reasonably rule, as to the FLIK Report, that Reyes "has not established that he could not have discovered its existence before trial with due diligence." (2006 Pickholz Order at 5.) As the state court explained, the document appears to have been "completed well before trial," but Reyes "apparently made no effort to subpoena Circle Line or its parent company for employee records and materials pertaining to the incident"—despite the fact that "the assistant district attorney provided the defense with discovery material clearly indicating that FLIK's human resources department had been notified of the incident and that a department representative was present when [Reyes' boss] Khanii spoke with the complainant." (*Id.* at 6.) But as iterated and reiterated above, because at least the information in the report does not suggest likely perjury by Martinez, the lack of due diligence on this score makes no difference.

Hence, whatever the other problems with the perjury claim, the doctrine of waiver does not present an independent barrier for Reyes.

C. Petitioner's *Brady* Claim Is Denied.

Petitioner's second claim on remand is that the prosecution denied him due process by withholding the exculpatory evidence in the FLIK Report from the defense at trial. (Pet.'s Pro Se Mem., Doc. 2 at 5–10.) "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." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

Justice Pickholz denied this claim on two distinct grounds: first, as quoted above, "there is no reason to believe that the prosecution was in possession or control of the timeline, or

that it even had actual or constructive knowledge of the document," and second, "none of the statements at issue constitute *Brady* material" because "although they arguably provide material for impeachment, the statements are not exculpatory." (2006 Pickholz Order at 10 (citation omitted).)

The second of these reasons was incorrect because "[i]mpeachment evidence, ... as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). But the first reason—the dearth of any evidence that the government possessed or even knew about the FLIK Report—remains uncontradicted. The state cannot suppress evidence of which it is unaware. *See, e.g.*, *United States v. Skelly*, 442 F.3d 94, 100 (2d Cir. 2006). As addressed above, petitioner has presented no evidence to show that Justice Pickholz's finding on this first point was erroneous, let alone unreasonably so. *See Parker v. Matthews*, 132 S. Ct. 2148, 2152 (2012) (per curiam) (where one "ground was sufficient to reject [a] claim, ... it is irrelevant that the court also invoked a ground of questionable validity").

D. A Certificate of Appealability Is Granted as to the Perjury Claim.

***15** Pursuant to 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." As interpreted by the Supreme Court, "[t]hat standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.' " *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Dismissing Reyes' perjury claim requires a sufficient number of judgment calls—in particular, on the questions whether (and which) discrepancies identified by Reyes amount to willful falsehoods—that reasonable minds can differ with the conclusion reached above.

III. Conclusion

For the foregoing reasons, the Court finds that:

1. Some, but not all, of the alleged inconsistencies in Martinez's trial testimony were likely the result of perjury;

2. Petitioner did not waive his perjury claim by failing to exercise due diligence; and

3. The prosecution did not know, nor should it have known, of any of the evidence suggesting likely perjury at trial.

IT IS HEREBY ORDERED that:

1. The petition pursuant to 28 U.S.C. § 2254 is denied;

2. As petitioner has made a substantial showing that reasonable jurists could find it debatable whether he was deprived of his constitutional right to due process of law by the knowing use of perjured testimony at trial, a certificate of appealability shall issue with respect to the perjury claim. Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c); Welch v. United States, 136 S. Ct. 1257, 1263 (2016); and

3. As petitioner has not made a substantial showing of the denial of a constitutional right with respect to the alleged violation of his rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963), a certificate of appealability shall not issue with regard to that claim. 28 U.S.C. § 2253(c)(2); Middleton v. Attorneys Gen. of N.Y. & Penn., 396 F.3d 207,209 (2d Cir. 2005) (per curiam).

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 1517204

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 66

----------X

THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 4258/02

WILLIAM REYES :

Defendants. :

----------X

RUTH PICKHOLZ, J.:

The defendant moves to vacate his conviction on the grounds that he was not afforded effective representation by his attorney, that his conviction was obtained by means of perjured testimony, and that he is actually innocent of the rape of which was convicted.

The defendant was a supervisor at a concession stand run by Circle Line. In 2002 Jane Martinez, a new employee whom he had recently begun to supervise, accused him of raping her in a bathroom at the pier where the company's boats were docked. Ms. Martinez waited until the next day to report the rape to the police. The defendant admitted the sexual encounter, but testified that it was consensual. As there were no witnesses to the incident and scant evidence of physical trauma, the case turned on the credibility of the two participants and what little could be gleaned from witnesses who testified as the actions and demeanor of Ms. Martinez following the incident. A jury found the defendant guilty of one count of rape and two counts of sexual abuse in the first degree. He is currently serving an 18-year prison term stemming from his conviction.

The defendant moved unsuccessfully to set aside the verdict on the ground that the evidence underlying the verdict was not credible. He then appealed his conviction, also to no avail. In a 2006 motion to vacate his conviction he argued that the prosecution had denied him Brady and Rosario material when it failed to provide him with an investigative report prepared by FLIK International, the parent company of Circle Line. I denied that motion in a decision dated July 5, 2006. Immediately thereafter he filed a habeas petition in federal court. On November 28, 2008 it too was denied.

Throughout these attacks on his conviction the defendant has consistently claimed that Ms. Martinez's tale of rape was an invention. He does so again here. He contends that she concocted her accusation in a fit of pique after he told her that the sex they had enjoyed meant nothing, and that it was further motivated by the thought that she might squeeze money from Circle Line by filing a lawsuit against them. His current application contains more than a half-dozen affidavits and additional hearsay accounts which together cast varying amounts of doubt on her testimony. Most of the affiants were either Circle Line employees or people who knew Ms. Martinez from the Catholic Guardian Home. The exception is Delphina Cruz, a social worker who was married to Ms. Martinez's grandfather, and in whose home she once lived. Together, these people paint her as an unprincipled, petty and vengeful 17-year-old who had a history of acting out and making false claims against those who did not let her get her way or displeased her. Two representative affidavits come from Barbara Womack, who worked at Circle Line, and Tyesha Burroughs, who lived with Martinez at the Catholic Guardian Home. Womack states that, in contrast to Ms. Martinez's testimony that she had no romantic or sexual interest in the defendant,

she overheard the girl tell another employee that the defendant was "hot." Additionally, Womack had seen the Martinez and defendant flirting prior to the incident. Martinez testified that defendant ordered her to accompany him to the isolated boat where he took her by surprise and raped her, but Womack states that she saw Martinez volunteer to go with the him. Womack also states that when the girl returned from the boat she did not look upset or distressed. Tyesha Burroughs states that Ms. Martinez also told her that the defendant was "hot" and that she wanted to have sex with him. Burroughs saw the two laughing and flirting as they left the scene of the purported rape. When she later pushed Martinez to tell her if the rape accusation was true, Martinez said, "who cares." She then smiled at Burroughs and said, "I am not going to call the police just yet. I am going to sue their asses, though." (At trial, Ms. Martinez denied having any intention of suing the company.) It appears that neither Womack nor Burroughs, nor any of the others who have supplied the affidavits appended to defendant's motion were contacted by his trial attorney at any time. The substance, if not the trustworthiness, of the hearsay material is stronger yet. Delphina Cruz told an investigator that her ex-husband told her that Ms. Martinez had confided in a cousin vulnerable to deportation that she made up the rape story. She then threatened to inform the immigration authorities about him, and to have her boyfriend beat him if he revealed her secret. Ms. Martinez testified that her father had sexually molested her for five years until she was fourteen years old, when she ran away to escape the abuse. Ms. Cruz state that she overheard Ms. Martinez admit that the sexual abuse charges that she had leveled against her father were false.

The defendant notes that his attorney's 18B voucher for the case reveals that he spent only two hours on investigation, which defendant contends was completely inadequate under

the circumstances. He argues that the key to the defense case was undermining Ms. Martinez's credibility, and that had his attorney spoken to the available witnesses, he would have discovered a wealth of material that not only cast doubt on her veracity in general, but which contradicted her account of the rape. According to defendant, his trial attorney's shortcomings also extended to failuring to visit the dock, investigate the physical layout of the boat and verify the particulars of the complainant's account. The Rosario material that defense counsel was provided revealed that Ms. Martinez stated on three separate occasions that the defendant locked the bathroom door on the boat before raping her. A visit to the boat would have revealed that there was no bathroom door.[1] At trial the defendant testified that he asked Ms. Martinez to accompany him to the boat because he wanted her to help him carry back some coffee canisters that had been left there. At trial the People adduced evidence that the canisters were light and that a single person easily could have carried them. Defendant claims that any of the witnesses who worked at the pier could have verified his claim about the canisters by testifying that the canisters were three to four feet tall and heavy. A visit to the boat would have revealed the same thing. The defendant also complains that the attorney did not try to obtain internal reports prepared by Circle Line or FLIK even though he must have been aware from discovery that such reports existed. Defendant argues that the reports were replete with information which could have been used to impeach Ms. Martinez and contradict her tale. He also contends that investigation would have revealed that, in contradiction to her testimony that she did not report the rape from the Catholic Guardian Home because of a lack of cell phone reception, the cellphone reception was fine at the home.

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[1] At trial she testified that the defendant locked the stall door, and did not mention a bathroom door.

In addition to arguing that his trial attorney was ineffective for failing to investigate the case and interview the witnesses that were available, the defendant makes two other arguments in support of his application to vacate his conviction. He contends that Ms. Martinez's gave material testimony which was false and which the prosecutor knew to be false. He also claims that he is actually innocent of the rape. The claim that the prosecutor knowingly utilized perjured testimony to obtain his conviction may be dismissed out of hand. Assuming for the sake of argument that Ms. Martinez testified falsely, defendant provides no basis to believe that the prosecutor was aware or had reason to know that she did so.

Defendant has also not established that he is entitled to a hearing on his actual innocence claim, as the majority of the admissible evidence that defendant has gathered in support of his application is not clearly exculpatory. Most of it consists of impeachment material. That there may have been a sexual attraction between the defendant and the complainant does not preclude the possibility that she did not consent to having sex with him on the boat. That she lied about not intending to sue Circle Line does not preclude that possibility either. Several of the affidavits submitted in support of the motion report conversations with Ms. Martinez which, if credited, reveal that the truth meant little to her, and permit the inference that she was lying about the rape. But in none of these conversations does she directly admit that she was not raped. The conversations, even taken in conjunction with the remaining material presented by defendant, do not clearly and convincingly establish that the he was indeed innocent. Ms. Cruz reports that her ex-husband told her that Ms. Martinez once admitted to an unnamed cousin that she made up the rape story. Whether the cousin or yet another person told her ex-husband about the incident is

unclear. As defendant concedes, the report incorporates multiple layers of hearsay, and there appears to be no way to verify it. A report of this nature is simply not trustworthy. Accordingly, that branch of the motion seeking vacatur on actual innocence grounds is denied.

The defendant has not provided an affidavit from trial counsel which speaks to any of the complaints that he makes against him, nor does he explain the absence of such an affidavit. Additionally, Not all of defendant's arguments about the attorney's performance are equally compelling. His complainants about the attorney's failure to object to the introduction of certain evidence, and his failure to investigate about the coffee urns, cell phone reception, and the bathroom door do not alone make out an establish ineffectiveness. The alleged failing to interview witnesses is another matter (*see* People v. Cantave, 83 AD3d 857). Trial counsel attempted to show that Ms. Martinez was sexually attracted to the defendant in support of the defense that the sex that occurred had been consensual. Preliminarily, it appears that had the witnesses who have provided affidavits in support of defendant's motion testified in his behalf, they would have supported this theory. They also may well have raised doubt in the minds of the jurors as to the credibility of the complainant. The witnesses state that the defense never contacted them, but this claim as well as the other matters that they have put into writing must be tested in the context of a hearing. Moreover, at this point it is impossible to know to what extent the attorney should have been aware of the witnesses, and whether he made a conscious and strategic decision not to present their testimony (*see* People v. Barnes, 29 AD3d 390; People v. English, 246 Ad2d 925). Accordingly, a hearing is ordered as to these issues.

A.J.S.C.

Dated: July 16, 2013

Supreme Court
of the
State of New York

Part 66*-New York County

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The People of the State of New York

INDICTMENT: 04258-2002

MOTION FOR: CPL § 440.10

-against-

William Reyes,

CALENDAR DATE: October 15, 2012

Defendant

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Ordered **that upon the papers submitted, this motion is hereby**

GRANTED_____

DENIED ✓ SEE ACCOMPANYING DECISION

DATE DEC 30 2013
I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office

Date 12-23-2013

Hon.

County Clerk and Clerk of the Supreme Court New York County
OFFICIAL USE

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 66

----------X

THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 4258/02

WILLIAM REYES :

Defendants. :

----------X

RUTH PICKHOLZ, J.:

In a decision dated July 16, 2013 I ordered a hearing in conjunction with defendant's most recent motion to vacate his conviction, in which he contends that his trial attorney did not afford him effective representation. The subjects of the hearing were: whether trial counsel ever contacted the witnesses who provided affidavits in support of defendant's motion; if he did contact them, whether he had a strategic reason not to call them; whether it is reasonable to expect that these witnesses should have come to his attention; whether, if he had called them, their testimony would have resulted in a different outcome.

The defendant called four witnesses, whose testimony I summarize below, and the prosecution called two, the complainant, and the investigator utilized by the attorney who represented defendant on the motion to vacate. Neither Tyesha Burroughs, a resident of the Catholic Guardian Home who provided an affidavit for the defense, nor defendant's trial attorney testified. In addition, I reviewed subpoenaed materials consisting of Family Court records and records of the Administration for Children's Services pertaining to the complainant. I did not find that these records shed any light on the issues before me.

In order to establish that an attorney has been ineffective under the federal standard enunciated in Strickland v. Washington) "[a] defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense" (Strickland v. Washington, 466 U.S. 668, 687). The first prong of the test requires a showing "that counsel's representation fell below an objective standard of reasonableness" (Hill v. Lockhart, 474 U.S. 52 at 57). The second looks at whether "there is a reasonable probability that, but for, counsel's unprofessional errors the result of the proceeding would have been different" (Strickland v. Washington, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" (id.).

The New York standard is somewhat different. A defendant must show that his attorney failed to provide "meaningful representation" (People v. Baldi, 54 N.Y.2d 137, 147; People v. Benevento, 91 N.Y.2d 708, 713–714). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the [state] constitutional requirement will have been met" (People v. Baldi, 54 N.Y.2d 137, 147). The defendant has the burden of establishing the facts essential to support his motion by a preponderance of the evidence (CPL 440.30[6]).

The defense called Barbara Womack, who worked at Circle Line at the time of the events in question. I find that defendant's trial attorney can not be blamed for failing to interview her, as it is likely that she would not have spoken to him or his investigator had they sought her out. She testified at the hearing that she was warned by her employer, Circle Line, that she would be terminated if she spoke to the investigator, and that she would not have spoken about the case until

she left their employ. That did not occur until long after the trial was over. Ms. Womack testified that she might have spoken with someone if she had been approached outside of work but I find this assertion to be doubtful given her fear of being fired. Moreover, Ms. Womack testified that an investigator came to the pier and handed out business cards. It seems certain that the investigator was employed by the defense.[1] Ms. Womack did not take a card, or undertake any affirmative steps to contact the defense. It is unclear how an investigator would have been able to contact her if she did not reach out to him first.

Assuming for the sake of argument that it was unreasonable for the attorney not to have spoken with her, I find that he was not at fault for failing to adduce her testimony. Ms. Womack testified to the effect that Ms. Martinez, the complainant, appeared to be sexually attracted to Mr. Reyes, and that he did not order her to accompany him to go to the boat where the sexual encounter occurred, but volunteered to go with him. This testimony was contrary to the complainant's testimony at trial. She also testified that Ms. Martinez was not disheveled and did not appear to be upset when she returned from the boat. Ms. Martinez testified at trial that, in the days prior to the rape, the defendant acted inappropriately toward her, and had once kissed her. Ms. Womack testified that she hadn't observed the defendant engage in such behavior. Had Ms. Womack given such testimony at trial it would have supported defendant's claim that the sex that occurred on the boat was consensual, but only weakly and indirectly. As I noted in my earlier opinion that there may have been a sexual attraction between the defendant and the complainant

[1] If this were not the case, Circle Line would not have barred its employees from speaking with him.

does not preclude the possibility that she did not consent to having sex with him. That Ms. Womack may not have observed the defendant taking liberties with Ms. Martinez prior to the incident on the boat does not mean that he did not do so in fact. Even if he did not engage in such behavior, that fact does not mean that she consented to the intercourse. Ms. Womack also testified as to other matters, e.g., the size and weight of the coffee urns, but I find that her testimony as to these would not have had a material effect on the outcome of the trial.

Although the testimony of Delphina Cruz, in whose home Ms. Martinez lived for a time, would have cast doubt on the veracity of Ms. Martinez, it is impossible to fault Mr. Reyes's trial attorney for failing to interview her. Ms. Cruz did not know that Ms. Martinez had accused Mr. Reyes of rape until three years ago. She would therefore not have come forward to the defense by herself, and there is little likelihood that any attorney would have discovered that she existed or had impeachment testimony to give. Additionally, any impeachment testimony that she provided would have been substantially undercut by the fact that it is apparent that she holds an animus toward Ms. Martinez, whom she blames for damaging her life and the lives of her children. Perhaps Ms. Cruz's most damaging allegation was that she overheard Ms. Martinez admit that she had lied when she had accused her father of raping her. Assuming such testimony would have been admitted at trial, it would have been discounted by the jury, as a recording played by the People during the hearing compels the conclusion that the father indeed committed the rape. The recording would have been admissible on the People's rebuttal case at trial.

Similarly, few attorneys would have considered that Charise Pearson and Rosalie Davis, both of whom worked at the Catholic Guardian Home, might provide testimony that was favorable to the defense. Like Ms. Cruz, they were not witnesses to any of the events at the pier. Additionally, nothing that they testified to at the hearing would have materially benefitted defendant's case at trial. I consider the issue of the lack of cellphone reception in the Home to be an exceedingly minor point. I note that Ms. Davis stated in an affidavit that she had been present when a social worker asked Ms. Martinez if she was really raped, or whether she was making up the story, just as she made up so many other stories. In her affidavit Ms. Davis stated that Martinez had remained silent after the question. At the hearing Ms. Davis denied being present or knowing about what had happened in the room. I note too that the defense made the jury fully aware that the complainant's veracity was open to question. Indeed, she had been caught in a lie on the witness stand. Even if the defense had been able to prove that she was known to make things up, it would not have necessarily made their point any stronger.

In summary, I find that trial counsel's representation did not fall below an objective standard of reasonableness. It is unreasonable to have expected him to have discovered the existence of Delphina Cruz or to anticipate that she would have favorable testimony to provide. It is unreasonable to expect that he would have been able to speak to Barbara Womack. Although he might have found Ms. Pearson and Ms. Davis, I do not find that it was objectively unreasonable for him not to consider interviewing them. As for the second prong of Strickland, Mr. Reyes was, for the most part, not prejudiced by their failure to testify. It is not reasonably probable to believe that the testimony of these four witnesses, alone or in conjunction with the other evidence that the

defense presented at trial, would have resulted in a different outcome. I have previously stated that trial counsels's failure to investigate the coffee urns, cell phone reception, and the bathroom door did not alone constitute ineffective representation. These omissions in investigation, coupled with his failure to adduce the testimony of the witnesses who testified at the hearing did not rise to the level of ineffective representation, either. Additionally, looking at the representation that trial counsel provided as a whole, I find that it was meaningful. Trial counsel sent an investigator to the pier to speak to witnesses. Given the resistance of Circle Line, that the investigator did not succeed in getting anyone to speak to him does not reflect negatively on the attorney. The attorney's performance, both before and during trial, was not deficient. The motion to vacate the conviction is therefore denied.

A.J.S.C.

DEC 30 2013

I hereby certify that the foregoing paper is a true copy of the original thereof, filed in my office.

County Clerk and Clerk of the Supreme Court New York County
FOR OFFICIAL USE

Dated: December 23, 2013

S.D.N.Y.-N.Y.C.
06-cv-5525
Stein, 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 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of November, two thousand nine,

Present:

Robert D. Sack,
Richard C. Wesley,
Circuit Judges,
John F. Keenan,*
District Judge.

William Reyes, also known as Vampiro,

Petitioner-Appellant,

v. 09-1510-pr

Superintendent Ercole,

Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that Appellant's motion is GRANTED for the purpose of REMANDING this case to the district court for further consideration of the merits of Appellant's claims that: (1) perjury at trial violated his right to due process; and (2) the prosecution withheld exculpatory evidence in violation of his right to due process. *See Drake v. Portuondo*, 321 F.3d 338, 345-46 (2d Cir. 2003)

*John F. Keenan, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

SAO-rlf

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by _____ DEPUTY CLERK

ISSUED AS MANDATE: 11-19-09

("conviction must be set aside if (1) the prosecution knew, or should have known, of the perjury, and (2) there is any reasonable likelihood that the false testimony *could have* affected the judgment of the jury"; "the Fourteenth Amendment does not cease to apply merely because the false testimony goes only to the credibility of the witness.") (internal quotation marks omitted) (*emphasis added*); *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule.") (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

On remand, the district court should make factual findings as to: (1) whether the prosecution knew or should have known of the evidence suggesting perjury at trial; (2) whether Appellant waived the claim by failing to uncover, through due diligence, the evidence in time for trial or direct appeal, *see Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003) (stating that, although the Supreme Court has not imposed such a requirement, this Court has held that "at least for purposes of a collateral attack, a defendant is normally required to exercise due diligence in gathering and using information to rebut a lying prosecution witness"); and (3) whether the alleged inconsistencies were likely the result of perjury or, alternatively, could have resulted from the Appellant's and the victim's differing memories of the relevant events, the victim's incorrect, but not perjured, recollection, or a difference of opinion as to the information requested - e.g., what constitutes a "personal" conversation. It is further ORDERED that the COA motion is DENIED and the appeal is DISMISSED on all other claims.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____

2009 WL 790104
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

William REYES, Petitioner,
v.
Superintendent ERCOLE, Respondent.

No. 06 Civ. 5525(SHS).
|
March 25, 2009.

West KeySummary

1 **Habeas Corpus**
Evidence and Witnesses; Arrest and Search

A habeas corpus petitioner's failure in a state prosecution to make a contemporaneous objection to the trial court's admission of the victim's emotional response to the rape and her history of sexual abuse procedurally barred him from raising the issue in the habeas corpus proceeding.

ORDER

SIDNEY H. STEIN, District Judge.

***1** William Reyes brings this petition pursuant to 28 U.S.C. § 2254 alleging that his confinement by the State of New York is unlawful because (1) his conviction was against the weight of the evidence and thus violated due process, (2) newly discovered exculpatory evidence demonstrates that his right to due process and a fair trial were denied when the prosecution's witness committed perjury, (3) the prosecutor violated the Fourteenth Amendment by failing to disclose the exculpatory evidence, (4) the trial court improperly admitted evidence of the victim's emotional response to the rape and prior history of sexual abuse into the record, (5) prosecutorial misconduct during jury selection deprived him of a fair trial by an impartial jury, and (6) his trial counsel provided ineffective assistance. In a Report and Recommendation dated November 20, 2008, Magistrate Judge Kevin Nathaniel Fox concluded that Mr. Reyes was not entitled to habeas relief on any of these grounds and that the petition should be denied in all respects. Mr. Reyes filed an objection to the Report and Recommendation on December 27, 2008.

Upon de novo review of Judge Fox's Report and Recommendation dated November 20, 2008 and of petitioner's objections dated December 27, 2008, the Court adopts the findings and conclusions of the Report and Recommendation.

Accordingly, IT IS HEREBY ORDERED that:

1. Magistrate Judge Fox's Report and Recommendation is adopted;

2. The petition pursuant to 28 U.S.C. § 2254 is dismissed;

3. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; *see also Richardson v. Greene,* 497 F.3d 212, 217 (2d Cir.2007); and

4. Pursuant to 28 U.S.C. § 1915(a), the Court certifies that any appeal from this Order would not be taken in good faith.

SO ORDERED.

REPORT AND RECOMMENDATION

KEVIN NATHANIEL FOX, United States Magistrate Judge.

TO THE HONORABLE SIDNEY H. STEIN, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Before the Court is William Reyes' ("Reyes") amended petition for a writ of habeas corpus made pursuant to 28 U.S.C. § 2254. Reyes contends his confinement by New York State is unlawful because: (1) his conviction violated his right to due process, because it was against the weight of the evidence; (2) his rights to due process and a fair trial were denied, when the prosecution's witnesses committed perjury, as evidenced by the "Flik investigative report" ("Flik report")[1] and an affidavit by Barbara Womack ("Womack affidavit"), a concession stand employee for Circle Line Pier ("Circle Line"); (3) the prosecutor failed to disclose exculpatory evidence, in violation of the Fourteenth Amendment, *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *People v. Rosario,* 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881 (1961); (4) the trial court admitted into the record, improperly, evidence of the victim's "emotional response to the rape" and "her prior history of sexual abuse by her father"; (5) the prosecutor's misconduct during jury selection deprived him of a fair trial by an impartial jury; and (6) his trial counsel rendered ineffective assistance to him by failing to object, or by making generalized objections, to: (i) various prejudicial aspects of the jury selection process; (ii) the victim's testimony concerning her history of prior sexual abuse; (iii) testimony about the victim's emotional responses to the rape; and (iv) the prosecutor's reliance on that evidence in summation.

[1] It appears, from the record, that Flik International is the parent corporate entity of the petitioner's former employer, Circle Line Pier.

***2** Respondent opposes the petitioner's application, which is analyzed below.

II. BACKGROUND AND PROCEDURAL HISTORY

In June 2002, Jane Martinez ("Martinez") was hired by Circle Line[2] to work in a concession stand. Reyes was Martinez's manager. Shortly after Martinez began working for Circle Line, Reyes grabbed Martinez and kissed her on her lips, and Martinez pushed Reyes away from her.

[2] Circle Line offers sightseeing cruises around Manhattan.

On July 2, 2002, her fourth day of work, Martinez heard Reyes receive a radio transmission requesting that Reyes retrieve coffee urns from one of the Circle Line boats. Reyes asked Martinez to collect the coffee urns, and Martinez walked toward the boat and Reyes followed her. Once on the boat, Reyes asked Martinez to search for the coffee urns on the lower level, where the bathrooms were located. As Martinez descended the stairs, Reyes grabbed her arms and forced her down the stairs and into a bathroom stall. Reyes forcibly held Martinez as he touched her breasts, untied her pants, penetrated her and ejaculated. Once Reyes released Martinez, she left the stall, and Reyes warned Martinez not to say anything to anyone because they would both be fired. Martinez returned to the concession stand and initially told Sylina King ("King"), a Circle Line employee, that something had happened to another employee on the boat, but "eventually," Martinez told King that something had happened to her.

At noon, Martinez's boyfriend arrived at Martinez's workplace; Martinez did not tell her boyfriend about the incident with Reyes. Martinez went to her home and showered, because she "felt disgusting." Later that day, Martinez spoke with her friend, Serita Godby ("Godby"), but, because Martinez did not have privacy where the telephones were located at the group home where she resided, Martinez did not tell Godby about the incident on the boat. Martinez stayed at her boyfriend's home that night and washed the clothes she had worn that day. Martinez did not tell her boyfriend about the assault by Reyes, or the injuries she suffered from the attack, including: a scratch on her back, pain "everywhere," bruised thighs and a broken fingernail.

The following day, Martinez arrived to work at the concession stand. She spoke with Godby about the assault by Reyes, and Godby took Martinez to her "immediate manager," Dinaldo Khanii ("Khanii"), to whom Martinez recounted the incident. Thereafter, the police were called to the scene, and Martinez was taken to a hospital, where she was examined by doctors. On July 10, 2002, Martinez went to a police precinct to view a lineup, and she identified Reyes as the man who had assaulted her.

Following the petitioner's arrest, he was indicted for one count of first-degree rape and two counts of first-degree sexual abuse. Jury selection for the petitioner's trial began on March 19, 2003. In relevant part, during voir dire, the prosecutor posed the following hypothetical situation to the potential jurors: "[Y]ou ... have a daughter, let's say, around the age of 18, who just got a job as a secretary and she tells you that ... her boss had asked her to stay after work late and that she had done so and that after she and he were the last two people left, he had forced her onto a desk and forced her to have sex." The prosecutor asked the potential jurors whether they would believe that their hypothetical daughter had been raped if: (1) a weapon had

been displayed; (2) "if she didn't physically fight off her boss during the situation"; and (3) no visible signs of injury existed.

***3** During the trial, Martinez testified that, when she was approximately 13 years old, she stopped living with her parents, because her father had molested her sexually for five years. When she finally told her mother about the abuse, "[her] mom could not handle it and she left [Martinez]." Martinez explained that, for the last five years, she lived in seven "group homes," found living in group homes to be "hard and stressful," and is "not able to trust anyone."

With regard to the assault by Reyes, Martinez stated that she cried and felt "embarrassed" and "upset," as a result of Reyes' actions, and, when she saw herself in a mirror after the attack, she looked "sad" and "depressed." Martinez asserted that, on the day of the assault, the only employee of Circle Line whom she told about the rape was King. Martinez stated that, after he raped her, Reyes returned to the concession stand and appeared to be "fine," and noted, over objection, that she felt "sad because he had just touched [her] everywhere, [and] didn't care what he did."

King also testified. She recalled that, on the morning of July 2, 2002, she saw Martinez at the concession stand and observed that Martinez "looked sad, her eyes were red, her cheeks w[ere] red, her hair was kind of messed up, her shirt was tucked out of her pants," and she was "walking funny," with her "legs ... a little apart." King stated that Martinez told her she had been raped. Thereafter, King spoke separately with Jason Iovino ("Iovino") and Khanii, Circle Line managers, and King told them "about [her] conversation" with Martinez.

Reyes testified in his own defense, and stated that, on June 27, 2002, he spent the entire day training Martinez to work at the Circle Line concession stand, and that, during training, they discussed their personal relationships and children. On July 1, 2002, Reyes had planned to take Martinez to the Cloisters, where there was "a place to park and just talk," but they did not go.

Reyes explained that, on July 2, 2002, he and Martinez went to a Circle Line boat to retrieve coffee "canisters," and Martinez asked him why he had not taken her to the Cloisters the previous day. Reyes asked if he "still had a chance," and "invited her go to downstairs with [him]," where the bathrooms are located. Once downstairs, Reyes and Martinez started kissing; Reyes "took [Martinez's] hand and ... put it on [his] penis .... and she started squeezing it"; and Reyes then "turned her towards the sink ." Reyes then removed Martinez's pants, retrieved a condom from his wallet and put it on, and had intercourse with Martinez. Afterward, Reyes told Martinez "this is just sex," and he did not want this encounter to be a "problem for [him] and [his] girlfriend."

During the prosecutor's summation, Martinez was described as a "survivor" in that she, "at 9 years old[,] began a five year ordeal at the hands of her biological father .... that left her withdrawn, wary of people, men in particular." The prosecutor argued that "Martinez ... has managed to overcome sexual victimization and humiliation—not once, but twice." The prosecutor stated that, as a result of the rape, Martinez felt "upset," "embarrassed," and she cried.

***4** While delivering its instructions to the jury, the trial court explained, inter alia, that the jury, "may not consider anything outside of the evidence," and that "[t]his case will be decided based on the credible or believable evidence you heard or the lack of such evidence and for no other reason." In addition, the trial court instructed that the jury's "recollection and understanding of the facts ... control regardless of anything I may have said or anything the attorneys have said," and noted that "[n]othing that we have said is evidence."

On March 28, 2003, the jury found Reyes guilty for one count of first-degree rape, and two counts of first-degree sexual abuse. On July 11, 2003, the petitioner was sentenced to eighteen years imprisonment on the first-degree rape count, and seven years imprisonment on each of the first-degree sexual abuse counts, which were all to run concurrently.

In November 2004, Reyes filed his appellate brief with the New York State Supreme Court, Appellate Division, First Department, in which he argued that: (1) the verdict was against the weight of the evidence and violated his right to due process; (2) the trial court admitted into the trial record, improperly, the evidence of the victim's "emotional response to the rape" and "her prior history of sexual abuse by her father"; (3) the prosecutor's misconduct during jury selection deprived him of a fair trial by an impartial jury; and (4) his sentence was harsh and excessive. Reyes noted, in his brief, that his trial counsel had failed to object, initially, to the questions regarding Martinez's "emotional response to the rape."

On April 19, 2005, the Appellate Division affirmed the petitioner's conviction unanimously. See *People v. Reyes*, 17 A.D.3d 205, 206, 794 N.Y.S.2d 14, 15 (App. Div. 1st Dep't 2005). The Appellate Division found that: (1) the verdict was not against the weight of the evidence; (2) the petitioner received effective assistance from his trial counsel; (3) no perceivable basis for reducing the petitioner's sentence existed; and (4) the petitioner failed

to object, or object with adequate specificity, so as to preserve his claims "concerning various aspects of jury selection, the victim's testimony and the prosecutor's summation." *Id.* The petitioner applied for leave to appeal to the New York Court of Appeals. On June 27, 2005, that application was denied. See *People v. Reyes,* 5 N.Y.3d 768, 801 N.Y.S.2d 262, 834 N.E.2d 1272 (2005).

On March 17, 2006, the petitioner moved to vacate the judgment, pursuant to New York Criminal Procedure Law ("CPL") § 440. 10, based upon claims that: (1) newly discovered exculpatory evidence: the Flik report and the Womack affidavit, would have created a reasonable doubt about whether the rape occurred; and (2) the prosecutor's failure to produce the Flik report and the Womack affidavit constituted a Brady and Rosario violation. The Flik report, which purports to provide "a timeline of events and allegations" related to the rape of Martinez, and which was prepared by employees of Circle Line, included the following information: (1) on the day of the incident, Martinez told Willie Leverman, a grill cook at the concession stand, that "William forced himself upon her"; (2) when King spoke with her superiors, Iovino and Khanii, about her conversation with Martinez on the date of the incident, King did not inform Iovino or Khanii specifically that Martinez had been raped by Reyes, but had suggested that "something bad" happened to an employee, which left Khanii with the impression that "it had to do with some type of sexual behavior"; and (3) Martinez told Nina Monteleone and Jennifer Ruza, whose relationship to Martinez is not disclosed in the record before the Court, that (a) Reyes had "asked her about herself, where she lived etc.," and Martinez "responded to all his questions with correct answers," and (b) Reyes asked Martinez if Martinez's boyfriend could help Reyes "move something into a van off duty," and Martinez agreed and her boyfriend assisted Reyes.

***5** Reyes also attached to his CPL § 440.10 motion the Womack affidavit. Womack stated that, on July 2, 2002, she heard Reyes "request[ ] ... a volunteer ... to retrieve the missing coffee pots," and Martinez "volunteered to go with him." Womack contended that Martinez followed Reyes to the boat and, when Martinez returned to the concession stand, she "looked as if nothing was wrong."

On July 5, 2006, the New York Supreme Court, New York County, denied the petitioner's CPL § 440.10 motion. The court found that: (1) the petitioner failed to show that, with due diligence, he could not have discovered this evidence before trial; and (2) the Flik report and the Womack affidavit did not "meet the newly-discovered-evidence standard," since these documents were, inter alia, unlikely to change the result if a new trial were granted, and did not constitute evidence "material to an issue at defendant's trial." The court also found no merit to the petitioner's Brady and Rosario claims existed. On August 1, 2006, the petitioner moved for leave to appeal from the denial of his CPL § 440.10 motion. On October 19, 2006, the New York State Supreme Court, Appellate Division, First Department, denied him permission to appeal.

The instant application for a writ of habeas corpus followed.

III. DISCUSSION

Where a state court has adjudicated the merits of a claim raised in a federal habeas corpus petition, 28 U.S.C. § 2254 provides that the writ may issue only if the state court's adjudication resulted in a decision that: (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. See 28 U.S.C. § 2254(d); see also *Williams v. Taylor,* 529 U.S. 362, 374–90, 120 S.Ct. 1495, 1503–11, 146 L.Ed.2d 389 (2000); *Francis S. v. Stone,* 221 F.3d 100, 107–08 (2d Cir.2000). In addition, when considering an application for a writ of habeas corpus by a state prisoner, a federal court must be mindful that any determination of a factual issue made by a state court is to be presumed correct and the habeas corpus applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

A. Conviction Against the Weight of the Evidence

"Federal habeas review is not available where there is simply an error of state law." *Tucker v. Phillips,* No. 04 Civ. 2964, 2008 WL 4128202, *6 (S.D.N.Y. Sept. 2, 2008) (citing 28 U.S.C. § 2254(a)). "In making a 'weight of the evidence' argument, ... [the petitioner] does not assert a federal claim as required by 28 U .S.C. § 2254(a)," but, "[r]ather, ... raises an error of state law, for which habeas review is not available." *Douglas v. Portuondo,* 232 F.Supp.2d 106, 116 (S.D.N.Y.2002).

The petitioner's claim, that his conviction is against the weight of the evidence because Martinez's testimony "shifted at each retelling and was contradicted by the physical evidence," is not amenable to habeas review.

Therefore, granting him habeas corpus relief, based on this claim, would be inappropriate.

B. Perjured Testimony Based on Newly Discovered Evidence

***6** "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976). "In determining what constitutes perjury," the Supreme Court "rel[ies] upon the definition ... under the federal criminal perjury statute, 18 U.S.C. § 1621." *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 1116, 122 L.Ed.2d 445 (1993). "A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *Id.*

Even assuming, arguendo, that the prosecution knowingly proffered perjured testimony by Martinez as it related to the information in the Flik report and the Womack affidavit, it cannot be said that there is a "reasonable likelihood" that this testimony "affected the judgment of the jury" or that such testimony concerned a "material matter." The information at issue-(1) the number of people Martinez told about the rape on the day of the rape; (2) whether Martinez told Reyes personal information about herself; (3) whether Martinez was asked, or volunteered, to retrieve the coffee urns; and (4) whether Reyes followed Martinez to the boat, or vice versa—are peripheral to whether Reyes raped Martinez. In addition, since King did not testify about the specific information she relayed to Iovino and Khanii, her testimony cannot be said to be inconsistent with, no less evidence of perjury when compared to, the Flik report, since the Flik report notes merely that King had indicated that "something bad" had happened to an employee. Further, although Womack's affidavit contradicted trial testimony that Martinez appeared visibly upset after the rape, that different witnesses observed different demeanor in Martinez does not suggest that any witness testified falsely about his or her observations or provided perjured testimony willfully.

Altogether, it cannot be said that the denial of the petitioner's CPL § 440.10 motion—on the ground that the Flik report and the Womack affidavit did not constitute "newly discovered evidence" since these documents were unlikely to change the result at trial, and did not constitute evidence "material to an issue at defendant's trial"—was either contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States. It also cannot be said that these findings were based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

C. Failure to Disclose Exculpatory Evidence

Under Brady, the Government is required to disclose evidence to criminal defendants which "is material [to either] guilt or punishment." Brady, 373 U.S. at 87, 83 S. Ct at 1196–97. This duty extends not only to evidence that is exculpatory, but also to evidence that could be used to impeach a government witness. See *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). In the context of Brady, a defendant is deprived of a fair trial where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985), or where the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995).

***7** Here, Reyes contends the prosecution failed to disclose Brady material: the Flik report and the Womack affidavit. However, as discussed above, the information in the Flik report and the Womack affidavit was not "material" and, thus, even if the Court were to assume, arguendo, that the Flik report and the Womack affidavit constituted Brady material, it is not probable that, if these documents had been disclosed to the defense, the "result of the proceeding would have been different," Bagley, 473 U.S. at 682, 105 S.Ct. at 3383, or the "whole case" would be cast "in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435, 115 S.Ct. at 1566. Therefore, it cannot be said that the state court's finding that the petitioner's Brady claim was meritless is contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States. Further, it cannot be said that the state court's finding was an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

To the extent Reyes argues that the prosecution's failure to disclose the Flik report and the Womack affidavit constituted a Rosario violation, "the failure to turn over

Rosario material is not a basis for habeas relief as the Rosario rule is purely one of state law." *Randolph v. Warden,* No. 04 Civ. 6126, 2005 WL 2861606 *5 (S.D.N.Y. Nov. 1, 2005).

D. Admission of "Emotional Response" and "Sexual History" Testimony

Generally, federal courts will not consider "a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729, 111 S.Ct. 2546, 2553, 115 L.Ed.2d 640 (1991). New York's contemporaneous objection rule, codified at CPL § 470.05, has been found to be a procedural bar that qualifies as an independent and adequate state ground, since it is "firmly established" and "regularly followed." *Richardson v. Greene,* 497 F.3d 212, 219 (2d Cir.2007); see also *Garvey v. Duncan,* 485 F.3d 709, 714–15 (2d Cir.2007) ("A general objection is not sufficient to preserve an issue.... Instead New York's highest courts uniformly instruct that to preserve a particular issue for appeal, defendant must specifically focus on the alleged error."). To overcome this procedural bar, the petitioner must show cause for the default and prejudice flowing therefrom, or that failure to review a claim would result in a "fundamental miscarriage of justice." Coleman, 501 U.S. at 750, 111 S.Ct. at 2565. A fundamental miscarriage of justice results "where a constitutional violation has probably resulted in the conviction of one who is actually innocent of the substantive offense." *Dretke v. Haley,* 541 U.S. 386, 393, 124 S.Ct. 1847, 1852, 158 L.Ed.2d 659 (2004) (internal quotations and citations omitted). "[I]n this regard[,] ... 'actual innocence' means factual innocence, [and] not mere legal insufficiency." *Bousley v. United States,* 523 U.S. 614, 623, 118 S.Ct. 1604, 1611, 140 L.Ed.2d 828 (1998).

***8** The petitioner raised, on direct appeal, his claim that the trial court admitted improperly, into the record, "emotional response" and sexual abuse testimony by Martinez. The Appellate Division determined that Reyes did not preserve this claim for appellate review, since he failed to object, or object with adequate specificity, so as to preserve his claims regarding "the victim's testimony." See Reyes, 17 A.D.3d at 205, 794 N.Y.S.2d at 15. Here, Reyes does not attempt to show cause and prejudice for his default; rather, he alleges a miscarriage of justice would result if his claim were not considered since, if the jury had considered the information contained within the Flik report and the Womack affidavit, it "is more likely than not that ... no reasonable juror would have found Mr. Reyes guilty beyond a reasonable doubt." Inasmuch as Reyes does not allege "factual innocence," and instead contends the information in the Flik report and the Womack affidavit would support a finding that the proof at trial was legally insufficient for the jury to find him guilty beyond a reasonable doubt, he has not demonstrated that a fundamental miscarriage of justice would result if the court declined to consider this claim. Therefore, the petitioner's claim, that the trial court admitted improperly, into the trial record, evidence of the victim's emotional response to the rape and her history of sexual abuse, is procedurally barred, and the petitioner has failed to overcome this bar.

E. Prosecutorial Misconduct During Jury Selection

As with the petitioner's claim that he was denied a fair trial, by the admission into evidence of Martinez's testimony regarding her "emotional response" and previous sexual abuse, the Appellate Division found the petitioner's prosecutorial misconduct claim was unpreserved for appellate review because Reyes failed to object, or to object with adequate specificity, to the prosecutor's comments during jury selection. See *id.,* at 205, 794 N.Y.S.2d 14, 794 N.Y.S.2d at 15. Reyes has not shown cause or prejudice flowing from this procedural default, nor does he allege that he is factually innocent. Therefore, this claim is procedurally barred, as discussed more thoroughly above, and cannot be a basis upon which to rely in granting habeas corpus relief.

F. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, the petitioner must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for counsel's error(s), the outcome of the proceeding would have been different. See *Strickland v. Washington,* 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2064–65, 2068, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. at 2065.

***9** Reyes contends his trial counsel rendered ineffective assistance by failing to object to the prosecutor's "prejudicial" questions during the jury selection process. However, the jurors were instructed that they could "not

consider anything outside of the evidence," and that "[n]othing that [the trial court or the attorneys] have said is evidence." A jury is presumed to follow the instructions of the trial judge. See *Weeks v. Angelone,* 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000). Therefore, it does not appear that the prosecutor's questions during voir dire had any effect on the outcome of the proceeding, and the petitioner's trial counsel did not render ineffective assistance by failing to object to the prosecutor's questioning during voir dire.

The petitioner claims his trial counsel was ineffective in failing to object to Martinez's testimony regarding: (a) how she felt after she was raped; and (b) the sexual abuse inflicted by her father. Under New York law, "all relevant evidence is admissible unless its admission violates some exclusionary rule." *People v. Scarola,* 71 N.Y.2d 769, 777, 530 N.Y.S.2d 83, 86, 525 N.E.2d 728 (1988). The Supreme Court has stated that Federal Rule of Evidence 402 "provides the baseline" for the admissibility of evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 587, 113 S.Ct. 2786, 2793–94, 125 L.Ed.2d 469 (1993). Fed.R.Evid. 402 provides that, with exceptions, "[a]ll relevant evidence is admissible." The term " '[r]elevant evidence' is defined as that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Id.* at 587, 113 S.Ct. at 2794.

Martinez testified she felt "embarrassed," "sad," "depressed," and "upset," as a result of the incident that occurred on July 2, 2002. This testimony is relevant to whether Martinez had consented to have intercourse with Reyes. See, e.g., *People v. Rouse,* 142 A.D.2d 788, 788–89, 530 N.Y.S.2d 333, 334 (App. Div. 3rd Dep't 1988) (citing a victim's "emotional state directly following the sexual attack" as evidence properly considered by the jury in convicting the defendant). Martinez's testimony regarding the sexual abuse she suffered in the past, and her failure to report such sexual abuse for several years, was relevant to Martinez's initial delay in reporting the rape to authorities, or mentioning it to her boyfriend. See, e.g., *People v. Wigfall,* 253 A.D.2d 80, 83, 690 N.Y.S.2d 2, 7–8 (App. Div. 1st Dep't 1999) ("the sexual history evidence was clearly admissible as relevant to the issue of why complainant failed to immediately inform her husband of the rape, as well as to defendant's contention that the sexual encounter was consensual....").

Relevant evidence may be excluded "when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Old *Chief v. United States,* 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) (internal quotations and citations omitted). Here, evidence regarding Martinez's history of being abused sexually was probative of her failure to report the rape by Reyes immediately, and it cannot be said that Reyes was "unfairly prejudice[d]" by the brief testimony by Martinez of the sexual abuse she endured, nor can it be said that the jury was misled by the admission of this testimony. See *id.* ("[t]he term 'unfair prejudice,' ... speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged"). Likewise, the probative value of Martinez's testimony that she felt embarrassed, hurt, upset, and sad after the rape is not "substantially outweighed by the danger of unfair prejudice" nor is it likely to "mislead[ ] the jury." See Fed.R.Evid. 403.

***10** Since the probative value of this evidence is not outweighed by any prejudice to Reyes, the claim that the petitioner's counsel was ineffective in failing to object, or to object with specificity, to the admission of Martinez's emotional state after the rape and to the testimony on Martinez's history of sexual abuse by her father, is not supported by the record.

The petitioner's claim that his counsel was ineffective in failing to object to the prosecutor's references, during summation, to the evidence of Martinez's emotional response to the rape and history of sexual abuse, also fails. "Given the ... broad latitude afforded parties in commenting on evidence during summation," *United States v. Bautista,* 23 F.3d 726, 734 (2d Cir.1994) (internal quotations and citations omitted), it cannot be said that the prosecutor's summary of the admitted evidence "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (internal quotations and citations omitted). The evidence of Martinez's testimony regarding her emotional response to the rape and her history of sexual abuse was properly admitted. Therefore, the prosecutor's reference to this evidence during summation was appropriate, and any objection to the prosecutor's summation would have been futile.

Altogether, as the above analysis indicates, the Appellate Division's finding that the petitioner's counsel did not render ineffective assistance to him is not contrary to, nor an unreasonable application of, clearly established Federal law as determined by the Supreme Court. Additionally, it cannot be said that the state court's finding was an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

IV. RECOMMENDATION

For the reasons set forth above, I recommend that Reyes' petition for a writ of habeas corpus be denied.

V. FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed.R.Civ.P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Sidney H. Stein, 500 Pearl Street, Room 1010, New York, New York, 10007, and to the chambers of the undersigned, 40 Foley Square, Room 540, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Stein. FAILURE TO FILE OBJECTIONS WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *IUE AFL–CIO Pension Fund v. Hellmann,* 9 F.3d 1049, 1054 (2d Cir.1993); *Frank v. Johnson,* 968 F.2d 298, 300 (2d Cir.1992); *Wesolek v. Canadair Ltd.,* 838 F.2d 55, 58–59 (2d Cir.1988); *McCarthy v. Manson,* 714 F.2d 234, 237 (2d Cir.1983).

All Citations

Not Reported in F.Supp.2d, 2009 WL 790104

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM REYES,	:	
Petitioner,	:	**REPORT AND RECOMMENDATION**
-against-	:	06 Civ. 5525 (SHS)(KNF)
SUPERINTENDENT ERCOLE,	:	
Respondent.	:	

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE SIDNEY H. STEIN, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Before the Court is William Reyes' ("Reyes") amended petition for a writ of habeas corpus made pursuant to 28 U.S.C. § 2254. Reyes contends his confinement by New York State is unlawful because: (1) his conviction violated his right to due process, because it was against the weight of the evidence; (2) his rights to due process and a fair trial were denied, when the prosecution's witnesses committed perjury, as evidenced by the "Flik investigative report" ("Flik report")[1] and an affidavit by Barbara Womack ("Womack affidavit"), a concession stand employee for Circle Line Pier ("Circle Line"); (3) the prosecutor failed to disclose exculpatory evidence, in violation of the Fourteenth Amendment, Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), and People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S. 2d 448 (1961); (4) the trial court admitted into the record, improperly, evidence of the victim's "emotional response to the rape"

[1] It appears, from the record, that Flik International is the parent corporate entity of the petitioner's former employer, Circle Line Pier.

and "her prior history of sexual abuse by her father"; (5) the prosecutor's misconduct during jury selection deprived him of a fair trial by an impartial jury; and (6) his trial counsel rendered ineffective assistance to him by failing to object, or by making generalized objections, to: (i) various prejudicial aspects of the jury selection process; (ii) the victim's testimony concerning her history of prior sexual abuse; (iii) testimony about the victim's emotional responses to the rape; and (iv) the prosecutor's reliance on that evidence in summation.

Respondent opposes the petitioner's application, which is analyzed below.

II. BACKGROUND AND PROCEDURAL HISTORY

In June 2002, Jane Martinez ("Martinez") was hired by Circle Line[2] to work in a concession stand. Reyes was Martinez's manager. Shortly after Martinez began working for Circle Line, Reyes grabbed Martinez and kissed her on her lips, and Martinez pushed Reyes away from her.

On July 2, 2002, her fourth day of work, Martinez heard Reyes receive a radio transmission requesting that Reyes retrieve coffee urns from one of the Circle Line boats. Reyes asked Martinez to collect the coffee urns, and Martinez walked toward the boat and Reyes followed her. Once on the boat, Reyes asked Martinez to search for the coffee urns on the lower level, where the bathrooms were located. As Martinez descended the stairs, Reyes grabbed her arms and forced her down the stairs and into a bathroom stall. Reyes forcibly held Martinez as he touched her breasts, untied her pants, penetrated her and ejaculated. Once Reyes released Martinez, she left the stall, and Reyes warned Martinez not to say anything to anyone because they would both be fired. Martinez returned to the concession stand and initially told Sylina

[2] Circle Line offers sightseeing cruises around Manhattan.

King ("King"), a Circle Line employee, that something had happened to another employee on the boat, but "eventually," Martinez told King that something had happened to her.

At noon, Martinez's boyfriend arrived at Martinez's workplace; Martinez did not tell her boyfriend about the incident with Reyes. Martinez went to her home and showered, because she "felt disgusting." Later that day, Martinez spoke with her friend, Serita Godby ("Godby"), but, because Martinez did not have privacy where the telephones were located at the group home where she resided, Martinez did not tell Godby about the incident on the boat. Martinez stayed at her boyfriend's home that night and washed the clothes she had worn that day. Martinez did not tell her boyfriend about the assault by Reyes, or the injuries she suffered from the attack, including: a scratch on her back, pain "everywhere," bruised thighs and a broken fingernail.

The following day, Martinez arrived to work at the concession stand. She spoke with Godby about the assault by Reyes, and Godby took Martinez to her "immediate manager," Dinaldo Khanii ("Khanii"), to whom Martinez recounted the incident. Thereafter, the police were called to the scene, and Martinez was taken to a hospital, where she was examined by doctors. On July 10, 2002, Martinez went to a police precinct to view a lineup, and she identified Reyes as the man who had assaulted her.

Following the petitioner's arrest, he was indicted for one count of first-degree rape and two counts of first-degree sexual abuse. Jury selection for the petitioner's trial began on March 19, 2003. In relevant part, during voir dire, the prosecutor posed the following hypothetical situation to the potential jurors: "[Y]ou . . . have a daughter, let's say, around the age of 18, who just got a job as a secretary and she tells you that . . . her boss had asked her to stay after work late and that she had done so and that after she and he were the last two people left, he had forced

her onto a desk and forced her to have sex." The prosecutor asked the potential jurors whether they would believe that their hypothetical daughter had been raped if: (1) a weapon had been displayed; (2) "if she didn't physically fight off her boss during the situation"; and (3) no visible signs of injury existed.

During the trial, Martinez testified that, when she was approximately 13 years old, she stopped living with her parents, because her father had molested her sexually for five years. When she finally told her mother about the abuse, "[her] mom could not handle it and she left [Martinez]." Martinez explained that, for the last five years, she lived in seven "group homes," found living in group homes to be "hard and stressful," and is "not able to trust anyone."

With regard to the assault by Reyes, Martinez stated that she cried and felt "embarrassed" and "upset," as a result of Reyes' actions, and, when she saw herself in a mirror after the attack, she looked "sad" and "depressed." Martinez asserted that, on the day of the assault, the only employee of Circle Line whom she told about the rape was King. Martinez stated that, after he raped her, Reyes returned to the concession stand and appeared to be "fine," and noted, over objection, that she felt "sad because he had just touched [her] everywhere, [and] didn't care what he did."

King also testified. She recalled that, on the morning of July 2, 2002, she saw Martinez at the concession stand and observed that Martinez "looked sad, her eyes were red, her cheeks w[ere] red, her hair was kind of messed up, her shirt was tucked out of her pants," and she was "walking funny," with her "legs . . . a little apart." King stated that Martinez told her she had been raped. Thereafter, King spoke separately with Jason Iovino ("Iovino") and Khanii, Circle Line managers, and King told them "about [her] conversation" with Martinez.

Reyes testified in his own defense, and stated that, on June 27, 2002, he spent the entire day training Martinez to work at the Circle Line concession stand, and that, during training, they discussed their personal relationships and children. On July 1, 2002, Reyes had planned to take Martinez to the Cloisters, where there was "a place to park and just talk," but they did not go.

Reyes explained that, on July 2, 2002, he and Martinez went to a Circle Line boat to retrieve coffee "canisters," and Martinez asked him why he had not taken her to the Cloisters the previous day. Reyes asked if he "still had a chance," and "invited her go to downstairs with [him]," where the bathrooms are located. Once downstairs, Reyes and Martinez started kissing; Reyes "took [Martinez's] hand and . . . put it on [his] penis. . . . and she started squeezing it"; and Reyes then "turned her towards the sink." Reyes then removed Martinez's pants, retrieved a condom from his wallet and put it on, and had intercourse with Martinez. Afterward, Reyes told Martinez "this is just sex," and he did not want this encounter to be a "problem for [him] and [his] girlfriend."

During the prosecutor's summation, Martinez was described as a "survivor" in that she, "at 9 years old[,] began a five year ordeal at the hands of her biological father. . . . that left her withdrawn, wary of people, men in particular." The prosecutor argued that "Martinez . . . has managed to overcome sexual victimization and humiliation–not once, but twice." The prosecutor stated that, as a result of the rape, Martinez felt "upset," "embarrassed," and she cried.

While delivering its instructions to the jury, the trial court explained, inter alia, that the jury, "may not consider anything outside of the evidence," and that "[t]his case will be decided based on the credible or believable evidence you heard or the lack of such evidence and for no other reason." In addition, the trial court instructed that the jury's "recollection and

understanding of the facts . . . control regardless of anything I may have said or anything the attorneys have said," and noted that "[n]othing that we have said is evidence."

On March 28, 2003, the jury found Reyes guilty for one count of first-degree rape, and two counts of first-degree sexual abuse. On July 11, 2003, the petitioner was sentenced to eighteen years imprisonment on the first-degree rape count, and seven years imprisonment on each of the first-degree sexual abuse counts, which were all to run concurrently.

In November 2004, Reyes filed his appellate brief with the New York State Supreme Court, Appellate Division, First Department, in which he argued that: (1) the verdict was against the weight of the evidence and violated his right to due process; (2) the trial court admitted into the trial record, improperly, the evidence of the victim's "emotional response to the rape" and "her prior history of sexual abuse by her father"; (3) the prosecutor's misconduct during jury selection deprived him of a fair trial by an impartial jury; and (4) his sentence was harsh and excessive. Reyes noted, in his brief, that his trial counsel had failed to object, initially, to the questions regarding Martinez's "emotional response to the rape."

On April 19, 2005, the Appellate Division affirmed the petitioner's conviction unanimously. See People v. Reyes, 17 A.D.3d 205, 206, 794 N.Y.S.2d 14, 15 (App. Div. 1st Dep't 2005). The Appellate Division found that: (1) the verdict was not against the weight of the evidence; (2) the petitioner received effective assistance from his trial counsel; (3) no perceivable basis for reducing the petitioner's sentence existed; and (4) the petitioner failed to object, or object with adequate specificity, so as to preserve his claims "concerning various aspects of jury selection, the victim's testimony and the prosecutor's summation." Id. The petitioner applied for leave to appeal to the New York Court of Appeals. On June 27, 2005, that application was

denied. See People v. Reyes, 5 N.Y.3d 768, 801 N.Y.S.2d 262 (2005).

On March 17, 2006, the petitioner moved to vacate the judgment, pursuant to New York Criminal Procedure Law ("CPL") § 440.10, based upon claims that: (1) newly discovered exculpatory evidence: the Flik report and the Womack affidavit, would have created a reasonable doubt about whether the rape occurred; and (2) the prosecutor's failure to produce the Flik report and the Womack affidavit constituted a Brady and Rosario violation. The Flik report, which purports to provide "a timeline of events and allegations" related to the rape of Martinez, and which was prepared by employees of Circle Line, included the following information: (1) on the day of the incident, Martinez told Willie Leverman, a grill cook at the concession stand, that "William forced himself upon her"; (2) when King spoke with her superiors, Iovino and Khanii, about her conversation with Martinez on the date of the incident, King did not inform Iovino or Khanii specifically that Martinez had been raped by Reyes, but had suggested that "something bad" happened to an employee, which left Khanii with the impression that "it had to do with some type of sexual behavior"; and (3) Martinez told Nina Monteleone and Jennifer Ruza, whose relationship to Martinez is not disclosed in the record before the Court, that (a) Reyes had "asked her about herself, where she lived etc.," and Martinez "responded to all his questions with correct answers," and (b) Reyes asked Martinez if Martinez's boyfriend could help Reyes "move something into a van off duty," and Martinez agreed and her boyfriend assisted Reyes.

Reyes also attached to his CPL § 440.10 motion the Womack affidavit. Womack stated that, on July 2, 2002, she heard Reyes "request[] . . . a volunteer . . . to retrieve the missing coffee pots," and Martinez "volunteered to go with him." Womack contended that Martinez followed Reyes to the boat and, when Martinez returned to the concession stand, she "looked as if

nothing was wrong."

On July 5, 2006, the New York Supreme Court, New York County, denied the petitioner's CPL § 440.10 motion. The court found that: (1) the petitioner failed to show that, with due diligence, he could not have discovered this evidence before trial; and (2) the Flik report and the Womack affidavit did not "meet the newly-discovered-evidence standard," since these documents were, inter alia, unlikely to change the result if a new trial were granted, and did not constitute evidence "material to an issue at defendant's trial." The court also found no merit to the petitioner's Brady and Rosario claims existed. On August 1, 2006, the petitioner moved for leave to appeal from the denial of his CPL § 440.10 motion. On October 19, 2006, the New York State Supreme Court, Appellate Division, First Department, denied him permission to appeal.

The instant application for a writ of habeas corpus followed.

III. DISCUSSION

Where a state court has adjudicated the merits of a claim raised in a federal habeas corpus petition, 28 U.S.C. § 2254 provides that the writ may issue only if the state court's adjudication resulted in a decision that: (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. See 28 U.S.C. § 2254(d); see also Williams v. Taylor, 529 U.S. 362, 374-90, 120 S. Ct. 1495, 1503-11 (2000); Francis S. v. Stone, 221 F.3d 100, 107-08 (2d Cir. 2000). In addition, when considering an application for a writ of habeas corpus by a state prisoner, a federal court must be mindful that any determination of a factual issue made by a state court is to

be presumed correct and the habeas corpus applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

A. Conviction Against the Weight of the Evidence

"Federal habeas review is not available where there is simply an error of state law." Tucker v. Phillips, No. 04 Civ. 2964, 2008 WL 4128202, *6 (S.D.N.Y. Sept. 2, 2008) (citing 28 U.S.C. § 2254(a)). "In making a 'weight of the evidence' argument, . . . [the petitioner] does not assert a federal claim as required by 28 U.S.C. § 2254(a)," but, "[r]ather, . . . raises an error of state law, for which habeas review is not available." Douglas v. Portuondo, 232 F. Supp. 2d 106, 116 (S.D.N.Y. 2002).

The petitioner's claim, that his conviction is against the weight of the evidence because Martinez's testimony "shifted at each retelling and was contradicted by the physical evidence," is not amenable to habeas review. Therefore, granting him habeas corpus relief, based on this claim, would be inappropriate.

B. Perjured Testimony Based on Newly Discovered Evidence

"[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976). "In determining what constitutes perjury," the Supreme Court "rel[ies] upon the definition . . . under the federal criminal perjury statute, 18 U.S.C. § 1621." United States v. Dunnigan, 507 U.S. 87, 94, 113 S. Ct. 1111, 1116 (1993). "A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty

memory." Id.

Even assuming, arguendo, that the prosecution knowingly proffered perjured testimony by Martinez as it related to the information in the Flik report and the Womack affidavit, it cannot be said that there is a "reasonable likelihood" that this testimony "affected the judgment of the jury" or that such testimony concerned a "material matter." The information at issue–(1) the number of people Martinez told about the rape on the day of the rape; (2) whether Martinez told Reyes personal information about herself; (3) whether Martinez was asked, or volunteered, to retrieve the coffee urns; and (4) whether Reyes followed Martinez to the boat, or vice versa–are peripheral to whether Reyes raped Martinez. In addition, since King did not testify about the specific information she relayed to Iovino and Khanii, her testimony cannot be said to be inconsistent with, no less evidence of perjury when compared to, the Flik report, since the Flik report notes merely that King had indicated that "something bad" had happened to an employee. Further, although Womack's affidavit contradicted trial testimony that Martinez appeared visibly upset after the rape, that different witnesses observed different demeanor in Martinez does not suggest that any witness testified falsely about his or her observations or provided perjured testimony willfully.

Altogether, it cannot be said that the denial of the petitioner's CPL § 440.10 motion–on the ground that the Flik report and the Womack affidavit did not constitute "newly discovered evidence" since these documents were unlikely to change the result at trial, and did not constitute evidence "material to an issue at defendant's trial"–was either contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States. It also cannot be said that these findings were based upon an unreasonable determination

of the facts in light of the evidence presented in the State court proceedings.

C. Failure to Disclose Exculpatory Evidence

Under Brady, the Government is required to disclose evidence to criminal defendants which "is material [to either] guilt or punishment." Brady, 373 U.S. at 87, 83 S. Ct at 1196-97. This duty extends not only to evidence that is exculpatory, but also to evidence that could be used to impeach a government witness. See Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972). In the context of Brady, a defendant is deprived of a fair trial where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985), or where the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566 (1995).

Here, Reyes contends the prosecution failed to disclose Brady material: the Flik report and the Womack affidavit. However, as discussed above, the information in the Flik report and the Womack affidavit was not "material" and, thus, even if the Court were to assume, arguendo, that the Flik report and the Womack affidavit constituted Brady material, it is not probable that, if these documents had been disclosed to the defense, the "result of the proceeding would have been different," Bagley, 473 U.S. at 682, 105 S.Ct. at 3383, or the "whole case" would be cast "in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435, 115 S. Ct. at 1566. Therefore, it cannot be said that the state court's finding that the petitioner's Brady claim was meritless is contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States. Further, it cannot be said

that the state court's finding was an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

To the extent Reyes argues that the prosecution's failure to disclose the Flik report and the Womack affidavit constituted a Rosario violation, "the failure to turn over Rosario material is not a basis for habeas relief as the Rosario rule is purely one of state law." Randolph v. Warden, No. 04 Civ. 6126, 2005 WL 2861606 *5 (S.D.N.Y. Nov. 1, 2005).

D. Admission of "Emotional Response" and "Sexual History" Testimony

Generally, federal courts will not consider "a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553 (1991). New York's contemporaneous objection rule, codified at CPL § 470.05, has been found to be a procedural bar that qualifies as an independent and adequate state ground, since it is "firmly established" and "regularly followed." Richardson v. Greene, 497 F.3d 212, 219 (2d Cir. 2007); see also Garvey v. Duncan, 485 F.3d 709, 714-15 (2d Cir. 2007) ("A general objection is not sufficient to preserve an issue. . . . Instead New York's highest courts uniformly instruct that to preserve a particular issue for appeal, defendant must specifically focus on the alleged error."). To overcome this procedural bar, the petitioner must show cause for the default and prejudice flowing therefrom, or that failure to review a claim would result in a "fundamental miscarriage of justice." Coleman, 501 U.S. at 750, 111 S. Ct. at 2565. A fundamental miscarriage of justice results "where a constitutional violation has probably resulted in the conviction of one who is actually innocent of the substantive offense." Dretke v. Haley, 541 U.S. 386, 393, 124 S. Ct. 1847, 1852 (2004) (internal quotations and

citations omitted). "[I]n this regard[,] . . . 'actual innocence' means factual innocence, [and] not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611 (1998).

The petitioner raised, on direct appeal, his claim that the trial court admitted improperly, into the record, "emotional response" and sexual abuse testimony by Martinez. The Appellate Division determined that Reyes did not preserve this claim for appellate review, since he failed to object, or object with adequate specificity, so as to preserve his claims regarding "the victim's testimony." See Reyes, 17 A.D.3d at 205, 794 N.Y.S.2d at 15. Here, Reyes does not attempt to show cause and prejudice for his default; rather, he alleges a miscarriage of justice would result if his claim were not considered since, if the jury had considered the information contained within the Flik report and the Womack affidavit, it "is more likely than not that . . . no reasonable juror would have found Mr. Reyes guilty beyond a reasonable doubt." Inasmuch as Reyes does not allege "factual innocence," and instead contends the information in the Flik report and the Womack affidavit would support a finding that the proof at trial was legally insufficient for the jury to find him guilty beyond a reasonable doubt, he has not demonstrated that a fundamental miscarriage of justice would result if the court declined to consider this claim. Therefore, the petitioner's claim, that the trial court admitted improperly, into the trial record, evidence of the victim's emotional response to the rape and her history of sexual abuse, is procedurally barred, and the petitioner has failed to overcome this bar.

E. Prosecutorial Misconduct During Jury Selection

As with the petitioner's claim that he was denied a fair trial, by the admission into evidence of Martinez's testimony regarding her "emotional response" and previous sexual abuse,

the Appellate Division found the petitioner's prosecutorial misconduct claim was unpreserved for appellate review because Reyes failed to object, or to object with adequate specificity, to the prosecutor's comments during jury selection. See id., at 205, 794 N.Y.S.2d at 15. Reyes has not shown cause or prejudice flowing from this procedural default, nor does he allege that he is factually innocent. Therefore, this claim is procedurally barred, as discussed more thoroughly above, and cannot be a basis upon which to rely in granting habeas corpus relief.

F. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, the petitioner must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for counsel's error(s), the outcome of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064-65, 2068 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065.

Reyes contends his trial counsel rendered ineffective assistance by failing to object to the prosecutor's "prejudicial" questions during the jury selection process. However, the jurors were instructed that they could "not consider anything outside of the evidence," and that "[n]othing that [the trial court or the attorneys] have said is evidence." A jury is presumed to follow the instructions of the trial judge. See Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 733 (2000). Therefore, it does not appear that the prosecutor's questions during voir dire had any effect on the outcome of the proceeding, and the petitioner's trial counsel did not render

ineffective assistance by failing to object to the prosecutor's questioning during voir dire.

The petitioner claims his trial counsel was ineffective in failing to object to Martinez's testimony regarding: (a) how she felt after she was raped; and (b) the sexual abuse inflicted by her father. Under New York law, "all relevant evidence is admissible unless its admission violates some exclusionary rule." People v. Scarola, 71 N.Y.2d 769, 777, 530 N.Y.S.2d 83, 86 (1988). The Supreme Court has stated that Federal Rule of Evidence 402 "provides the baseline" for the admissibility of evidence. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587, 113 S. Ct. 2786, 2793-94 (1993). Fed. R. Evid. 402 provides that, with exceptions, "[a]ll relevant evidence is admissible." The term "'[r]elevant evidence' is defined as that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Id. at 587, 113 S. Ct. at 2794.

Martinez testified she felt "embarrassed," "sad," "depressed," and "upset," as a result of the incident that occurred on July 2, 2002. This testimony is relevant to whether Martinez had consented to have intercourse with Reyes. See, e.g., People v. Rouse, 142 A.D.2d 788, 788-89, 530 N.Y.S.2d 333, 334 (App. Div. 3rd Dep't 1988) (citing a victim's "emotional state directly following the sexual attack" as evidence properly considered by the jury in convicting the defendant). Martinez's testimony regarding the sexual abuse she suffered in the past, and her failure to report such sexual abuse for several years, was relevant to Martinez's initial delay in reporting the rape to authorities, or mentioning it to her boyfriend. See, e.g., People v. Wigfall, 253 A.D.2d 80, 83, 690 N.Y.S.2d 2, 7-8 (App. Div. 1st Dep't 1999) ("the sexual history evidence was clearly admissible as relevant to the issue of why complainant failed to

immediately inform her husband of the rape, as well as to defendant's contention that the sexual encounter was consensual. . . .").

Relevant evidence may be excluded "when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 650 (1997) (internal quotations and citations omitted). Here, evidence regarding Martinez's history of being abused sexually was probative of her failure to report the rape by Reyes immediately, and it cannot be said that Reyes was "unfairly prejudice[d]" by the brief testimony by Martinez of the sexual abuse she endured, nor can it be said that the jury was misled by the admission of this testimony. See id. ("[t]he term 'unfair prejudice,' . . . speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged"). Likewise, the probative value of Martinez's testimony that she felt embarrassed, hurt, upset, and sad after the rape is not "substantially outweighed by the danger of unfair prejudice" nor is it likely to "mislead[] the jury." See Fed. R. Evid. 403.

Since the probative value of this evidence is not outweighed by any prejudice to Reyes, the claim that the petitioner's counsel was ineffective in failing to object, or to object with specificity, to the admission of Martinez's emotional state after the rape and to the testimony on Martinez's history of sexual abuse by her father, is not supported by the record.

The petitioner's claim that his counsel was ineffective in failing to object to the prosecutor's references, during summation, to the evidence of Martinez's emotional response to the rape and history of sexual abuse, also fails. "Given the . . . broad latitude afforded parties in commenting on evidence during summation," United States v. Bautista, 23 F.3d 726, 734 (2d

Cir. 1994) (internal quotations and citations omitted), it cannot be said that the prosecutor's summary of the admitted evidence "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986) (internal quotations and citations omitted). The evidence of Martinez's testimony regarding her emotional response to the rape and her history of sexual abuse was properly admitted. Therefore, the prosecutor's reference to this evidence during summation was appropriate, and any objection to the prosecutor's summation would have been futile.

Altogether, as the above analysis indicates, the Appellate Division's finding that the petitioner's counsel did not render ineffective assistance to him is not contrary to, nor an unreasonable application of, clearly established Federal law as determined by the Supreme Court. Additionally, it cannot be said that the state court's finding was an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

IV. RECOMMENDATION

For the reasons set forth above, I recommend that Reyes' petition for a writ of habeas corpus be denied.

V. FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Sidney H. Stein, 500 Pearl Street, Room 1010, New York, New York, 10007, and to the chambers of the undersigned, 40 Foley Square, Room 540, New York, New York, 10007. Any requests for an

extension of time for filing objections must be directed to Judge Stein. FAILURE TO FILE OBJECTIONS WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 58-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983).

Dated: New York, New York
November 20, 2008

Respectfully submitted:

/Kevin Nathaniel Fox/
KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

Copies mailed to:

Stephanie M. Carvlin, Esq.
Jodi Ann Danzig, Esq.

JUDGE STEIN 06 CV 5525

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions -- Read Carefully

If you are attacking a state court judgment of conviction under which you are serving a sentence, you must fill in the name of the state and county where judgment was entered.

(1) This petition must be typewritten or handwritten and legibly signed by you under the penalty of perjury.

(2) You must include all grounds for relief and all facts supporting such grounds.

(3) If you were convicted in Bronx, Dutchess, New York (Manhattan), Orange, Putnam, Rockland, Sullivan or Westchester County then the Southern District of New York is the proper Court in which to file your petition. 28 U.S.C. § 112 (b); Local Civil Rule 83.3.

Complete the attached form and send the original plus two copies to:

United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Court House
Pro Se Office
500 Pearl Street, Room 230
New York, New York 10007

This instruction page need not be copied or submitted. Retain a copy of the petition for your records. The Court will acknowledge receipt of your petition.

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court for the Southern District of New York

Name	Prisoner Identification No.
William Reyes	03A3932

Place of Confinement

Greenhaven Correctional Facility, Stormville, NY

Name of Petitioner (include name under which convicted)	Name of Respondent (warden or superintendent of your prison)
William Reyes	v. Superintendent Eagle

PETITION

1. Name and location of court which entered the judgment of conviction under attack Supreme Court, New York County 100 Center St, NY, NY

2. Name and address of lawyer who represented you Ralph Cherchian 61 Wall St, 2nd FL NY, NY 10005

3. Date of judgment of conviction 7/11/2003

4. Length of sentence See attached

5. Nature of offense involved (all counts) See attached

6. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐

If you entered a guilty plea to one count of indictment, and not a guilty plea to another count of indictment, give details:

7. If you pleaded not guilty, what kind of trial did you have? (Check one)

7. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

8. Did you testify at the trial?
   Yes ☒ No ☐

9. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

10. If you did appeal, answer the following:

(a) Name of court Appellate Division, First Department

(b) Name and address of lawyer who represented you Gayle Pollack
Center for Appellate Litigation, 74 Trinity Pl., NY, NY 10006

(c) Result Affirmed

(d) Date of result and citation, if known 4/19/2005

(e) Grounds raised See attached

(f) If you sought further review of the decision by appeal to a higher state court, please answer the following:

(1) Name of court Court of Appeals

(2) Name and address of lawyer who represented you

(3) Result Leave to appeal was denied

(4) Date of result and citation, if known 6/27/2005

(5) Grounds raised

(g) If you filed a petition for Writ of Certiorari in the United States Supreme Court, please provide the date the petition was filed and the date of result and citation, if known

(1) Name and address of lawyer who represented you

11. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

12. If your answer to 11 was "yes," give the following information:

(a) (1) Name of court Supreme Court, New York County

(2) Name and address of lawyer who represented you Pro Se

(3) Nature of proceeding 440.10 motion

(3) Grounds raised See attached

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Date motion was filed with the Court 3/20/2006

(6) Date and result of motion Denied on 7/17/2006

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Name and address of lawyer who represented you

(3) Nature of proceeding

(4) Grounds raised

(5) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(6) Date motion was filed with the Court

(7) Date and result of motion

(c) Did you appeal to the highest state court having jurisdiction the decision on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☒

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

I will be applying for leave to appeal the decision of the 440.10 motion within 30 days of it's decision (no later than 8/14/2006)

13. STATE EVERY GROUND ON WHICH YOU CLAIM THAT YOU ARE BEING HELD UNLAWFULLY. EACH GROUND SHOULD BE SET FORTH UNDER A SEPARATELY NUMBERED PARAGRAPH. IF YOU ARE RAISING THE SAME GROUNDS THAT YOU RAISED ON DIRECT APPEAL, YOU SHOULD ATTACH A COPY OF YOUR STATE COURT APPELLATE BRIEF OR ITS TABLE OF CONTENTS. YOU MUST EXHAUST YOUR STATE COURT REMEDIES ON EACH GROUND YOU ARE CLAIMING YOU ARE BEING HELD UNLAWFULLY.

Ground(s):

See attached

(attach additional papers as necessary)

14. **TIMELINESS OF PETITION:** If your judgment of conviction was made final over one-year ago, you must set forth below why the one-year statute of limitations as codified in 28 U.S.C. § 2244(d) does not bar your petition.*

I am currently within the 90 day + 1 year time limitation imposed since the denial of my request for leave to appeal my conviction to the court of appeals (I did not submit a petition for writ of certiorari within that inital 90 day period)

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as codified in 28 U.S.C. § 2244(d) provides in part that:

(1) A 1- year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made

retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) 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.

15. Do you have a petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☒ No ☐

(a) If so, give the name and location of court in which the petition or appeal is pending leave to appeal the decision of the 440.10 motion will be submitted.

16. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

7/21/2006
(date)

Signature of Petitioner

03A3932
Inmate Number

PO BOX 4000
Stormville NY 12582
Address

I declare under penalty of perjury that on 7/21/2006 (date), I delivered this petition to ~~prison authorities to be mailed to~~ the United States District Court for the Southern District of New York.

Signature of Petitioner

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
NEW YORK COUNTY

----------x

WILLIAM REYES, Petitioner
v.
SUPERINTENDENT ERCOLL, *Greenhaven Correctional Facility*, Respondent

----------x

PETITION

WILLIAM REYES, being duly sworn, deposes and says,

1. I am the defendant in the above-entitled proceeding. I make this affidavit in support of my petition for writ of Habeas Corpus.
2. I was indicted for one count of rape in the first degree (P.L. § 130.35(1)) and two counts of sexual abuse in the first degree (P.L. § 130.65(1)). At arraignment I entered a plea of "not guilty" and was unable to post bail. I was tried in this court before Hon. Judge Fried on March 24th, 2003. The case was submitted to a jury on March 27, 2003, which rendered a verdict of guilty on March 28, 2003. Defense counsel made a C.P.L. §330.30 motion asking the court to set aside the verdict. The court refused, finding no error that would require reversal as a matter of law.
3. On July 11, 2003, I was sentenced to 18 years, with two concurrent 7-year terms. Having served 4 years of this term, I am currently incarcerated pursuant to this judgment.
4. On April 19th, 2005, the Appellate Division, First Department, affirmed my conviction. The appeal raised the following questions for review:

    i. Whether appellant's conviction violated due process and was against the weight of the evidence when the complainant had a history of lying and told inconsistent and improbable versions of the alleged rape to several people.
    U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 6.

iv. Whether the trial court erred in admitting into evidence irrelevant testimony designed to vilify appellant and make complainant appear more sympathetic, particularly as the prosecutor leaned heavily on that evidence during summation. U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 6.

v. Whether the prosecutor's misconduct at jury selection, during which she asked prospective jurors if they would call their own daughters liars if they came home from work and claimed to have been raped in circumstances similar to the allegations in this case, deprived appellant of a fair trial and due process. U.S. Const. Amend. XIV; N.Y. Const. Art. I, § 2.

iv. Whether appellants sentence was unduly harsh and should be reduced in the interest of justice.

5. Leave to appeal to the Court of Appeals was subsequently denied on June 27th, 2005.

6. On March 20, 2006, a pro se 440.10 motion was submitted to the Supreme Court of the County of New York before Judge Pickholtz. The motion was denied on July 17, 2006. The 440.10 motion raises the following grounds for review:

i. William Reyes's conviction should be vacated based on newly discovered evidence that would have resulted in a more favorable verdict. C.P.L. §440.10 (1)(g)

ii. William Reyes's conviction should be vacated if the People had knowledge of the newly discovered evidence prior to trial. C.P.L. §440.10 (1) (b), (h), U.S. Constitution, Amends. V, XIV; N.Y. Constitution, Art. 1, §6

8. I have not petitioned for Writ of Habaes Corpus before. I am submitting my petition at this time to ensure it is timely based on the 1 year + 90 day time restriction.[1] The 440.10 motion was just decided on July 17, 2006, and I intend to request for leave to appeal to the Appellate Division. This request will be made within 30 days from the denial of the 440.10 motion, and will be submitted no later than August 14, 2006. Beyond this, I intend to exhaust all the state remedies afforded to me for the 440.10 motion.

9. I request that this petition be "stayed" until such time as the 440.10 motion has exhausted all it's remedies, or that it be dismissed without prejudice to the filing of a new petition once all state remedies have been exhausted.

[1] A mandate of detention has been requested from Superintendent Ercole of Greenhaven Correctional Facility. It was not yet available at the time of this petition and is forthcoming.

GROUNDS

A summary of the trial evidence can be found in the attached copy of the Appellate brief. In addition, a summary of the trial evidence can also be found in the attached copy of the 440.10 motion, which also includes a summary of any and all evidence discovered after trial. This summary of evidence can be used to provide a factual context for evaluating the relevance and significance of the grounds outlined below.

POINT I

Because the complaining witness's story shifted at each retelling and was contradicted by the physical evidence, the defendant's conviction was against the weight of the evidence and violated his right to due process.
US. Const. Amend. XIV

**For facts pertaining to this issue, see Argument I of the attached Appellate Brief*

POINT II

Because prosecution witnesses perjured themselves and withheld exculpatory evidence from the defense at trial, including a denial of the alleged rape by the complaining witness and a prosecution witness, the defendant was not afforded his right to a fair trial, violating his right to due process.
US. Const. Amend. XIV

** For facts pertaining to this issue, see Argument, Point I of the attached 440.10 motion*

POINT III

Because the prosecutor should have known about the exculpatory evidence not provided to the defense at trial, as well as false testimony given by prosecution witnesses, the prosecutor's misconduct, whether intentional or inadvertent, denied the defendant his right to a fair trial, violating his right to due process.
US. Const. Amend. XIV

** For facts pertaining to this issue, see Argument, Point II of the attached 440.10 motion*

POINT IV

The trial court improperly admitted testimony about the complaining witness's emotional response to the rape, and her prior history of sexual abuse by her father, which, while irrelevant to the issues at trial, created sympathy for the complaining witness and incited the jury to vindicate her past abuse.
US. Const. Amend. VI, XIV

** For facts pertaining to this issue, see Argument II of the attached Appellate Brief*

POINT V

The prosecutors misconduct during jury selection, including asking the potential jurors whether they would demand physical proof if their children claimed they were raped in a situation similar to the one presented at trial, and asking the jurors to think about how they would respond to being raped, was so prejudicial that it deprived the defendant of any opportunity of a fair trial by an impartial jury.
US. Const. Amend. VI, XIV

** For facts pertaining to this issue, see Argument III of the attached Appellate Brief*

POINT VI

Defense counsel was ineffective in his "failing to object, or by making generalized objections . . . [to the various prejudicial] aspects of the jury selection, the victim's testimony and the prosecutor's summation".[2]
US. Const. Amend. XIV

** For facts pertaining to this issue, see Arguments I, II, and III of the attached Appellate Brief*

[2] New York v. William Reyes, Decision and Order of the Supreme Court, Appellate Division, First Department, entered April 19, 2005

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 66
----------X

THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 4958/02

WILLIAM REYES,
Defendant. :

----------X

Ruth Pickholz, J.:

Defendant moves to vacate his conviction pursuant to CPL 440.10.

The defendant was convicted after trial of rape in the first degree and other crimes. Both the defendant and the complainant worked at a concession stand operated by Circle Line. The complainant testified that on July 2, 2002, the defendant directed her to retrieve some coffee urns from the bottom of one of the boats docked at the pier. He followed her, pushed her into one of the stalls in the women's bathroom, bent her over at the waist and forcibly penetrated her. He then withdrew his penis and ejaculated in front of the toilet. The physician who examined the complainant shortly after the event at Bellevue Hospital observed scratching but no bruising, and there was no indication of semen in the specimens taken from her.

The primary prosecution witnesses were the complainant and three co-workers to whom she had reported the rape, Sylina King, Serita Godby, and Dinaldo

Khanii. When the complainant returned to the concession stand from the boat immediately after the incident she confided to King that she had been raped. King told a manager about the conversation, who then contacted the human relations department of FLIK International (FLIK), Circle Line's parent company. A report that something had occurred between defendant and the complainant reached Khanii, a manager at the pier, later that day. The complainant told Godby about the rape the next morning. At Godby's urging she reported the rape to Khanii.

The complainant brought a civil suit against Circle Line and the defendant immediately after the trial. As a consequence of that suit defendant came into possession of various documents that pertained to the incident. One of these is an undated, eleven-page report that defendant refers to as the "timeline." [1] It bears no attribution and is marked confidential. The timeline appears to be an internal FLIK document consisting of daily entries which begin on the day of the incident and end seventeen days later. The entries detail FLIK's investigation of the rape and its attempts to find the complainant another position in one of its component companies.

The defendant contends that the timeline contains information that he was unaware of at the time of the trial. He further argues that the information undercuts the People's case to such a degree that, had it been known to him at trial, he probably would

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[1] The document bears no heading or title, but its top line reads "Documentation William Reyes/[complainant's name]". The second line reads "Below is a timeline of events and allegations."

have been acquitted. Defendant contends, for example, that the timeline indicates that at a July 3rd meeting with Khanii and two representatives from FLIK's human resources department the complainant stated that she had been touched but denied that she had been raped . The report states:

> Dinaldo [Khanii] then began to speak with [the complainant] and asked her questions about what had occurred the day before. Per Dinaldo, he was able to get [the complainant] to explain to him the details of what happened after asking her many questions . . . She states that she told him about the rape. After being asked if it was William Reyes who had done this [she] replied, "yes" . . . .
>
> A few minutes after this discussion Glenn Bergman . . . and Jennifer Ruza [the representatives from the human resources department] arrived.
>
> Jennifer met with [the complainant], Glenn and Dinaldo. . . . Dinaldo explained what [the complainant] had already mentioned to him earlier that morning what had happened. Dinaldo recounted the story as he said [the complainant] had just told him:
>
> > On 7/2/02 . . . William asked [the complainant] to go to the boat and that he would meet her there to get the coffee urns. William met her at the boat and asked [her] to go downstairs. He went downstairs with her and grabbed [her] by the arm very aggressively, he said to her, "We can do this, we can do this." Dinaldo did not mention that [the complainant] agreed that there was penetration. He explained that William grabbed her and touched her. [The complainant] ran off the boat before anything else happened.
> >
> > Jennifer asked [the complainant] if this information was correct. [The complainant] responded that it was. Jennifer asked [the complainant] if there was any information that she wanted to add; [The complainant] shook her head no. . . .
>
> Dinaldo called Jennifer at about 1 pm stating that [the complainant] was pressing charges and that the Police were at the unit. Jennifer asked Dinaldo to clarify again what exactly happened on the boat. Jennifer said, "William grabbed and touched [the complainant] and she got away, correct?" Dinaldo replied, "No, she said she was raped."

The time line indicates that Nina Monteleone, another FLIK representative, spoke with Khanii about the July 3rd meeting on July 11th. She asked him to tell her what

the complainant had told him on July 3rd. Khanii told Monteleone that the complainant told him that

> he (she did not name the person) asked her to go to one of the boats, that when she arrived he was there and he asked her to go downstairs, and that there he pushed her and grabbed her. . . . . Then Dinaldo asked [her], "Did William do this?' Dinaldo stated that [the complainant] shook her head yes. Dinaldo asked her if there was penetration by William and and she responded yes. [The human resources representatives then joined the meeting] Dinaldo saw their joining [the complainant] and him as distractions. Jennifer, Glenn, Dinaldo and [the complainant] then sat down and covered the dialogue covered under [the entry dated] 7/3/02 of this document [i.e., the timeline] Nina asked Dinaldo why he did not include his knowledge of the penetration during the first conversation with Jennifer and Glenn; he was unsure why.

The defendant states that he did not learn until after his conviction that Bergman and Ruza were present at the July 3rd meeting and had no way of knowing that the complainant and Dinaldo denied to them during the meeting that a rape had a occurred. He questions (as did Monteleone) how Khanii could have failed to mention to Bergman and Ruza that the complainant hold told him only minutes before that she had been raped. He further contends that the complainant's failure to assert to them on July 3rd that she had been raped, despite being given an opportunity to add to Khanii's account, casts doubt on her story. The defendant argues that, had he known of the complainant's denial he would have been in a position to challenge the version of the events set forth by the prosecution. Further, he continues, as there was no medical evidence establishing that the complainant had been raped, and the case hinged upon the jury's assessment of credibility of the prosecution's witnesses, the absence of any mention of a rape in these statements would have created a reasonable doubt.

The defendant also focuses on several other statements contained in the timeline which contradict portions of the testimony at trial. In addition, he has submitted an affidavit from Barbara Womack, who claims to be former employee of Circle Line who was present on the pier on July 2nd. She states that the complainant volunteered to accompany the defendant to the boat to retrieve the coffee urns, followed him to the boat, went right back to work after returning from the boat. and "looked as if nothing was wrong." The defendant contends that the cumulative effect of this evidence would have been to undermine the credibility of the People's witnesses and likely would have caused the jury to acquit him.

A court may vacate a criminal conviction on the grounds of newly discovered evidence "provided that such evidence (1) will probably change the result if a new trial is granted; (2) is discovered since the previous trial; (3) was not discoverable before the trial by the exercise of due diligence; (4) is material to an issue at defendant's trial; (5) is not cumulative; and (6) is not merely impeachment testimony" (People v. Reyes, 255 AD2d 261, 263; *see* People v. Salemi, 309 NY 20, 215). The evidence adduced by defendant in support of his motion fails to satisfy this standard on several scores.

Although he may not have known of the existence of the timeline until after trial, the defendant has not established that he could not have discovered its existence before trial with due diligence. The document purports to be a series of entries made contemporaneously with or immediately after the events they describe. If so, it

was completed well before trial. The defendant knew the name of his employer, but apparently made no effort to subpoena Circle Line or its parent company for employee records and materials pertaining to the incident. In addition, the assistant district attorney provided the defense with discovery material clearly indicating that FLIK's human resources department had been notified of the incident and that a department representative was present when Khanii spoke with the complainant. Defendant has also not shown that, had he attempted to obtain such material by way of subpoena, he could not have obtained the timeline. Even if the timeline was not discoverable with due diligence, however, the information it contains does not meet the newly-discovered-evidence standard, as it is either merely impeachment material, not of the type that would change the outcome of the trial, or not material to the issues at trial.

No matter how much the defendant would have it otherwise, neither Khanii's nor the complainant's omissions on July 3rd can be characterized as "denials" that the complainant had been raped. The timeline indicates that the complainant told Khanii that he had penetrated her only a few minutes before Ruza and Bergman joined the meeting. At most, that she did not explicitly reiterate this fact after they arrived would have served as grist for impeachment. The same can be said for Khanii's failure to mention the fact to Bergman and Ruza at the meeting. Later that afternoon he took pains to clarify to Ruza that the complainant told him that defendant had raped her. He made it clear again on the 11th to Monteleone. Neither of the omissions in question constitutes proof of defendant's innocence.

The same can be said for defendant's arguments concerning her co-worker, Salina King, and Willie Leverman, who worked as a grill cook at the pier. The timeline does not state that the complainant told Salina King that the defendant had raped her. It says, rather, that "she told Salina King what had occurred." Additionally, the timeline indicates that King told Khanii and another supervisor only that "something bad" happened to a co-worker. This information, argues the defendant, is contrary to the testimony at trial, which created the impression that the complainant told King that she had been raped and that King made this clear to her supervisors.

Defendant's argument is meritless, as the information in question does not establish defendant's innocence and is merely impeachment material. Whether the complainant explicitly told King that she had been raped, and whether King used the word "rape" when she first brought the matter to the attention of her superiors are issues that defendant possibly could have explored in cross-examining the witnesses in question. The information upon which he focuses, however, does not contradict any of the trial testimony. [2] Moreover, both the complainant's testimony and the information in the timeline easily permit the inference, which was argued by the assistant district

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[2] The complainant's testimony mirrors the information in the timeline that she told King "what had occurred." At trial, the assistant district attorney asked the complainant, "Without telling us what you said, did you tell her [King] what happened on Boat 10?" The complainant answered, "yes." I note that, pursuant to the rules of evidence, neither the victim nor the person to whom she complained may testify as to the details of the complaint (see People v. McDaniel, 81 NY2d 10, 17).

attorney on summation, that the complainant told King that she had been raped. It was not impermissible for the prosecution to make such an argument.

The timeline indicates that Ruza and Monteleone met with Leverman on July 8th. Leverman told them that he saw the defendant and the complainant go toward the boats on July 2nd and that the complainant told him about the rape that same day. Leverman did not testify at trial and he was never mentioned in the discovery materials that the prosecution provided to the defense. The complainant testified that on July 2nd she informed Salina King about the rape, but that she told no one else about it that day. On cross-examination she was confronted with medical records which indicated that she informed medical personnel that she told three co-workers about the rape before she left the pier on July 2nd. She testified that the records were incorrect as to that point and insisted that she never made such a statement.

The defendant argues that, had the jurors known that the complainant spoke to Leverman, they would have doubted her credibility and given more credence to the medical report. [3] This argument is meritless. Had the jurors known that the complainant made prompt outcry to yet another person, they would have had greater,

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[3] The defendant does not make clear why it would have been important for the jury to give more credence to the medical report, but I presume that the basis of his argument is as follows: The absence of medical evidence of rape undermines the complainant's account. In addition, as many details of the rape that she gave in other accounts and on the witness stand are omitted from the report, it can be inferred that the complainant never mentioned them to medical personnel. If so, her credibility is put into question.

not less, cause to believe her report true. It seems highly unlikely that her inability to recall speaking with Leverman would have greatly concerned them. Moreover, in light of the fact that the complainant testified that the defendant did not ejaculate in her, and that she laundered her clothes after the incident, the lack of medical evidence confirming that she had been raped was not especially telling. Indeed, there is no reason why the jury could not have both fully credited the medical findings contained in the report and accepted the complainant's account of the rape.

Defendant also focuses on the fact that the timeline states that the complainant informed Monteleone that she told the defendant about herself, including where she lived, when she first began working for Circle Line. This information contradicts testimony to the effect that the two had no prior relationship. Assuming, for the sake of argument that the information contained in the timeline is accurate, it is not relevant to any material issue at trial. Similarly, the fact that the complainant may have told Monteleone that the defendant was waiting for her at the boat when she went to retrieve the coffee urns, and not that he followed her, merely would have provided material for impeachment. The same analysis holds for the information contained in the affidavit of Barbara Womack, which is to the same effect.

There is no merit to defendant's contentions that the prosecution, in failing to provide him with the statements of the complainant and others which are contained in the timeline, did not fulfill its obligations under Brady v. Maryland (373 US 83) and

People v. Rosario (9 NY2d 86). As for the Rosario, claim, there is no reason to believe that the prosecution was in possession or control of the timeline (*see* People v. Washington, 86 NY2d 189), or that it even had actual or constructive knowledge of the document. In addition, none of the statements at issue constitute Brady material. As already noted, although they arguably provide material for impeachment, the statements are not exculpatory. The contention that several prosecution witnesses committed perjury is completely baseless, as none of the statements to which defendant points materially contradicts the testimony at trial.

The defendant is not entitled to a hearing on this last issue, or on any of his claims that the prosecution was aware of Brady or Rosario material but withheld it from him. "Mere conclusory allegations of prosecutorial misconduct are alone insufficient to require a trial court to conduct an evidentiary hearing for the purpose of resolving those accusations" (*see* People v. Taylor, 56 NY2d 242, 246-247). The defendant has not produced a scintilla of evidence to substantiate his claims of prosecutorial misconduct. The inferences he draws from the manner in which the assistant district attorney examined witnesses, and the district attorney's office answered his requests under the Freedom of Information Act are strained and do not withstand even cursory examination. They do not constitute proof of misconduct.

Accordingly, defendant's motion is denied.

A.J.S.C.

Dated: July 5, 2006