APPENDIX
A

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

1147
KA 16-00185
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

Vs. MEMORANDUM AND ORDER

JUSTIN WOODARD, DEFENDANT-APPELLANT.

EDELSTIEN & GROSSMAN, NEW YORK CITY (JONATHAN I. EDELSTIEN OF COUNSEL), FOR DEFENDANT-APPELLANT.
SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered December 26, 2015. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL § 440.10.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: Defendant appeals by permission of this court from an order denying without a hearing his motion pursuant to CPL article 440 seeking to vacate on, inter alia, the ground of ineffective assistance of counsel the judgment convicting him upon a jury verdict of murder in the second degree (Penal law §

125.25[3]) and attempted robbery in the first degree (§§ 110.00, 160.15[2]). We previously affirmed that judgment of conviction (People v. Woodard, 96 AD3d 1619, (4th Dept. 2012), lv denied 19 NY3d 1030 [2012]).

Defendant contends that he was denied effective assistance of counsel because defense counsel failed to investigate the circumstances under which defendant provided a written statement to police. Preliminarily, we agree with defendant that his ineffective assistance of counsel claim is not procedurally barred by CPL 440.10(2)(c).

With respect to the merits, "[a] defendant's right to effective assistance of counsel includes counsel's reasonable investigation" (People v. Rossborough, 122 AD3d 1244, 1245 [4th Dept. 2014]; see People v. Howard, 175 AD3d 1023, 1025 [4th Dept.2019]; People v. Jenkins, 84 AD3d 1403, 1408 [2nd Dept. 2011] lv. denied 19 NY3d 1026 [2012]). Although "the failure to investigate may amount to ineffective assistance of counsel" (Rossborough, 122 AD3d at 1245; see People v. Kurkowski, 117 AD3d 1442, 1443 [4th Dept. 2014]), the governing standard is "'reasonable competence' not perfect representation" (People v. Modica, 64 NY2d 828, 829 [1985]; see People v. Young 167 AD3d 1448, 1449 [4th Dept 2008], lv denied 33 NY3d 1036 [2019]).

Here, defendant alleges that he invoked his right to counsel while in police custody prior to giving a written statement to police. Defendant contends that defense counsel's failure to discover that fact during his investigation of defendant's case amounts to ineffective assistance. We disagree. Defense counsel properly requested and received discovery materials and filed an Omnibus Motion on defendant's behalf seeking, inter alia, suppression of defendant's written statement. The discovery materials produced gave no indication that defendant requested a lawyer at any time, and the testimony adduced at the ensuing Huntly hearing established that defendant freely and voluntarily

waived his right to counsel prior to giving his written statement to police. Defendant admittedly failed to inform defense counsel that he invoked his right to counsel prior to giving the written statement until after the Huntly hearing, at which point defense counsel moved to reopen the hearing. Thus, the record establishes that defense counsel sufficiently investigated the facts, and defense counsel's failure to argue or elicit information at the Huntly hearing tending to show that defendant had invoked his right to counsel while in police custody is attributable to defendant's failure to inform him of that alleged fact (see Young, 167 AD3d at 1450; People v. Bradford, 202 AD2d 441, 442 [2nd Dept. 1994]. lv denied 84 NY2d 823 [1994]).

ENTERED: JANUARY 31, 2020.

APPENDIX B

APPENDIX B

SUPREME COURT OF MONROE COUNTY
ROCHESTER, NEW YORK

DECEMBER 23, 2015

Jane S. Myers. Esq.
60 Remsen Street, Suite 4E
Brooklyn, New York, 11201-3414

Justin Woodard, 09-B-1588
Eastern N.y Correctional Facility
30 Institution Rd.d
P.O. Box 338,
Napanoch, New York, 12458-0338

Geoffrey Kaeuper, Esq.
Assistant District Attorney
47 S. Fitzhugh Street, Suite 832
Rochester, New York, 14614

RE: **People v. Justin Woodard**
IND. No. 2008-0769

DECISION AND ORDER

Dear Ms. Myers, Mr. Woodard and Mr. Kaeuper:

Defendant stands convicted, following a jury trial of Murder in the Second Degree (felony Murder) and Attempted Robbery in the First degree in connection with the shooting death of the victim on or about January 14, 2007 by one or both of his co-defendants. On direct appeal, the judgment of conviction was affirmed (see People v. Woodard, 96 AD3d 1619 [2012]. lv denied 19 NY3d 1030).

By notice of Motion dated April 27, 2015, the defendant, pro-se, seeks an order pursuant to CPL 440.10(1)(b),(c),(f) and (h)

vacating his conviction. The motion is supported by defendant's affidavit and Memorandum of Law. By answering affirmation of Assistant District Attorney, Geoffrey Kaeuper, Esq., dated June 9, 2015, the people oppose the motion. The defendant further submits an amended affidavit with minor changes.

By Notice of Motion dated June 23, 2015, Jane S. Myers, Esq., on behalf of the defendant, moves for an order permitting the defendant to supplement and amend his pro-se Motion. The court granted the application, and the defendant additionally seeks, pursuant to CPL 440.10(1)(d),(f) and (h), to vacate the judgment of conviction by an attorney affirmation of Ms. Meyers, dated September 25, 2015, affidavits of Defendant and his brother, Sinclair Mountain, sworn to September 1 and 4, 2015, respectively, a Memorandum of Law, and a six-volume appendix.

The people further oppose the motion, as supplemented by the answering Affirmation of Mr. Kaeuper, dated November 9, 2015, with an attached exhibit (Robert Brewer's statement to police inadvertently omitted from the Appendix). All of the above have been thoroughly reviewed and are incorporated herein by reference in rendering this decision.

Upon review of same, including the official Court record, the Defendant's motion is herewith denied, (see CPL 440.30; People v.Satterfield, 66 NY2d 796, 799; People v. Maddox, 256 AD2d 1068, lv denied 93 NY2d 875), for the reasons stated in the People's answering Affirmations (see CPL 440.30[4][a-c]).

The defendant's contentions that the prosecution suborned perjury is not supported by "sworn allegations substantiating or tending to substantiate all the essential facts" (CPL 440.30[4][b]). Further, his argument that the people failed to indict him within the time period for preliminary hearings is also without merit (see CPL 440.30[4][b]).

The defendant asserts, as well, that the judgment of conviction is subject to vacatur because he was denied effective assistance of counsel by trial counsel's failure to investigate and request suppression of his statement to police on the ground that he invoked his right to counsel when detained by the Elmira Police Department. The appendix reflects that counsel sought to reopen the suppression hearing on the basis that defendant invoked his right to counsel, which motion was denied (see Appendix Vol.2 at A378-A385, A396-A399, A403-405). Thus, the alleged deficiency in counsel's representation is apparent from the record, and therefore, no hearing is required (see CPL 440.10[2][c]).

In any event, a single error by otherwise competent trial counsel does not generally deprive a defendant of his or her constitutional right to effective assistance of Counsel (see People v. Turner, 5 NY3d 476, 480-481). Only where a single failing is of such prejudicial magnitude that there exists a reasonable likelihood of a different outcome would defendant be so deprived (see People v. Caban, 5 NY3d 143, 152; People v. Douglas, 296 AD2d 656, 657, lv denied 99 NY2d 535; People v. Prue, 26 AD3d 671-672, lv denied 7 NY3d 816). Even assuming arguendo, that counsel erred in not investigating and advancing the argument that defendant earlier invoked his right to counsel and the motion to suppress his statement to police would have been successful, defendant's testimony before the Grand Jury, which was consistent with his statement to police, was nevertheless considered by the Jury (Woodard, 96 AD3d at 1621). Thus, the alleged error by counsel was not so prejudicial as to have likely resulted in a different trial outcome (see Caban 5 NY3d 143, 152).

Any claims not specifically addressed herein are likewise deemed to be without merit and could have been raised or, in fact,

were raised on defendant's direct appeal. Therefore, they are likewise denied (see CPL 440.10[2][a],[c]; People v. Bruno, 97 AD3d 986, lv denied 20 NY3d 931; People v. Vigliotti, 24 AD3d 1216).

To the extent that defendant is pro-se, pursuant to 22 NYCRR Sec. 1039(a) he is hereby advised that he has the right, within the time provided by statute, to file a motion before the Appellate Division, Fourth Department, for leave to appeal from this Order and for permission to proceed as a poor Person.

The above constitutes the Decision and Order of the court.

Dated this 23 day of December, 2015, at Rodchester, New York.

FRANCIS A. AFFRONTI
Supreme Court Justice.

APPENDIX C

APPENDIX C

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON: ROWAN D. WILSON, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT,

ORDER DENYING LEAVE

-against-

JUSTIN WOODARD,

APPELLANT.

Appellant having applied for leave to appeal to this court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: April 9, 2020

Associate Judge

Description of order: Order of the Supreme Court, Appellate Division, Fourth Department, entered January 31, 2020, affirming an order of the Supreme Court, Monroe County, entered December 26, 2015.

APPENDIX D

APPENDIX D

FIFTH AMENDMENT STATEMENT

No person shall be held to answer for a Capitol crime, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT STATEMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT STATEMENT

All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the state wherein they reside, no state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

SIMILARITIES AND DISTINCTIONS BETWEEN STATE AND FEDERAL CONSTITUTIONS.

Both the Federal and State Constitutions provide that the state may not deprive a person of property without due process of law. The similarity of the State and Federal Due Process provisions is more than a similarity of language. The impact of the provisions is the same, and a statute repugnant to the Due process clause of the State Constitution is also repugnant to the Due Process of the 14th Amendment.

However, under the State due process clause, a court may impose higher standards than those held to be necessary by the United States Supreme Court under the corresponding Federal Constitutional provision, **People v. Isaacson, 44 N.Y.2d 511; 378 N.E.2d 78,** Thus at times, the due process clause of the New York Constitution is more protective of rights than its Federal Counterpart, usually in cases involving the rights of Criminal defendant's. **Hernandez v. Robles, 7 N.Y.3d 338.** In an Appellate case, the protections provided by New York's Due Process clause will be afforded more expansive interpretation than the federal Constitution, **Samuels v. New York State Dept. of Health, 29 A.D.3d 9.** When the New York Constitution is asserted, it is appropriate to consider whether the history and traditions unique to the state points clearly to the need for additional protection beyond that afforded by the United states Constitution, see **Samuels, Supra.**

It has been said that the Historical differences between the Federal & State Due process clauses make clear that they were adopted to combat entirely different evils, the 14th Amendment was watershed, an attempt to extend and catalogue a series of natural privileges and immunities, thereby furnishing minimum standards designed to guarantee the individual protection against the potential abuses of a monolithic government. In contrast, State Constitutions in General, and the New York Constitution in particular, have long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose, **People v. Taylor**, 9 N.Y.3d 129. Due process clause in the New York Constitution provides greater protection than its Federal counterpart as construed by the United States Supreme Court, U.S.C.A **Const. Amend. 14; Mckinney's Const. Art. 1 § 6, People v. Hamilton**, 979 N.Y.S.2d 97 (App. Div. 2nd Dept. 2014).

RELEVANT STATE AND FEDERAL STATUTORY PROVISIONS

FEDERAL PROVISIONS

RULE 410 - PLEAS, PLEA DISCUSSIONS AND RELATED STATEMENTS

A) **Prohibited Uses**, In a Civil or Criminal case, evidence of the folowing **IS NOT ADMISSIBLE** against the defendant who made the plea or participated in plea discussions:

1) A guilty plea that was later withdrawn.

2) A nolo Contendere plea

3) A statement made during a proceeding of those pleas under Federal Rules of Criminal Procedure, or a Comparable State Procedure; or

4) A statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea, or they resulted in a later withdrawn plea.

B) **EXCEPTIONS.** The court may admit a statement described in rule 410a 3 or 4:

1) In any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

2) In a Criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

FEDERAL RULES OF CRIMINAL PROCEDURE - 11(e)(6)(d)

E) **Plea Agreement Procedure**

6) Inadmissibility of pleas, plea discussions, and related statements, except as otherwise provided in this paragraph, evidence of the following is not, in any Civil or Criminal Proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions.

d) Any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such statement is admissible:

i) In any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, (ii) in a criminal proceeding for perjury

or false statements if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

18 U.S.C.A 6003

Whenever a witness refuses, on the basis of his privilege against self-Incrimination, to testify or provide other information in a proceeding before or ancillary to-

(1) A court or Grand Jury of the united States.

(2) An agency of the United States, or

(3) Either house of congress, a joint committee of the two houses, or a subcommittee of either house, and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination, **but no testimony or other information may be used against the witness in any criminal case**, except a prosecution for perjury, giving false statements, or otherwise failing to comply with the order.

STATE STATUTORY PROVISIONS

McKinney's CPL § - Rules Of Evidence
Admissibility of Statements of Defendants.

1) Evidence of a written or oral confession, admission, or other statements made by a defendant with respect to his participation or lack of participation in the offense charged, **may not be received in evidence against him in a criminal proceeding** if such statement was involuntarily made.

2) A confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him:

A) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement, or

B) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:

i) By means of any **promise** or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself, or

ii) In violation of such rights as the defendant may derive from the Constitution of this state or of the United States.

3) Subdivision 3 of CPL § 64.45 is not relevant to the unique circumstances of the instance case and is therefore omitted.

CONSTITUTIONAL BASIS OF CPL § 60.45(1)

Subdivision (1) restates the Federal and State Constitutional imperative that a "statement made by a defendant with respect to his participation or lack of participation in the offense charged, may not be received in evidence against him [or her] in a criminal proceeding if such statement was involuntarily made," see U.S Const. Amend. V [No person "shall be compelled in any criminal case to be a witness against himself"] and XIV [No state shall "deprive any person of life, liberty, or property, with Due Process of Law"] and N.Y Const. Art. 1 § 6 [no person shall "be compelled in any criminal case to be a witness against

himself or herself".]

The evolution of the Federal Standard of Voluntariness, which applies to the states, is highlighted by the following three cases: **Brown v. Mississippi**, 297 U.S 278, 279, 56 S.Ct. 461, 462, 801 L.E.d 682 (1936) (holding, before application of the Fifth Amendment to the states, that a confession extorted by officers of the state by brutality and violence violates the Due Process clause of the Fourteenth Amendment); **Chambers v. Florida**, 309 U.S 227, 60 S.Ct 472, 84 L.E.d 716 (1940) (recognizing that coercion can be mental as well as physical); **Malloy v. Hogan**, 378 U.S 1, 6, 84 S.Ct. 1489, 1492, 121 L.E.d2d 653 (1964) (applying the Fifth Amendment exemption from compulsory self-incrimination to the states and thereby holding that the examination of a confession was not limited by the Due Process clause, that is "the Constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary that is (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence'")

Standards adjudging whether a custodial statement was produced voluntarily were inadequate to stem law enforcements continued abuse of one interrogation process. Thus, the court decided in **Miranda v. Arizona**, 384 U.S 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.E.d 2d 694 (1966), that "the prosecution may not use statements whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination... prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and

that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Before Miranda, New York declined to require preinterrogation warnings, People v. Gunner, 15 N.Y.2d 226, 232, 257 N.Y.S.2d 924, 205 N.E.2d 852 (1965). Since Miranda, however, New York has "embraced" the Miranda rule "as consistent with Article 1 § 6 of the New York Constitution"; it may therefore provide "rights broader than those guaranteed under the Fifth Amendment". People v. Paulman, 5 N.Y.3d 122, 800 N.Y.S.2d 96, 833 N.E.2d 239 (2005), citing e.g., People v. Bethea, 67 N.Y.2d 364, 502 N.Y.S.2d 713, 493 N.E.2d 937 (1986). Further, the New York Constitution's "right to counsel" rules, a violation of which may result in the suppression of a "voluntary" statement, are in varying aspects broader than the United States Constitution's. see NY court of Appeals on Criminal law, Ch.7, Part I, confession, Counsel, Overview.

In sum, "basically, two Constitutional issues are involved: (1) Statements coerced by a public servant; and (2) Constitutional guidelines that public servants MUST follow for obtaining a statement from a suspect in custody. The difference between the two is that obtaining evidence through coercion by a public servant violates the Constitutional privilege against Self-incrimination and fundamental Due process, resulting in preclusive...use of any information obtained or derived therefore. Violation of the guidelines results in Constitutional preclusion of a testimonial communication obtained for proof of

the people's case". Thus, a voluntary statement taken in violation of the preinterrogation warnings, while **not admissible** on the people's **direct case**, may be used to impeach the credibility of a defendant who testifies and gives testimony inconsistent with his or her statement. Harris v. New York, 401 U.S 222, 224, 91 S.Ct. 643, 28 L.E.d.2d 1 (1971) affirming people v. Harris, 25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349 (1969).

CPL § 190.40, GRAND JURY, WITNESSES, COMPULSORY OF EVIDENCE AND IMMUNITY

1) Every witness in a Grand Jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.

2) A witness who gives evidence in a Grand Jury proceeding receives immunity unless:

A) He has effectively waived such immunity pursuant to section 190.45, or

B) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.

C) The evidence given by the witness consists only of Books, paper's, records or other physical evidence of an enterprise, as defined in **Subd. one of sec. 1750.** of the **Penal Law**, the production of which is required by a subpoena duces tecum, and the witness does not poses a privilege against self-incrimination with respect to the production of such evidence. Any further evidence given by the witness entitles the witness to immunity except as provided in Subparagraph 1 (a) and (b) of this subdivision.

This section confers automatic transactional immunity upon every witness

who gives evidence **in the Grand Jury**; subject only to the exceptions set forth in **Subd. Two.** In this respect immunity in New York Grand Jury proceedings differ from Federal Practice, where a Grand Jury witness must invoke the Fifth Amendment privilege against self=incrimination before the Government is put to the election of trading Immunity for testimony (see e.g., **United States v. Washington, 431 U.S 181, 97 S.Ct. 1814, 521 L.E.d.2d 238 [1977])**, and differs as well from Immunity in other New York Proceedings, where the witness must assert the privilege to receive Immunity (**see CPL § 50.20[4]**). Under the CPL, a witness cannot invoke the privilege against self-incrimination in the Grand Jury **(See CPL §§ 50.20[1], 190.40[1])** and no one confers Immunity upon the witness, Immunity is **AUTOMATIC.**

The automatic immunity feature provided in this section was put forward as a method of solving a long tangled history of confusing litigation revolving about the issue of the rights of a suspect or **"target"** subpoenaed to give evidence before a Grand Jury. The court of Appeals has held that compelling a target to appear before the Grand Jury violates the New York Constitutional privilege against self-incrimination (see e.g., **People v. Steuding, 6 N.Y.2d 214, 189 N.Y.S.2d 166, 160 N.E.d2d 468 (1959)** Moreover, various other holdings have ruled that such witnesses not only would have Immunity but also could not be charged with perjury or contempt for their answers or refusal to answer. Accordingly the CPL neutralized the New York Constitutional problems by granting automatic immunity to all witnesses, so that a subpoena to appear and give evidence would not violate the rights of any witness, whether target, or not...

This simple device, in combination with New York's unnecessary adherence to transactional - rather than use - immunity, raises a separate difficulty, which may occur through inadvertently calling a perpetrator who is not suspected of any

complicity in the offense to testify regarding the incident. Such a witness, upon giving an answer responsive to any inquiry that has any bearing on the incident, receives automatic Transactional immunity and can never thereafter be prosecuted for his of her criminal responsibility for that incident, see e.g., **People v. Williams, 56 N.Y.2d 916, 453 N.Y.S.2d 430, 438 N.E.2d 1146 (1982).** affirming on the opinion below at **81 A.D.2d 418, 440 N.Y.S.2d 935 (2nd dept. 1981).** Indeed, a witness may even receive transactional Immunity for a crime totally unrelated to the one under investigation by responding to a single question regarding a seemingly innocuous fact -- e.g., the witnesses occupation. Moreover, as noted by Judge Bellacose in his 1981 commentaries on this section, subsequently cited by the court of Appeals a prosecutor will have a difficult time avoiding these consequences on the asserted ground that an answer was non-responsive or volunteered, because a "high burden is placed on the prosecutor to establish non-responsiveness" see **Brockway v. Monroe, 59 N.Y.2d 179. 189. 464 N.Y.S.2d 410, 451 N.E.2d 168 (1983).**

CPL § 50.20, COMPULSION OF EVIDENCE BY OFFER OF IMMUNITY

1) Any witness in a legal proceeding, other than a Grand jury proceeding, may refuse to give evidence requested of him on the ground that it may tend to incriminate him and he may not, except as provided in subdivision two, be compelled to give such evidence.

2) Such a witness may be compelled to give evidence in such a proceeding notwithstanding an assertion of his privilege against self-incrimination if:

A) The proceeding is one in which, by express provision of statute, a person conducting or connected therewith is declared a competent authority to

confer immunity upon witnesses therein, and

B) Such competent authority (i) orders such witness to give the requested evidence notwithstanding his assertion of his privilege against self-incrimination, and (ii) advises him that upon so doing he will receive Immunity.

3) A witness who is **ordered** to give evidence pursuant to subdivision two and who complies with such order receives immunity. Such witness is not deprived of such immunity because such competent authority did not comply with statutory provisions requiring notice to a specified public servant of intention to confer immunity.

4) A witness who, without asserting his privilege against self-incrimination, give evidence in a legal proceeding other than a Grand jury proceeding does not receive immunity.

5) The rules governing the circumstances in which witnesses may be compelled to give evidence and in which they receive Immunity therefor in Grand Jury proceedings are prescribed in section 190.40 of the CPL (see above)

IMMUNITY DEFINED

TRANSACTIONAL Vs. USE IMMUNITY

The immunity conferred upon a person under the Federal Constitution and laws is known as "use immunity", and the immunity conferred by New York law is known as "Transactional Immunity".

"Use Immunity" bars the use in a criminal proceeding of any compelled testimony or other information, or any information directly or indirectly derived

therefrom, and "such Immunity from use and derivative use is coextensive with the scope of the [Federal] privilege against self-incrimination, and therefore is sufficient to compel testimony [in a federal legal proceeding] over a claim of the privilege." Kastigar v. United States, 406 U.S 441, 453, 92 S.Ct. 1653, 1661, 321 L.E.d2d 212 (1972). Thus, under Federal Law, a person who receives "use Immunity" may still be prosecuted, provided that the testimony or other information which was compelled and any evidence derived therefrom is not utilized. New York Statute [CPL § 50.10] provides "Transactional Immunity."

"Transactional Immunity" is defined by CPL § 50.10(1) to bar a person from being "convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein." "Transactional Immunity" therefore, affords a person "considerably broader protection than does the Fifth Amendment privilege." Kastigar, 406 U.S at 453; People v. Sabotker, 61 N.Y.2d 44, 47, 471 N.Y.S.2d 78, 459 N.E.2d 187 (1984).

When "transactional Immunity" is not forthcoming pursuant to the dictates of New York's statutory laws, but a person's Fifth Amendment privilege has been breached, the Federal Constitution controls and dictates that the person be accorded use Immunity against the use or derivative use of his or her "compelled" statements. Parenthetically, for a short period, it appeared that the court of Appeals had interpreted New York's statutory law to accord only "use Immunity", but that interpretation was promptly overruled. see People v. Labello, 24 N.Y.2d 598, 301 N.Y.S.2d 544, 249 N.E.2d 412 (April 24, 1969), overruled by Gold v. Menna, 25 N.Y.2d 475, 481, 307 N.Y.S.2d 33, 255 N.E.2d 235 (1969).

CPL § 710.40, MOTION TO SUPPRESS EVIDENCE, WHEN MADE AND DETERMINED

1) A motion to suppress evidence must not be made after the commencement of the criminal action in which such evidence is allegedly about to be offered, and, except as otherwise provided in section 710.30 and in subdivision two of this section, it must be made within the period provided in subdivision one of section 255.20.

2) The motion may be made for the first time when, owing to unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion previously, or when the evidence which he seeks to suppress is of a kind specified in section 710.30 and he was not served by the people, as provided in said section 710.30, with a pre-trial notice of intention to offer such evidence at the trial.

3) When the motion is made before trial, the trial may not be commenced until determination of the motion.

4) If after a pre-trial determination and denial of the motion the court is satisfied upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, it may permit him to renew the motion before trial or, if such was not possible owing to the time of the discovery of the alleged new facts, during trial.

This section establishes the time frame for making and deciding a motion to suppress evidence. Basically, the procedure mandates a motion prior to trial in situations where defendant is aware, or should with

reasonable diligence have been aware, of the basis for the motion. In such case the motion must be made within forty=five days after defendant has been arraigned on the information or indictment... [T]he forty-five day window for bringing the motion is a concomitant of the Omnibus Motion procedure designed to prevent multiple motions for matters that should be decided prior to commencement of the trial. [O]rdinarily, failure to move for suppression within the forty-five day window will result in summary denial of the motion. However, if defendant can show unawareness of the factual basis for a motion to suppress due either to the people's failure to serve the § 710.30 notice or through learning of some other fact notwithstanding the exercise of due diligence, the court will for good cause nevertheless entertain the motion.

Note that it is not unusual for defendant to learn additional facts that could furnish the basis for a new motion to suppress notwithstanding another or a prior suppression hearing. For example, new information may be disclosed at a suppression hearing on another issue (see e.g., **People v. Boyer, 6 N.Y.3d 427, 813 N.Y.S.2d 31, 846 N.E.2d 461** [basis for a Wade motion uncovered during testimony at a Huntly hearing]; or defendant may subsequently learn new facts disclosed in Grand jury testimony delivered by the people (**People v. Clark, 88 N.Y.2d 552, 647 N.Y.S.2d 479, 670 N.E.2d 980 (1966)** [conflict between testimony in Grand Jury and at suppression hearing relevant to identification]. In such case defendant may move for an additional hearing or to reopen one already decided (**see subd. 4 of this section and** CPL § 255.20[3]), provided the pertinent new facts are material to the issue of suppression. **see Clark, Supra.**

APPENDIX
E

APPENDIX H

APPENDIX H

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

774
KA 11-00357

PRESENT: SCUDDER, P.J., SMITH, FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V. MEMORANDUM AND ORDER

JUSTIN T. WOODARD, DEFENDANT- APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT- APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgement of the Supreme Court, Monroe County (David D. Egan, J.), rendered May 14, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and attempted Robbery in the first degree.

It is hereby **ordered** that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of Murder in the second degree [Penal Law § 125.25[3] [Felony Murder]) and attempted robbery in the first degree (§§ 110.00, 160.15[2]) in connection with the shooting death of the victim by one or both of the co-defendants. Defendant contends that Supreme court erred in refusing to instruct the jury on the affirmative defense to felony murder (§ 125.25[3]), on the ground that there was no evidence to support a determination that defendant knew that the co-defendants' guns were loaded. We reject that contention (see People v. Cox, 21 AD3d 1361, lv denied 6 NY3d 753).

the evidence established that defendant willingly drove the codefendants from Elmira to Rochester for the express purpose of robbing the victim and that defendant knew that the codefendants had guns with them for that purpose. Thus, when viewing the evidence in the light most favorable to the defendant (see People v. White, 79 NY2d 900, 903), we conclude that the evidence does not support the affirmative defense (see People v. Samuel, 88 AD3d 1020, 1021, lv denied 18 NY3d 861; cf. People v. Cable, 96 AD2d 251, 260-261, revd on other grounds sub nom. Matter of Anthony M., 63 NY2d 270).

Defendant failed to preserve for our review his contention that the court erred in refusing to permit defense counsel to pursue questioning at the suppression hearing with respect to whether defendant's arrest was based upon probable cause, because defendant did not move to suppress evidence on that ground (see People v. Mobley, 49 AD3d 1343, 1343-1344, lv denied, 11 NY3d 791). Defendant also failed to preserve for our review his contention that the court abused its discretion and denied defendant his constitutional rights by denying his motion pursuant to CPL 710.40(4) to reopen the suppression on the issue whether the arrest was based on probable cause. Instead, defendant sought to re-open the hearing based upon his contention that he invoked his right to counsel when he was arrested in Elmira, before being transported to meet with police officers from the Rochester Police department (see Mobley, 49 AD3d at 1343-1344). "Because defendant had knowledge of the facts surrounding his arrest, those facts may not be considered additional pertinent facts... discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion" (People v. Simon, 222 AD2d 1117, 1117, lv denied 87 NY2d 977, rearg denied 88 NY2d 854 [internal quotation marks omitted]; see CPL 710.40[4]). In any event, inasmuch as evidence at the suppression hearing established that defendant had been identified in a photo array as a participant in the crime prior to his arrest, we conclude that the arrest was based upon probable cause (see people v. Dumbleton, 67 AD3d 1451, 1452, lv denied 14 NY3d 770).

defendant also failed to preserve for our review his contention that the court erred in permitting the people to use his Grand jury testimony in their direct case, in contravention of a cooperation agreement defendant had signed)(see CPL 470.15[2]). In any event, we conclude that any error is harmless inasmuch as the evidence is overwhelming and there is not a significant probability that he would have been acquitted if the alleged error had not occurred (see People v. Crimins, 36 NY2d 230, 241-242). Defendant's statement to the police, which was consistent with his Grand jury testimony, was also admitted in evidence, and it was corroborated by the testimony of an eyewitness and by physical evidence (see generally People v. Faust, 73 NY2d 828, 829, rearg. denied 72 NY2d 995).

We reject defendant's contention that he was deprived of effective assistance of counsel. The failure to provide a specific basis for a trial order of dismissal that had no chance of success does not constitute ineffective assistance of counsel (see people v. Horton, 79 AD3d 1614, 1616, lv denied 16 NY3d 859). Indeed, defendant does not contend on appeal that the evidence is legally insufficient to support the conviction (see i.d.). Further, defendant had failed to demonstrate that a motion to suppress his statement based on the lack of probable cause for his arrest, if made, would have been successful, and thus he has failed to establish that defense counsel was ineffective for failing to make the motion (see People v. Borcyk, 60 AD3d 1489, 1490, lv denied 12 NY3d 923). defendant;s remaining contentions with respect to defense counsel's performance either are outside the record and thus not reviewable on direct appeal (see people v. Slater, 61 AD3d 1328, 1329, lv denied 13 NY3d 749). or they are without merit (see generally People v. Balbi, 54 NY2d 137, 147).

Finally, in light of his willing participation in the plan to rob the victim and his knowledge that the codefendants' both had guns, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the court

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JUSTIN WOODARD,

Petitioner,

-vs-

No. 6:13-CV-6123(MAT)
DECISION AND ORDER

PAUL CHAPPIUS, Superintendent,
Elmira Correctional Facility,

Respondent.

I. Introduction

Justin Woodard ("Woodard" or "Petitioner") filed a pro se habeas corpus application pursuant to 28 U.S.C. § 2254, alleging that he is being held in Respondent's custody in violation of his federal constitutional rights. Petitioner's state custody arises from a judgment entered on May 14, 2009, in New York State Supreme Court, Monroe County, convicting him, after a jury trial, of Murder in the Second Degree (N.Y. Penal Law ("P.L.") Law § 125.25(3) (felony murder)) and Attempted Robbery in the First Degree (P.L. §§ 110.00, 160.15(3)). Petitioner is serving concurrent sentences aggregating 20 years to life in prison, plus five years of post-release supervision.

II. Factual Background

On January 14, 2007, at approximately 4:00 p.m., Kentrell Monte Burks ("Burks") received a telephone call at home from William "Bubba" Miller ("Miller"), with whom he had been friends

for seven or eight years. T.239-40, 243.[1] Burks referred to Miller as his "cousin" even though they were not blood relatives. T.286. Soon after Burks received the phone call, Miller arrived in a van driven by a heavy set, Hispanic-looking man, whom Burks identified later as Woodard. Accompanying them was Miller's girlfriend, whom Burks only knew as "Cha Chi", and several of Cha Chi's children. T.240-41. The person in the front passenger's seat passenger was a "skinnier guy, looked Hispanic, real slender[.][2]" T.241-42. At Miller's suggestion, they went to the Norton Street home of Miller's sister, Carmella Miller ("Carmella"), to play cards. T.244-45.

Miller and Carmella argued about her boyfriend, Keith Holloway ("Holloway"), having touched Carmella's youngest son in a sexual manner. T.245. Miller asked the children to demonstrate what Holloway had done, and they showed "hand gestures and fondling of the[ir] private areas." T.286. Burks, Miller, Petitioner, Brewer, Cha Chi, and the children all went to Miller's mother's new house

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1 Numerals preceded by "T." refer to pages from the transcript of Woodard's trial. Numerals preceded by "H." refer to pages from the transcript of the pre-trial suppression hearing.

2 This individual was co-defendant Robert Brewer ("Brewer"). Respondent indicates that he and Miller also were charged with murder and tried separately, and both apparently were convicted of second-degree murder and sentenced to prison terms of 25 years to life. A Westlaw search does not reflect any appellate activity with respect to these convictions, suggesting that Brewer and Miller may not have completed their appeals.

in the Town of Gates or Greece. T.246-247, 282. Cha Chi stayed there with the children, while the others returned to Carmella's home. T.248, 289. Miller and his sister continued to argue about what Holloway had done. T.248.

At some point, Burks left with Miller, Petitioner, and Brewer. They made three or four stops in the area of Parsells Avenue, where Holloway stayed. T.248-50. According to Burks, "Miller kept talking about how he was going to rob or get at Keith Holloway" and "fuck 'em up." T.250. Petitioner was "not really doing too much," just "pacing back and forth." T.251. When the men returned to Norton Street, there was yet more arguing between Miller and his sister. T.251. According to Burks, Woodard and Brewer left the apartment for about 15 minutes and then returned. T.252.

Eventually, Miller had his sister call Holloway and ask him to come over to the Norton Street house. T.252. Burks tried to talk them out of it "[b]ecause William Miller had been drinking, the other guy had been drinking, [and there was] just a lot of animosity in the air." Id. Burks decided to leave, but before he could do so, Holloway arrived. T.252-53. At that point, Petitioner, Miller, and Brewer were all in the dining room. T.254-55. Burks "heard William Miller say, ['']What up, nigger,['] and then I heard the [skinny] Hispanic guy [i.e., Brewer] say, ['']Nigger, run it[.]'" T.254. Burks explained that the phrase, "run it", means, "Give it to me, I am robbing you, basically." T.254.

Burks looked over his shoulder and saw "the [skinny] Hispanic guy [i.e., Brewer] with the gun raised" and pointed at Holloway's head. T.253. Holloway put his hands over his face and started backing up. Burks then heard four or five gunshots, so he "got out of there". T.255. Burks did not see Holloway hit the ground and did not see what happened after he (Burks) started running.

Burks admitted on cross-examination that in his initial statements to the authorities, he falsely stated that he did not know who the shooter was. He explained that he was afraid of Woodard and Miller, who were not in custody and knew where he lived. According to Burks, Miller told him that he had better not talk; otherwise Miller was "going to come see [him]" next. T.256-58.

The autopsy performed on Holloway revealed multiple gunshot wounds as well as blunt force injuries to his skull. See T.407-10. Holloway sustained a gunshot wound through the head and one through the torso, each of which independently was sufficient to cause death. See T.417-19.

Rochester Police Department ("RPD") Investigator Neil O'Brien ("O'Brien") was assigned to investigate Holloway's death; he was assisted by Investigator William Lawler ("Lawler"). On November 8, 2007, a witness who was subject to a protective order viewed a "six-pack" photo array in the presence of O'Brien and Investigator Randy Benjamin ("Benjamin"). H.31-32, 55. The witness "immediately"

selected number 5 (Woodard's photo) and said, "That's him." The witness described Woodard as "the bigger of the two Hispanic looking people that were with [Miller] that were at the house that day on Norton Street." H.33, 57.

At various times during the ten months following the shooting, O'Brien and Lawler conducted investigations in Elmira, where Petitioner lived. H.12-13. On November 20, 2007, Lawler and O'Brien received a call that Petitioner was in custody in Elmira. The Elmira police, who did not have a warrant for Petitioner's arrest, transferred custody of him to the RPD investigators at a rest stop in Dansville. E.g., H.36, 54.

After being advised of his rights, T.37-38, Petitioner stated he understood them and said, "I'll talk." H.39-40. O'Brien then told Petitioner that they were investigating an incident involving Miller and his girlfriend, both of whom Petitioner said he knew from Elmira. O'Brien did not question Petitioner further about the incident until they arrived at the Public Safety Building in Rochester about an hour later. Woodard said that he would tell them what he knew if they would guarantee that he could go home that night. E.g., H.43, 61-62. After Benjamin spoke with an assistant district attorney, he relayed following message to O'Brien to give to Petitioner: If he told the truth, he would go home that night, but there was a "distinct possibility" that he could be arrested in the future for Holloway's murder. T.343.

Notwithstanding his potential exposure, Petitioner gave a written statement to the investigators in which he stated that on the day of the murder, he and Brewer had run into Miller, who said that his niece or nephew had been raped by someone named Holloway, a "big weed dealer" in Rochester. T.372. Miller "wanted to go to Rochester to rob the kid who raped his niece or nephew" and said that he needed ride, so Petitioner offered to drive him. T.372. Petitioner took his wife's van and drove Miller, Cha Chi, and Brewer to Rochester. T.373.

Petitioner "knew Biz [i.e., Brewer] had a gun because [he] saw it on the way up in the van" and because "Biz always has a gun and this was a small Smith & Wesson nine millimeter." T.374. Petitioner added that "Bubba [i.e., Miller] said that he had a gun, but [Petitioner] never saw it." T.374. The group first drove to Miller's mother's house and dropped off Miller's girlfriend. T.373. Then they picked up Miller's "cousin" (i.e., Burks) and drove around looking for the intended victim's car. T.373. Unsuccessful in their search, they drove to the residence of Miller's sister, Carmella, whose boyfriend, Holloway, was the intended victim. T.373.

According to Petitioner, Carmella called Holloway and told him to come over to her house. In the interim, Petitioner left for a period of time but returned to Carmella's house when he received a call from Miller telling him that "the boyfriend was on his way."

T.373-74. When Holloway arrived, Carmella let him in, Miller slammed the door closed, and Brewer pointed his gun at him. T.374. Miller asked him, "'Where's it at?'" When Holloway asked why they were doing this to him, Brewer struck him on the back of the head with his gun. T.374. Petitioner stated that

> [w]hen [Holloway] stood back up, Bubba asked again, "Where's it at?" The guy didn't respond and Biz shot at the floor toward his feet. Then the guy ran toward the back of the house into the kitchen. Biz ran after him with the gun in his hand and I heard four quick shots. I was at the door to leave out the house when I heard Bubba say, "Finish him." Then I heard one more shot.

T.374. Petitioner said that he, Miller, and Brewer left together in the van, and Miller threw the gun out of the window as they drove. T.375.[3]

Defense counsel called Carmella's neighbor, Alicia Thompkins ("Thompkins"), to impeach Burks on the following issues-that he did not go by any nickname other than "Trell" and that he had last worked at Department of Social Services ("DSS") as a security guard in 2006. Thompkins testified that on the date of the shooting, she met someone named "Turk" at Carmella's residence. Later that month, the police showed her a photograph of Burks. Thompkins recognized Burks as the person she knew as "Turk" when she ran into him at the DSS. T.487. This was in January of 2007, and he was working as a security guard.

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[3] Petitioner's grand jury testimony was read into evidence at trial as part of the prosecution's case-in-chief. See T.461-76.

The jury returned a verdict convicting Petitioner as charged in the indictment. The trial court sentenced Petitioner to an indeterminate prison term of 20 years to life on the murder count and a determinate term of 15 years, plus five years of post-release supervision, on the attempted robbery count. Those sentences were set to run concurrently with each other.

Represented by new counsel, Petitioner appealed his conviction to the Appellate Division, Fourth Department, of New York State Supreme Court. On June 15, 2012, the Appellate Division unanimously affirmed the conviction. People v. Woodard, 96 A.D.3d 1619 (4th Dep't 2012). The New York Court of Appeals denied leave to appeal on September 12, 2012. People v. Woodard, 19 N.Y.3d 1030 (2012).

Petitioner then filed a pro se petition for a writ of error coram nobis asserting that appellate counsel had rendered ineffective assistance by failing to argue that trial counsel had been ineffective for not objecting to a portion of the jury instructions in which the trial court stated that the prosecution did not have to prove Petitioner's guilt "beyond all possible doubt". The Appellate Division summarily denied the petition on November 9, 2012, and the New York Court of Appeals denied leave to appeal on January 22, 2013. People v. Woodard, 100 A.D.3d 1472 (4th Dept. 2012), lv. denied, 20 N.Y.3d 1015 (2013).

Petitioner filed the instant habeas petition (Dkt #1) on February 14, 2013, asserting the following grounds for relief: (1) the trial court erred at the suppression hearing in precluding the defense from inquiring into the circumstances of Petitioner's arrest by the Elmira police; (2) the trial court was deceived by the prosecutor's misrepresentation regarding the terms of the cooperation agreement, and thus erred in allowing the prosecutor to introduce Petitioner's grand jury testimony during his case-in-chief; (3) the trial court erred in refusing to re-open the suppression hearing; (4) the trial court erred in failing to instruct the jury as to the affirmative defense to felony murder; and (5) Petitioner was deprived of effective representation of counsel in that counsel (a) failed to move for a Dunaway[4] or Payton[5] hearing when a question arose as to whether the police had probable cause to arrest him; (b) failed to invoke a provision of the cooperation agreement as a basis for excluding Petitioner's grand jury testimony during the prosecution's direct case; (c) failed to investigate the circumstances surrounding Petitioner's arrest, which would have shown that he had invoked his right to counsel; and (d) failed to properly move for a trial order of dismissal and renew the motion at the close of evidence, thereby precluding appellate review of the sufficiency of the evidence.

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[4] Dunaway v. New York, 442 U.S. 200 (1979).

[5] Payton v. New York, 445 U.S. 573 (1980).

Prior to Respondent filing his answer to the petition, Petitioner filed a motion to stay the petition or permit him to withdraw it without prejudice (Dkt #5). Respondent filed a declaration (Dkt #6) consenting to the withdrawal request but reserving the right to assert any untimeliness argument that might arise if and when Petitioner re-filed the petition. However, Respondent did not address Petitioner's alternative request for a stay.

Respondent then filed an answer to the petition on August 21, 2013 (Dkt #11), conceding that it was timely filed. Respondent admits that Petitioner has exhausted all but two of his claims. Petitioner filed a traverse in response to Respondent's opposition memorandum of law.

The matter is now fully submitted and ready for decision. For the reasons that follow, Petitioner's motion for a stay is denied. Petitioner's request for a writ of habeas corpus is denied, and the petition is dismissed.

III. Motion for a Stay

In Rhines v. Weber, 544 U.S. 269 (2005), the Supreme Court approved the stay-and-abeyance procedure outlined by the Second Circuit in Zarvela v. Artuz 254 F.3d 374, 380-82 (2d Cir.), cert. denied, 534 U.S. 1015 (2001), but held that it "is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court."

546 U.S. at 277. The Supreme Court explained that "even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." Id. (citing 28 U.S.C. § 2254(b)(2)). On the other hand, the Supreme Court noted, "it likely would be an abuse of discretion for a district court to deny a stay . . . if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." Id. at 278.

Petitioner asserts that he needs a stay in order to have "the opportunity to present Federal Constitutional issues which are outside the record" in "an appropriate post judgment motion in the State Courts." Dkt #5 at 1. The only issue he identifies with specificity is that he allegedly "suffered a Payton v. New York violation and his attorney failed to redress the matter of [P]etitioner being arrested in his home without an arrest or search warrant." Id. Petitioner faults counsel for "fail[ing] to investigate the circumstances of his warrantless arrest" and failing to "interview any of several witness [sic] to his warrantless arrest in his home." Id. at 2.

Here, as discussed further below, even if trial counsel had requested a Payton hearing and had succeeded in demonstrating a Payton violation, there would have been no effect whatsoever on the

verdict. Thus, trial counsel's alleged error did not result in prejudice, a necessary element of an ineffective assistance claim. Woodard's failure to demonstrate any prejudice proves fatal to his ineffectiveness claim. See Pavel v. Hollins, 261 F.3d 210, 216 (2d Cir. 2001) (stating that a habeas petitioner "must satisfy *both* prongs of the two-part test articulated in Strickland [v. Washington], 466 U.S. 688 (1984)].") (emphasis added). Since the issue as to which Woodard seeks permission to litigate in state court is "plainly meritless", it would be an abuse of this Court's discretion to grant a stay. Accordingly, Petitioner's motion for a stay is denied with prejudice.

IV. Exhaustion

Respondent asserts that Petitioner has failed to exhaust two of his claims: that the trial court erred in declining to charge the statutory affirmative defense to felony murder, and that trial counsel was ineffective in failing to investigate the circumstances of his arrest. Respondent asserts that the jury instruction claim must be deemed exhausted but procedurally defaulted, and that the ineffective assistance claim remains unexhausted but may be denied pursuant to 28 U.S.C. § 2254(b)(2). In his traverse, Petitioner asserts that he has fully exhausted his state-court remedies with regard to all of his claims. However, Petitioner does not attempt to show that any procedural default should be exhausted.

In the interests of judicial economy, the Court will dispose of both of these claims on the merits. See Dunham v. Travis, 313 F.3d 724, 729-730 (2d Cir. 2002) (discussing Lambrix v. Singletary, 520 U.S. 518, 523 (1997) (stating that "hurdling" the procedural bar is justified by a habeas court when the merits of a claim are easily resolvable against the petitioner); 28 U.S.C. § 2254(b)(2) (authorizing courts to deny mixed habeas petitions on the merits).

V. Standard of Review

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to Woodards' petition, filed in 2013. AEDPA "revised the conditions under which federal courts may grant habeas relief to a person in state custody." Kruelski v. Connecticut Superior Court for Judicial Dist. of Danbury, 316 F.3d 103, 106 (2d Cir.2003) (citing 28 U.S.C. § 2254). The Second Circuit has stated that "it is often appropriate in considering a habeas petition under the AEDPA for the federal court to go through two steps: first, the court determines what the correct interpretation of Supreme Court precedent is; second, if the state court's understanding or application of that precedent is determined to be erroneous, the federal court must still ask whether that error was a reasonable one." Kruelski, 316 F.3d at 106. Here, the Court need not determine whether Woodard's claims were adjudicated on the merits by the state courts, thereby triggering AEDPA review, because his claims fail even if the Court applies the less

deferential, pre-AEDPA standard. Messiah v. Duncan, 435 F.3d 186, 197 (2d Cir. 2006).

VI. Merits of the Petition

A. Errors at the Suppression Hearing

1. Erroneous Limitation of Cross-Examination

Woodard asserts that the trial court erred during the suppression hearing by precluding defense counsel from inquiring into the basis for his arrest by the Elmira police, who then transferred custody of Woodard to RPD investigators. According to Woodard, had defense counsel been permitted to pursue that line of inquiry, he would have established that Woodard was arrested without probable cause by the Elmira police and, as a result, Woodard's subsequent statement to RPD Investigators O'Brien and Benjamin should have been suppressed.

These claims, which implicate Woodard's Fourth Amendment right to be free from unreasonable searches and seizures, must be assessed by reference to the Supreme Court's decision in Stone v. Powell, 428 U.S. 465 (1976). Under Stone, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 494-95 (footnotes omitted). However, "[i]f the state provides no corrective procedures at all to redress Fourth

Amendment violations, federal habeas corpus remains available." Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (en banc). In addition, the Second Circuit noted, habeas relief may be possible if "the state provides the process but in fact the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process. . . ." Id.

Here, both of Woodard's claims involve alleged errors that occurred during litigation of his Fourth Amendment claims at the pretrial suppression hearing and on direct appeal. Thus, New York State corrective procedures were not only available to Petitioner, but were employed by him. See, e.g., Singh v. Miller, 104 F. App'x 770, 772 (2d Cir. 2004) (finding that petitioner had "ample opportunity to vindicate his Fourth Amendment rights in the state courts" when, inter alia, he "raised his Fourth Amendment argument on appeal" to the Second Department).

Whether there has been an "unconscionable breakdown" in the state corrective process depends on "the existence and application of the corrective procedures themselves" rather than on the "outcome resulting from the application of adequate state court corrective procedures." Capellan v. Riley, 975 F.2d 67, 71 (2d Cir. 1992). There has been no showing that the state failed to provide Woodard a full and fair opportunity to litigate the Fourth Amendment claims. In such case, the Stone bar on habeas relief is

"permanent and incurable. . . ." Graham v. Costello, 299 F.3d 129, 134 (2d Cir. 2002).

2. Denial of Motion to Re-Open Suppression Hearing

Woodard argues that the trial court erred denying defense counsel's motion pursuant to New York Criminal Procedure Law ("C.P.L.") § 710.40(4)[6] to re-open the suppression hearing to explore the issue of whether Woodard's arrest by the Elmira police was based on probable cause. The Appellate Division held that Woodard failed to preserve this contention for review because his motion to reopen was based upon a different contention (that he invoked his right to counsel when he was arrested in Elmira, before being transported to meet with RPD officers). Woodard, 96 A.D.3d at 1619 (citation omitted). The Appellate Division also found that the suppression court had properly applied C.P.L. § 710.40(4) to deny the motion because Woodard possessed knowledge of the facts surrounding his arrest, which precluded them from being "considered additional pertinent facts" that could not have discovered earlier with reasonable diligence. Id. (quotation and quotation marks omitted).

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[6] C.P.L. § 710.40(4) provides that if the defendant seeking reopening shows "that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion", the court "*may* permit him to renew the motion before trial. . . ." N.Y. CRIM. PROC. LAW § 710.40(4) (emphasis supplied).

Federal courts may "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties *of the United States*." 28 U.S.C. § 2254(a) (emphasis supplied). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

The Court finds that Woodard's claim regarding the denial of his motion to reopen the suppression hearing presents solely a matter of state law. On direct appeal, Woodard relied upon a state statutory provision, C.P.L. § 710.40(4), in support of his argument concerning the denial of the motion to reopen the suppression hearing. Furthermore, as Woodard has conceded, the decision to reopen a suppression hearing is a matter of the trial court's discretion. See People v. Fuentes, 53 N.Y.2d 892, 894 (1981) (cited in Petitioner's Appellate Brief ("Pet'r App. Br.") at 22 (Dkt #10-1)). This claim accordingly is dismissed as not cognizable on federal habeas review. See Tirado v. Walsh, 168 F. Supp.2d 162, 170-71 (S.D.N.Y. 2001) (rejecting petitioner's characterization of claim that trial court improperly reopened suppression hearing as a due process claim based on the Fourth and Fourteenth Amendments; claim "was clearly a matter of state law" not cognizable on federal habeas review).

B. Error in Admitting Petitioner's Grand Jury Testimony During the Prosecution's Direct Case

1. Factual Background

On December 7, 2010, Woodard signed a cooperation agreement with the prosecution and the RPD, in which he agreed, inter alia, to take a polygraph examination, testify truthfully, and not engage in criminal conduct. See Respondent's Exhibit ("Resp't Ex.") B at 287-90. If he successfully completed the terms of the agreement, he would be permitted to plead guilty to attempted first-degree robbery in exchange for a five-year sentence. Id. at 288. However, if he failed to meet the agreement's terms, the prosecution could prosecute him for felony murder and attempted robbery. In the latter case, the agreement provided that "it is agreed that statements made by [Petitioner] during the pendency of this Agreement, regarding the crime specified above will not be used against him on the People's direct case in that prosecution" but "may be used for impeachment purposes and for rebuttal." Id. at 289. In addition, Woodard signed a waiver of immunity prior to testifying before the grand jury convened to consider charges against Brewer and Miller. The waiver stated that he "consent[ed] and agree[d] to the use against [him] of any testimony given by [him] upon any investigation, hearing, trial, prosecution or proceeding." Resp't Ex. B at 213.

On December 26, 2007, while incarcerated, Woodard was charged with promoting prison contraband, and on February 28, 2008, he

pleaded guilty and received a sentence of time served. Resp't Ex. B at 285. Defense counsel terminated the cooperation agreement in a letter dated June 23, 2008. Id. at 279. The prosecutor later agreed to consider reinstating the agreement if Woodard passed a polygraph test, which he was unable to do. Id. at 285. The prosecutor accordingly did not reinstate the cooperation agreement. Id.

When the prosecution sought at trial to introduce Woodard's grand jury testimony in its case-in-chief, defense counsel objected on the basis that Woodard's written confession to the police was "the same as what he testified to before the Grand Jury," and that the grand jury testimony would confuse the petit jury because Woodard was acting as a prosecution witness when he testified before the grand jury. 3/20/09 Transcript ("Tr.") at 10-11. Defense counsel did not reference the terms of the then-terminated cooperation agreement. The prosecutor responded that Woodard's testimony constituted an admission, and that he had "waived immunity before he testified" in the grand jury and "signed a contract that was very clear that in the-that that information could be used against him in some future point in time. Id. at 12. The trial court ruled that the prosecutor would "be able to use [the testimony]." Id. Trial counsel did not contest the prosecutor's statement that "the contract" permitted the use Petitioner's grand jury testimony against him. The trial court

agreed that the testimony constituted an admission and ruled that it would admit the testimony. Trial counsel did not object.

2. The Arguments on Appeal

Woodard asserted on direct appeal that the trial court erred in permitting the prosecution to use his grand jury testimony in its direct case, in contravention of the cooperation agreement. The prosecution argued that the issue was not preserved for appellate review because although defense counsel sought preclusion of the grand jury testimony, he did so not on the basis that the cooperation agreement required it. Instead, defense counsel argued that because Woodard's written confession was "the same as to what he testified to before the Grand Jury," admission of the grand jury testimony constituted improper bolstering. See 3/20/07 Tr. at 11. Relying on C.P.L. § 470.05(2), the Appellate Division held that this claim was unpreserved for appellate review. Woodard, 96 A.D.3d at 1620 (citing N.Y. CRIM. PROC. LAW § 470.05(2)). In any event, the Appellate Division held, "any error is harmless inasmuch as the evidence is overwhelming and there is not a significant probability that he would have been acquitted if the alleged error had not occurred[.]" Id. at 1620-21 (quotation omitted). In particular, the Appellate Division noted, Woodard's statement to the police, which was consistent with the grand jury testimony, also was admitted into evidence, and the statement was corroborated by an eyewitness' testimony and physical evidence. Id. at 1621 (citation omitted).

Respondent now argues that the claim is procedurally defaulted as a result of the Appellate Division's reliance on an adequate and independent state ground, and, in any event, is without merit. The Court agrees that the claim is without merit and will bypass the procedural default issue in order to address the substance of the claim.

As Respondent argues, the prosecutor did not misrepresent the terms of the cooperation agreement to the trial court. Although the cooperation agreement did provide that in the event Petitioner failed to meet its terms, his statements could not be used against him on the prosecution's case-in-chief, the agreement did not indicate what might occur if it were terminated. Here, as noted above, Petitioner terminated the agreement by his attorney's letter of June 23, 2008, and the prosecutor declined to reinstate it after Petitioner failed his polygraph test. Thus, the cooperation agreement was no longer in effect. The only agreement in effect at the time of trial was the waiver of immunity, which did allow the prosecution to use Petitioner's grand jury testimony on its case-in-chief. Although the prosecutor might have articulated this point with more clarity, there was no outstanding agreement that precluded admission of Petitioner's grand jury testimony on the prosecution's case-in-chief. Thus, the introduction Petitioner's grand jury testimony was not done in violation of any legally operable contract. The only agreement in effect did permit the

introduction of that testimony. And, New York law provides that a defendant's grand jury testimony is admissible on the prosecution's case in chief as an admission. E.g., People v. Rodriguez, 73 A.D.3d 815, 816 (2d Dep't 2010) (collecting cases).

C. Failure to Charge the Jury on the "Non-Slayer" Affirmative Defense to Felony Murder

Petitioner claims that the trial court erred in not instructing the jury regarding the "non-slayer" affirmative defense to felony murder set forth in P.L. § 125.25(3)). At trial, defense counsel argued that the charge was warranted because there was no evidence to support a determination that Woodard knew that the co-defendants' guns were loaded. The Appellate Division rejected this claim, finding that "[t]he evidence established that [Woodard] willingly drove the codefendants from Elmira to Rochester for the express purpose of robbing the victim and that defendant knew that the codefendants had guns with them for that purpose." People v. Woodard, 96 A.D.3d at 1619-20 (internal and other citations omitted). Thus, even viewing the evidence in the light most favorable to Woodard, the Appellate Division found, it did "not support the affirmative defense[.]" Id. (citations omitted).

The petitioner's burden when collaterally challenging the failure to issue an instruction is "even greater than the showing required to establish plain error on direct appeal." Henderson v. Kibbe, 431 U.S. 145, 154 (1977). A petitioner must show that he was "erroneously deprived of a jury instruction to which he was

entitled under state law" before he can viably claim a violation of his due process rights. Jackson v. Edwards, 404 F.3d 612, 621 (2d Cir. 2005); see also Davis v. Strack, 270 F.3d 111, 124 (2d Cir. 2001).

Under New York State law, to be entitled to the "non-slayer" affirmative defense to felony murder, a defendant must establish, by a preponderance of the evidence, that he did not commit the homicidal act, or in any way solicit, request, command, importune, cause, or aid in the commissioner thereof; was not armed with a deadly weapon; had *"no reasonable ground to believe" that any other participant was armed with a deadly weapon;* and had "no reasonable ground to believe" that any other participant "intended to engage in conduct likely to result in death or serious physical injury". See N.Y. PENAL LAW § 125.25(3)(a)-(d) (emphasis supplied). The charge must be given if the record includes evidence which, viewed in the light most favorable to the defendant, with all reasonably permissible inferences drawn in his favor, satisfies the essential elements of the affirmative defense. See People v. Steele, 26 N.Y.2d 526, 529 (1970). A jury must be instructed "on all claimed defenses which are supported by a *reasonable* view of the evidence—not by any view of the evidence, however artificial or irrational." People v. Butts, 72 N.Y.2d 746, 751 (1988) (emphasis in original).

Even when viewed in the light most favorable to Woodard, the evidence presented at trial at most supports a finding that Woodard did not commit or aid in committing the homicidal act and was not armed with a deadly weapon. No affirmative evidence was introduced to support the remaining two prongs of the non-slayer defense. See, e.g., People v. Caicedo, 651 N.Y.S.2d 110, 111 (2d Dep't 1996) (affirming denial of non-slayer defense in part because defendant's statement failed to "establish that he lacked knowledge that one of the participants had a gun" and established "only that he did not see a gun"). Here, Woodard stated to the police that he knew Brewer had a 9-mm handgun because he had seen it in the van. He also stated Miller told him he had a gun, although Woodard did not see it. Woodard's statement to the police was read into the record at trial. The jury consequently could not have found that Woodard reasonably believed no one was armed, the third element of the non-slayer defense.

In addition, Woodard told the police that he knew Miller, who claimed to be armed, wanted to rob Holloway, a reputed marijuana dealer in Rochester, in retaliation for allegedly molesting his sister's children. Miller needed a ride to Rochester so that he could find Holloway, and Woodard agreed to drive him. Brewer asked to go on the trip, and while they were all in the van, and Woodard saw that Brewer had a gun. In Woodard's own statement, he admitted that he knew at least one participant, who claimed to have a gun,

intended to forcibly steal money from an alleged drug dealer. In light of these facts, the jury could not have found that Woodard reasonably believed that no one intended to engage in conduct that could have seriously injured or killed Holloway, and thus Woodard also failed to establish by preponderating evidence the fourth element of the non-slayer defense.

Because Woodard has failed to make the threshold showing that the Appellate Division erred as a matter of state law in upholding the trial court's refusal to charge the non-slayer defense, this Court need not reach the question of whether his due process rights were violated. See Davis v. Strack, 270 F.3d 111, 124 (2d Cir. 2001) (to grant habeas relief, court must find that the justification charge was required as a matter of New York state law; the failure to give the requested charge violated due process; and the state court's failure to issue the charge was "of such a nature that it is remediable by habeas corpus, given the limitations prescribed by 28 U.S.C. § 2254").

D. Ineffective Assistance of Trial Counsel

Woodard here raises the same errors of trial counsel that he asserted on direct appeal. The Appellate Division discussed the merits of the claims concerning counsel's failure to raise the probable cause argument and failure to make a specific motion for a trial order of dismissal, but held that the remaining two contentions regarding counsel's performance were "either outside

the record and thus not reviewable on direct appeal, or they [were] without merit[.]" People v. Woodard, 96 A.D.3d at 1621. (internal and other citations omitted).

Strickland, 466 U.S. 668, supra, announced a two-part test to determine if counsel's assistance was ineffective: A defendant first must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and second, that "there is a reasonable probability that, absent the errors [by counsel], the fact finder would have had a reasonable doubt respecting guilt." Id. at 687, 695. As discussed further below, the Court finds that all of Woodard's theories in support of his ineffective assistance of trial counsel claim are without merit under Strickland.

1. Failure to Request a Dunaway or Payton Hearing

In the context of an alleged failure to raise a Fourth Amendment claim, Strickland requires the Court first to ask if the claim would have been successful. If so, the Court must ask whether "the verdict would have been different absent the excludable evidence" that was the fruit of the illegal arrest. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). Woodard asserts that trial counsel should have requested a Dunaway hearing to press his claim that his post-arrest statements were suppressible because there was no probable cause for his arrest under the circumstances known to the police. See Dunaway, 442 U.S. at 216-18. As the Appellate

Division noted, probable cause for Petitioner's arrest by Elmira police did exist, as evidence adduced at the suppression hearing established that Petitioner had been identified, prior to his arrest, in a photo array as a participant in the crimes. Woodard, 96 A.D.3d at 1620. Thus, Woodard cannot show that the request for a Dunaway hearing was likely to be successful.

Woodard also asserts that trial counsel should have moved for a Payton hearing to argue that the police arrested him without a warrant in his home, thereby rendering the subsequent identification procedure suppressible as the fruit of an illegal arrest. See Payton, 445 U.S. at 589. The Fourth Amendment clearly "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest", Payton, 445 U.S. at 576, in the absence of "exigent circumstances", Kirk v. Louisiana, 536 U.S. 635, 638 (2002). Even assuming that there was a Payton violation, Woodard would not have succeeded in obtaining suppression of the line-up identification on this basis. Neither the United States Constitution nor the New York State Constitution "require[s] the suppression of evidence of a lineup identification made after an arrest based on probable cause but in violation of Payton." People v. Jones, 2 N.Y.3d 235, 244-45 (2004). Here, the line-up identification was not "the product of" the Payton violation but instead flowed from the police having probable cause to believe that Woodard was involved in the Norton

Street shooting based on an eyewitness' photographic identification. Jones, 2 N.Y.3d at 243 ("Due to the lack of a causal relationship between the Payton violation and the lineup identifications in this case, the lineups were not the 'fruit of the poisonous tree.'") (citations omitted). Because the line-up identification would not have been suppressed based on any alleged Payton violation, Woodard cannot show that he was prejudiced by trial counsel's failure to request a Payton hearing.

2. Failure to Properly Preserve A Claim

Petitioner claims that in opposing the prosecution's request to seek admission of his grand jury testimony in its case-in-chief, trial counsel should have relied upon the provision of the cooperation agreement that would have foreclosed that attempt. As noted above, Petitioner, through trial counsel, terminated the agreement by letter, and the cooperation agreement was never reinstated. The only agreement in effect at the time of trial was the waiver of immunity contract, which did not preclude the prosecution from utilizing Petitioner's grand jury testimony in its direct case. The Court cannot say that trial counsel was objectively unreasonable in declining to rely on an agreement that no longer had any legal effect. Moreover, the Appellate Division found that any error in admitting the grand jury testimony was harmless, and therefore Petitioner has not demonstrated that he was prejudiced by counsel's alleged error.

3. Failure to Investigate Petitioner's Arrest

Woodard contends that trial counsel was ineffective in failing to independently investigate the circumstances of his arrest. Supposedly, had he done so, trial counsel would have learned that Woodard had informed the Elmira police that he wanted an attorney, thereby making Woodard's later waiver of his constitutional rights at the Rochester police station invalid. The assertion that trial counsel did not render adequate performance in this regard is belied by the record. Trial counsel did move, by letter and formal motion, to re-open the suppression hearing on the basis that he did not learn, until after the suppression hearing, of Woodard's invocation of his right to counsel. However, as the trial court found, that fact was "easily capable of being shared with" counsel, and if Petitioner had withheld that information from counsel, "he did so at his own peril." Resp't Ex. B at 341. Where, as here, the client himself was in the best position to direct counsel's attention to the right-to-counsel issue, the subsequent attempt to fault counsel for not investigating that issue is specious.

4. Failure to Make a Specific Motion for a Trial Order of Dismissal

Woodard asserts that trial counsel was ineffective in failing to make a specific motion for a trial order of dismissal, for purposes of preserving a claim that the evidence was legally insufficient. As the Appellate Division pointed out, Woodard's appellate counsel did not bother arguing on appeal that the

evidence was legally insufficient, which suggests that appellate counsel did not think it was one of Woodard's stronger issues. Although the claim was unpreserved, appellate counsel could have urged the Appellate Division to invoke its statutory authority to review the claim in the interests of justice. The fact that counsel did not do so suggests that she realized the claim had no reasonable probability of success. In these circumstances, the Appellate Division correctly found that "[t]he failure to provide a specific basis for a trial order of dismissal that had no chance of success does not constitute ineffective assistance of counsel . . . ." Woodard, 96 A.D.3d at 1621.

VII. Conclusion

The application for a writ of habeas corpus is denied, and the petition (Dkt #1) is dismissed. Petitioner's motion for a stay (Dkt #5) is denied with prejudice. Because Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the Court declines to issue a certificate of appealability. The Clerk of the Court is requested to close this case.

SO ORDERED.

S/Michael A. Telesca

HONORABLE MICHAEL A. TELESCA
United States District Judge

DATED: January 13, 2014
Rochester, New York

APPENDIX
J

631 Fed. Appx. 65

United States court of Appeals
Second Circuit.

Justin WOODARD, Petitioner-Appellant,

v.

Paul CHAPPIUS, Respondent-Appellee.

No. 14-701-pr.

Jan. 22, 2016

Appeal from the United states District Court for the Western District of New York (Telesca, J.)

*66 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED AND DECREED, that the order of Said District Court be and it hereby is AFFIRMED.

Attorney's and law Firms omitted.

SUMMARY ORDER

Petitioner-Appellant Justin Woodard appeals from the January 13, 2014 order of the United States District Court for the Western District of New York (Telssca,J.), dismissing his petition for Habeas Corpus brought pursuant to 28 U.S.C § 2254 and denying his motion for a stay so that he could exhaust his unexhausted claims in state court. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

At issue in this appeal is whether the district court improperly denied a stay of the proceedings to allow **Woodard** to exhaust available state remedies on his claim that trial counsel was constitutionally ineffective in failing (1) to request a hearing as to the validity of Woodard's warrantless arrest, and (2) to investigate whether arrest circumstances warranted suppression of Woodard's confession for violation of **Miranda v. Arizona, 384 U.S 436 (1966).** We review a district court's denial of a stay for abuse of discretion. Under **Rhines v. Weber, 544 U.S 269, 125 S.ct. 1528, 161 L.Ed.2d 440 (2005),** a district court abuses its discretion in denying a stay to exhaust claims in a mixed petition if the unexhausted claims are not plainly meritless, if the petition has good cause for failing to exhaust, and if the petitioner did not engage in abusive dilatory litigation tactics. **id. at 277-78, 125 S.ct. 1528.**

The district court did not abuse its discretion in denying a stay so that Woodard could exhaust his ineffective assistance of counsel claims because these claims are plainly meritless. Pursuant to the well-known two-part test of **Strckland v. Washington, 466 U.S 668,** a Habeas Petitioner alleging ineffective assistance of counsel "must demonstrate (1) that his counsel's performance fell below what could be expected of a reasonably competent practitioner; and (2) that he was prejudiced by that substandard performance." **Pearson v. Callahan, 555 U.S 223, 241, 129 S.ct 808, 172 L.E.d.2d 565 (2009) (citing Strickland, (Supra).** To show actual prejudice under Strickland, Woodard must show that "that there is a reasonable probability that the verdict would have been different absent the excludable evidence." **Kimmelman v. Morrison, 477 U.S 365, 375, 106 S.ct. 2574, 91 L.E.d.2d 305 (1986).** Woodard argues that his attorney was constitutionally ineffective in failing to investigate the circumstances of the statement he gave to police on November 20, 2007, and failing to move to suppress that statement on several grounds. However, even if Woodard is correct that the statement should have been suppressed, there is no reasonable probability of a different verdict and therefore, no prejudice.

In addition to giving the November 20, 2007 statement

confessing to participating in the attempted robbery and the felony murder of Keith Holloway, Woodard also testified about his participation in those crimes before a Grand Jury pursuant to a cooperation agreement that he later violated, and after signing a waiver of Immunity. Specifically, Woodard testified that on January 14, 2007, he was with Robert Brewer. Woodard and Brewer ran into William miller, who was upset because he believed someone had raped his nephew. Miller stated that he wanted to go to Rochester to rob the individual he believed had raped his nephew. Woodard testified that Brewer stated that he wanted to participate in the robbery, and that Woodard agreed to give them a ride to Rochester. Woodard testified that after arriving in Rochester, they drove around searching for the victim, Holloway, because, according to Woodard, "we wanted to rob him." App'x at 1206. Woodard also testified that, when they were driving to Rochester, he saw that Brewer had a nine-millimeter gun. Woodard testified that he left for a period of time with Brewer, but he then received a call from Miller that Holloway was going to Miller's sister's house, and Woodard and Brewer therefore went to that house. Woodard testified that when Holloway arrived, Brewer pointed the gun at him, and Miller said "Where's it at?," meaning, "Where's the stuff, where's the money[?]" App'x at 1210. Brewer pistol-whipped Holloway, and then shot at his feet. Holloway then ran toward the Kitchen, with Brewer running after him and shooting at him. Miller asked Brewer, if Holloway was dead, Brewer said he did not know, and Miller told him, "Finish Him." App'x at 1211. Brewer returned to the kitchen, and Woodard heard another shot. Woodard testified that he saw everything that occurred. Woodard testified that he then drove Brewer and Miller to Miller's mother's house, during which Brewer threw the nine-millimeter gun out the window, and then drove Brewer and Miller to Elmira. This testimony, in addition to the November 20, 2007 statement, was introduced against Woodard at trial. The substance of Woodard's Grand Jury testimony was essentially identical to his prior statement. The only even material fact included in the November 20, 2007 statement, but not the grand jury testimony, was that Miller told Woodard prior to the attempted robbery that he also

had a gun.

Woodard's grand jury testimony was corroborated by other evidence at trial. Kentrell Burks, another witness to the attempted robbery and murder, testified against Woodard at trial, corroborating in large part the details of Woodard's Grand Jury testimony. Finally, an evidence technician testified about recovering bullets and nine-millimeter casings in the locations where Woodard described shots being fired, and the medical examiner testified that Holloway sustained blunt force trauma to his face, which was consistent with Woodard's testimony that Brewer pistol-whipped Holloway before shooting him.

Woodard raises no colorable argument that the Grand jury testimony should have also been suppressed, or that he would not have testified before the Grand jury had his statement been suppressed. Indeed, he testified before the grand jury on December 14, 2007, and the suppression hearing was not until January 15, 2009. Thus, even if the November 20, 2007 statement had been suppressed, given that another confession, given under oath, was introduced at trial and corroborated by other evidence, there is simply no reasonable probability that Woodard would not have been convicted at trial. Because he has suffered no actual prejudice, his **Strickland** claims are plainly meritless, and the district court did not abuse is discretion in denying Woodard's motion for a stay so that he could exhaust those claims.

We have considered the remainder of Woodard's arguments and find them to be *68 without merit. Accordingly, the order of the district court hereby is affirmed.

ALL CITATIONS

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