20-2296-pr
Zaire Paige v. Stewart Eckert, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 24th day of March, two thousand twenty one.

Present: ROSEMARY S. POOLER,
RICHARD J. SULLIVAN,
MICHAEL H. PARK,
Circuit Judges.

ZAIRE PAIGE,

Petitioner-Appellant,

v. 20-2296-pr

STEWART ECKERT, SUPERINTENDENT WENDE CORRECTIONAL FACILITY, LETITIA JAMES, ATTORNEY GENERAL OF NEW YORK,

Respondents-Appellees.[1]

Appearing for Appellant: Lorca Morello (Richard Joselson, *on the brief*), The Legal Aid Society, Criminal Appeals Bureau, New York, N.Y.

Appearing for Appellee: Terrence F. Heller, Assistant District Attorney (Leonard Joblove, Camille O'Hara Gillespie, Assistant District Attorneys, *on the*

[1] The Clerk of Court is respectfully directed to amend the caption as set forth above.

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brief) for Eric Gonzalez, District Attorney Kings County, Brooklyn, N.Y.

Appeal from the United States District Court for the Eastern District of New York (Brodie, *J.*).

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

Zaire Paige appeals from the July 9, 2020 judgment of the United States District Court for the Eastern District of New York (Brodie, *J.*) denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On November 12, 2010, after a jury trial in Kings County Supreme Court (the "Trial Court"), Paige was convicted of one count of murder in the second degree, three counts of assault in the first degree, one count of assault in the second degree, and one count of criminal possession of a weapon in the second degree. On January 24, 2011, the Trial Court issued its judgment and sentenced Paige to a total prison term of 107 years to life. Paige appealed his conviction to the New York Supreme Court Appellate Division, Second Department, alleging the Trial Court violated his constitutional right to be present during his trial by ejecting him from the court and refusing to readmit him. The Appellate Division affirmed the conviction. *People v. Paige*, 22 N.Y.S.3d 220, 229 (2d Dep't 2015). The Appellate Division reviewed Paige's behavior and held that his "actions throughout the course of the trial constituted disruptive conduct warranting [his] exclusion from the courtroom." *Id.* at 225 (citations omitted). It also held that the Trial Court was within its discretion in declining to credit Paige's proffered willingness to comport himself appropriately and refusing to readmit him to the courtroom. *Id.* at 226. Finally, the Appellate Division held that the Trial Court "did not improvidently exercise its discretion in declining defense counsel's request to permit [Paige] to view the proceedings from a remote location." *Id.* The New York Court of Appeals twice denied Paige's request for leave to appeal. *People v. Paige*, 27 N.Y.3d 1073 (2016); *People v. Paige*, 27 N.Y.3d 1137 (2016).

We review a district court's denial of a petition for habeas corpus de novo, and its underlying findings of fact for clear error. *Ramchair v. Conway*, 601 F.3d 66, 72 (2d Cir. 2010). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when a state court adjudicates a petitioner's habeas claim on the merits, a district court may grant relief only where the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1)-(2). This standard is extremely deferential to state court determinations. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks omitted). "We will not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy." *Burt v. Titlow*, 571 U.S. 12, 20 (2013) (alteration and internal quotation marks omitted).

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We conclude that the district court did not err in holding that the Appellate Division reasonably applied federal law when it rejected Paige's claim that he was denied his constitutional right to be present at trial. The relevant clearly established law for AEDPA purposes is the Supreme Court's decision in *Illinois v. Allen*, where the Court held that "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 397 U.S. 337, 343 (1970) (footnote omitted). The Supreme Court also held that, "[o]nce lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id.* Paige argues that the Appellate Division's decision was an unreasonable application of *Allen* both with respect to his initial ejection and his continued exclusion. We disagree.

Paige correctly notes that Allen's behavior was substantially more disruptive than Paige's. *See id.* at 339-41 (observing that throughout the course of the trial, Allen made direct threats to the judge's life, threw his papers across the courtroom, and made repeated outbursts regarding the intervention of his stand-by counsel). But we cannot say that the Appellate Division unreasonably applied *Allen* to the circumstances presented here. Indeed, our Court has held that a defendant may be removed for conduct significantly less egregious than Allen's. *See Norde v. Keane*, 294 F.3d 401, 413 (2d Cir. 2002) ("While Norde's behavior was significantly less egregious than that of the defendant in *Allen*, we conclude that Norde's removal was within the trial judge's broad discretion."). The Trial Court acted within its broad discretion in initially removing Paige from the courtroom. Paige argues that the Trial Court failed to provide the requisite warnings before his removal, describing the Trial Court's admonition of "Be quiet. If you want to testify, you can take the stand" as a sarcastic taunt rather than the constitutionally required warnings regarding removal. Appellant's Br. at 48. While the remark about testifying may not have been the most appropriate response to Paige's outburst, the instruction to "[b]e quiet" was clearly a lawful directive that Paige ignored. Furthermore, the Appellate Division found that Paige received numerous prior warnings that efforts to delay the trial would lead to it proceeding without him. *See Paige*, 22 N.Y.S.3d at 225-26. The record supports this finding, as Paige was repeatedly warned of the potential consequences of his prior behavior during disputes with the Trial Court about his clothing and production to the courtroom. The Trial Court did not err in ejecting Paige.

The Trial Court's refusal to readmit Paige after his ejection presents a closer question, but, under the standards provided by AEDPA, the Appellate Division did not misapply *Allen* in affirming the Trial Court's refusal to readmit Paige. The parties dispute the factual record on several matters relevant to Paige's credibility and pattern of conduct. Paige argues that the Trial Court improperly shaded the facts regarding Paige's absences prior to his exclusion and included disruptions not evident in the record. There is no basis to find that the Trial Court misrepresented the events prior to the confrontation. Paige was late to the courtroom several times, and the Trial Court described these incidents as deliberate attempts to frustrate the proceedings. We review the factual record regarding exclusion in habeas cases through a doubly deferential lens. *See Jones v. Murphy*, 694 F.3d 225, 241 (2d Cir. 2012) ("When [the deferential decision to exclude] is

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viewed through the additionally deferential lens of § 2254(d), the bar to relief is a high one." (citation and internal quotation marks omitted)).

Although *Allen* instructs courts to readmit a defendant who is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings, the Trial Court was permitted to examine Paige's pattern of behavior in declining to credit his stated willingness to behave appropriately. *Allen* does not require automatic readmission; rather, courts must only readmit defendants where "[the defendant] satisfactorily demonstrate[s] that he would not be violent or disruptive." *Id.* at 240. The Supreme Court in *Allen* noted that the discretion afforded regarding trial applied more broadly than to the specific facts of the case, explaining that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." 397 U.S. at 343.

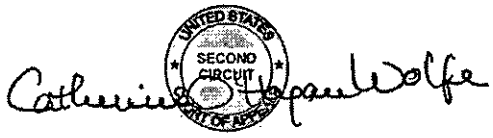
Here, Paige's pattern of behavior throughout the trial provides sufficient support for the Trial Court's refusal to readmit him. The Trial Court found Paige engaged in further delaying tactics after his exclusion by deliberately choosing to absent himself from the courthouse once trial resumed. Paige argues that the Trial Court failed to properly examine the circumstances of his absence, merely reciting what he was informed by court personnel. Paige contends that the Trial Court should have engaged in a more searching inquiry. However, applying the deferential standard of review, the Trial Court permissibly found that Paige voluntarily absented himself from the trial through more delaying tactics after his ejection. Given this behavior, the Trial Court was entitled to conclude that Paige could not satisfactorily demonstrate that he would behave with proper decorum. *See Jones*, 694 F.3d at 240-44. Thus, despite Paige's repeated promises to demonstrate decorum and *Allen*'s admonition for courts to readily readmit defendants, fair-minded jurists could reasonably disagree as to whether Paige had exhibited a willingness to forego further disruption of the trial proceedings. Accordingly, he is not entitled to relief under AEDPA's demanding standards. *See Harrington*, 562 U.S. at 101.

Paige also argues that the Trial Court violated his constitutional right to be present by denying his request to observe the trial through closed-circuit video after his exclusion. The Trial Court refused to accommodate this request. The Trial Court did not explain this denial beyond stating that Paige had waived his right to be present and that it would not alter the proceedings for his benefit after his disruptive behavior. The Appellate Division rejected Paige's argument that this constituted reversible error, explaining, "while a trial court that readily possesses the means to do so should generally permit a defendant who has been excluded from the courtroom to observe the proceedings from a remote location in order to minimize the possib[i]l[it]y of prejudice, we conclude that under the particular circumstances of this case, the court did not improvidently exercise its discretion in declining defense counsel's request to permit the defendant to view the proceedings from a remote location." *Paige*, 22 N.Y.S.3d at 226 (citations omitted). The Supreme Court has never held that an excluded defendant has a right to observe his trial through alternative mechanisms. Accordingly, the Appellate Division did not unreasonably apply clearly established federal law when it affirmed the Trial Court's rejection of Paige's proposed accommodation.[2]

[2] While the right to observe a trial after exclusion has not been clearly established by the Supreme Court, Justice Brennan in *Allen* did offer the following counsel to trial courts: "[W]hen

We have considered the remainder of Paige's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances." 397 U.S at 351 (Brennan, *J.*, concurring).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ZAIRE PAIGE,

Petitioner,

MEMORANDUM & ORDER
16-CV-6802 (MKB)

v.

STEWART ECKERT, *Superintendent of Wende Correctional Facility*, and LETITIA JAMES,[1] *Attorney General of New York*,

Respondents.

MARGO K. BRODIE, United States District Judge:

Petitioner Zaire Paige, represented by counsel and currently incarcerated at Sullivan Correctional Facility, brings the above-captioned petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he is being held in state custody in violation of his federal constitutional rights. (Pet., Docket Entry No. 1.) Petitioner's claims arise from multiple judgments of conviction following a jury trial in the Supreme Court of New York, Kings County (the "Trial Court") for one count of murder in the second degree, three counts of assault in the first degree, one count of assault in the second degree, and one count of criminal possession of a weapon in the second degree. (*Id.* at 1.) The Trial Court sentenced Petitioner to a total of 107 years in prison. (*Id.*) Petitioner appealed his conviction to the New York Supreme Court Appellate Division, Second Department (the "Appellate Division"), which affirmed the conviction. *People v. Paige*, 22 N.Y.S.3d 220 (App. Div. 2015). The New York Court of

[1] Attorney General Letitia James is substituted for former Attorney General Eric Schneiderman. *See* Fed. R. Civ. P. 25(d).

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Appeals denied leave to appeal, *People v. Paige*, 27 N.Y.3d 1073 (2016), and also denied Petitioner's motion for reconsideration, *People v. Paige*, 27 N.Y.3d 1137 (2016).

Petitioner's initial petition raised a single claim, arguing that the Trial Court unconstitutionally excluded him from his trial. (Pet'r Br. 20–37, Docket Entry No. 7.) On February 8, 2017, Petitioner filed a *pro se* motion for leave to amend his petition with additional claims that his counsel did not raise in his initial petition. (Mot. to Amend, Docket Entry No. 8.) By Order dated February 13, 2017, the Court granted the motion. (Order dated Feb. 13, 2017.) Petitioner raised three additional claims in his *pro se* supplemental briefing. (Pet'r Suppl. Initial Br., Docket Entry No. 13; Pet'r Suppl. Reply, Docket Entry No. 17.) In his supplemental initial brief, Petitioner argues that the Trial Court unconstitutionally removed two jurors from his jury and unconstitutionally admitted prejudicial testimony against Petitioner at trial. (Pet'r Suppl. Initial Br. 16–36.) In his supplemental reply brief, Petitioner asks the Court to grant habeas relief in light of the prosecutors' "new admission that [the cellular telephone] call data records [introduced at trial] . . . do[] not place Petitioner at the scene of the crime, as erroneously relied on by the [Appellate Division]." (Pet'r Suppl. Reply ¶ 8.)

For the reasons discussed below, the Court denies Petitioner habeas corpus relief on both the counseled and *pro se* claims.

I. Background

a. Charges against Petitioner

A grand jury indicted Petitioner on one count of murder in the second degree, three counts of assault in the first degree (with lesser, alternative charges on each count of reckless assault in the second degree), one count of assault in the second degree, and one count of criminal possession of a weapon. (Jury Trial Tr. 1316–29, annexed to Resp'ts Aff., Docket Entry

Nos. 10-1–10-7.)[2] Prosecutors tried Petitioner and co-defendant Robert Crawford jointly before the Trial Court, beginning on October 27, 2010. (*Id.* at 1.)

b. Trial

Petitioner was an aspiring motion picture actor and powerful member of the Crips street gang. (*Id.* at 619.) When Petitioner's best friend Teddy McNickle was murdered in 2006, both police and Petitioner suspected Lethania Garcia had committed the murder. (*Id.* at 576, 587, 879–80, 1068, 1072.)

In the fall of 2008, Petitioner's friends included Paul Wint and co-defendant Crawford. (*Id.* at 564, 571.) Although Crawford belonged to the rival Bloods street gang, the Crips with whom Petitioner and Wint associated allowed Crawford in their social circle because Crawford grew up with Petitioner. (*Id.* at 732.) Among Petitioner's associates, Wint was the only person with a vehicle.[3] (*Id.* at 577.)

i. Shooting of Garcia and bystanders

On October 27, 2008, Wint drove Petitioner and Petitioner's friend Smiley, and later Crawford, to a state courthouse in Brooklyn, where Petitioner announced that they were to look for Garcia, who Petitioner reiterated had killed Petitioner's best friend McNickle back in 2006. (*Id.* at 584–87.) After Wint and Smiley located Garcia inside one of the courtrooms, Smiley followed Garcia on foot as Garcia exited the courthouse, while Wint returned to Petitioner and Crawford so they could follow Garcia in Wint's vehicle. (*Id.* at 588–96.) When Wint parked the

[2] The Court refers to the original page numbers in the trial transcript and other state court hearing transcripts.

[3] Although Wint operated the vehicle and made the car payments, due to Wint's "license problems" and "bad driving record," Wint's friend registered the car, and Wint's girlfriend titled the car in her name to obtain a better car loan rate. (Jury Trial Tr. 572–73, annexed to Resp'ts Aff., Docket Entry Nos. 10-1–10-7.)

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car, Petitioner and Crawford pulled out semi-automatic firearms, and Petitioner instructed Crawford to cover him as he attempted to assassinate Garcia. (*Id.* at 597.) Petitioner and Crawford racked their weapons, exited the vehicle, moved toward Garcia, and gunshots followed shortly thereafter. (*Id.* at 448, 598–99.)

Petitioner and Crawford chased Garcia into a nearby hair salon. (*Id.* at 134, 404–06, 432, 448.) As Garcia stumbled into the salon — seemingly already injured — several bystanders unsuccessfully attempted to escape out the back door of the salon which had been wedged shut. (*Id.* at 111–12, 135–36, 141–42, 407–08, 433–34.) As a result of the gunfire, several bystanders were shot. (*Id.* at 434.) One — a hairdresser employed at the salon — suffered several shots in her upper thigh, arm, and back, causing her body to jerk with each bullet and eventually fall to the ground. (*Id.* at 115, 434.) The gunshots shattered the hairdresser's bones, the treatment of which required a half-dozen surgeries and the installation of a metal plate during two months of hospitalization, followed by physical therapy and rehabilitation. (*Id.* at 120–21.) The hairdresser testified at trial two years later that she continued to experience pain from her injuries, requiring five daily doses of three different prescription pain medications, and could no longer work as a result of her injuries. (*Id.* at 107, 122.)

A second bystander — an off-duty police officer at the salon for an appointment — suffered a gunshot wound through the top of her foot, breaking three toes, and exiting through the back of her big toe. (*Id.* at 139.)

A third bystander — a nearby pedestrian on the sidewalk — ran into the salon after hearing the gunshots. (*Id.* at 406–07.) After failing to escape through the salon's back door with the others, the third bystander dove to the ground near Garcia. (*Id.* at 407–08.) Petitioner stood atop Garcia and fired repeatedly into his head, striking the third bystander's leg twice in the

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process. (*Id.* at 408–09, 434.) The third bystander was hospitalized for about seven hours and endured painful treatment for weeks afterward. (*Id.* at 415, 418.) A bullet fragment remained embedded in his leg two years later when he testified at Petitioner's trial. (*Id.* at 408, 413, 418.)

Despite the bystanders' injures, Garcia was the only victim to die from the shooting. (*Id.* at 478.) An autopsy revealed eight gunshot wounds, including three in his head and one in his back. (*Id.* at 479–83.) These gunshot wounds perforated Garcia's brain and spinal cord as well as his liver and right lung. (*Id.* at 483.) Garcia died from the combination of gunshot "wounds of the head, body and extremities with perforations of brain, cervical spinal cord, liver, and lung." (*Id.* at 485.)

ii. Petitioner's actions after the shooting

Petitioner and Crawford returned to Wint's vehicle immediately after the shooting and instructed Wint to drive off quickly. (*Id.* at 436, 599–600.) During the drive, Petitioner verbally celebrated having killed Garcia, (*id.* at 600–01, 772), and after leaving the scene, Petitioner, Crawford, and Wint watched news coverage of the shooting on television, (*id.* at 602). After the shooting, Petitioner called the mother of his deceased best friend McNickle, wished her a happy birthday, and asked her to tell McNickle's father, "I took care of that." (*Id.* at 881.)

iii. Petitioner's behavior during the trial and sentencing

Petitioner's courtroom behavior was a major issue for the Trial Court. The Trial Court found that Petitioner's conduct, viewed as a whole, constituted a sustained effort "to delay the proceedings or frustrate the proceedings." (*Id.* at 1200.)

Petitioner engaged in several efforts to interfere with the trial's orderly progress. For example, Petitioner once refused to reenter the courtroom without receiving new trial clothing from his family, despite the family's non-compliance with mandatory security procedures in

place for providing an incarcerated defendant with trial clothing. (*Id.* at 157–58.) In addition, on multiple occasions, Petitioner would remove his clothing during short recesses, precluding his transport back into the courtroom. (*Id.* at 643–44, 983.)[4] The Trial Court found that Petitioner had been coordinating with his mother, who had been attending the trial, in order to disrupt the proceedings. (*Id.* at 1174.) The most noteworthy incident occurred when Petitioner disrupted the trial with an outburst during testimony in front of the jury. (*Id.* at 979.) In response to testimony that law enforcement had seized firearms, ammunition, and drugs from the location at which Petitioner had been arrested on another occasion unrelated to this case, Petitioner interrupted the testimony to deny possession of the seized items and accuse the witness of lying. (*Id.*) The Trial Court later described Petitioner's conduct during this outburst as "boisterous," noting that Petitioner "started shouting obscenities at the witness in the presence of the jury."[5] (*Id.* at 992–93.) The Trial Court observed that Petitioner ignored its "lawful directive" to stop interrupting the testimony, then "stood up and in front of the jury, shouted more obscenities," and

[4] The trial transcript filed with the Court is missing pages 639 through 672. (*See* Jury Trial Tr. 638, 673.) However, both Petitioner's Brief and Respondents' Affidavit quote in full the Trial Court's admonition on pages 643 through 644 of the trial transcript. (*See* Pet'r Br. 11, Docket Entry No. 7; Resp'ts Aff. ¶ 20, Docket Entry No. 10.) The Court relies on the parties' undisputed recitation of the record.

[5] During the testimony of the witness, Petitioner interrupted the proceedings as follows:

Petitioner:	That shit wasn't mine. It wasn't at my house.
Trial Court:	Be quiet. If you want to testify, you can take the stand.
Petitioner:	He's fucking lying.
Trial Court:	Take charge of the defendant.
Petitioner:	He is sitting up there fucking lying.
Trial Court:	Officer, take charge of the defendant.
Petitioner:	Get the fuck out of here, man.
(Defendant Paige was removed from the courtroom.)	

(Jury Trial Tr. 979.)

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required "two court officers [to] le[a]d [Petitioner] out of the courtroom" because he "resisted being cuffed by the officers." (*Id.* at 983, 992–93.) The Trial Court observed that during Petitioner's outburst, Petitioner's "mother, who had been sitting in the audience observing the trial, stood up and started shouting obscenities in the direction of this [c]ourt in the presence of this jury." (*Id.* at 993.)

The Trial Court adjourned for the day after Petitioner's removal, but Petitioner did not return to court when trial next reconvened. (*Id.* at 990.) Instead, Petitioner chose to get a haircut at the detention facility rather than board the appropriate transport to the courthouse. (*Id.* at 993, 1171.) At this point, the Trial Court chose to continue the trial in Petitioner's absence. (*Id.* at 993.)

Later in the proceedings, Petitioner's trial counsel spoke with Petitioner and informed the Trial Court that Petitioner was ready to conduct himself appropriately. (*Id.* at 1170.) The Trial Court declined to credit this representation and refused to readmit Petitioner to his trial. (*Id.* at 1170–74.)

After the Trial Court barred Petitioner from the courtroom, Petitioner's counsel indicated that Petitioner wished to testify in his own defense. (*Id.* at 1173.) Although the Trial Court suspected that Petitioner's desire to testify was a "delaying, stalling tactic on [Petitioner's] part" and that his request was "another example of [Petitioner] trying to delay the proceedings or frustrate the proceedings," the Trial Court nevertheless ordered Petitioner transported to the courtroom for the colloquy concerning testifying in one's own defense. (*Id.*) Upon arrival in the courtroom, Petitioner changed his mind and invoked his right not to testify. (*Id.* at 1201–02.)

Although Petitioner did not attend the remainder of his trial, Petitioner was present for his sentencing hearing. (Sentencing Tr. 2, annexed to Resp'ts Aff., Docket Entry No. 10-7.) During

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the hearing, Petitioner turned his back to the Trial Court and swore at a courtroom officer who instructed him to face forward. (*Id.* at 4.) When the Trial Court offered Petitioner an opportunity to be heard before imposing sentence, Petitioner berated the Trial Court in vulgar terms.[6] (*Id.* at 18.)

iv. The Trial Court's discharge of two jurors

On the trial day following Petitioner's mid-trial ejection from the courtroom, the Trial Court began interviewing each juror to determine whether they could remain fair and impartial after Petitioner's outburst. (Jury Trial Tr. 987.) With trial counsel present, the Trial Court first interviewed Juror No. 8, who admitted to saying to other jurors in the jury room that "cops are crooked," which she recharacterized moments later as "some cops are crooked." (*Id.* at 999–1000.) When questioned, Juror No. 8 stated that she did not realize her comments violated the Trial Court's order not to discuss the case or anything about the case. (*Id.* at 1000.) When asked why she did not volunteer her prior interactions with law enforcement during jury selection questioning, Juror No. 8 stated that her belief about police stemmed from "what [she had] seen interacting with police in [her] neighborhood," but that she "never had run-ins." (*Id.* at 1002.)

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[6] Petitioner stated:

> Pretty much regardless of no matter what the conviction was, I am still innocent. No matter what y'all think, no matter what y'all say. Whatever happened to y'all, that is bad, but I don't feel sorry for you because I didn't do it, point blank period. I didn't do it. And from the beginning of this trial, I am saying I already know you, Your Honor. You wasn't on my side. The D.A., you know what I am saying, like the whole trial, basically, y'all was sucking each other off and I just feel bad that I wasn't able to get sucked off. You understand? So with all due respect from the bottom of my heart, really, suck my dick. That is what I say. And that's it. And I really mean that too.

(Sentencing Tr. 18, annexed to Resp'ts Aff., Docket Entry No. 10-7.)

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Juror No. 8 agreed to follow the Trial Court's instructions going forward, and stated that she would not allow her personal opinions concerning police to cause her to be unfair or impartial. (*Id.* at 1001–02.)

Other jurors also discussed Juror No. 8 with the Trial Court and counsel. An alternate juror stated that he overheard Juror No. 8 state "something about how you can't — that all cops are bad, basically. It's like [ninety-seven] percent bad cops; then like [three] percent, I guess, that you could trust." (*Id.* at 1019–20.) Another juror also heard Juror No. 8 state that "none of them can be trusted. That is just her opinion of police officers." (*Id.* at 986.) This juror also suggested that Juror No. 8 had withheld information during jury selection, stating that "she said when she was asked during the questioning for jury duty that she did not want to raise her hand because she didn't want to bring any attention to herself." (*Id.* at 986–87.)

The Trial Court and counsel also interviewed Juror No. 9. (*Id.* at 1011.) When asked whether she had overheard jurors talking about "the believability of police officers, or anything at all regarding the police," Juror No. 9 admitted that she had been speaking about the topic, including "some incidents [she had] seen in [her] neighborhood." (*Id.*) This included an incident in which police took money out of an elevator shaft and claimed it as their own. (*Id.* at 1011–12.) Juror No. 9 stated that she did not "believe that all are bad, because I do speak with the ones in my neighborhood. But I have seen things over [twenty-nine] years I've been living there." (*Id.* at 1012.) She stated that the discussion about police behavior arose following Petitioner's outburst and removal from the courtroom: "I said that I have seen things done and people blamed for things that they haven't done, because I have seen this." (*Id.*) Juror No. 9 admitted to recalling the Trial Court's instruction to the jurors not to discuss their personal opinions about the police, but remained silent when asked if she realized her comments violated that instruction.

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(*Id.* at 1013.) She insisted she could remain fair and impartial, notwithstanding her comments. (*Id.*)

After interviewing all the jurors and alternates, the Trial Court discharged both Juror No. 8 and Juror No. 9. (*Id.* at 1023–25.) With regard to Juror No. 8, the Trial Court found that she purposefully withheld information during jury selection. (*Id.* at 1024.) The Trial Court found Juror No. 8 not credible, given "her demeanor and her actions," as well as the statements of the other jurors. (*Id.*) Ruling that she was "grossly unqualified" based on facts unknown at the time of jury selection and that she had engaged in "substantial" misconduct, the Trial Court removed Juror No. 8 from the jury and substituted the next alternate juror in line. (*Id.*)

With regard to Juror No. 9, the Trial Court found that she had not "been candid and forthcoming during the initial jury selection process," because "she purposefully withheld information from counsel, regarding her observations of, quote, 'police misconduct.'" (*Id.* at 1024–25.) The Trial Court also found that Juror No. 9 disregarded its instructions not to speak about the case. (*Id.* at 1025.) Finding that she had engaged in "substantial" misconduct and that she was "no longer competent to serve" on the jury as a result of facts unknown at the time of jury selection, the Trial Court removed Juror No. 9 from the jury and substituted the next alternate juror in line. (*Id.*)

v. Testimony challenged by Petitioner

During trial, Petitioner challenged the admission of certain testimony. Petitioner first challenged the testimony of Detective Dan Perez, a late addition to the prosecution's witness list, (*id.* at 846–48), and subsequently challenged testimony from Officer Rashan LaCoste, (*id.* at 937–79).

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1. Detective Dan Perez's challenged testimony

During trial, prosecutors sought to link Petitioner to a particular telephone number.[7] Detective Perez testified that he had once interviewed Petitioner in connection with an unrelated case years prior, during which Petitioner gave this particular number as his own. (*Id.* at 870.) Wint also testified that this same telephone number belonged to Petitioner. (*Id.* at 637.) However, telephone company records showed that the number was not registered to Petitioner. (*Id.* at 801.)

Initially, prosecutors had not planned to call Detective Perez as a witness because they expected to rely solely on Wint's testimony to link Petitioner to the telephone number. (*Id.* at 845.) For that reason, they had not disclosed Detective Perez as a witness. (*Id.*) However, Petitioner's trial counsel unexpectedly challenged Petitioner's connection to the telephone number during the defense's opening statement, suggesting that the jury should discredit Wint's testimony and noting that the telephone records did not name Petitioner. (*Id.* at 72–73.) When prosecutors realized in the middle of trial that they needed additional evidence to tie Petitioner to the telephone number, they sought the testimony of Detective Perez and made the relevant discovery disclosures concerning his testimony. (*Id.* at 845.)

In objecting to Detective Perez's testimony, Petitioner argued that the late disclosure violated state discovery rules. (*Id.* at 844.) Petitioner's trial counsel asked the Trial Court to bar the witness from testifying or, in the alternative, to give a curative instruction to alert the jury to

[7] According to the trial record, telephone company records showed that at the time of the shootings, the cellular telephone associated with this number made calls to and received calls from other numbers belonging to Petitioner's accomplices. (Jury Trial Tr. 793–95, 799–805.) In addition, the same records showed that at the time of the shootings, the cellular telephone associated with this number connected to cellular towers near the crime scene because those towers provided the strongest signal, suggesting that the person with this cellular telephone was in the vicinity — even at — the crime scene at the time of the shootings. (*Id.*)

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the late disclosure. (*Id.* at 844–45.) The Trial Court denied both requests, finding Detective Perez's testimony to be probative, that Petitioner's trial counsel could not articulate any prejudice from the late disclosure, and that prosecutors did not intentionally withhold the disclosure from opposing counsel. (*Id.* at 846–48.)

2. Officer LaCoste's challenged testimony

Petitioner also challenged the testimony of Officer LaCoste regarding (1) Petitioner's possession of a handcuff key, and (2) Petitioner's prior interactions with Officer LaCoste.

A. Possession of handcuff key

Officer LaCoste testified that after he arrested Petitioner, he took Petitioner to the precinct to search Petitioner for weapons. (*Id.* at 937–38.) During the search, Officer LaCoste saw Petitioner reach into his shoe and pull out a handcuff key. (*Id.* at 937.) Officer LaCoste tried to grab the key, but Petitioner put the key in his mouth and swallowed it. (*Id.* at 938–40.)

Defense counsel objected to this testimony, arguing that the testimony was both unfairly prejudicial and not probative of guilt because Petitioner had multiple outstanding warrants at the time of his arrest nine months after the shooting, and Petitioner could have possessed the handcuff key for fear of arrest on those warrants, and not the shooting. (*Id.* at 11–12.) The Trial Court permitted the testimony over defense counsel's objection. (*Id.* at 13.)

B. Petitioner's prior interactions with Officer LaCoste

Petitioner also challenged Officer LaCoste's testimony concerning his prior contact with Petitioner. Initially, Officer LaCoste testified only about his arrest of Petitioner for the crimes charged in this case. (*Id.* at 934–41.) On cross-examination, Petitioner's trial counsel asked Officer LaCoste about legal complaints and a federal lawsuit Petitioner had filed against Officer LaCoste that concerned their prior interactions. (*Id.* at 944, 947.)

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The Trial Court observed that Petitioner's trial counsel "brought out the fact that [Officer LaCoste] has prior knowledge of [Petitioner]," and reasoned that "[n]ow, [prosecutors] can explore what that prior knowledge is, how [Officer LaCoste] got it, and [prosecutors] can also bring out the fact about the lawsuits, so on and so forth." (*Id.* at 947.) As the Trial Court explained, "[t]he thrust of [Petitioner's] cross[-]examination of [Officer LaCoste] was that [Officer LaCoste] could not be believed, he is not reliable because he has hatred, bias against [Petitioner]." (*Id.* at 965.) The Trial Court found that Petitioner's cross-examination could mislead the jury if prosecutors were not permitted to demonstrate the nature of Officer LaCoste's prior interactions with Petitioner. (*Id.* at 965–66.)

In light of its findings, the Trial Court permitted prosecutors to question Officer LaCoste about his prior arrest of Petitioner and about the concurrent seizure of firearms from the premises at which Petitioner was located at the time. (*Id.* at 967.) Officer LaCoste then testified that he had previously arrested Petitioner at a location from which he also seized multiple firearms, ammunition, a quantity of crack cocaine, and a banana clip.[8] (*Id.* at 977–79.)

c. Verdict and sentencing

The jury found Petitioner guilty of murder in the second degree, three counts of assault in the first degree, one count of assault in the second degree, and one count of criminal possession of a weapon in the second degree. (Sentencing Tr. 20.)[9] The Trial Court sentenced Petitioner to twenty-five years to life in prison for murder in the second degree, twenty-five years in prison

[8] "A banana clip is a semi-circular clip of ammunition for automatic weapons, approximately ten inches long, capable of holding thirty rounds of ammunition." *Andrade v. Baptiste*, 583 N.E.2d 837, 838 n.1 (Mass. 1992). The jury did not hear any description of or definition for the term. (Jury Trial Tr. 979.)

[9] The trial transcript filed with the Court does not contain the jury's verdict. (*See* Jury Trial Tr.) However, the Trial Court recited the convictions at sentencing.

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plus five years post-release supervision for each of the three convictions for assault in the second degree, seven years in prison plus five years post-release supervision for assault in the second degree, and fifteen years in prison plus five years post-release supervision for criminal possession of a weapon in the second degree. (*Id.*) The Trial Court "direct[ed] that all of these sentences shall run consecutively with each other but for the firearms violation where [the Trial Court] direct[ed] that that run concurrent," for a total of 107 years in prison. (*Id.* at 21.)

d. Appeals to the Appellate Division and Court of Appeals

i. Appeal to the Appellate Division

Petitioner appealed the convictions to the Appellate Division, arguing that (1) the Trial Court unconstitutionally ejected Petitioner from the courtroom and unconstitutionally refused to let him return; (2) the Trial Court unconstitutionally discharged two Black female jurors in light of their comments about police misconduct in their neighborhoods; (3) the Trial Court unconstitutionally closed the courtroom for a substantive hearing; (4) the evidence was legally insufficient to convict him because it was based solely on the uncorroborated testimony of an accomplice; (5) the Trial Court improperly admitted evidence of uncharged crimes and gang membership, improperly permitted prosecutors to offer testimony of a witness without sufficient notice to Petitioner, and misled the jury by reading back only a portion of that witness' testimony on cross-examination; and (6) the 107-year sentence should be reduced in the interests of justice. (Pet'r App. Div. Br. iii–iv, annexed to Resp'ts Aff., Docket Entry No. 10-8.) The Appellate Division affirmed the convictions. *Paige*, 22 N.Y.S.3d at 223.

In particular, the Appellate Division upheld the Trial Court's decision to bar Petitioner from his trial. *See id.* at 225–27. In reaching its decision, the Appellate Division first reviewed Petitioner's behavior during court proceedings and held that his "actions throughout the course

of the trial constituted disruptive conduct warranting [Petitioner's] exclusion from the courtroom." *Id.* at 225. Second, the Appellate Division upheld the Trial Court's decision not to credit Petitioner's promise to behave appropriately if readmitted to the courtroom, and also held that the Trial Court "did not improvidently exercise its discretion in refusing defense counsel's request to readmit [Petitioner] to the courtroom." *Id.* at 226. Finally, the Appellate Division held that the Trial Court "did not improvidently exercise its discretion in declining defense counsel's request to permit [Petitioner] to view the proceedings from a remote location." *Id.*

The Appellate Division also upheld the Trial Court's removal of the two jurors. *See id.* at 226–28. With regard to Juror No. 8, the Appellate Division upheld her removal for largely the same reasons as the Trial Court. *See id.* at 226–27. With regard to Juror No. 9, the Appellate Division noted that Petitioner's objection to this juror's removal at trial differed from his objection on appeal. *See id.* at 228. Accordingly, the Appellate Division found Petitioner's objection "unpreserved for appellate review." *Id.* Ruling in the alternative, the Appellate Division also upheld the Trial Court's removal of Juror No. 9 on the merits, again relying on the same reasoning as the Trial Court. *See id.*

In addition, the Appellate Division reviewed the Trial Court's decision to permit Detective Perez's testimony about Petitioner's telephone number without a curative instruction, even though prosecutors did not disclose Detective Perez as a witness until after the parties' opening statements. *See id.* at 229. While the Appellate Division did not explicitly state whether or not the Trial Court erred, the Appellate Division did hold that "any prejudice caused by the [Trial Court's] refusal to provide a curative instruction after permitting [prosecutors] to add a witness after the parties' opening statements was not so great as to deprive [Petitioner] of a fair trial." *Id.*

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In allowing Officer LaCoste to testify about Petitioner's possession of a handcuff key, the Appellate Division found that the Trial Court committed error but found the error to be harmless. *Id.* at 226.

The Appellate Division also found that the Trial Court should not have permitted Officer LaCoste "to testify that when he arrested [Petitioner] on a previous occasion for crimes unrelated to the crimes charged in this case, various guns and ammunition were recovered from the residence where [Petitioner] was located at the time of that arrest," but found the error harmless. *Id.* at 229.

ii. Appeal to the Court of Appeals

Petitioner sought leave to appeal from the Court of Appeals, making the same arguments made before the Appellate Division. (Pet'r Ct. App. Br. 1–2, annexed to Resp'ts Aff., Docket Entry No. 10-11.) The Court of Appeals denied leave to appeal. *Paige*, 27 N.Y.3d at 1073. Petitioner moved for reconsideration, focusing on his argument concerning his ejection from the courtroom. (Pet'r Ct. App. Reh'g. Br. 1, annexed to Resp'ts Aff., Docket Entry No. 10-12.) The Court of Appeals denied rehearing. *Paige*, 27 N.Y.3d at 1137.

e. Habeas petition

On December 9, 2016, Petitioner, represented by counsel, filed a petition for a writ of habeas corpus with the Court. (Pet.) Petitioner made one claim alleging that the Trial Court unconstitutionally excluded him from the courtroom during trial in violation of the Sixth Amendment. (Pet'r Br. 20–37; Pet'r Reply 3–13, Docket Entry No. 11.)

On February 8, 2017, Petitioner filed a *pro se* motion for leave to amend his petition with additional claims that his counsel did not raise in his initial petition. (Mot. to Amend.) By Order dated February 13, 2017, the Court granted the motion. (Order dated Feb. 13, 2017.) Petitioner,

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acting *pro se*, subsequently filed supplemental briefs, alleging additional claims. First, Petitioner alleges that the Trial Court unconstitutionally discharged Juror No. 8 and Juror No. 9 in violation of the Sixth Amendment. (Pet'r Suppl. Initial Br. 16–25.) Second, Petitioner alleges that the Trial Court unconstitutionally permitted testimony from Detective Perez and Officer LaCoste in violation of his right to a fundamentally fair trial under due process principles. (Pet'r Suppl. Initial Br. 26–36; Pet'r Suppl. Reply ¶ 7.) Finally, Petitioner argues that a concession by Respondents in their briefing before this Court demonstrates that the Appellate Division unreasonably determined the facts related to the strength of the telephone company records linking Petitioner to the crime. (Pet'r Suppl. Reply ¶ 8.)

II. Discussion

a. Standard of review

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for a writ of habeas corpus by a person in custody pursuant to a state court judgment may only be brought on the grounds that his or her custody is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petitioner is required to show that the state court decision, having been adjudicated on the merits, is either "contrary to, or involved an unreasonable application of, clearly established Federal law" or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Shoop v. Hill*, --- U.S. ---, ---, 139 S. Ct. 504, 406 (2019) (per curiam) ("[H]abeas relief may be granted only if the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, Supreme Court precedent that was clearly established at the time of the adjudication." (citation and internal quotation marks omitted)); *Kernan v. Hinojosa*, --- U.S. ---, -

--, 136 S. Ct. 1603, 1604 (2016) (per curiam); *Hittson v. Chatman*, --- U.S. ---, ---, 135 S. Ct. 2126, 2126 (2015); *Woods v. Donald*, --- U.S. ---, ---, 135 S. Ct. 1372, 1374 (2015) (per curiam); *Johnson v. Williams*, 568 U.S. 289, 292 (2013). "An 'adjudication on the merits' is one that '(1) disposes of the claim on the merits, and (2) reduces its disposition to judgment.'" *Bell v. Miller*, 500 F.3d 149, 155 (2d Cir. 2007) (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 313 (2d Cir. 2001)); *see also Kernan*, 136 S. Ct. at 1606; *Harrington v. Richter*, 562 U.S. 86, 98 (2011). Under the section 2254(d) standards, a state court's decision must stand as long as "fairminded jurists could disagree on the correctness of the . . . decision." *Richter*, 562 U.S. at 101 (citation and internal quotation marks omitted).

For the purposes of federal habeas review, "clearly established law" is defined as "the holdings, as opposed to 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); *see also Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam) ("As we have repeatedly emphasized, however, circuit precedent does not constitute clearly established Federal law, as determined by the Supreme Court [under] § 2254(d)(1)."); *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (per curiam) ("The Sixth Circuit also erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the [state] [c]ourt's decision."). A state court decision is "contrary to," or an "unreasonable application of," clearly established law if the decision (1) is contrary to Supreme Court precedent on a question of law; (2) arrives at a conclusion different than that reached by the Supreme Court on "materially indistinguishable" facts; or (3) identifies the correct governing legal rule but unreasonably applies it to the facts of the petitioner's case. *Williams*, 529 U.S. at 412–13. In order to establish that a state court decision is an unreasonable application of federal law, the state court decision must be "more than incorrect or erroneous."

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Lockyer v. Andrade, 538 U.S. 63, 75 (2003). The decision must be "objectively unreasonable." *Id.*

A court may also grant habeas relief if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). "[S]tate-court factual determinations [are not] unreasonable 'merely because [a federal post-conviction court] would have reached a different conclusion in the first instance.'" *Brumfield v. Cain*, 576 U.S. 305, 335 (2015) (Thomas, J., dissenting) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Rather, factual determinations made by the state court are "presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Even if "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to'" overturn a state court factual determination. *Wood*, 558 U.S. at 301 (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)). A court may overturn a state court's factual determination only if the record cannot "plausibly be viewed" as consistent with the state court's fact-finding or if "a reasonable factfinder must conclude" that the state court's decision was inconsistent with the record evidence. *Rice*, 546 U.S. at 340–41.

b. Petitioner's ejection from the courtroom and refusal of reentry

Counsel for Petitioner brings one claim on Petitioner's behalf, arguing that the Trial Court unconstitutionally ejected him from the courtroom and unconstitutionally prohibited him from returning. (Pet'r Br. 20–37; Pet'r Reply 3–13.) Because the state court's decision neither contradicts nor unreasonably applies clearly established Supreme Court precedent, nor unreasonably determines the facts, the Court denies habeas relief as to this claim.

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"[A] defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1985)). Put another way, "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *see also Norde v. Keane*, 294 F.3d 401, 411 (2d Cir. 2002) ("A criminal defendant has the right to be 'present at all stages of the trial.'" (quoting *Faretta v. California*, 422 U.S. 806, 820 n.15 (1975))). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Gagnon*, 470 U.S. at 526 (quoting *Snyder*, 291 U.S. at 105–06).

"However, that right [to be present at all stages of the trial] is not absolute and may be waived, either explicitly or by the defendant's conduct." *Norde*, 294 F.3d at 411 (citing *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970)). Thus, "[t]he court may bar from the courtroom a criminal defendant who disrupts a trial." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991); *see also Jones v. Murphy*, 694 F.3d 225, 238 (2d Cir. 2012) ("[A] defendant may *constructively* waive his rights to be present at trial by disruptive behavior." (citing *Allen*, 397 U.S. at 343)). Courts possess the power to exclude unruly defendants from their own trials because "[i]t would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes." *Allen*, 397 U.S. at 346. "[T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Id.* at 343.

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To remove a defendant from a trial, the defendant should ideally be "warned by the judge that he will be removed if he continues his disruptive behavior." *Id.* However, the Second Circuit has questioned whether clearly established Federal law makes this "warning . . . a requirement in every situation." *Gilchrist v. O'Keefe*, 260 F.3d 87, 96 (2d Cir. 2001).

The primary requirement for involuntary removal is that a defendant must "insist[] on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id.* (quoting *Allen*, 397 U.S. at 343). Although the defendant in *Allen* behaved in an extremely disruptive manner — even threatening the trial judge's life — the Second Circuit has suggested that clearly established Federal law does not set *Allen*-level misconduct as the minimum threshold for removing a defendant from the courtroom: to the contrary, the Second Circuit has upheld, on federal post-conviction review, a state court's removal of a defendant who exhibited "significantly less egregious" behavior — repeatedly talking out of turn, notwithstanding the trial judge's order to remain quiet — than did the *Allen* defendant. *Norde*, 294 F.3d at 413.

"Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Allen*, 397 U.S. at 343. According to the Second Circuit, clearly established Supreme Court precedent requires a defendant to "satisfactorily demonstrate[] that he would not be violent or disruptive" in order to obtain readmission to his trial, putting the burden on the defendant to justify his return to the courtroom. *Jones*, 694 F.3d at 240 (citing *Allen*, 397 U.S. at 343). On federal post-conviction review, the court must review a trial judge's decision to remove a defendant from the courtroom with two levels of deference: first, the deference afforded to any decision to remove a defendant from the courtroom, and second, the

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deference afforded to any state court decision on federal post-conviction review. *Id.* at 241. In other words, a court may order post-conviction relief on such a claim only if the state court unreasonably determined that the trial court did not abuse its discretion. *Cf. id.* at 240.

The Court rejects Petitioner's claim because none of Petitioner's arguments demonstrate that habeas relief is warranted.

i. The Trial Court's lack of warning to Petitioner

First, Petitioner argues that the Trial Court did not warn him that his behavior would preclude his attendance at trial. The Court finds that Petitioner is not entitled to habeas relief on this ground.

The Second Circuit has indicated that no clearly established Supreme Court precedent requires a warning in all circumstances prior to ejecting a defendant from trial. *Gilchrist*, 260 F.3d at 96 (noting that the Supreme Court upheld a courtroom ejection without warning where the defendant clearly knew of his right to be present at trial and that the trial would continue in his absence). Petitioner cites no clearly established Supreme Court precedent — and this Court's independent research has not uncovered any — requiring a warning under the circumstances presented by Petitioner's conduct. Thus, the Appellate Division could not have unreasonably applied or contradicted clearly established Supreme Court precedent since that precedent does not exist.

Even if clearly established Supreme Court precedent did require a warning in Petitioner's circumstances, the Court cannot find that the Appellate Division unreasonably determined that Petitioner "had been repeatedly warned by the [T]rial [C]ourt that if he did not desist in such conduct, he would be barred from attending the remainder of the trial." *Paige*, 22 N.Y.S.3d at 225. The record demonstrates that the Trial Court gave Petitioner multiple warnings, beginning

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with *Parker*[10] warnings at the trial's outset. (Jury Trial Tr. 993–94.) During the *Parker* warnings, the Trial Court "admonished" Petitioner "that if he frustrated or delayed his production by the Department of Corrections [it] would be considered a waiver of his right to be present." (*Id.*)

During trial, the Trial Court again warned Petitioner that it would not permit Petitioner to delay trial proceedings, irrespective of whether his family had difficulty with custodial personnel when attempting to provide him with trial clothing. (*Id.* at 157–58.) The Trial Court explicitly stated that it would "not tolerate" further delays. (*Id.* at 157.)

The Trial Court warned Petitioner on a third occasion that the Trial Court would not permit him to delay the trial by removing his clothing during short recesses. (*Id.* at 643–44.) During the course of this warning, the Trial Court made a finding, based on communication from "the courtroom officer," that Petitioner's "disrobing during break" was "why it is taking [fifteen], [twenty] minutes to get [Petitioner] in this courtroom at the appropriate time." (*Id.*) The Trial Court explicitly told Petitioner that in the event of another "voluntary tactic to delay these proceedings," the Trial Court may decide that it would "not have [Petitioner] in the courtroom." (*Id.*)

Only after its fourth warning — when Petitioner's outburst during live testimony delayed court proceedings in front of the jury — did the Trial Court follow through with its prior indication that it would conduct the trial without Petitioner. (*Id.* at 979.) Even during this incident, the Trial Court alerted Petitioner that he could avoid expulsion if he would "[b]e quiet,"

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[10] *See People v. Parker*, 57 N.Y.2d 136, 141 (1982) ("In order to effect a voluntary, knowing and intelligent waiver [of the right to be present at trial], the defendant must, at a minimum, be informed in some manner of the nature of the right to be present at trial and the consequences of failing to appear for trial . . . .").

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and that "[i]f you want to testify, you can take the stand." (*Id.*) In the context of the Trial Court's prior admonitions to Petitioner, a plausible reading of this statement is that the Trial Court was warning Petitioner that his conduct constituted grounds for expulsion. The Trial Court itself later characterized its statement by saying that "[t]he [c]ourt immediately warned [Petitioner] to be quiet." (*Id.* at 992.) Only after Petitioner continued to obstruct the trial did the Trial Court order Petitioner removed. (*Id.* at 979.)

Accordingly, because no clearly established Supreme Court precedent requires a warning before ejecting a defendant from his trial under the circumstances presented in this case, the Appellate Division's decision could not have contradicted or unreasonably applied clearly established Federal law concerning a pre-ejection warning. Moreover, even if warnings were required, as Petitioner argues, a plausible reading of the record demonstrates that the Trial Court repeatedly warned Petitioner that his conduct could result in his ejection from the trial. Therefore, the Court cannot conclude that the Appellate Division unreasonably determined the facts when it cited the Trial Court's repeated warnings. *See Paige*, 22 N.Y.S.3d at 225.

ii. The nature of Petitioner's misconduct

Second, Petitioner argues that he engaged in only a single outburst, and that any other misconduct is not the type of behavior the Trial Court could consider when deciding whether or not to eject a defendant from the courtroom. Because no clearly established Supreme Court precedent supports Petitioner's point, the Court rejects this argument.

Petitioner cites both federal courts of appeals decisions and a state court decision to establish that "behavior that is merely disruptive is insufficient under *Allen* to justify removal." (Pet'r Br. 30); *see also United States v. Ward*, 598 F.3d 1054, 1058 (8th Cir. 2010); *Badger v. Cardwell*, 587 F.2d 968, 979 (9th Cir. 1978); *Tatum v. United States*, 703 A.2d 1218, 1223 (D.C.

1997). Indeed, the Second Circuit has observed that "behavior that[] [is] contentious and improper" will not automatically "warrant the extreme response of involuntary exclusion." *Jones*, 694 F.3d at 238.

However, as the Supreme Court continues to make clear, courts of appeals precedent is not "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(2); *see also Parker*, 567 U.S. at 48–49 ("The Sixth Circuit also erred by consulting its own precedents, rather than those of [the Supreme] Court, in assessing the reasonableness of the [state] [c]ourt's decision."). Petitioner cites no Supreme Court decision holding that out-of-court misconduct that creates in-court disruption cannot constitute grounds for the expulsion of a criminal defendant from trial. Contrary to Petitioner's argument, clearly established Supreme Court precedent holds that misconduct warrants removal, not if that conduct "makes it impossible to conduct the trial with the defendant in the courtroom," (Pet'r Br. 30), but rather, if that conduct "permit[s] our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes," *Allen*, 397 U.S. at 346.

The Trial Court found that Petitioner's conduct, viewed as a whole, constituted a sustained effort "to delay the proceedings or frustrate the proceedings." (Jury Trial Tr. 1200.) Accordingly, the Appellate Division did not contradict or unreasonably apply existing Supreme Court precedent when it held that Petitioner's conduct was of the type warranting exclusion. *See Paige*, 22 N.Y.S.3d at 225.

iii. Petitioner's level of misconduct

Third, Petitioner argues that the totality of his misconduct — even considering the pre-outburst incidents — did not rise to the level warranting removal, contrasting his misconduct

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with the more outrageous misbehavior of the defendant in *Allen*. Because no clearly established Supreme Court precedent sets *Allen* as the minimum threshold for removal from the courtroom and because Petitioner engaged in a pattern of delaying conduct, the Court rejects this argument. *See Norde*, 294 F.3d at 413 (holding that "significantly less egregious" misconduct than the misconduct described in *Allen* can warrant removal from the courtroom).

The record demonstrates that Petitioner delayed proceedings by refusing to reenter the courtroom without receiving new trial clothing from his family, despite the family's non-compliance with the security procedures in place for providing an incarcerated defendant with trial clothing. (Jury Trial Tr. 157–58.) In addition, the record demonstrates that Petitioner delayed the trial by removing his clothing during short recesses, precluding his transport back into the courtroom. (*Id.* at 643–44.) The Trial Court made an on-the-record finding, based on communication from "the courtroom officer," that Petitioner's "disrobing during break" was "why it is taking [fifteen], [twenty] minutes to get [Petitioner] in this courtroom at the appropriate time." (*Id.*) Later in the trial, the Trial Court found that Petitioner "was consistently late, would take his clothes off during luncheon recesses and insure that we were late at all times." (*Id.* at 983.) A plausible reading of these findings is that the Trial Court noticed these delays on multiple prior occasions but did not place its observations on the record at every occurrence. This conclusion is supported by the Trial Court's later finding that Petitioner "was consistently late, would take his clothes off during luncheon recesses and insure that we were late at all times." (*Id.*)

Following these incidents, Petitioner again disrupted the trial with an outburst during testimony in front of the jury. (*Id.* at 979.) The Trial Court later described Petitioner's conduct during this outburst as "boisterous," noting that Petitioner "started shouting obscenities at the

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witness in the presence of the jury." (*Id.* at 992–93.) The Trial Court noted that Petitioner ignored its "lawful directive" to stop interrupting the testimony, then "stood up and in front of the jury, shouted more obscenities," and required "two court officers [to] le[a]d [Petitioner] out of the courtroom" because he "resisted being cuffed by the officers." (*Id.* at 983, 992–93.)

When trial next convened, Petitioner was absent. (*Id.* at 990.) Having received information from court staff that Petitioner "ha[d] refused to come to court, because he allegedly wanted a haircut," the Trial Court ordered trial to proceed without Petitioner. (*Id.* at 993.) Petitioner's attorney suggested that the fault for Petitioner's failure to appear rested with custodial personnel for failing to place him on the appropriate bus from the jail to the courthouse. (*Id.* at 1170.) The Trial Court, observing that Petitioner had "zero credibility before this [c]ourt," rejected this explanation. (*Id.* at 1171.) The Trial Court instead credited the information it received from the custodial personnel that Petitioner was at fault for visiting the jail barber instead of boarding the transport bus. (*Id.*) Petitioner points to no clear and convincing evidence to undermine the Appellate Division's decision to credit the Trial Court's finding. *See* 28 U.S.C. § 2254(e)(1).

Finally, the Trial Court found that Petitioner had been coordinating with his mother, who had been attending the trial, in order to disrupt the proceedings. (Jury Trial Tr. 1174.) When the Trial Court ejected Petitioner from the courtroom due to his outburst, the Trial Court observed Petitioner's "mother, who had been sitting in the audience observing the trial, st[an]d up and start[] shouting obscenities in the direction of this [c]ourt in the presence of this jury." (*Id.* at 993.) Prosecutors noted on the record that Petitioner's mother attended every day of Petitioner's trial except for the day Petitioner visited the jail barber rather than board the bus to

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the courthouse, suggesting Petitioner warned her ahead of time that he would not be coming to court that day and she need not show up either. (*Id.* at 1172.)

Given the evidence in the record, the Appellate Division did not unreasonably uphold the Trial Court's findings of fact supporting the Trial Court's decision to eject Petitioner from his trial. In addition, given the Trial Court's findings, the Appellate Division did not contradict or unreasonably apply clearly established Supreme Court precedent when it upheld the Trial Court's decision to eject Petitioner. *See Paige*, 22 N.Y.S.3d at 225.

iv. Presumption of voluntary absence

Fourth, Petitioner argues that the Trial Court should not have presumed that Petitioner voluntarily absented himself from proceedings because he was in state custody during trial, and the custodial authorities were responsible for transporting Petitioner to trial. Because a plausible reading of the record shows that Petitioner voluntarily took actions that prevented his appearance in the courtroom, this argument does not support the relief requested.

As discussed above, the Trial Court received information from court staff that Petitioner "has refused to come to court, because he allegedly wanted a haircut." (Jury Trial Tr. 993.) Petitioner's attorney indicated that the fault for Petitioner's failure to appear rested with custodial personnel for failure to place him on the appropriate bus from the jail to the courthouse. (*Id.* at 1170.) The Trial Court, observing that Petitioner had "zero credibility before this [c]ourt," rejected this explanation. (*Id.* at 1171.) The Trial Court instead credited the information it had received from custodial personnel that Petitioner was at fault for visiting the jail barber instead of boarding the transport bus. (*Id.*) In addition, prosecutors noted on the record that Petitioner's mother was absent for the first time that day despite having attended every prior day of Petitioner's trial, suggesting Petitioner warned his mother ahead of time that she could skip court

because he would not be in attendance. (*Id.* at 1172.) This record supports the Trial Court's conclusion that Petitioner had voluntarily absented himself from the trial. Thus, the Appellate Division did not unreasonably determine the facts when it deferred to the Trial Court's finding. *See Paige*, 22 N.Y.S.3d at 225.

Citing to lower court precedent, Petitioner further contends that the Trial Court was required to bring him to the courtroom to obtain an in-court waiver prior to conducting the trial without Petitioner, and should not have relied on information from courtroom personnel to make the voluntariness determination. (Pet'r Br. 27–28 & n.7 (first citing *United States v. Gordon*, 829 F.2d 119, 125–26 (D.C. Cir. 1987); then citing *United States v. Fontanez*, 878 F.2d 33, 36–37 (2d Cir. 1989); then citing *Cross v. United States*, 325 F.2d 629, 631–33 (D.C. Cir. 1963); then citing *Evans v. United States*, 284 F.2d 393, 395 (6th Cir. 1960); and then citing *People v. Epps*, 37 N.Y.2d 343, 350 (1975)).) Assuming without deciding that Petitioner's reading of the lower court precedent is correct,[11] the Court cannot grant habeas relief on account of rulings contrary to lower court precedent. *See Parker*, 567 U.S. at 48–49. Petitioner cites no clearly established Supreme Court precedent supporting this argument, and the Court's independent review has not located any.

Petitioner also argues that the Trial Court "improperly shifted the burden to defense counsel to prove that his incarcerated client's absence was not voluntary." (Pet'r Br. 28–29.) The Court disagrees with Petitioner's characterization of the record. The record instead shows

[11] The Court disagrees with Petitioner's reading of the Second Circuit precedent. The Second Circuit has held only that a trial court "must conduct a record inquiry to determine whether the defendant's absence was 'knowing and voluntary' and without sound excuse," not that the defendant must himself be present for this inquiry. *See United States v. Tureseo*, 566 F.3d 77, 83 (2d Cir. 2009). In fact, a trial court may dispense even with this limited inquiry where "the facts are clear and undisputed." *United States v. Fontanez*, 878 F.2d 33, 36 (2d Cir. 1989).

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that after reciting a host of evidence, (Jury Trial Tr. 991–94), the Trial Court found that Petitioner "ha[d] voluntarily absented himself from these proceedings, knowing that the trial [would] continue in his absence," (*id.* at 994). In its very next sentence, the Trial Court stated that "[c]ounsel for [Petitioner] has been unable to provide this [c]ourt with any evidence contrary to the reasons given by the court staff as to why [Petitioner] is not in court today." (*Id.* at 994–95.) The Trial Court never used the word "burden," nor did it state that Petitioner's counsel must "demonstrate," "establish," or "prove" anything. Read in context, the Trial Court's statement merely places on the record that the evidence on which the Trial Court relied — the same evidence that the Trial Court had just cited at length — was undisputed. The Trial Court did not shift the burden to Petitioner.

v. Denial of Petitioner's readmission

Finally, Petitioner argues that the Trial Court should have readmitted him to the courtroom after his defense counsel conveyed Petitioner's willingness to conduct himself appropriately. The Court finds that Petitioner is not entitled to relief on this ground for two reasons. First, the Appellate Division did not contradict nor unreasonably apply clearly established Supreme Court precedent by permitting the Trial Court to weigh the evidence to determine whether Petitioner genuinely offered to respect courtroom decorum or whether Petitioner's representation was a farce. Second, the Appellate Division did not unreasonably determine the facts by upholding the Trial Court's finding that Petitioner's promise to behave was not genuine.

As to the law, the Appellate Division did not contradict or unreasonably apply clearly established Supreme Court precedent. Petitioner is correct that an ejected defendant must be allowed readmission "as soon as the defendant is willing to conduct himself consistently with the

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decorum and respect inherent in the concept of courts and judicial proceedings." *Allen*, 397 U.S. at 343. Notably, *Allen* explains that a defendant must be "willing" to behave appropriately; *Allen* does not hold that a defendant may merely "represent his willingness" to behave appropriately, whether or not that representation is genuine. *Id.*

According to the Second Circuit, clearly established Supreme Court precedent does not adopt the interpretation of *Allen* argued by Petitioner. *Jones*, 694 F.3d at 240. Rather, the Second Circuit has held that *Allen* requires a defendant to "satisfactorily demonstrate[] that he would not be violent or disruptive" in order to obtain readmission to his trial, putting the burden on the defendant to justify his return to the courtroom. *Jones*, 694 F.3d at 240. This is consistent with *Allen*'s admonition that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *See Allen*, 397 U.S. at 343. This Court cannot conclude that the Appellate Division unreasonably applied clearly established Supreme Court precedent by concluding that this discretion includes the authority to gauge the genuineness of a defendant's promise to respect courtroom decorum. *See Paige*, 22 N.Y.S.3d at 226.

As to the facts, the Appellate Division did not unreasonably determine the facts when it upheld the Trial Court's determination that Petitioner's promise to respect courtroom decorum was not genuine. On federal post-conviction review, a court must review a trial judge's decision to remove a defendant from the courtroom with two levels of deference: first, the deference afforded to any decision to remove a defendant from the courtroom, and second, the deference afforded to any state court decision on federal post-conviction review. *Jones*, 694 F.3d at 241. In other words, this Court may order post-conviction relief on this claim only if the state court unreasonably determined that the Trial Court did not abuse its discretion. *Cf. id.* at 240.

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When the Trial Court rejected Petitioner's contention that he was willing to conduct himself appropriately, the Trial Court had before it a substantial record supporting its decision. The Trial Court had all the evidence leading up to Petitioner's ejection: Petitioner's delays over receiving trial clothing from his family, (Jury Trial Tr. 157–58), his disrobing during court recesses, (*id.* at 643–44), his coordination with his mother to disrupt the proceedings, (*id.* at 1174), and his outburst before the jury, (*id.* at 979), including physical resistance to being restrained, (*id.* at 983, 992–93). When the Trial Court faced the question of whether to readmit Petitioner to the courtroom, Petitioner chose to get a haircut at the detention facility rather than board the appropriate transport to the courthouse. (*Id.* at 993, 1171.) At this point, the Trial Court barred Petitioner from the trial. (*Id.* at 993.) The Court cannot say that the Appellate Division unreasonably determined the facts when it upheld the Trial Court's decision that Petitioner lacked a genuine "willing[ness] to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Allen*, 397 U.S. at 343.

Even if this record were insufficient, events occurring after the Trial Court's decision not to readmit Petitioner reinforce the Trial Court's finding that Petitioner was not willing to conduct himself appropriately, notwithstanding his trial counsel's representations to the contrary.

Although Petitioner had insisted throughout trial that he did not wish to testify, Petitioner claimed to have changed his mind after being ejected from the courtroom. (Jury Trial Tr. 1173.) Although the Trial Court suspected that this new desire to testify was a "delaying, stalling tactic on [Petitioner's] part" and that his request was "another example of [Petitioner] trying to delay the proceedings or frustrate the proceedings," the Trial Court nevertheless ordered Petitioner transported to the courtroom to conduct the colloquy concerning testifying in his own defense. (*Id.*) Consistent with the Trial Court's prediction, Petitioner changed his mind and declined to

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testify when he arrived in the courtroom. (*Id.* at 1201–02.) Petitioner presents no clear and convincing evidence to contest the Appellate Division's decision to uphold the Trial Court's determination that Petitioner never wanted to testify but instead merely wanted to delay the proceedings. *See* 28 U.S.C. § 2254(e)(1).

In addition, Petitioner displayed further disrespect for the Trial Court and the judicial system at his sentencing hearing, suggesting that he never had any intention of "conduct[ing] himself consistent[] with the decorum and respect inherent in the concept of courts and judicial proceedings." *Allen*, 397 U.S. at 343. Shortly after the beginning of the hearing, Petitioner turned his back to the Trial Court and swore at a courtroom officer who instructed Petitioner to face forward. (Sentencing Tr. 4.) When the Trial Court offered Petitioner an opportunity to be heard before the imposition of sentence, Petitioner offered a profanity-laced tirade about how during "the whole trial," the Trial Court and the prosecution were "sucking each other off and [he] just fe[lt] bad that [he] wasn't able to get sucked off." (*Id.* at 18.) Petitioner then told the Trial Court to, "with all due respect from the bottom of [his] heart, really, suck [his] dick." (*Id.*)

Given the totality of the record evidence, the Appellate Division did not unreasonably determine the facts by finding "that the record in this case does not support [Petitioner's] contention that, after he was removed from the courtroom for his profanity-ridden outburst, he was willing to 'conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.'" *See Paige*, 22 N.Y.S.3d at 226 (quoting *Allen*, 397 U.S. at 343).

vi. Conclusion with regard to the ejection of Petitioner from the courtroom

In short, Petitioner has not shown that the Appellate Division either contradicted or unreasonably applied clearly established Supreme Court precedent when upholding the Trial

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Court's decision to eject Petitioner from the courtroom and deny his readmission. Petitioner has likewise failed to show that the Appellate Division unreasonably determined the facts relevant to either the ejection or the denial of readmission. Accordingly, the Court denies Petitioner's request for habeas relief as to this claim.

c. Dismissal of jurors

In his *pro se* submission, Petitioner's first claim is that the Trial Court unconstitutionally discharged two jurors during trial. (Pet'r Suppl. Initial Br. 17–25.) This claim does not entitle Petitioner to relief because no clearly established Supreme Court precedent entitled Petitioner to keep the two jurors on the jury.

Clearly established Supreme Court precedent entitles criminal defendants "to a fair trial before an impartial jury." *Rivera v. Illinois*, 556 U.S. 148, 158 (2009). "Jurors . . . need not enter the box with empty heads in order to determine the facts impartially. 'It is sufficient if the juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court.'" *Skilling v. United States*, 561 U.S. 358, 398–99 (2010) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

Petitioner argues that the converse is also true: that if a juror "*can* lay aside his impression or opinion and render a verdict based on the evidence presented in court," then a trial court is *prohibited* from discharging the juror. (Pet'r Suppl. Initial Br. 20 (emphasis added).) No clearly established Supreme Court precedent supports this proposition.

Even if the Trial Court erred by discharging the two jurors, this error would not violate clearly established Supreme Court precedent unless some constitutional defect existed with the newly constituted jury. *See Rivera*, 556 U.S. at 157. "Any claim that the jury was not impartial . . . must focus not on [the removed jurors], but on the jurors who ultimately sat." *Ross v.*

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Oklahoma, 487 U.S. 81, 86 (1988); *cf. United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000) (noting that a trial court's erroneous failure to strike a biased juror "would require reversal" if it "result[ed] in the seating of any juror who should have been dismissed for cause"). The fact that the Trial Court's removal of two jurors "may have resulted in a jury panel different from that which would otherwise have decided the case" does not convert a state law error concerning jury composition into a constitutional violation. *Ross*, 487 U.S. at 87.

Petitioner makes "no allegation that the replacement jurors were biased, or that some constitutional infirmity ensued as a result of the [T]rial [C]ourt's decision" to replace the two jurors. *See Wheeler v. Phillips*, No. 05-CV-4399, 2006 WL 2357973, at *6 (E.D.N.Y. Aug. 15, 2006). In the absence of unconstitutional prejudice to Petitioner, the substitution of two alternates for the two removed jurors — even if erroneous — does not violate the Constitution. *See United States v. Hamed*, 259 F. App'x 377, 378–89 (2d Cir. 2008); *Baston v. Artus*, No. 08-CV-3425, 2010 WL 5067696, at *3 (E.D.N.Y. Dec. 6, 2010); *Sutton v. Conway*, No. 06-CV-5833, 2010 WL 744417, at *9 (E.D.N.Y. Mar. 2, 2010).

Accordingly, the Appellate Division did not contradict or unreasonably apply clearly established Supreme Court precedent by upholding the Trial Court's discharge of the two jurors.

d. Improperly admitted evidence

Petitioner's second *pro se* claim is that the Trial Court erroneously admitted certain evidence against him, the cumulative effect of which denied him a fundamentally fair trial in violation of federal due process principles. (Pet'r Suppl. Initial Br. 26–36.) The Appellate Division agreed that the Trial Court admitted some of this evidence in violation of New York

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rules of evidence,[12] but found the violations harmless. *See Paige*, 22 N.Y.S.3d at 229. This claim does not entitle Petitioner to relief because the admission of evidence in violation of state evidentiary rules does not (without more) violate the Constitution, and the cumulative effect of these evidentiary rulings was not so egregious as to deny Petitioner a fundamentally fair trial.

During federal habeas review of a state court conviction, a federal court may not inquire into whether the state court violated state rules of evidence. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). "Merely showing that the state court admitted evidence in violation of state rules of evidence is not enough" to warrant federal post-conviction relief, "for such a state court decision on state law, even if erroneous, is not an independent ground for the writ of habeas corpus to issue under AEDPA." *Griggs v. Lempke*, 797 F. App'x 612, 615 (2d Cir. 2020). However, a court may "review an error of state evidentiary law to assess whether the error deprived the petitioner of his due process right to a 'fundamentally fair trial.'" *Freeman v. Kadien*, 684 F.3d 30, 35 (2d Cir. 2012) (quoting *Zarvela v. Artuz*, 364 F.3d 415, 418 (2d Cir. 2004)); *see also Vincent v. Bennett*, 54 F. App'x 714, 717 (2d Cir. 2003). A state law evidence violation becomes a federal constitutional violation if "the evidence was . . . 'so extremely unfair that its admission violate[d] fundamental conceptions of justice.'" *Vega v. Walsh*, 669 F.3d 123, 126 (2d Cir. 2012) (quoting *Dowling v. United States*, 493 U.S. 342, 353 (2010)); *see also*

[12] The Appellate Division held that the Trial Court should not have permitted Officer LaCoste to testify that Petitioner possessed and later swallowed a handcuff key during his arrest. *See People v. Paige*, 22 N.Y.S.3d 220, 229 (App. Div. 2015). The Appellate Division also found that the Trial Court erred by permitting Officer LaCoste to testify concerning the guns and ammunition found on the premises during Officer LaCoste's prior arrest of Petitioner for crimes unrelated to this case. *See id.* However, the Appellate Division upheld the Trial Court's decision to admit evidence of Petitioner's gang membership. *See id.* In addition, without ruling on the appropriateness of the Trial Court's decision, the Appellate Division found that no prejudice resulted from the Trial Court's decision not to offer a curative instruction that prosecutors had violated discovery rules by calling Detective Perez to testify concerning his knowledge of Petitioner's telephone number. *See id.*

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Freeman, 684 F.3d at 35. Only a narrow set of evidentiary violations fits within this category. *See Evans v. Fischer*, 712 F.3d 125, 133 (2d Cir. 2013).

i. Exhaustion and AEDPA deference

As a threshold matter, the parties disagree over whether Petitioner has exhausted his state court remedies concerning one set of testimony covered by this claim — the Trial Court's allegedly improper admission of the testimony of Detective Perez. (Resp'ts Suppl. Br. 2–3, Docket Entry No. 15; Pet'r Suppl. Reply ¶ 7.)

The Court assumes without deciding that Petitioner failed to exhaust part of this claim, but this assumption does not prejudice Petitioner because the Court rejects his claim on the merits. *See* 28 U.S.C. § 2254(b)(2). This assumption benefits Petitioner because "[t]he Court reviews unexhausted claims *de novo*," instead of applying normal AEDPA deference. *Medina v. Gonyea*, 111 F. Supp. 3d 225, 236 (E.D.N.Y. 2015); *see also Rosario v. Roden*, 809 F.3d 73, 74 (1st Cir. 2015); *Robinson v. Beard*, 762 F.3d 316, 329 n.4 (3d Cir. 2014); *Allen v. Mullin*, 368 F.3d 1220, 1235 (10th Cir. 2004); *Newell v. Hanks*, 335 F.3d 629, 631 (7th Cir. 2003); *Jones v. Jones*, 163 F.3d 285, 299–300 (5th Cir. 1998). Because the unexhausted portion of this claim (concerning Detective Perez's testimony) is intertwined with the entire claim — that is, Petitioner argues that the *cumulative* effect of Detective Perez's testimony *combined* with the other improperly admitted evidence denied him a fundamentally fair trial — the Court reviews the entire claim *de novo*.

ii. The Trial Court did not deprive Petitioner of a fundamentally fair trial

As to the merits of the claim, Petitioner challenges three items of testimony. Although the Trial Court erroneously admitted some of this testimony, the cumulative effect of all three items of testimony did not deprive Petitioner of a fundamentally fair trial.

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First, Petitioner challenges the testimony of Detective Perez, whose testimony linked Petitioner to a prepaid cellular telephone tied to the shootings, (Jury Trial Tr. 868–71), but Wint's testimony also linked Petitioner to this telephone, (*id.* at 637).

Second, Petitioner challenges the testimony of Officer LaCoste concerning Petitioner's possession of a handcuff key. (*Id.* at 937–40.) However, testimony about the handcuff key made up only a small portion of the prosecution's evidence, (*id.* at 938–40, 1050–51), and the key received only brief mention in the prosecution's opening statement and summation, (*id.* at 63, 1278). In addition, Petitioner's trial counsel repeatedly impeached Officer LaCoste on cross-examination, both by questioning the plausibility of Officer LaCoste's testimony and by suggesting Officer LaCoste's bias against Petitioner due to the legal complaints and federal lawsuits Petitioner had filed against Officer LaCoste. (*Id.* at 944–47, 1035–36.)

Third, Petitioner challenges additional testimony from Officer LaCoste concerning his seizure of firearms, ammunition, and crack cocaine from a location at which he previously arrested Petitioner, (*id.* at 977–79), but Petitioner's trial counsel mitigated the impact of this testimony on cross-examination. Officer LaCoste conceded that Petitioner had not been convicted of possessing the weapons because the charges were still pending. (*Id.* at 1032–33.) In fact, Officer LaCoste conceded that at the time of the seizure, police arrested three other individuals for possession of the weapons. (*Id.* at 1033.) Petitioner's trial counsel also elicited from Officer LaCoste a concession that the location from which police seized the weapons was different from the address Petitioner listed as his home address during booking. (*Id.*) In addition, Officer LaCoste's timeline demonstrated that police had seized the firearms prior to the shootings in this case, and therefore the seized weapons could not have been used in the shootings in this case. (*Id.* at 1032–33.) Perhaps most importantly, the jury had only limited

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exposure to the evidence of the seized guns: prosecutors did not mention the seizure again, either during Officer LaCoste's remaining testimony or in their summation.

Given the limited impact of this testimony, the Court cannot conclude that the testimony was so extremely unfair as to violate fundamental conceptions of justice. This is not a case where, for example, the Trial Court's erroneous evidentiary rulings undercut Petitioner's entire defense at trial. *See, e.g.*, *Jimenez v. Walker*, 458 F.3d 130, 148 (2d Cir. 2006). While the Trial Court wrongfully permitted some of this testimony in violation of New York evidence law, the presence of this improper evidence did not so thoroughly infect the proceedings as to render them fundamentally unfair. Accordingly, the Court rejects Petitioner's challenge to the fundamental fairness of his trial.

iii. Harmless error

Much of Petitioner's supplemental argument concerns harmless error. (Pet'r Suppl. Initial Br. 29–33, 34–35; Pet'r Suppl. Reply ¶¶ 7–8, 15, 22, 34–35.) Because the Court finds no federal constitutional violation, the Court cannot engage in harmless error analysis. *See McKnight v. Henderson*, Nos. 86-CV-0938E(M), 86-CV-1015E(M) & 87-CV-0035E(M), 1995 WL 129036, at *2 (W.D.N.Y. Mar. 14, 1995). Put another way, because the Court has found no constitutional violation, there is no constitutional error to analyze for whether it was harmless.

Petitioner further argues that the Appellate Division improperly analyzed the harmlessness of these state law violations. However, "[t]he harmlessness of an error of state law in a state criminal prosecution is itself a question of state law for which no federal habeas review is available under 28 U.S.C. § 2254." *Freeman*, 684 F.3d at 35. Accordingly, the Court cannot review the Appellate Division's harmless error analysis as applied to state law violations if those state law violations do not also violate the Constitution.

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e. Prosecutors' concession concerning cellular telephone records

Finally, Petitioner asks the Court to grant habeas relief concerning prosecutors' "new admission that [the cell phone] call data records [introduced at trial] . . . do[] not place Petitioner at the scene of the crime, as erroneously relied on by the [Appellate Division]." (Pet'r Suppl. Reply ¶ 8.) Because this argument appears for the first time in a reply brief, the Court does not consider it. *See, e.g.*, *Dixon v. Miller*, 293 F.3d 74, 80 (2d Cir. 2002).

f. Certificate of appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) Gov'g § 2254 Cases in U.S. Dist. Cts. Having denied the petition for a writ of habeas corpus, the Court issues a certificate of appealability for Petitioner's claim related to his ejection from trial, but not for any of his remaining claims.

A court must issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means that a habeas petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, --- U.S. ---, ---, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). "Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed,' and '[courts] should not decline the application . . . merely because [they] believe[] the applicant will not demonstrate an entitlement to relief.'" *Welch v. United States*, --- U.S. ---, ---, 136 S. Ct. 1257, 1263–64 (2016)

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(second alteration in original) (quoting *Miller-El*, 537 U.S. at 337). In fact, a certificate of appealability may issue even if "every jurist of reason might agree, after the [certificate of appealability] has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 337–38.

The Court grants a certificate of appealability for the counseled claim concerning Petitioner's ejection from the courtroom. Because of the importance of the right of a criminal defendant to be present during his or her trial, reasonable jurists could debate the merits of Petitioner's claim that the Appellate Division unreasonably applied clearly established Supreme Court precedent or that it reached an unreasonable determination of the facts related to that claim. In addition, *Allen*, the controlling decision, is sufficiently vague as to permit reasonable jurists to at least debate its scope. While the Court doubts that any reasonable jurist would come to a different conclusion, the Court must nevertheless issue the certificate so long as the issue is debatable. *See Miller-El*, 537 U.S. at 337–38. Accordingly, the Court issues a certificate of appealability concerning Petitioner's *Allen* claim.

With regard to the remaining claims, none warrants a certificate of appealability and the Court declines to issue a certificate of appealability as to any. Reasonable jurists could not debate whether the claim concerning the two discharged jurors should have been resolved differently because those two discharged jurors did not form part of the jury that convicted Petitioner. The same is true with regard to Petitioner's claim concerning the improper testimony. Reasonable jurists could not debate whether Detective Perez's and Officer LaCoste's testimony — even if permitted in violation of state law — deprived Petitioner a fundamentally fair trial under due process principles. The threshold for an evidentiary error to violate due process is too high and the impact of the testimony on Petitioner's trial is too minimal for this claim to warrant

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debate among reasonable jurists. *See Evans*, 712 F.3d at 133. Finally, reasonable jurists would not debate Petitioner's claim concerning the cellular telephone records because he raised it for the first time in a reply brief. The principle that courts will not consider arguments first raised in a reply brief "is a well-settled prudential doctrine" familiar to litigators and judges throughout the nation. *Beyond Pesticides v. Monsanto Co.*, 311 F. Supp. 3d 82, 90 (D.D.C. 2018) (quoting *Benton v. Laborers' Joint Training Fund*, 121 F. Supp. 3d 41, 51 (D.D.C. 2015)). The Second Circuit has followed that practice for nearly a century and continues to do so today. *See Diaz v. United States*, 633 F. App'x 531, 556 (2d Cir. 2015); *Smith v. U.S. Shipping Bd. Emerg. Fleet Corp.*, 26 F.2d 337, 339 (2d Cir. 1928). No reasonable jurist would debate a claim raised for the first time in a reply brief. Accordingly, the Court declines to issue a certificate of appealability for any of these claims.

III. Conclusion

For the reasons explained above, the Court declines to grant habeas corpus relief as to any of Petitioner's claims, and denies the petition for habeas corpus. Because this is a final order adverse to Petitioner, the Court issues a certificate of appealability on Petitioner's *Allen* claim but denies certificates of appealability on all remaining claims.

Dated: July 8, 2020
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of May, two thousand twenty-one.

Zaire Paige,

Petitioner - Appellant,

v.

Stewart Eckert, Superintendent Wende Correctional Facility, Leticia James, Attorney General of New York,

Respondents - Appellees.

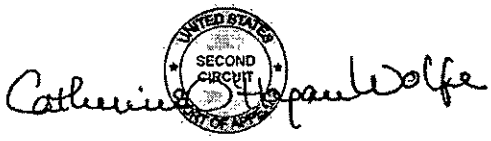
ORDER

Docket No: 20-2296

Appellant, Zaire Paige, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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134 A.D.3d 1048
Supreme Court, Appellate Division, Second Department, New York.

The PEOPLE, etc., respondent,
v.
Zaire PAIGE, appellant.

Dec. 23, 2015.

Synopsis

Background: Defendant was convicted upon a jury verdict in the Supreme Court, Kings County, Del Guidice, J., of murder, assault, and criminal possession of a weapon. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

ample corroborative evidence existed to connect defendant to crimes in addition to testimony of defendant's accomplice;

defendant knowingly, voluntarily, and intelligently waived his constitutional right to be present at trial;

trial court's decision to reject representations made by juror that she could be impartial was not based on impermissible speculation, and thus trial court properly dismissed juror as grossly unqualified;

defendant failed to preserve argument that trial court erred in dismissing juror for engaging in substantial misconduct; and

trial court's errors in permitting certain evidence was harmless.

Affirmed.

Attorneys and Law Firms

**222 Seymour W. James, Jr., New York, N.Y. (Lorca Morello of counsel), for appellant.

**223 Kenneth P. Thompson, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Solomon Neubort, and Terrence F. Heller of counsel), for respondent.

REINALDO E. RIVERA, J.P., RUTH C. BALKIN, ROBERT J. MILLER, and SYLVIA O. HINDS–RADIX, JJ.

Opinion

***1049** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Del Guidice, J.), rendered January 24, 2011, convicting him of murder in the second degree, assault in the first degree (three counts), assault in the second degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant was charged with, inter alia, murder in the second degree, assault in the first degree (three counts), assault in the second degree (four counts), and criminal possession of a weapon in the second degree (two counts). The People alleged that the defendant and his codefendant, Robert Crawford, acting in concert, shot and killed Lethania Garcia because they believed Garcia had killed one of their friends two years earlier.

At the defendant's jury trial, the People presented evidence that on October 27, 2008, the defendant and Crawford located Garcia in downtown Brooklyn. The People's evidence showed that the defendant and Crawford, each armed with a handgun, began shooting at Garcia while he stood on the sidewalk in front of a bakery. When the shooting began, Garcia fled into a nearby hair salon and the two gunmen followed him inside. Garcia attempted to escape out a back door, but the door was jammed. Witnesses inside the hair salon testified that everyone in the salon got down on the floor to escape the hail of bullets that flew around them. Testimony showed that one of the two gunmen stood at the door of the salon while the other gunman stood over Garcia and fired eight shots into him as he lay on the floor. Garcia sustained gunshot wounds that went through his brain, spinal cord, liver, and a lung. These injuries were fatal, and Garcia was pronounced dead at the scene. In addition to Garcia, the gunfire also struck numerous other individuals who had sought refuge in the hair salon and who had been crowded onto the floor when the shooting occurred, including a woman who sustained a total of 17 gunshot wounds and an off-duty police officer who was shot in the foot.

The defendant and Crawford fled the scene in a sport utility vehicle driven by an accomplice. At the trial, the accomplice testified pursuant to a plea agreement. His testimony provided the jury with a detailed account of the events leading up to, ***1050** and occurring after, Garcia's murder. The accomplice's testimony was the primary evidence identifying the defendant and Crawford as the perpetrators of these crimes, although mobile phone records and cell tower data were evidence of the defendant's presence at the location of the crime when the shooting occurred and other evidence corroborated the accomplice's account of the incident.

During the course of the trial, the defendant was excluded from the courtroom after he began shouting expletives at a police witness who was testifying on behalf of the People. The defendant repeatedly accused the police witness of "lying" before court officers removed him. This outburst occurred in the presence of the jury. After the court issued a curative instruction and warned the jurors not to discuss the case or begin deliberations until they were so charged, the jurors were excused for the day.

****224** The court later learned that members of the jury had a discussion in the jury room regarding the credibility of police officers following the defendant's outburst. One member of the jury had reportedly stated that "she hated police officers" and that "none of them [could] be trusted." This juror—juror number eight—reportedly stated that she hid her negative views during jury selection because she "didn't want to bring any attention to herself." The court proceeded to individually interview each of the jurors and each of the alternate jurors in the presence of the prosecutor and defense counsel, questioning them about the contents of the discussion that had occurred in the jury room and whether they could remain fair and impartial. At the conclusion of this inquiry, the court dismissed two jurors—juror number eight and juror number nine. The court determined that juror number eight was grossly unqualified to serve and that she had engaged in substantial misconduct. The court dismissed juror number nine on the ground that she had engaged in substantial misconduct. The discharged jurors were replaced with alternate jurors and the trial resumed.

At the conclusion of the evidence and after summations, the jury was charged and retired to deliberate. The jury returned a verdict finding the defendant guilty of murder in the second degree, assault in the first degree (three counts), assault in the second degree, and criminal possession of a weapon in the second degree. The defendant appeared at sentencing and was permitted to address the court, at which time he maintained his innocence and directed obscenities at the Trial Justice. Noting that the defendant had "turned the streets of Brooklyn into ***1051** a war zone" and had callously "executed" Garcia and "grievously wounded ... additional innocent bystanders," the court imposed a sentence of imprisonment. We affirm.

On appeal, the defendant contends that the evidence was legally insufficient to support the convictions since they were based solely on the uncorroborated testimony of the accomplice in violation of Criminal Procedure Law § 60.22(1). This contention is without merit.

Criminal Procedure Law § 60.22(1) provides that "[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense" (CPL 60.22[1]). "[T]he role of the additional evidence is only to connect the defendant with the commission of the crime, not to prove that he committed it" (*People v. Reome,* 15 N.Y.3d 188, 192, 906 N.Y.S.2d 788, 933 N.E.2d 186 [internal quotation marks omitted]; *see People v. Sage,* 23 N.Y.3d 16, 27, 988 N.Y.S.2d 104; *People v. Breland,* 83 N.Y.2d 286, 294, 609 N.Y.S.2d 571, 631 N.E.2d 577). The statutory corroboration requirement may be satisfied by evidence that " 'tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " (*People v. Reome,* 15 N.Y.3d at 192, 906 N.Y.S.2d 788, 933 N.E.2d 186, quoting *People v. Dixon,* 231 N.Y. 111, 116, 131 N.E. 752; *see People v. Sage,* 23 N.Y.3d at 27, 988 N.Y.S.2d 104).

Here, contrary to the defendant's assertion, there was ample corroborative evidence tending to connect the defendant to these crimes. Numerous eyewitnesses testified that two shooters had been involved in the incident. One eyewitness observed the two shooters enter a sport utility vehicle after the shooting, and that witness wrote down the license plate number of the vehicle. The license plate number ****225** of the sport utility vehicle led police to the accomplice. In addition, although none of the eyewitnesses to the shooting identified the defendant as the shooter, the phone records and testimony from employees of the cell phone providers served to establish the defendant's presence at the scene when the crime was committed (*see* CPL 60.22[1]; *People v. Vantassel,* 95 A.D.3d 907, 907–908, 942 N.Y.S.2d 886; *People v. Sudhan,* 83 A.D.3d 874, 874, 920 N.Y.S.2d 678). The accomplice's assertion that the defendant killed Garcia because the defendant believed that Garcia had killed the defendant's friend two years earlier was corroborated by Kim Tillson, the mother of the defendant's deceased friend, who testified that the defendant called her on the

date of the shooting to wish her happy birthday and to inform her that he "took care of that." Accordingly, the defendant's contention that the evidence was legally insufficient to support his convictions is without merit. ***1052** Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see* CPL 470.15[5]).

The defendant also contends that he was deprived of his right to be present at his trial when the court permanently excluded him from the courtroom following his outburst. This contention is without merit.

A defendant's right to be present at a criminal trial is encompassed within the confrontation clauses of the state and federal constitutions (*see* N.Y. Const., art. I, § 6; U.S. Const. 6th Amend.). "Of course the right to be present may, as a general matter, be waived under both Constitutions" (*People v. Parker,* 57 N.Y.2d 136, 139, 454 N.Y.S.2d 967, 440 N.E.2d 1313). "[A] waiver of the right to be present at a criminal trial may be inferred from certain conduct engaged in by the defendant after the trial has commenced" (*id.* at 139, 454 N.Y.S.2d 967, 440 N.E.2d 1313; *see People v. Johnson,* 37 N.Y.2d 778, 779, 375 N.Y.S.2d 97, 337 N.E.2d 605; *People v. Epps,* 37 N.Y.2d 343, 350–351, 372 N.Y.S.2d 606, 334 N.E.2d 566). "[A] defendant who engages in disruptive behavior during a trial may be held to have, in effect, waived his [or her] right to be present" (*People v. Connor,* 137 A.D.2d 546, 549, 524 N.Y.S.2d 287; *see Illinois v. Allen,* 397 U.S. 337, 342, 90 S.Ct. 1057, 25 L.Ed.2d 353; *People v. Byrnes,* 33 N.Y.2d 343, 349, 352 N.Y.S.2d 913, 308 N.E.2d 435).

In this case, the defendant's actions throughout the course of the trial constituted disruptive conduct warranting the defendant's exclusion from the courtroom (*see People v. Byrnes,* 33 N.Y.2d at 349–350, 352 N.Y.S.2d 913, 308 N.E.2d 435; *People v. Palermo,* 32 N.Y.2d 222, 225, 344 N.Y.S.2d 874, 298 N.E.2d 61; *People v. Baxter,* 102 A.D.3d 805, 805, 961 N.Y.S.2d 194; *People v. Garcia,* 57 A.D.3d 918, 918–919, 869 N.Y.S.2d 618; *People v. Felix,* 2 A.D.3d 535, 536, 767 N.Y.S.2d 918). The record reflects that, even prior to the defendant's outburst, he had engaged in a pattern of behavior that delayed and frustrated court proceedings notwithstanding the fact that he had been repeatedly warned by the trial court that if he did not desist in such conduct, he would be barred from attending the remainder of the trial. To the extent that the defendant disputes the trial court's characterization of these events with reference to matter dehors the record, such contentions are not properly before this Court (*see generally People v. Cass,* 18 N.Y.3d 553, 556, 942 N.Y.S.2d 416, 965 N.E.2d 918). In sum, the record adequately demonstrates that the defendant, in persisting in his pattern of behavior despite the trial court's admonitions, knowingly, voluntarily, and intelligently waived his right to be present at the remainder ****226** of his trial (*see People v. Johnson,* 37 N.Y.2d at 779, 375 N.Y.S.2d 97, 337 N.E.2d 605; *People v. Epps,* 37 N.Y.2d at 350–351, 372 N.Y.S.2d 606, 334 N.E.2d 566; *People v. Byrnes,* 33 N.Y.2d at 349–350, 352 N.Y.S.2d 913, 308 N.E.2d 435; *People v. Palermo,* 32 N.Y.2d at 225, 344 N.Y.S.2d 874, 298 N.E.2d 61; *see also People v. Baxter,* 102 A.D.3d at 805, 961 N.Y.S.2d 194; *People v. Garcia,* 57 A.D.3d at 918–919, 869 N.Y.S.2d 618).

Furthermore, under the circumstances of this case, the trial ***1053** court did not improvidently exercise its discretion in refusing defense counsel's request to readmit the defendant to the courtroom (*see Illinois v. Allen,* 397 U.S. at 342–343, 90 S.Ct. 1057; *People v. Epps,* 37 N.Y.2d at 351, 372 N.Y.S.2d 606, 334 N.E.2d 566; *People v. Menner,* 2 A.D.3d 650, 651, 769 N.Y.S.2d 569). Although a court should strive, "once the goal of preserving order and decorum is achieved, [to make] every reasonable effort ... to minimize the possibility of prejudice" to a defendant (*People v. Palermo,* 32 N.Y.2d at 226, 344 N.Y.S.2d 874, 298 N.E.2d 61), the record in this case does not support the defendant's contention that, after he was removed from the courtroom for his profanity-ridden outburst, he was willing to "conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings" (*Illinois v. Allen,* 397 U.S. at 343, 90 S.Ct. 1057; *see People v. Menner,* 2 A.D.3d at 651, 769 N.Y.S.2d 569). Furthermore, while a trial court that readily possesses the means to do so should generally permit a defendant who has been excluded from the courtroom to observe the proceedings from a remote location in order to minimize the possibly of prejudice (*see generally People v. Palermo,* 32 N.Y.2d at 226, 344 N.Y.S.2d 874, 298 N.E.2d 61; *People v. Sanchez,* 7 A.D.3d 645, 646, 777 N.Y.S.2d 144; *People v. Harris,* 115 A.D.2d 619, 620, 496 N.Y.S.2d 476), we conclude that under the particular circumstances of this case, the court did not improvidently exercise its discretion in declining defense counsel's request to permit the defendant to view the proceedings from a remote location (*cf. People v. Sanchez,* 7 A.D.3d at 646, 777 N.Y.S.2d 144; *People v. Harris,* 115 A.D.2d at 620, 496 N.Y.S.2d 476).

The defendant next contends that the trial court erred in dismissing juror number eight and juror number nine on the ground that they were grossly unqualified and/or had engaged in substantial misconduct. This contention is partially unpreserved for appellate review and, in any

event, without merit.

"The constitutional right of a criminal defendant to a fair trial includes both the right to be tried by the jury in whose selection the defendant himself has participated, and the right to an impartial jury" (*People v. Rodriguez,* 71 N.Y.2d 214, 218, 524 N.Y.S.2d 422, 519 N.E.2d 333; *see* N.Y. Const., art. I, §§ 6, 2; U.S. Const. 6th, 14th Amends.). In order to safeguard these rights, the Legislature has supplied, inter alia, a mechanism to allow for a juror to be dismissed during the trial or during deliberations (*see* CPL 270.35; *People v. Rodriguez,* 71 N.Y.2d at 218, 524 N.Y.S.2d 422, 519 N.E.2d 333). Accordingly, "[i]f at any time after the trial jury has been sworn and before the rendition of its verdict ... the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature ... the court *must* discharge such juror" (CPL 270.35 [1] [emphasis added]; *see People v. Buford,* 69 N.Y.2d 290, 298, 514 N.Y.S.2d 191, 506 N.E.2d 901).

***1054** Here, the defendant contends that the trial court erred in concluding ****227** that juror number eight was grossly unqualified in light of her unequivocal assurance that she could remain fair and impartial. The Court of Appeals has held that a juror is grossly unqualified "only when it becomes obvious that [the] particular juror possesses a state of mind which would prevent the rendering of an impartial verdict" (*People v. Buford,* 69 N.Y.2d at 298, 514 N.Y.S.2d 191, 506 N.E.2d 901 [internal quotation marks omitted]; *see People v. Rodriguez,* 71 N.Y.2d at 219, 524 N.Y.S.2d 422, 519 N.E.2d 333). In order to determine whether this standard has been met, " [a] trial court should first conduct an in camera proceeding in the presence of the attorneys and defendant" (*People v. Rodriguez,* 71 N.Y.2d at 219, 524 N.Y.S.2d 422, 519 N.E.2d 333). This proceeding should be a "probing and tactful inquiry" into the "unique facts" of each case, including a careful consideration of the juror's "answers and demeanor" (*People v. Buford,* 69 N.Y.2d at 299, 514 N.Y.S.2d 191, 506 N.E.2d 901; *see People v. Rodriguez,* 71 N.Y.2d at 219, 524 N.Y.S.2d 422, 519 N.E.2d 333). "The Trial Judge generally is accorded latitude in making the findings necessary to determine whether a juror is grossly unqualified under CPL 270.35, because that Judge is in the best position to assess partiality in an allegedly biased juror" (*People v. Rodriguez,* 71 N.Y.2d at 219, 524 N.Y.S.2d 422, 519 N.E.2d 333; *see People v. Guy,* 93 A.D.3d 877, 878, 939 N.Y.S.2d 613; *People v. Rosado,* 53 A.D.3d 455, 457, 862 N.Y.S.2d 41; *People v. Franklin,* 7 A.D.3d 966, 967, 776 N.Y.S.2d 596; *People v. Burse,* 299 A.D.2d 911, 912, 749 N.Y.S.2d 350; *People v. Bamfield,* 208 A.D.2d 853, 854, 618 N.Y.S.2d 64).

In this case, the trial court properly conducted an in camera proceeding to inquire into the nature of the statements that juror number eight had made to other jurors regarding her views on law enforcement personnel. During this inquiry, juror number eight admitted that she had stated, during a discussion with other jurors, that "cops are crooked." Although juror number eight later asserted that she had only said that "some cops are crooked" and represented that she could be fair and impartial despite her "personal opinion" as to law enforcement personnel, the trial court was not required to accept these representations at face value (*see People v. Rojas,* 15 A.D.3d 211, 212, 790 N.Y.S.2d 431; *People v. Aybinder,* 215 A.D.2d 181, 181, 626 N.Y.S.2d 150; *People v. Cannady,* 138 A.D.2d 616, 616–617, 526 N.Y.S.2d 202; *see also People v. Hicks,* 6 N.Y.3d 737, 739, 810 N.Y.S.2d 396, 843 N.E.2d 1136; *Mikel v. Zon,* 2007 WL 9225080, *18, 2007 U.S. Dist. LEXIS 103479, *50 [W.D.N.Y., No. 04–CV–6448 (CJS/VEB)]). Contrary to the defendant's contention, the court's decision to reject the representations of juror number eight as to her partiality was not based on impermissible speculation; it was supported by the record (*cf. People v. Telehany,* 302 A.D.2d 927, 928, 754 N.Y.S.2d 508; *People v. Velasquez,* 167 A.D.2d 364, 365, 561 N.Y.S.2d 314; *People v. Garcia,* 153 A.D.2d 951, 953, 545 N.Y.S.2d 758). Indeed, two of the alternate jurors who ***1055** were interviewed by the trial court controverted the account of the discussion given by juror number eight and indicated that, in the jury room, she had expressed deep hostility against law enforcement personnel. Under the circumstances, we decline to disturb the trial court's credibility determination with respect to juror number eight (*cf. People v. Johnson,* 245 A.D.2d 305, 305, 670 N.Y.S.2d 118, 119). In light of this factual determination, we conclude that the trial court properly dismissed juror number eight inasmuch as the record established that she was "grossly unqualified to serve in the case" (CPL 270.35[1]; *see* ****228** *People v. Rojas,* 15 A.D.3d at 212, 790 N.Y.S.2d 431; *People v. Aybinder,* 215 A.D.2d at 181, 626 N.Y.S.2d 150).

The defendant further contends that the trial court erred in dismissing juror number nine on the ground that she had engaged in substantial misconduct. However, the defendant did not take this position during the trial. Rather, the defendant's attorney merely argued that juror number nine was not grossly unqualified due to her alleged bias against police officers. Even after the trial court determined, on the record, that juror number nine had engaged in substantial misconduct, defense counsel failed to take exception to the court's ruling on this

ground. Accordingly, the defendant's contention that the trial court erred in determining that juror number nine had engaged in substantial misconduct is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v. Jenkins,* 257 A.D.2d 666, 682 N.Y.S.2d 910; *see also People v. Hicks,* 6 N.Y.3d at 739, 810 N.Y.S.2d 396, 843 N.E.2d 1136; *People v. Gonzalez,* 246 A.D.2d 554, 554, 666 N.Y.S.2d 934).

In any event, the record supports the trial court's conclusion that juror number nine had engaged in misconduct of a substantial nature warranting her dismissal pursuant to CPL 270.35(1). When she was questioned by the court during its in camera inquiry, juror number nine indicated that she had discussed the trustworthiness of police officers with other jury members, telling them that "some [police officers] do things that are not right," and related instances in which she had observed police misconduct. In response to a question about what precipitated her remarks, juror number nine indicated that these discussions "pertain[ed] to what took place [in the courtroom]" on the previous Friday, the day on which the defendant had disrupted court proceedings by accusing a police witness of lying. The record demonstrates that juror number nine engaged in these discussions despite the fact that the trial court had repeatedly admonished the jury "[y]ou may not discuss any subject connected with this case among yourselves," and had repeated these warnings just prior to discharging the jury in the wake of the defendant's outburst. Although juror ***1056** number nine acknowledged receiving these instructions, she refused to acknowledge that she had violated them. In addition, the record reflects that she failed to adequately respond to questions during jury selection about her past experiences with law enforcement personnel despite the fact that the prospective jurors were asked whether they had any "personal experiences" that would "impact" how they would evaluate police testimony, and this and similar questions were specifically incorporated into the questions directed at juror number nine. In light of the foregoing, we decline to disturb the trial court's finding that juror number nine improperly withheld information from the court and the lawyers during voir dire and violated the court's repeated instructions not to discuss the case prior to formal deliberation. In light of this factual determination, we conclude that the trial court properly dismissed juror number nine inasmuch as the record demonstrated that she had "engaged in misconduct of a substantial nature" (CPL 270.35[1]; *see People v. Cannady,* 138 A.D.2d at 616–617, 526 N.Y.S.2d 202; *see also People v. Havner,* 19 A.D.3d 508, 508, 798 N.Y.S.2d 476; *People v. Rojas,* 15 A.D.3d at 212, 790 N.Y.S.2d 431; *People v. Tamayo,* 256 A.D.2d 98, 99, 682 N.Y.S.2d 37; *People v. Radtke,* 219 A.D.2d 739, 739–740, 631 N.Y.S.2d 763; *People v. Johnson,* 217 A.D.2d 667, 668, 629 N.Y.S.2d 801; *People v. Berrios,* 177 A.D.2d 493, 494, 575 N.Y.S.2d 709; *People v. Fox,* 172 A.D.2d 218, 567 N.Y.S.2d 723).

****229** The defendant also contends that he was denied his right to a public trial when the trial court closed the courtroom for the limited purpose of determining the extent to which defense counsel had "opened the door" to certain evidence. However, the defendant waived this claim by explicitly consenting to the closure (*see People v. Bens,* 23 A.D.3d 489, 805 N.Y.S.2d 621; *People v. Sevencan,* 258 A.D.2d 485, 685 N.Y.S.2d 735). The defendant's further contention that his limited waiver of this right was not knowing, voluntary, and intelligent is without merit (*see People v. Moody,* 300 A.D.2d 510, 510–511, 751 N.Y.S.2d 542; *People v. Roque,* 291 A.D.2d 417, 417, 737 N.Y.S.2d 306).

There is no merit to the defendant's contentions regarding the admission of evidence of the defendant's gang membership, as the evidence was relevant to the issue of the defendant's motive, was inextricably interwoven into the narrative, and explained the relationships between the parties (*see People v. Bruno,* 127 A.D.3d 986, 7 N.Y.S.3d 408; *People v. Harris,* 117 A.D.3d 847, 855, 985 N.Y.S.2d 643, *affd.* 26 N.Y.3d 1, 18 N.Y.S.3d 583, 40 N.E.3d 560; *People v. Borrero,* 79 A.D.3d 767, 768, 912 N.Y.S.2d 634; *People v. Jordan,* 74 A.D.3d 986, 986, 902 N.Y.S.2d 379).

However, the trial court should not have permitted the elicitation of evidence that the defendant had a handcuff key in his possession at the time of his arrest, nor allowed Police ***1057** Officer Rashan LaCoste to testify that when he arrested the defendant on a previous occasion for crimes unrelated to the crimes charged in this case, various guns and ammunition were recovered from the residence where the defendant was located at the time of that arrest. However, these errors were harmless, as the proof of the defendant's guilt, without reference to the error, is overwhelming, and there is no significant probability that the jury would have acquitted the defendant had it not been for the error (*see People v. Gillyard,* 13 N.Y.3d 351, 356, 892 N.Y.S.2d 288, 920 N.E.2d 344; *People v. Crimmins,* 36 N.Y.2d 230, 241–242, 367 N.Y.S.2d 213, 326 N.E.2d 787). Similarly, any prejudice caused by the court's refusal to provide a curative instruction after permitting the People to add a witness after the parties' opening statements was not so great as to deprive the defendant of a fair trial.

Contrary to the defendant's further contention, the court's interpretation of a jury request for a readback was

reasonable, and its response meaningful (*see* CPL 310.30; *People v. Grant,* 127 A.D.3d 990, 991, 6 N.Y.S.3d 648; *People v. Clark,* 108 A.D.3d 797, 968 N.Y.S.2d 249; *People v. Briggs,* 61 A.D.3d 770, 771, 876 N.Y.S.2d 654; *People v. Jones,* 297 A.D.2d 256, 257, 746 N.Y.S.2d 596).

Under the circumstances, the Supreme Court did not improvidently exercise its discretion in sentencing the defendant to the maximum aggregate sentence permitted (*see People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675). Contrary to the defendant's further contention, the sentencing limitations provided in Penal Law § 70.30(1)(e) do not apply where the two or more crimes include, as here, a class A felony (*see* Penal Law § 70.30[1][e][iii]; *Matter of Roballo v. Smith,* 63 N.Y.2d 485, 483 N.Y.S.2d 178, 472 N.E.2d 1006).

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27 N.Y.3d 1073
(The decision of the Court of Appeals of New York is referenced in the North Eastern Reporter and New York Supplement in a table entitled "Applications for Leave to Appeal - Criminal.")
Court of Appeals of New York

People
v.
Zaire Paige

May 19, 2016

2d Dept.: 134 A.D.3d 1048, 22 N.Y.S.3d 220 (Kings)

Opinion

Rivera, J.

Denied.

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Synopsis

APPENDIX E