E.D.N.Y.–C. Islip
18-cv-3683
Kuntz, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of July, two thousand twenty-one.

Present:

Rosemary S. Pooler,
Raymond J. Lohier, Jr.,[1]
Circuit Judges.

Glen Campbell,

Petitioner-Appellant,

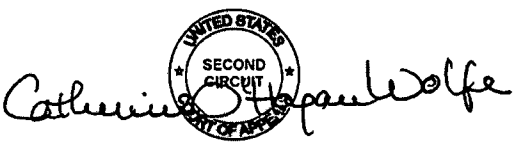
v. 21-226

J. LaManna,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability and in forma pauperis status. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

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



[1] Circuit Judge Joseph F. Bianco, a member of the original panel, is recused from this matter. This motion is decided by the two remaining members of the panel, pursuant to Internal Operating Procedure E(b) of the United States Court of Appeals for the Second Circuit.

MANDATE

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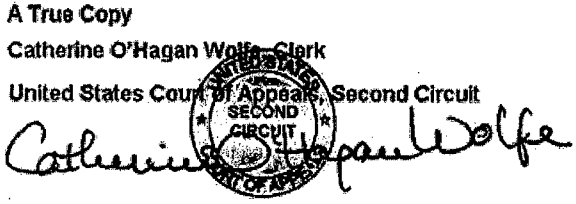
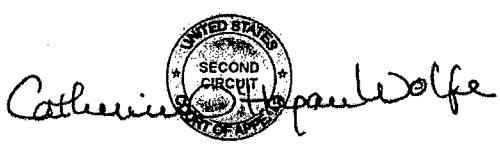
United States Court of Appeals, Second Circuit





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MANDATE ISSUED ON 08/23/2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GLEN CAMPBELL,	:	
	:	
Petitioner,	:	
	:	
v.	:	**DECISION & ORDER**
	:	18-CV-3683 (WFK)
J. LAMANNA,	:	
	:	
Respondent.	:	

WILLIAM F. KUNTZ, II, United States District Judge: Glen Campbell ("Petitioner"), through counsel, brings this second petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 (the "Amended Petition"). Am. Pet. at 1, ECF No. 18. Through the Amended Petition, Petitioner challenges his conviction for Robbery in the First Degree, Burglary in the First Degree, Robbery in the Second Degree, and Conspiracy in the Fourth Degree. *Id.* Petitioner raises three grounds in support of the Amended Petition. *Id.* at 4–12. For the reasons discussed below, the Amended Petition is DENIED in its entirety.

BACKGROUND

I. Conviction and Sentencing

On November 19, 2010, Petitioner, along with five others, participated in a home-invasion robbery in Nassau County, New York. Aff. of Andrea M. DiGregorio in Opp'n to Pet. ¶ 9, ECF No. 20 ("DiGregorio Aff."). The involved persons stole jewelry and money before fleeing upon police arrival. *Id.* The police caught Petitioner on the property of a country club adjacent to the burglarized home within approximately half an hour of the crime. *Id.* After being advised of and waiving his constitutional rights, Petitioner confessed to participating in the crime, both orally and in writing. *Id.* Petitioner was indicted for the following crimes: (1) two counts of first-degree robbery, in violation of N.Y. Penal Law § 160.15[4]; (2) one count of second-degree robbery, in violation of N.Y. Penal Law § 160.10[1]; (3) two counts of first-degree burglary, in violation of N.Y. Penal Law § 140.30[4]; and (4) one count of fourth-degree conspiracy, in violation of N.Y. Penal Law § 105.10[1]. *Id.* ¶ 10.

On August 5, 2011, Petitioner pleaded guilty to all counts of the indictment and the court promised Petitioner a sentence of fifteen years' imprisonment. State Court Record ("R.") at 21:1–11.[1] Prior to his sentencing, but after pleading guilty, Petitioner filed a motion to withdraw his guilty plea. *See* R. at 21-1:2–4 (discussion of the motion, which the court denied, at the beginning of the Petitioner's sentencing hearing). On October 18, 2011, the court sentenced Petitioner to a determinate period of fifteen years' imprisonment on each of the first-degree robbery, second-degree robbery, and first-degree burglary convictions and an indeterminate period of two to four years' imprisonment on the conspiracy conviction, all to run concurrently. R. at 21-1:9. The court also imposed a five-year period of post-release supervision. *Id.*

Petitioner appealed his conviction to the New York Supreme Court, Appellate Division, Second Department ("Appellate Division"). R. at 21-2:1–32. He argued, *inter alia*, his guilty plea was not knowingly, intelligently, and voluntarily entered into because he had not been advised of the mandatory term of post-release supervision when he pleaded guilty. R. at 21-2:19–23. The Appellate Division reversed Petitioner's judgment of conviction, vacated his plea, and remitted the case to the Nassau County Supreme Court for further proceedings. *People v. Campbell*, 102 A.D.3d 979, 979 (N.Y. App. Div. 2d Dep't 2013).

Following remitter, the trial court conducted a suppression hearing beginning on March 12, 2014. R. at 27:1–27-1:278. The trial court denied Petitioner's motions for suppression and preclusion. R. at 27-2:1–28. After declining a plea offer in exchange for a sentence of fifteen years' imprisonment, R. at 27-3:21–23, Petitioner continued to trial, *see* R. at 27-3:1–27-6:420. On October 2, 2014, the jury convicted Petitioner on all counts. R. at 27-6:414–17.

[1] As the State Court Record is comprised of multiple documents, in this Decision & Order, page citations to the State Court Record refer to the ECF docket entry followed by the page number as it appears in PDF pagination.

On December 18, 2014, the trial court sentenced Petitioner to twenty-five years' imprisonment each on the first-degree robbery and first-degree burglary convictions, fifteen years' imprisonment on the second-degree robbery conviction, and two to four years' imprisonment on the conspiracy conviction. R. at 21-4:8–9. The trial court also imposed a term of five-years' post-release supervision on the robbery and burglary convictions. *Id.* All the sentences were ordered to run concurrently. *Id.*

II. Post-Conviction Activity

Petitioner appealed his conviction to the Appellate Division. R. at 21-5:1–51. Petitioner raised the following arguments: (1) Petitioner's warrantless arrest was not supported by probable cause, requiring suppression of his post-arrest statements as the fruits of the illegal arrest; and (2) Petitioner was denied a fair trial by the admission of opinion evidence from four police officers he was one of the perpetrators shown on a videotape, which was not only a contested issue, but the ultimate issue in the case. R. at 21-5:2–3. On March 22, 2017, the Appellate Division affirmed Petitioner's judgment of conviction. *People v. Campbell*, 148 A.D.3d 1044, 1044 (N.Y. App. Div. 2d Dep't 2017). By letter dated April 12, 2017, Petitioner sought leave to appeal to the New York Court of Appeals on the issue of whether Petitioner's warrantless arrest was supported by probable cause. R. at 22-4:1–2. On June 28, 2017, the Court of Appeals denied Petitioner leave to appeal. *People v. Campbell*, 86 N.E.2d 253 (N.Y. 2017).

By motion papers dated May 1, 2017, Petitioner, proceeding *pro se*, moved in the Appellate Division for a writ of error *coram nobis*. R. at 22-2:1–28. Petitioner argued he received the ineffective assistance of appellate counsel on his direct appeal because, *inter alia*, appellate counsel denied permission for Petitioner to file a supplemental brief, failed to raise preserved issues Petitioner requested and instead raised unpreserved issues. R. at 22-2:1. On

January 10, 2018, the Appellate Division denied Petitioner's motion, holding he "failed to establish that he was denied the effective assistance of appellate counsel." *People v. Campbell*, 157 A.D.3d 715, 715 (N.Y. App. Div. 2d Dep't 2018). On March 21, 2018, the Court of Appeals denied Petitioner leave to appeal. *People v. Campbell*, 102 N.E.3d 436 (N.Y. 2018).

On June 25, 2018, Petitioner, through his attorney, initiated the present federal *habeas* proceeding. ECF No. 1. In his original petition, Petitioner raised the following grounds for *habeas* relief: (1) denial of a full and fair hearing on probable cause, in violation of *Stone v. Powell*, 428 U.S. 465 (1976), *Wong Sun v. United States*, 371 U.S. 471 (1963), and the Fourth Amendment to the United States Constitution; (2) denial of right to a fair trial through the admission of legal testimonial evidence; and (3) denial of the right to effective assistance of counsel on Petitioner's state court appeal. Pet. at 6–11, ECF No. 1. On July 2, 2018, the Honorable Joseph F. Bianco issued an Order to Show Cause, requiring Respondent to respond to the petition within 30 days. ECF No. 6. On July 3, 2018, Petitioner filed his first motion for a stay of the proceedings. ECF No. 7. Respondent filed a response in opposition to the motion to stay on July 5, 2018. ECF No. 8. After a telephone conference with the parties, Judge Bianco allowed Petitioner to file a motion to amend. ECF No. 10. On September 7, 2018, Petitioner filed a motion to amend the petition and for the Court to stay these proceedings. ECF No. 11. On March 8, 2019, the case was reassigned to this Court. On April 7, 2020, the Court granted the motion to amend and denied the motion to stay. ECF No. 16.

Prior to the decision on the motions to amend and stay, by motion papers dated January 17, 2019, Petitioner, again proceeding *pro se*, moved in the trial court to vacate his conviction

pursuant to N.Y. Crim. Proc. Law § 440.10. R. at 24-1:2–24-2:12.[2] Petitioner raised five grounds in support of his motion: (1) ineffective assistance of counsel; (2) denial of due process right to a fair trial due to prosecutorial misconduct; (3) the trial court erred in denying the motion to suppress evidence in its ruling on facts outside of the record; (4) entitlement to having the motion decided on the merits; and (5) trial counsel should be ordered to submit an affidavit responding to the allegations in the motion. R. at 24-1:19–24-2:12. On July 11, 2019, the trial court denied Petitioner's motion. R. at 23-5:1–8. On February 21, 2020, the Appellate Division denied Petitioner leave to appeal the decision. R. at 26-2:1.

On June 18, 2020, Petitioner filed the Amended Petition. ECF No. 18. Respondent opposes the Amended Petition. ECF No. 20.

LEGAL STANDARD

The Court's review of the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. A federal *habeas* court may only consider whether a person is in custody pursuant to a state court judgment "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). AEDPA requires federal courts to apply a "highly deferential standard" when conducting *habeas corpus* review of state court decisions and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks and citations omitted).

When a claim has been "adjudicated on the merits" in state court, a federal court may grant a *habeas* petition only where it finds adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,

[2] The State Court Record contains two additional motions pursuant to N.Y. Crim Proc. Law § 440.10. The first, R. at 22:1–32, was delivered to the Nassau County District Attorney's Office on or about October 5, 2017, but was never filed. DiGregorio Aff. ¶¶ 40–46. The second, dated March 12, 2018, R. at 23-3:2–35, was filed with the trial court, but was withdrawn prior to decision. DiGregorio Aff. ¶¶ 47–53.

as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). In *Williams v. Taylor*, the United States Supreme Court further explained this standard for evaluating state court decisions under the AEDPA:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

529 U.S. 362, 412–13 (2000). To entitle a prisoner to federal *habeas* relief, a state court decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). With these legal principles in mind, the Court now turns to the analysis of Petitioner's request for *habeas* relief.

DISCUSSION

Petitioner raises three arguments in support of the Amended Petition: (1) he did not receive a full and fair hearing in the state court on the probable cause issue due to trial counsel's failure to call Petitioner as a witness at the suppression hearing; (2) ineffective assistance of counsel; and (3) violation of his right to a fair trial due to the prosecutor's summation and misconduct during trial. Am. Pet. at 4–12. The Court will address each ground in turn.

I. Petitioner's Fourth Amendment Claim is Barred from *Habeas* Review

Petitioner first argues he "did not receive a full and fair hearing in the state court below on the probable cause issue due to trial counsel's failure to call Petitioner as a witness at the suppression hearing." Am. Pet. at 4. The crux of Petitioner's claim is a Fourth Amendment

violation; Petitioner "contends that the evidence in the record demonstrates no probable cause to arrest was present." *Id.* at 7. However, because this claim is grounded in the Fourth Amendment, it is barred from *habeas* review under the rule laid out in *Stone v. Powell*, 428 U.S. 465 (1976).

In *Stone*, the United States Supreme Court held a federal *habeas* court should deny *habeas* relief "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." 428 U.S. at 494. The Second Circuit, in light of *Stone*, has held "review of fourth amendment claims in habeas petitions [should] be undertaken in only one of two instances: (a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process." *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir. 1992). "[T]he focus of the inquiry as to whether there has been an 'unconscionable breakdown' in the state corrective process is on 'the existence and application of the corrective procedures themselves' rather than on the 'outcome resulting from the application of adequate state court corrective procedures.'" *Singh v. Miller*, 104 F. App'x 770, 772 (2d Cir. 2004) (summary order) (quoting *Capellan*, 975 F.2d at 71). "[A] petitioner cannot gain federal review of a fourth amendment claim simply because the federal court may have reached a different result." *Capellan*, 975 F.2d at 71.

Neither instance outlined in *Capellan* is present here. First, New York provides multiple avenues to address alleged Fourth Amendment violations. "Indeed, the 'federal courts have approved New York's procedure for litigating Fourth Amendment claims . . . as being facially adequate.'" *Id.* at 70 n.1 (quoting *Holmes v. Scully*, 706 F. Supp. 195, 201 (E.D.N.Y. 1989) (Glasser, J.)). Petitioner took advantage of such procedure, embodied in N.Y. Crim. Proc. Law

§ 710.10 *et seq.*, through his pretrial suppression hearing, which was held over numerous days between March 12, 2014 and April 8, 2014. *See* R. at 27:1–27-1:278. Following the lengthy hearing, the trial judge denied the suppression and preclusion motions in all respects. R. at 27-2:1–28. Petitioner also litigated his Fourth Amendment claims before the Appellate Division, R. at 21-5:37–48 (arguing Petitioner's warrantless arrest was not supported by probable cause, thus requiring suppression of his post-arrest statements), and the Court of Appeals, R. at 22-4:1 (seeking Court of Appeals review on the issue of whether Petitioner's warrantless arrest was supported by probable cause). The Appellate Division rejected Petitioner's argument as "without merit," R. at 21-7:1, and the Court of Appeals denied leave to appeal, R. at 22-6:1.

Second, Petitioner has not established an "unconscionable breakdown" in the corrective process. Petitioner only claims ineffective assistance of counsel as a result of his counsel's unwillingness to allow him to testify at the suppression hearing. *See* Am. Pet. at 4–8. Petitioner claims this deprived him of a full and fair hearing on the probable cause issue. *See id.* However, ineffective assistance of counsel does not amount to an unconscionable breakdown in the state's corrective process. *E.g.*, *Shaw v. Scully*, 654 F. Supp. 859, 865 (S.D.N.Y. 1987) (Ward, J.) ("Where petitioners have either taken advantage of an opportunity to present Fourth Amendment claims or deliberately bypassed the procedure, however, courts within this circuit have refused to equate ineffective assistance of counsel with unconscionable breakdown."); *see also Doll v. Chappius*, 2018 WL 6310191, at *9 (W.D.N.Y. Dec. 3, 2018) (Telesca, J.) ("Habeas courts in this Circuit have observed that petitioners may not make an end-run around Stone v. Powell by equating ineffective assistance of counsel with an 'unconscionable breakdown.'").

Of course, Petitioner may bring—and, in fact, has brought—an independent claim of ineffective assistance of counsel, which the Court considers below. *See Shaw*, 654 F. Supp at

865 ("While the Court may not sidestep *Stone v. Powell* by equating ineffective assistance of counsel with unconscionable breakdown, it may nonetheless consider the ineffective assistance claim independently.").

Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

II. Petitioner Was Not Denied the Effective Assistance of Counsel

Next, Petitioner raises a claim of ineffective assistance of counsel. *See* Am. Pet. at 8–10. Specifically, Petitioner argues his:

> [R]ight to the effective assistance of counsel was violated when the attorney failed to prepare for the suppression hearing, or the trial, and failed to call Petitioner as a witness, in his defense or cross-examine a material witness on impeachment materials that proved the identification of Petitioner at the trial was erroneously made. Trial counsel failed to call witnesses on Petitioner's behalf that made sworn statements on his behalf and failed to discuss the pros and cons of accepting the plea.

Am. Pet. at 8. Petitioner raised these arguments in support of an ineffective assistance claim in his 2019 section 440.10 motion. R. at 24-1:19–33. The trial court rejected his arguments. R. at 23-5:5–8. In denying the 440.10 motion on this basis, the court stated Petitioner "failed to show that defense counsel did not provide meaningful representation. Counsel cross-examined witnesses and provided [Petitioner] with meaningful representation. Additionally, counsel conducted himself in a professional manner while executing a legitimate trial strategy." R. at 23-5:7–8.

Strickland v. Washington, 466 U.S. 668 (1984), sets forth the relevant federal law governing ineffective assistance of counsel claims. In reviewing a state court's application of the *Strickland* standard, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, [the district court] were adjudicating a *Strickland* claim on direct

review of a criminal conviction in a United States [D]istrict [C]ourt." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). However, as an initial matter, the Court may evaluate whether defense counsel's performance was sufficient under *Strickland*, as a finding defense counsel met the *Strickland* standard is dispositive of Petitioner's AEDPA claim for ineffective assistance of counsel. *Moreno v. Smith*, 06-CV-4602, 2010 WL 2975762, at *15 (E.D.N.Y. July 26, 2010) (Matsumoto, J.).

> Under *Strickland*, in order to prevail on an ineffective-assistance-of-counsel claim, a defendant must meet a two-pronged test: (1) he "must show that counsel's performance was deficient," 466 U.S. at 687, 104 S.Ct. 2052, so deficient that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," *id.* at 690, 104 S.Ct. 2052; and (2) he must show that "the deficient performance prejudiced the defense," *id.* at 687, 104 S.Ct. 2052, in the sense that "there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, 104 S.Ct. 2052.

Bennett v. United States, 663 F.3d 71, 84 (2d Cir. 2011). "It is the accused's 'heavy burden' to demonstrate a constitutional violation under *Strickland*." *Moreno*, 2010 WL 2975762 at *15 (quoting *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004)).

Under the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotation marks and citations omitted).

Under the second prong, to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in

the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Id.* at 694.

With these legal principles in mind, the Court now turns to the analysis of Petitioner's request for *habeas* relief based on ineffective assistance of counsel.

A. Petitioner's Claim Counsel Failed to Cross-Examine Sabrina Kahn As to Her Previous Identification of Petitioner is Based on a Misrepresentation of the Record and Cannot Support a Claim of Ineffective Assistance of Counsel

Petitioner first argues "[d]efense counsel had an obligation to impeach Kahn with her previous inconsistent statement immediately after the crime, stating she did not witness Petitioner involved in any criminal activity on the date in question." Am. Pet. at 8. However, Petitioner's argument in based on a misrepresentation of Ms. Kahn's testimony. Despite Petitioner's insistence Ms. Kahn identified him as the perpetrator at the trial, *id.*, Ms. Kahn testified she could not identify her assailant. R. at 27-4:47 ("Q. And just to be clear, at any point were you able to make a facial identification of this man? A. I wasn't."). Defense counsel appropriately cross-examined Ms. Kahn about her close interactions with the assailant during the robbery and what she remembered. R. at 27-4:60–67. This allowed defense counsel to argue during summation Ms. Kahn, despite being in the burglarized house and in close proximity with the assailant, could not identify Petitioner. R. at 27-6:286 ("But the two most important witnesses, Miss Khan and Miss Younas, the two witnesses that were in the house that day who had many opportunities to see [Petitioner], who were answering the door and who were grabbed by somebody wearing a Champion jacket, neither of them were able to identify [Petitioner]."). As the trial court stated in rejecting this claim, Petitioner "has failed to show there was no strategic or other legitimate explanation for [trial counsel] failing to cross examine Ms. Khan on what defendant claims to be impeachment evidence." R. at 23-5:6. This decision was not contrary to, or an unreasonable application of, existing Supreme Court precedent, nor was the

decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1)–(2).

Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

B. Petitioner Did Not Receive the Ineffective Assistance of Counsel When Trial Counsel Did Not Seek to Admit Co-Defendant Michael Mohammed's Affidavit Into Evidence

Petitioner next seemingly argues he received the ineffective assistance of counsel when his trial counsel failed to admit Michael Mohammed's—a co-defendant—affidavit, in which he stated he did not know Petitioner, into evidence. Am. Pet. at 9; *see also* R. at 24-2:20 (the purported affidavit). Petitioner contends "[d]efense counsel possessed Mohammed's sworn statements to the defense that indicated all the above was manufactured by the police which counsel failed to make a part of the state court record." Am. Pet. at 9. As an initial matter, the affidavit represents textbook hearsay; Petitioner seeks its admission to prove he did not participate in the crime. Trial counsel cannot be ineffective for failing to seek to admit an obviously inadmissible affidavit. *United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995) ("[T]he failure to make a meritless argument does not rise to the level of ineffective assistance.").

Moreover, the trial court became aware of Mr. Mohammed's affidavit during the course of the trial, determined it was "irrelevant," and instructed counsel "not [to] get[] into the confines of th[e] affidavit." R. at 27-6:232. The trial court made it clear during the side-bar discussion regarding the affidavit, R. at 27-6:229–32, the affidavit was not going to be admitted or given any further credence during the trial. Trial counsel may have made the strategic decision not to seek admission of the affidavit at that time. Such a strategic decision does not constitute ineffective assistance. *See, e.g.*, *Henry v. Poole*, 409 F.3d 48, 63 (2d Cir. 2005) ("Actions or

omissions by counsel that might be considered sound trial strategy do not constitute ineffective assistance.") (internal citations and quotations omitted).

Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

C. Petitioner Fails to Establish Trial Counsel Failed to Inform Him of His Right to Testify at the Suppression Hearing or Any Resulting Prejudice from His Failure to Testify

Next, Plaintiff argues he "was never advised he had a right to testify at the suppression hearing to advise the court how he was arrested and what he was subjected to during his seizure and thereafter." Am. Pet. at 9. The trial court rejected this argument in denying Petitioner's 2019 section 440.10 motion. R. at 23-5:6. The Court sees no reason to disturb that decision.

As an initial matter, Petitioner puts forth no evidence to support this self-serving statement. Petitioner's "own highly self-serving and improbable assertion[]" is not sufficient to satisfy his burden of proving he was denied his right to testify at the suppression hearing. *Chang v. United States*, 250 F.3d 79, 86 (2d Cir. 2001). Further, Petitioner's trial attorney submitted an affirmation averring he "discussed with [Petitioner] his testifying at the pretrial suppression hearing, but felt it would not be in his interest to do so. I did not, however, prevent [Petitioner] from testifying at the pretrial suppression hearing." R. at 25:77. This affirmation alone is sufficient to deny Petitioner's claim. *See Castrillo v. Breslin*, 01-CV-11284, 2005 WL 2792399, at *14 (S.D.N.Y. Oct. 26, 2005) (Gorenstein, Mag. J.), *report and recommendation adopted*, 01-CV-11284, ECF No. 21 ("Where, as here, a habeas court is faced with self-serving allegations that are contradicted by a credible affirmation by a trial attorney, it may choose to credit the attorney and dismiss the ineffective assistance of counsel claim without further hearings.").

Moreover, even if the Court were to assume the truth of Petitioner's claim, it would be insufficient to grant *habeas* relief. Petitioner fails to establish how his testimony would have altered the outcome of the proceeding, therefore failing the second *Strickland* prong. *See*

Strickland, 466 U.S. at 694. Petitioner provides no detail as to what he would have testified and how that testimony would have resulted in the granting of his suppression motion. Therefore, even crediting Petitioner's testimony (which the Court does not) the Court has no basis upon which to grant *habeas* relief.

The trial court's rejection of Petitioner's claim, based upon the same grounds outlined above, was not contrary to, or an unreasonable application of, existing Supreme Court precedent, nor was the decision 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). Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

D. Petitioner Cannot Establish He Received the Ineffective Assistance of Counsel During the Plea Process

Petitioner next argues he received the ineffective assistance of counsel because trial counsel "failed to talk diligently with Petitioner about the plea offer permitting Petitioner to feel a trial was the only option." Am. Pet. at 9. The trial court rejected this argument in denying Petitioner's 2019 section 440.10 motion. R. at 23-5:6–7. The Court again sees no reason to disturb that decision.

The Sixth Amendment's guarantee of the right to counsel extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To satisfy the *Strickland* standard in the context of a plea, a *habeas p*etitioner "must show the outcome of the plea process would have been different with competent advice." *Id.* at 163. In other words, here, Petitioner bears the burden of demonstrating but for trial counsel's ineffective assistance, he would have accepted the plea offer and not opted to proceed to trial. The record plainly does not support such a conclusion. As an initial matter, Petitioner puts forth no evidence to support his self-serving assertion. This self-serving statement alone does not, and cannot, satisfy Petitioner's burden.

Moreover, other evidence in the record demonstrates Petitioner's statement is not credible. For example, in the trial attorney's affirmation he averred he "accurately and timely informed [Petitioner] about all plea offers that were conveyed to me and extended to [Petitioner]." R. at 25:77; *see also Castrillo*, 2005 WL 2792399, at *14. Petitioner's counsel also averred he "did not discourage [Petitioner] from accepting a plea offer." R. at 25:77. Further, Petitioner was informed on the record about the plea offers and he declined to accept the offer and instead choose to proceed with the litigation. R. at 27:4–6. Therefore, the trial court properly rejected this claim. This decision was not contrary to, or an unreasonable application of, existing Supreme Court precedent, nor was the decision 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).

Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

E. Trial Counsel Effectively Prepared and Presented the Defense Witness

Petitioner also claims he received the ineffective assistance of counsel due to counsel's failure to prepare defense witness Sydney Ragbirsingh, Petitioner's brother, before calling him to the stand and failing to make a motion limiting the state's ability to cross-examine Ragbirsingh on pending criminal cases. Am. Pet. at 10. Petitioner put forth this same argument in his 2019 section 440.10 motion, which the trial court rejected as "without merit." R. at 23-5:7. The Court reaches the same conclusion here.

At trial, counsel elicited testimony from Mr. Ragbirsingh supporting the defense theory of the case. Specifically, Mr. Ragbirsingh testified about his interactions with Petitioner the day of his arrest and provided an innocent explanation for Petitioner's presence at the country club where he was arrested. *See* R. at 27-6:76–89. Further, Mr. Ragbirsingh's testimony did not implicate Petitioner in any robbery and was consistent with Petitioner's testimony. *Compare* R.

at 27-6:76–109, *with* R. at 27-6:113–72, 185–249. Petitioner fails to outline how exactly trial counsel failed in preparing Mr. Ragbirsingh or what additional testimony Mr. Ragbirsingh would have given if properly prepared by trial counsel. *See Strickland*, 466 U.S. at 694. Such a naked, conclusory assertion cannot form the basis for a successful ineffective assistance of counsel claim.

Moreover, contrary to Petitioner's contention, the cross-examination of Mr. Ragbirsingh, a non-defendant witness, regarding his criminal history was entirely appropriate under New York law. *See* R. at 27-6:92–93 (stating the line of questioning was "fair game"). Therefore, trial counsel cannot be ineffective on this basis because "the failure to make a meritless argument does not rise to the level of ineffective assistance." *Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995).

The Court finds the trial court's decision rejecting Petitioner's claim on this basis was not contrary to, or an unreasonable application of, existing Supreme Court precedent, nor was the decision 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). Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

F. Petitioner's Argument Regarding Trial Counsel's Conduct is Not Sufficient to Support a Claim for *Habeas* Relief

Lastly, Petitioner claims he received the ineffective assistance of counsel because "throughout the trial the attorney made jokes about evidence and other matters that caused the entire courtroom to erupt in laughter, thereby making the jury believe that the entire trial was a joke." Am. Pet. at 10. The trial court resoundingly rejected this argument, stating counsel "conducted himself in a professor manner while vigorously defending his client. Counsel's litigation abilities cannot be to blame for defendant's conviction when the defendant perjured himself, there was overwhelming evidence against him and he rejected a reasonable plea

agreement." R. at 23-5:7. The trial court's factual finding counsel conducted himself in a professional manner is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). Petitioner has submitted no evidence or citations to the record to support a contrary conclusion. Therefore, the Court finds the trial court's decision was not contrary to, or an unreasonable application of, existing Supreme Court precedent, nor was the decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Id.* § 2254(d).

Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

III. Petitioner's Claims of Prosecutorial Misconduct Are Barred from *Habeas* Review

Finally, Petitioner argues his "right to a fair trial was violated by the People's summation and misconduct during the trial." Am. Pet. at 10. Petitioner cites three instances of misconduct in support of his claim: (1) the prosecutor's solicitation of opinion testimony from several police officers; (2) Officer Molinelli's direct examination, which Petitioner claims "went too far"; and (3) the prosecutor's summation was improper. *Id.* at 11. Petitioner contends "[t]he cumulative effect of the inflammatory conduct was so egregious that the jury convicted Petitioner based on the prejudicial evidence and not on the facts of the case." *Id.* at 10. For the reasons discussed below, the claims are barred from *habeas* review and must be dismissed.

A. Petitioner's Claims Regarding Improper Solicitation of Evidence are Procedurally Defaulted and Meritless

As an initial matter, the Court finds Petitioner's claims regarding improper solicitation of evidence are procedurally barred as unexhausted and must be dismissed. Petitioner argued on direct appeal the four police officers gave improper admission testimony. R. at 21-5:49–51. However, Petitioner argued the trial court erred in admitting the testimony and therefore deprived Petitioner of a fair trial. *Id.* On direct appeal, Petitioner did not raise the argument in

the context of a prosecutorial misconduct claim, as he does here. A *habeas* petitioner is required to exhaust all state court remedies before filing a motion for a writ of *habeas corpus* in federal court. 28 U.S.C. § 2254(b)(1)(A). "[E]xhaustion of state remedies requires that petitioners fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (internal quotation marks and alterations omitted). Here, Petitioner did not "fairly present" his prosecutorial misconduct claim to the state courts by raising the issue of improper opinion testimony within the context of an erroneous evidentiary ruling. "This is not a case in which the habeas petitioner has simply applied a slightly different label to what is essentially the same claim." *Jones v. Murphy*, 694 F.3d 225, 247 (2d Cir. 2012). Petitioner therefore failed to exhaust his state remedies and the Court is precluded from granting *habeas* relief on this ground. 28 U.S.C. § 2254(b)(1)(A).

Nonetheless, the Court finds Petitioner's claims meritless. *Id.* § 2254(b)(2). Prosecutorial conduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process" to warrant granting *habeas* relief. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Under New York law, the trial court has the discretion to allow a police officer to offer an opinion as to the identify of an individual captured in a video or photograph if there is "some basis for concluding that the police [officer] . . . was more likely than the jury to correctly determine whether the defendant was depicted in the video [or photograph]." *People v. Daniels*, 140 A.D.3d 1083, 1084 (N.Y. App. Div. 2d Dep't 2016). The Appellate Division held the testimony in this case was permissible. *Campbell*, 148 A.D.3d at 1044 (rejecting Petitioner's argument the opinion testimony was improper as "without merit"). As such, the prosecutor properly questioned the police officers regarding the identity of the

individual in the surveillance video. Therefore, the fact the prosecutor elicited such testimony cannot serve as the basis for a claim of prosecutorial misconduct.

Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

B. Petitioner's Claim Regarding the Prosecutor's Summation is Barred by the Independent and Adequate State Ground Doctrine

In the Amended Petition, Petitioner claims the prosecutor's summation was improper because the prosecutor "underscored that several law enforcement officers had viewed the surveillance video," "misstating the evidence, vouching for the credibility of witnesses with regard to opinion testimony by officers to significant aspects of the People's case, and improperly denigrated the defense." Am. Pet. at 11. The Court's review of this ground is precluded by the independent and adequate state court doctrine and it must be denied.

"Under the independent and adequate state ground doctrine, a federal court sitting in habeas 'will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)) (emphasis omitted). "[A]n adequate and independent finding of procedural default will bar federal *habeas* review of the federal claim, unless the habeas petitioner can show cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989) (internal quotations and citations omitted). The procedural default rule of N.Y. Crim. Proc. Law § 440.10[2][c] is an independent and adequate state ground precluding habeas review. *Clark v. Perez*, 510 F.3d 382, 391–93 (2d Cir. 2008); *Sweet v. Bennett*, 353 F.3d 135, 140–41 (2d Cir. 2003).

In his 2019 440.10 motion, Petitioner, *inter alia*, advanced the same argument he puts forth in the Amended Petition: the prosecutor's summation was improper. R. at 24-1:3, 24-1:37–24-2:3. The trial court the rejected Defendant's argument, finding "with respect to [D]efendant's other arguments pertaining to prosecutorial misconduct, each of these claims is record based and [D]efendant failed to raise them in his previous filings on appeal. Therefore, these arguments must be denied pursuant to CPL §440.10(2)(c)." R. at 23-5:5. The trial court's reliance on section 440.10 constitutes an independent and adequate state ground precluding this Court's review in *habeas*. Moreover, Petitioner has not demonstrated cause for the default nor resulting prejudice or a fundamental miscarriage of justice.

Accordingly, Petitioner's claim for *habeas* relief on this ground must be DENIED.

CONCLUSION

For the foregoing reasons, the Amended Petition is DENIED in its entirety. A certificate of appealability shall not issue. *See* 28 U.S.C. § 2253. The Clerk of the Court is respectfully directed to serve notice of entry of this Order on all parties and to close the case.

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: December 18, 2020
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GLEN CAMPBELL,

Petitioner,

JUDGMENT
18-CV-3683 (WFK)

v.

J. LAMANNA,

Respondent.

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A Decision and Order of Honorable William F. Kuntz II, United States District Judge, having been filed on December 18, 2020, denying the Amended Petition in its entirety; denying the issuance of a certificate of appealability, *See* 28 U.S.C. § 2253; it is

ORDERED and ADJUDGED that the Amended Petition is denied in its entirety; and that no certificate of appealability shall issue, *See* 28 U.S.C. § 2253.

Dated: Brooklyn, NY
December 21, 2020

Douglas C. Palmer
Clerk of Court

By: /s/*Jalitza Poveda*
Deputy Clerk

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