APPENDIX

APPENDIX A — ORDER OF THE NEW YORK COURT OF APPEALS DENYING APPLICATION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS DATED FEBRUARY 17, 2022

State of New York
Court of Appeals

BEFORE: ANTHONY CANNATARO, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

JOSE MEJIA,

Appellant.

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

UPON the papers filed and due deliberations, it is

ORDERED that the application is denied.

Dated: 2/17/22

/s/ Anthony Cannataro
Associate Judge

* Description of Order: Order of the Appellate Division, Fourth Department, entered October 1, 2021, affirming a judgment of Supreme Court, Erie County, entered October 11, 2018.

APPENDIX B —ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT, DATED JANUARY 28, 2022

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NO. 0787 / 21
KA 18-02204

PRESENT: SMITH, J.P., CENTRA, LINDLEY, WINSLOW AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

JOSE MEJIA, DEFENDANT-APPELLANT.

Indictment No: 2006-01534

Appellant having moved for reargument of the order of this Court entered October 1, 2021,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is denied.

Entered: January 28, 2022

Ann Dillon Flynn
Clerk of the Court

APPENDIX C — MEMORANDUM AND ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT, DATED OCTOBER 1, 2021

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

787
KA 18-02204
PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MEJIA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO, (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered October 11, 2018. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his CPL 440.10 motion to vacate the judgment convicting him following a jury trial of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of robbery in the first degree (§ 160.15 [2]). We affirmed the judgment of conviction on direct appeal (People v Mejia, 126 AD3d 1364 [4th Dept 2015], lv denied 26 NY3d

1090 [2015], cert denied — US —, 136 S Ct 2416 [2016]). Defendant made the motion herein to vacate the judgment of conviction on the ground, inter alia, that defense counsel was ineffective. Contrary to defendant's contention, we conclude that Supreme Court properly denied the relevant part of the motion pursuant to CPL 440.10 (2) (c) because the allegations of ineffectiveness that are in question involve matters of record that could have been raised on direct appeal from the judgment of conviction (see People v Watkins, 79 AD3d 1648, 1648 [4th Dept 2010], lv denied 16 NY3d 800 [2011]; People v Smith, 269 AD2d 769, 770 [4th Dept 2000], lv denied 95 NY2d 858 [2000]; see also People v McCullough, 144 AD3d 1526, 1526-152 [4th Dept 2016], lv denied 29 NY3d 999 [2017]; see generally People v Maffei, 35 NY3d 264, 269-270 [2020]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

APPENDIX D — CERTIFICATION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT, DATED JANUARY 22, 2019

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

KA 18-02204

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

JOSE MEJIA, DEFENDANT-APPELLANT.

Indictment No. 2006-01534

I, Patrick H. NeMoyer, Associate Justice of the Appellate Division, Fourth Judicial Department, do hereby certify that upon the motion of defendant for a certificate granting leave to appeal pursuant to CPL 460.15 from an order of the Supreme Court, Erie County entered October 11, 2018, there are questions of law or fact which ought to be reviewed by this Court in connection with defendant's claim of ineffective assistance of trial counsel, and permission to appeal is hereby granted to that extent only.*

Dated: 1/22/19

/s/ Hon. Patrick H. NeMoyer
Associate Justice

*Note: Within 15 days after issuance of this certificate, a copy of this certificate and a notice of appeal must be filed with the clerk of the court in which the order appealed from was entered (*see* CPL 460.10 [4] [b]).

APPENDIX E — MEMORANDUM AND ORDER OF SUPREME COURT, COUNTY OF ERIE, NEW YORK, DENYING MOTION PURSUANT TO C.P.L. § 440.10 DATED APRIL 12, 2018
(Entered October 11, 2018)

At a Criminal Special Term of Supreme Court, Part 14, held in and for the County of Erie and the State of New York at the Erie County Courthouse on the 12th day of April 2018.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

Indictment No. 2006-04534

JOSE MEJIA,

Defendant

Hon. John J. Flynn, Jr.,
District Attorney of Erie County
By: Donna A. Milling, Esq.,
Assistant District Attorney,
Appearing for the People.

Jose Mejia,
Defendant, *pro se*

MEMORANDUM AND ORDER

BUSCAGLIA, Acting Justice

The defendant moves pursuant to section 440.10 of the Criminal Procedure Law for an order vacating the judgment of conviction obtained in the above-entitled matter.

Following a jury trial, the defendant, on October 21, 2011, was found guilty of two counts of murder in the second degree (Penal Law §§ 125.25[1], [3]), one count of robbery in the first degree (P.L. § 160.15[2]), one count of criminal possession of a weapon in the second degree (P.L. § 265.03[2]) and one count of criminal possession of stolen property in the fifth degree (P.L. § 165.40). The charges arose out of an incident occurring in the City of Buffalo at approximately 1:07am on June 22, 2006 when the defendant and a co-defendant (Luis Hernandez), while in the process of committing or attempting to commit the crime of robbery, allegedly caused the death of a Mr. Darryl Jones by shooting the victim.

On March 19, 2012, the defendant was sentenced to a combination of determinate and indeterminate terms of imprisonment, which resulted in an aggregate term with a maximum of life and a minimum of twenty-five (25) years (Wolfgang, J., Supreme Court, Erie County). A notice of appeal was timely filed. On March 20, 2015, the judgment of conviction was unanimously affirmed (*People v. Mejia,* 126 AD3d 1364). A petition for a writ of certiorari was denied (*Mejia v. New York*, 136 S.Ct. 2416).

On the instant motion, the defendant contends that:

1) defense counsel was ineffective for failing:

(i) to introduce exculpatory DNA evidence showing that the victim's DNA was not on the sneakers found at the defendant's residence by the police, which sneakers the People contended were owned by the victim and removed from the victim following the killing;

(ii) to produce a DNA expert to show that it is unlikely that the victim's DNA or the victim's b rother's DNA would not be on the sneakers if the victim and his brother actually owned the sneakers;

(iii) to challenge the entire body of evidence offered by the prosecution;

(iv) to object to the introduction into evidence of the sneakers because they were seized without a warrant or without consent;

(v) to call the defendant's mother to testify that the sneakers belonged to the defendant and to seek the testimony of his co-defendant, Mr. Hernandez; and

(vi) to object to the misconduct on the part of the prosecution;

2) the prosecution engaged in misconduct when it:

(i) had exculpatory evidence in the form of a DNA analysis report showing that the defendant was innocent, but chose to prosecute anyway;

(ii) did not present exculpatory DNA evidence to the Grand Jury;

(iii) presented false evidence to the Grand Jury showing that the sneakers belonged to the victim;

(iv) made comments at the closing that shifted the burden of proof to the defense by asserting that the defendant needed to explain how the victim's sneakers were found in the defendant's residence;

(v) made a statement at closing referring to the defendant as the killer;

(vi) improperly vouched for prosecution witnesses and for their testimony in its closing arguments; and

(vii) allowed a key prosecution witness, to wit: Cory Famer, brother of the victim, to testify falsely regarding the sneakers;

3) since the People failed to prove that the weapon was operable, there was insufficient proof that said weapon was used to commit the homicide and said weapon should have been suppressed;

4) the defendant was deprived of his right to confront a witness when Mer. Hernandez' testimony given at the defendant's first trial was read into the record due to his unavailability at the retrial, thereby resulting in a *Crawford* violation; and

5) the defendant is actually innocent because there is no evidence linking him to the crime.

Having examined the defendant's affidavits in support of that instant motion and the answering affidavit submitted by the People, this court finds and concludes that the motion is without merit and accordingly is denied.

Considering, at the outset, grounds 1(iii), 2(iv), 3 and 4 of the defendant's motion, this court notes that said issues were raised on defendant's direct appeal. Subdivision two of CPL §440.10, which severely limits the availability of CPL §440.10[1] relief, provides, in its relevant parts, that:

> 2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgement when:
>
> (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has be a retroactively effective change in the law controlling such issue ... .

The Court of Appeals has observed that the procedural bars under CPL §440.10[2] exist to ensure that motions 6to vacate judgments of conviction are not used as substitute for a direct appeal (see *People v. Cuadrado,* 9 NY3d362; *People v. Cooks,* 67 NY2d 100). Consequently the motion of the defendant, based on grounds 1(iii), 2(iv), 3 and 4, must be denied (CPL §440.10[2][a]; see *People v King*, 79 AD2d 992).

Turning now to the remaining allegations of ground 1, ground 2(v) and ground 2(vi) of the defendant's motion, he alleges that his defense attorney was ineffective for sundry reasons and that the prosecuting attorney engaged in misconduct. This court notes, however, that the record is sufficient to have permitted the Appellate Division to review the issues forming the basis for said grounds. Subdivision two CPL §440.10, which also severely limits the availability of CPL §440.10[1] relief, provides, provides [sic], in its pertinent parts, that:

> 2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate judgment when:
>
> . . .
>
> (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the

> ground or issue raised on the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure . . . to raise such ground or issue upon an appeal actually perfected by him.

The claims of the defendant raised on grounds 1(i), 1(ii), 1(iv), 1(v), 2(v) and 2(vi) of this motion necessarily appear on the record or could have been made to appear on the record. His unjustifiable failure to raise these issues on direct appeal precludes him from doing so through the use of a motion pursuant to CPL §440.10 (CPL §440.10[2][c]; see *People v. Pignataro,* 20 AD3d 832 [4th Dept.]). Consequently, the motion of the defendant, based on said grounds, must be denied.

Turning now to ground 1(vi) of the motion, the defendant contends that his attorney was ineffective as result of failing to request a missing witness charge relative to the defendant's mother and his co-defendant. However, neither the defendant's mother, nor his co-defendant, was a missing witness.

This court notes that the party seeking a missing witness charge must show that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, that such witness can be expected to provide noncumulative testimony favorable to the party and that the witness is available to such party (see *People v. Gonzalez*, 68 NY2d 424). If the proper showing is made, the party opposing the charge must account for the witness' absence or otherwise show that the charge would not be appropriate (see *People v. Gonzalez*, 68 NY2d, at p. 428). A party may demonstrate that the charge would be inappropriate by showing the witness is not knowledgeable about the issue, that the issue is irrelevant or that the testimony would be cumulative (see *People v. Gonzalez*, 68 NY2d, at p. 428). A party may account for a witness' absence by showing unavailability or lack of control (see *People v. Gonzalez*, 68 NY2d, at p. 428).

In the instant case, the defendant's mother was not a missing witness because she was not under the control of the prosecution. His mother testified at the suppression hearing held prior to the first trial (see Huntley/Suppression Hearing Transcript, pp. 4-51). If the defense believed that the defendant's mother had relevant and material testimony that would have benefitted him, the defense could have called her to testify. The fact that she did not testify at trial cannot be ascribed to the prosecution.

Similarly, the co-defendant, Mr. Hernandez, was not a missing witness. He testified at the defendant's first trial, but refused to testify at the second trial. The

court granted the prosecution's request that Mr. Hernandez' testimony from the first trial be read into the record of the second trial. On appeal, the fourth Department held that the court did not abuse its discretion in not allowing the co-defendant to be called to the stand simply to express his refusal to testify in front of the jury (see *People v. Mejia*, 126 AD3d, at p. 1365). Consequently, Mr. Hernandez and the defendant's mother were not missing witnesses and defense counsel was not ineffective for not requesting a missing witness charge relative to these two individuals (see *People v. Stultz*, 2 NY3d 277, at 287 – a defense attorney is not required to make a motion or purse a defense that has little or no chance of success). The defendant's motion, based on the ground 1(vi) is denied.

Considering the merits of the defendant's claims of prosecutorial misconduct raised on grounds 2(i), 2(ii), 2(iii) and 2(vii) of his motion, this court notes that there is a presumption of regularity in governmental operations (see *Matter of Driscoll v. Troy Housing Authority*, 6 NY2d 513). In the absence of clear evidence to the contrary, it is presumed that governmental agencies, including the courts, prosecutors and police officers, "act honestly and in accordance with the law and do nothing contrary to official duty nor omit anything which official duty requires to be done" (Fisch on NY Evidence, 2nd Ed., Section 1134; *Tela-News Flash v. District Attorney of Queens County,* 197 Misc 1015, affirmed 277 App Div 1119).

Moreover, there is a presumption of regularity attaching to judgments of conviction (see *People v Sessions*, 34 NY2d 254; *People v. Ramsey*, 104 AD2d 388). Such presumptions impose upon a defendant the burden of coming forward with substantial evidence to rebut the presumptions (see *People v. Pichardo*, 168 AD2d 577).

While the production of contrary evidence will satisfy the burden of going forward and eliminate the presumption of regularity from the case, bare allegations are insufficient to carry this evidentiary burden (see *People v. Session*, supra; *People v. Spencer*, 322 NY2d 446). In the instant case, the allegations that the prosecution withheld exculpatory DNA evidence from the defense and the Grand Jury, presented false evidence to the Grand Jury regarding the ownership of the sneakers and allowed a prosecution witness to provide false testimony at trial regarding the sneakers have not been substantiated. The defendant has failed to proffer any evidence beyond unsupported allegations, innuendo, surmise and excessive speculation to support his contentions that the prosecution engaged in the alleged misconduct. Therefore, the motion of the defendant, based on ground 2(i), 2(ii), 2(iii) and 2(vii), is denied.

NOW, THEREFORE, upon reading and filing the notice of motion dated August 9, 2017, and the supporting affidavit of the defendant, together with exhibits,

sworn to on the 14th day of August 2017, and the opposing affidavit of the District Attorney of Erie County by Donna A. Milling, Assistant District Attorney, sworn to on the 25th day of October 2017, and the affidavit of the defendant, sworn to on the 11th day of November 2017, in reply to the opposing affidavit of the District Attorney, and the supplemental statement of the defendant, together with an exhibit, sworn to on the 14th day of November 2017, and due deliberation having been had thereon, it is

ORDERED, ADJUDGED AND DECREED that the said motion be and is hereby denied in all respects without a hearing.

This decision shall constitute the order in this matter for appeal purposes and no other or further order shall be required. Pursuant to CPL §§ 450.15 and 460.15, the defendant may appeal from this order denying his post-conviction motion to vacate his judgment of conviction only if a certificate is obtained granting him leave to appeal (see *People v Serio*, 87 AD2d 3978[4th Dept.]) If he wishes to appeal, the defendant must make an application to the Appellate Division of Supreme Court, Fourth Department, for such a certificate within thirty (30) days of service upon him of this Memorandum and Order (CPL § 460.10[4][a]). If he is unable to pay the cost of such an appeal, the defendant may apply to the Appellate Division for leave to appeal as a poor person.

DATED: Buffalo, New York
April 12, 2018

/s/ Hon. Russell P. Buscaglia
Acting Justice of the Supreme Court

APPENDIX F — DECISION AND ORDER OF UNITED STATES DISTRICT COURT, WESTERN DISTRICT, NEW YORK DENYING PETITION FOR WRIT OF HABEAS CORPUS SIGNED FEBRUARY 5, 2021

Jose MEJIA, 07-B-2418, Petitioner,
v.
People of the State of NEW YORK, Respondent.

6:17-CV-6362 CJS

BY:

Jose Mejia, Attica, NY, pro se.

Donna Milling, Matthew B. Powers, United States Attorney's Office, Buffalo, NY, for Respondent.

DECISION AND ORDER

CHARLES J. SIRAGUSA, United States District Judge

INTRODUCTION

Petitioner Jose Mejia ("Mejia" or "Petitioner") brings this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his convictions in New York State Supreme Court, Erie County, for Murder in the Second Degree, Robbery in the First Degree, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of Stolen Property in the Fifth Degree, for which he was sentenced principally to a term of imprisonment of 25 years to life.[1] The Petition asserts three claims: 1) violation of Petitioner's right to confront witnesses; 2) conviction was against the weight of the evidence; and 3) violation of Petitioner's right to due process and a fair trial resulting from prosecutorial misconduct. For the reasons explained below, the petition for a writ of habeas corpus is denied.

BACKGROUND

The evidence viewed in the light most-favorable to the prosecution indicates that late on the evening of June 21, 2006, Petitioner and Luis Hernandez ("Hernandez") decided to commit a robbery using a .22 caliber pistol borrowed from an acquaintance, Marc Staples ("Staples"). Petitioner and Hernandez chose as their victim Darryl

Jones ("Jones"), who was walking to his girlfriend's house, carrying a backpack. Petitioner and Hernandez demanded that Jones give them everything he had. Jones handed over his cell phone but then tried to run away, at which point Petitioner knocked him to the ground and took his sneakers and wallet. Jones then again tried to run, whereupon Petitioner shot him in the back once, killing him. Petitioner and Hernandez fled on bicycles, taking the deceased's sneakers, wallet and cell phone. A witness heard the shot and then heard a male voice say, "Come on, let's go." The same witness came outside and saw Jones's backpack ripped open and its contents (Jones' clothing) scattered in the street. The police arrived within minutes and found Jones's body face down in the grass, with no shoes. When Jones failed to arrive at his destination, his family and friends attempted to call his cell phone, and Petitioner and/or Hernandez answered, saying "nasty things" and eventually indicating that Jones was dead.

Within minutes after the shooting, Petitioner and Hernandez used Jones's phone to call a female acquaintance, Michelle Pizzaro ("Pizzaro"). Petitioner and Hernandez then went directly to Pizzaro's house, and Hernandez told Pizzaro that they had just robbed and shot a guy, and had taken his phone, wallet and sneakers. Petitioner heard Hernandez's comments and did not dispute them. The next day Petitioner and Hernandez returned the gun to Staples.

Hernandez continued to use Jones's phone for a few days until it broke, whereupon he threw the phone's parts into Pizzaro's yard, where they were later recovered by police. Cell phone data led the police to Pizzaro's mother, who indicated that Pizzaro hung around with Petitioner and Hernandez. Pizzaro then implicated Petitioner and Hernandez. Police located Hernandez, who gave a statement that minimized his involvement and blamed Petitioner for the robbery and murder. Police also recovered the gun that had been borrowed from Staples to commit the robbery.

When Petitioner was arrested, he was in possession of a pair of sneakers matching the brand, model and size of Jones's sneakers. (Incidentally, the sneakers were a smaller size than Petitioner usually wore.). Evidently having realized that he was linked to the crime through phone records and the sneakers, Petitioner gave two statements to the police. In the first statement, Petitioner indicated that he had borrowed a phone and sneakers from a guy named Darryl, who he knew from Erie County Community College. In the second statement, Petitioner admitted that he had robbed and shot Jones, though he claimed that the shooting was an accident.

Petitioner was indicted for Murder in the First Degree, Robbery in the First Degree, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of Stolen Property in the Fifth Degree. Because of his age Hernandez was not charged with First Degree Murder but he was charged with Murder in the Second Degree (felony murder) and various other crimes.

Hernandez agreed to plead guilty to manslaughter[2] and testified against Petitioner at trial. Hernandez was extensively cross-examined by Petitioner's attorney.[3] Staples and Pizzaro also testified. Petitioner also testified, in narrative fashion, and indicated that he was innocent and that every witness who had testified at trial had lied. With regard to the signed statements attributed to him by the police, Petitioner acknowledged that he had made the first statement but claimed that the second statement had been completely fabricated by the detectives who interviewed him. However, later in his testimony, Plaintiff asserted that the police had fabricated both statements.[4] With regard to his possession of the sneakers, Petitioner first testified that he had been given them by a guy named Darryl, then indicated that he had bought them from a guy named Zack, and finally asserted that both stories were true, in that he had been handed the shoes by Darryl but had paid Zack for them.

Petitioner was convicted after trial of all charges. However, on appeal, the New York State Supreme Court, Appellate Division Fourth Department ("Appellate Division"), reversed the convictions and remanded for a new trial, finding that the trial court had erred in failing to suppress Petitioner's statements to the police. *See, generally, People v. Mejia*, 64 A.D.3d 1144, 882 N.Y.S.2d 621 (4th Dept. 2009).

Prior to the second trial, Hernandez, who had already received the benefit of his plea deal and was serving his 20-year sentence, indicated to the prosecutor that he was unwilling to testify again, arguing that his plea deal did not require him to testify at two trials.[5] The trial court assigned an attorney for Hernandez, and following a hearing at which Hernandez reiterated that he was unwilling to testify, even under the threat of contempt, the court held Hernandez in contempt and found that he was "unavailable" to testify within the meaning of New York Criminal Procedure Law ("CPL") § 670.10(1) due to "incapacity," citing *People v. Muccia*, 139 A.D.2d 838, 839, 527 N.Y.S.2d 620 (3d Dept. 1988) ("A traditional hearsay exception for prior testimony of an unavailable witness is codified in CPL 670.10, which relevantly provides that the testimony of a witness at trial is admissible at a subsequent related proceeding which the witness is unable to attend because of 'incapacity.' Downs' refusal to testify constituted incapacity because County Court made sufficient good-faith efforts, including a threat to cite Downs for contempt, in order to induce him to testify in person.") (citations omitted) and *People v. Barber*, 2 A.D.3d 1290, 1291, 770 N.Y.S.2d 537, 538 (4th Dept. 2003) ("Evans testified against defendant at the first trial in exchange for a lenient sentence but refused to testify at the second trial, contending that his deal with the People did not require him to testify at more than one trial. Evans persisted in his refusal to testify despite the court's warning that he would be held in contempt and, indeed, he was held in contempt following a hearing. The court thereafter determined that Evans was unavailable to testify and permitted the People to present his testimony from the first trial in evidence pursuant to CPL 670.10(1). We conclude that the court properly admitted that testimony in evidence under the circumstances of this case.").

Following additional briefing and argument the trial court further ruled that the prosecution could read Hernandez's testimony from the first trial to the jury. In its written ruling on that point, the trial court discussed Hernandez's unavailability to testify, stating in pertinent part:

> The People contend that Mr. Hernandez refuses to testify, claiming that his agreement with the People did not require him to testify at more than one trial. On July 21, 2010, a hearing was conducted before this Court wherein Mr. Hernandez affirmed his refusal to testify in the new trial over the Court's threat of contempt. Due to his refusal this Court then declared Mr. Hernandez incapacitated and unavailable to testify in the new trial. Mr. Hernandez was also found in contempt. CPL Section 670.10(1).[6]

Additionally, the trial court found that admission of Hernandez's prior trial testimony would not violate Petitioner's right to confrontation, since the testimony met the criteria for reliability and the direct examination and cross-examination of Hernandez at the first trial had not been restricted in any way. *Id.* at p. 168; *see also*, *id.* at p. 172 ("It is clear from a review of the transcript of the first trial that the Defendant's counsel at that time vigorously cross-examined Mr. Hernandez.").

Prior to trial, Petitioner's newly-retained counsel attempted to re-argue the court's rulings concerning Hernandez's unavailability and the use of his prior testimony, but the trial court adhered to its prior rulings, reiterating that Hernandez was unavailable to testify and that "the admission of the prior testimony in the second trial cannot be deemed to violate the Defendant's right to confrontation as the Defendant had a full opportunity to cross-examine Mr. Hernandez at the first trial. *Crawford v. Washington*, 541 U.S. 36." Decision dated 7/22/11.

Defense counsel also argued that the trial court should at least place Hernandez on the witness stand so that the jury could see and hear him refuse to testify. Defense counsel insisted that the court should follow that procedure, so that the jury would glean that Hernandez's unavailability was not Petitioner's fault.[7] The trial court denied the request.

Petitioner did not testify at the second trial. Petitioner also attempted to re-argue, before the new judge to whom the case had recently been reassigned, that the prosecution should not be permitted to read Hernandez's prior testimony into the record. Alternatively, Petitioner re-asserted that the court should place Hernandez, who had been subpoenaed to court by the defense, on the witness stand so that the prosecution could attempt to question him in the jury's presence. The trial court denied the request and the prosecution read Hernandez's testimony to the jury.

During the trial, Jones's brother identified the sneakers that were in Petitioner's possession at the time of his arrest as having belonged to Jones, indicating that he was very familiar with the shoes because he had purchased them as part of a set, along with a matching jersey, hat and wristbands, that he had shared them with his late brother. Indeed, Jones' brother indicated that he often cleaned the sneakers and was familiar with the various creases and stains on them. However, in his summation defense counsel attempted to cast doubt on that testimony by arguing that the particular brand and model of sneaker was popular and widely available. For example, during his summation defense counsel stated,

> Nike isn't a Fortune 500 company for no reason. They reproduce sneakers that came out 13 years ago and they still sell millions of them....You know what I am getting at, okay. Who knows how many thousands of young men or ladies across this area have those sneakers....[T]hese are common shoes that are used by young men, especially in the city."[8]

Defense counsel also suggested that the sneakers might not have been taken from Jones during the robbery, and that someone else might have come along later and stolen them from the body before the police arrived. Presumably, defense counsel meant to imply that Petitioner might have later obtained the sneakers from whoever took them from Jones' body, though he never conceded that the sneakers possessed by Petitioner were the same ones taken from Jones.

During the prosecutor's summation, he attempted to rebut those arguments by stating,

> And we have heard over the last week and again today, well, they [the sneakers] are a mass-produced product....Maybe thousands of these around Western New York, who's to say. Or then we heard maybe they were stolen off [the victim's] feet [prior to the police arriving at the scene] because he was there forty to sixty minutes. No he wasn't. Well, which is it? Because this morning we never heard him [defense counsel] say they were his. But somehow, they made it to his [the defendant's] foyer, but really [the defendant wants you to believe] they aren't the same ones, you can't believe that [they're the victim's sneakers]. Well, that was all from that chair [defense counsel's chair]. From that chair [the witness chair] we heard and confirmed they were one hundred and fifty dollars a pair in 2006. They aren't cheap. One hundred fifty dollars a pair. Not some Dollar Store item that everyone has and tosses aside after one walk through the mud. Hardly. I submit to you these Air Jordan [sneakers] are not as common as some in this courtroom need you to believe because, when they're found in your foyer only sixteen days after the owner is murdered and they are taken off his feet and your friend is saying you did it with him and others as well, well then, you better say something about why they are in your foyer. Even if it's as silly as everyone has them or maybe someone stole

them.

Trial Tr. at p. 720.

At the conclusion of the trial, Petitioner was acquitted of Murder in the First Degree and convicted of Murder in the Second Degree, Robbery in the First Degree, Criminal Possession of a Weapon in the Second Degree and Criminal Possession of Stolen Property in the Fifth Degree. The trial court imposed the maximum sentence on Petitioner, citing the cruel nature of the crime.

On direct appeal to the Appellate Division, Petitioner raised the following arguments:

1) admission of Hernandez's testimony from the first trial violated Petitioner's right to confrontation; 2) the trial court erred in allowing Pizarro to testify to Petitioner's tacit admission of guilt; 3) the verdict was against the weight of the evidence; 4) the prosecutor committed misconduct by allegedly commenting on Petitioner's silence; and 5) the sentence is harsh and excessive. The Appellate Division denied the appeal. With regard to the Confrontation Clause claim, the court stated, in pertinent part:

> We reject Defendant's contention that that the admission of the prior testimony violated his right of confrontation or CPL § 670.10(1). The codefendant refused to testify based on his belief that his plea agreement with the People did not require him to testify twice, and his refusal to testify constituted incapacity inasmuch as the court threatened to hold the codefendant in contempt, and indeed did hold him in contempt, for his refusal to testify. Contrary to defendant's further contention, the court did not abuse its discretion in not allowing the codefendant to be called to the stand and refuse to testify in front of the jury.

People v. Mejia, 126 A.D.3d 1364, 1365, 6 N.Y.S.3d 813, 814 (2015). With regard to the claim of prosecutorial misconduct, the Appellate Division held that the prosecutor's "better say something" statement was a proper comment on the defense summation and that in any event the statement was isolated and did not deprive Petitioner of a fair trial. *See, People v. Mejia*, 126 A.D.3d at 1365-66, 6 N.Y.S.3d at 815 (2015) ("Defendant contends that he was denied a fair trial based on a comment made by the prosecutor during summation. That comment, however, was a fair response to defense counsel's summation. In any event, that single remark was isolated and not so egregious as to warrant a reversal.") (citations and internal quotation marks omitted).

The New York Court of Appeals denied Petitioner's application for leave to appeal, and the U.S. Supreme Court denied his petition for writ of certiorari.

As already mentioned, the instant petition asserts three claims.[9] First, Petitioner

contends that his right to confront witnesses was violated by the use of Hernandez's testimony from the first trial. In that regard, Petitioner argues that Hernandez was not truly "unavailable" to testify, and that he was prejudiced by the jury's inability to observe Hernandez's demeanor. Second, Petitioner maintains that the convictions were against the weight of the evidence, since, for example, there were "discrepancies and contradictions" between the testimony of Hernandez, Pizzaro and Staples. And, third, Petitioner argues that his right to "a fair trial and due process" was violated by various comments from the prosecutor, including the "better say something" comment which Petitioner insists was a reference to his "silence while being taken into custody."

Respondent opposes the petition in its entirety, essentially indicating that the "weight of the evidence" claim is not cognizable in this proceeding and that the other two claims lack merit. The Court has considered the parties' submissions and the entire record.

DISCUSSION

Petitioner's *Pro Se* Status

Since Petitioner is proceeding *pro se*, the Court has construed his submissions liberally, "to raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994).

Evidentiary Hearing Not Required

Pursuant to Rule 8 of Rules Governing Habeas Corpus cases under Section 2254 in the United States District Courts and upon review of the answer, transcript and record, the Court determines that an evidentiary hearing is not required.

Section 2254 Principles

Petitioner brings this habeas corpus petition pursuant to 28 U.S.C. § 2254, and the general legal principles applicable to such a claim are well settled.

> As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and interpreted by the Supreme Court, 28 U.S.C. § 2254—the statutory provision authorizing federal courts to provide habeas corpus relief to prisoners in state custody—is "part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011). A number of requirements and doctrines...ensure the centrality of the state courts in this arena. First, the exhaustion requirement ensures that state prisoners present their constitutional claims to the state courts in the first instance. *See id.* (citing 28 U.S.C. § 2254(b)). Should the state court reject a federal claim on procedural grounds, the procedural default doctrine bars further

> federal review of the claim, subject to certain well-established exceptions. *See generally Wainwright v. Sykes*, 433 U.S. 72, 82–84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). If the state court denies a federal claim on the merits, then the provisions of § 2254(d) come into play and prohibit federal habeas relief unless the state court's decision was either: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court." 28 U.S.C. § 2254(d)(1)-(2). Finally, when conducting its review under § 2254(d), the federal court is generally confined to the record before the state court that adjudicated the claim. *See Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 1398–99, 179 L.Ed.2d 557 (2011).

Jackson v. Conway, 763 F.3d 115, 132 (2d Cir. 2014). As just mentioned, regarding claims that were decided on the merits by state courts,

> a federal court may grant habeas corpus relief to a state prisoner on a claim that was adjudicated on the merits in state court only if it concludes that 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 in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).
>
> A state court decision is contrary to clearly established Federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Supreme Court's result.
>
> A state court decision involves an unreasonable application of clearly established Federal law when the state court correctly identifies the governing legal principle but unreasonably applies it to the facts of the particular case. To meet that standard, the state court's 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. It is well established in this circuit that the objectively unreasonable standard of § 2254(d)(1) means that a petitioner must identify some increment of incorrectness beyond error in order to obtain habeas relief.

Santana v. Capra, No. 15-CV-1818 (JGK), 2018 WL 369773, at *7–8 (S.D.N.Y. Jan. 11, 2018) (Koeltl, J.) (citations and internal quotation marks omitted).

Unexhausted and Procedurally Defaulted Claims

Respondent maintains that Petitioner's "weight of the evidence" argument is exhausted but not cognizable in a § 2254 habeas petition. Respondent indicates, however, that to the extent Petitioner might to attempt to instead argue that the

evidence was *legally insufficient* to support his convictions, such an argument would be unexhausted since it was not made to the state courts.

The legal principles concerning the need to exhaust claims before raising them in a § 2254 petition are clear:

> If anything is settled in habeas corpus jurisprudence, it is that a federal court may not grant the habeas petition of a state prisoner "unless it appears that the applicant has exhausted the remedies available in the courts of the State; or that there is either an absence of available State corrective process; or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b)(1). To satisfy § 2254's exhaustion requirement, a petitioner must present the substance of "the same federal constitutional claim[s] that he now urges upon the federal courts," *Turner v. Artuz*, 262 F.3d 118, 123-24 (2d Cir.2001), "to the highest court in the pertinent state," *Pesina v. Johnson*, 913 F.2d 53, 54 (2d Cir.1990).
>
> When a claim has never been presented to a state court, a federal court may theoretically find that there is an "absence of available State corrective process" under § 2254(b)(1)(B)(i) if it is clear that the unexhausted claim is procedurally barred by state law and, as such, its presentation in the state forum would be futile. In such a case the habeas court theoretically has the power to deem the claim exhausted. *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir.1997). This apparent salve, however, proves to be cold comfort to most petitioners because it has been held that when "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred," federal habeas courts also must deem the claims procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).
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> ***
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> Dismissal for a procedural default is regarded as a disposition of the habeas claim on the merits....For a procedurally defaulted claim to escape this fate, the petitioner must show cause for the default and prejudice, or demonstrate that failure to consider the claim will result in a miscarriage of justice (*i.e.*, the petitioner is actually innocent). *Coleman*, 501 U.S. at 748-50, 111 S.Ct. 2546 (1991).

Aparicio v. Artuz, 269 F.3d 78, 89–90 (2d Cir. 2001).

Where a claim is unexhausted but not procedurally barred, meaning that it could still be raised in state court, a district court may stay the action to allow the petitioner to exhaust the claim if, *inter alia*, it is not plainly meritless. *See, Woodard v. Chappius*, 631 F. App'x 65, 66 (2d Cir. 2016) ("Under *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct.

1528, 161 L.Ed.2d 440 (2005), a district court abuses its discretion in denying a stay to exhaust claims in a mixed petition if the unexhausted claims are not plainly meritless, if the petitioner has good cause for failing to exhaust, and if the petitioner did not engage in abusive or dilatory litigation tactics. *Id.* at 277–78, 125 S.Ct. 1528."). However, where a stay is not appropriate, the district court may deny the unexhausted claim if it is meritless. *See, e.g., Wilson v. Graham*, No. 9:17-CV-0863 (BKS), 2018 WL 6001018, at *6 (N.D.N.Y. Nov. 15, 2018) ("A habeas court may, however, deny on the merits a habeas petition containing unexhausted claims if those claims are plainly meritless.").

In the instant case, if Petitioner attempted to argue that his conviction was unconstitutional due to the legal insufficiency of the evidence, the claim would be both unexhausted and procedurally defaulted. That is because Petitioner did not make that argument to the state courts, and he cannot do so now since the claim could have been raised in his direct appeal. In sum, the claim would be procedurally defaulted under state law and procedurally barred here, and no exception would apply.[10] However, even liberally construing the Petition, it does not appear to be making a legal sufficiency argument.[11] Rather, Petitioner has argued only that his conviction was against the weight of the evidence, citing alleged inconsistencies between the testimony of Hernandez, Pizzaro and Staples.[12] Consequently, the Court finds that Respondent's exhaustion argument as to this point is moot, inasmuch as it is directed at an argument Petitioner is not making.[13]

However, other aspects of the petition are unexhausted. Specifically, Petitioner's claim that he was denied a fair trial and due process based on prosecutorial misconduct relies on three alleged statements by the prosecutor: First, Petitioner maintains that it was improper for the prosecutor to say, during his opening, that he was going to show that the sneakers found in Petitioner's possession were the same ones stolen from Jones, since the prosecutor never introduced DNA evidence on that point; next, Petitioner contends that it was improper for the prosecutor to say, during his summation, "I submit to you these Air Jordan [sneakers taken from the victim] are not as common as some in this courtroom need you to believe because, when they're found in your foyer only sixteen days after the owner is murdered and they are taken off his feet and your friend [Hernandez] is saying you did it with him and others as well, well then, you better say something about why they are in your foyer," since that statement referred to Petitioner's right to remain silent; and, finally, Petitioner asserts that it was improper and misleading for the prosecutor to say, during his summation, that police had recovered the murder weapon, since, for example, no scientific evidence was presented indicating that the bullet taken from Jones's body was fired by the gun that was recovered from Staples. Of these three alleged instances of prosecutorial misconduct, only the second one was raised before the state courts. The first and third instances of alleged prosecutorial misconduct are unexhausted, procedurally barred and procedurally defaulted, and no exception

applies.[14] Consequently, those two aspects of Petitioner's prosecutorial misconduct/fair trial/due process claim are denied on that basis.[15] The Court will discuss the exhausted aspect of that claim below.

Non-Cognizable Claims

Respondent next maintains that Petitioner's "weight of the evidence" claim is "not cognizable" in a § 2254 habeas proceeding. The Court agrees.

"A claim that a state conviction was obtained in violation of state law is not cognizable in the federal court." *Howard v. Walker*, 406 F.3d 114, 121 (2d Cir. 2005) (citing *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) and *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir.1998)); *see also, Guerrero v. LaManna*, 325 F. Supp. 3d 476, 483 (S.D.N.Y. 2018) ("The role of federal courts reviewing habeas petitions is not to re-examine the determinations of state courts on state law issues, but only to examine federal constitutional or statutory claims. 28 U.S.C. § 2254(a); *see Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Federal courts deciding habeas petitions do not serve as appellate courts to review state court decisions of state law claims. Their purpose instead is to review whether the circumstances surrounding the petitioner's detention 'violate fundamental liberties of the person, safeguarded against state action by the Federal Constitution.' *Townsend v. Sain*, 372 U.S. 293, 311-312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Habeas petitions may not simply repackage state law claims, which have previously been found to be meritless, in order to obtain review. *DiGuglielmo v. Smith*, 366 F.3d 130, 136 (2d Cir. 2004).").

As Respondent correctly points out, a claim that a conviction was against the weight of the evidence is a state-law argument that is not cognizable in a federal § 2254 habeas action. *See, McKinnon v. Superintendent, Great Meadow Corr. Facility*, 422 F. App'x 69, 75 (2d Cir. 2011) ("[T]he argument that a verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus, *see, e.g., Correa v. Duncan*, 172 F.Supp.2d 378, 381 (E.D.N.Y.2001), *Douglas v. Portuondo*, 232 F.Supp.2d 106, 116 (S.D.N.Y.2002); *see also Estelle*, 502 U.S. at 67–68, 112 S.Ct. 475, and as a matter of federal constitutional law a jury's verdict may only be overturned if the evidence is insufficient to permit any rational juror to find guilt beyond a reasonable doubt, *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), *Policano v. Herbert*, 507 F.3d 111, 116 (2d Cir.2007)."); *see also, Blackshear v. Artus*, No. 917CV143MADDJS, 2019 WL 6837719, at *3 (N.D.N.Y. Dec. 16, 2019) ("Review of a conviction as against the 'weight of the evidence' is a product of New York state statute and, therefore, merely a state-law issue for which no cognizable federal issue is presented.").

Consequently, Petitioner's "weight of the evidence" argument is not cognizable in this action and is denied.

The Remaining Claims, Although Exhausted and Cognizable, Lack Merit

Right to Confront Witnesses
Petitioner contends that his right to confront witnesses was denied by the use of Hernandez's testimony from the first trial. In this regard, Petitioner contends that although Hernandez was cross-examined at the first trial, he might have testified differently at the second trial, and that the use of the prior testimony deprived the jury of the opportunity to observe Hernandez's demeanor. Petitioner further contends that Hernandez was not actually "unavailable" to testify, since the prosecution never offered him immunity to testify. Finally, Petitioner contends that before using the prior testimony the trial court should have at least placed Hernandez on the stand so that the jury could see him refuse to testify.

Criminal defendants have a Sixth Amendment right to confront the witnesses against them, with certain exceptions:

> "The Sixth Amendment guarantees every criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, the Supreme Court interpreted this Clause to bar the admission at trial of a witness's "testimonial evidence"—which includes "at a minimum" his "prior testimony...before a grand jury"—*unless the witness is unavailable and the defendant has been afforded a prior opportunity for cross-examination*. 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Chrysler v. Guiney, 806 F.3d 104, 118 (2d Cir. 2015) (emphasis added).

> [A] witness is not 'unavailable' for purposes of the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.
>
> ***
>
> The lengths to which the prosecution must go to produce a witness...is a question of reasonableness.

Hardy v. Cross, 565 U.S. 65, 69–70, 132 S. Ct. 490, 493–94, 181 L. Ed. 2d 468 (2011) (citations and internal quotation marks omitted).

Here, the Court liberally construes the Petition to allege that the trial court's finding that Hernandez was "unavailable" to testify, 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 in the State court proceeding. In particular, Petitioner maintains that the finding of "unavailability" was incorrect

since the prosecution did not make a reasonable good-faith effort to get Hernandez to testify at the second trial. As proof, Petitioner contends that the prosecutor never offered immunity to Hernandez.

However, this argument lacks merit for various reasons. To begin with, Petitioner's contention that Hernandez was not "unavailable" to testify is incorrect, since Hernandez invoked his 5th Amendment privilege and refused to testify despite being held in contempt. *See, Latine v. Mann*, 25 F.3d 1162, 1166 (2d Cir. 1994) ("A declarant is unavailable for purposes of Confrontation Clause analysis if he invokes his Fifth Amendment privilege against self-incrimination and refuses to testify at trial."); *see also, Ross v. Dist. Attorney of the Cty. of Allegheny*, 672 F.3d 198, 206 (3d Cir. 2012) ("The Confrontation Clause does not require a witness to face the threat of sanctions in order to be rendered unavailable. A witness is unavailable for Confrontation Clause purposes when he or she refuses to testify, regardless of whether the refusal is in response to an order to testify under threat of sanctions.")

Moreover, the state court's determination that Hernandez was unavailable to testify was not unreasonable under the circumstances. *See, Hardy v. Cross*, 565 U.S. at 71–72, 132 S. Ct. at 495 ("[T]he Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising. And, more to the point, the deferential standard of review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken. Under AEDPA, if the state-court decision was reasonable, it cannot be disturbed."); *see also, Green v. MacLaren*, No. 17-1249, 2017 WL 3973956, at *2 (6th Cir. Aug. 2, 2017) ("Green argues that the trial court's decision violated his right to confront his witnesses. The Confrontation Clause prohibits the admission of testimonial statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). It is undisputed that Lewis provided testimonial statements at Green's first trial and that Green had an opportunity to cross-examine him. Nonetheless, Green contends that Lewis was not truly unavailable to testify at his second trial. However, a witness is unavailable for full and effective cross-examination when he refuses to testify, even when the refusal is punishable as contempt. Lewis made it clear to the trial court that he was exercising his Fifth Amendment right not to testify. Even if it was not proper for Lewis to invoke his right in this context since his pending murder charge was unrelated to Green's case, it appears that any warning by the court to hold Lewis in contempt would have been ineffective. Lewis already was incarcerated and facing life imprisonment if convicted of the murder charge. Further, this court may not overturn a state court's determination of unavailability merely because it can identify additional steps that the state court may have taken. *See Hardy v. Cross*, 565 U.S. 65, 71 (2011).").

Petitioner's contention that the prosecutor failed to act in good faith by not offering immunity to Hernandez also lacks merit, since the prosecutor had no reason to offer immunity to a witness who had already clearly indicated to the court that he was not going to testify under any circumstances because he did not believe that his plea agreement required him to do so. *See, e.g., Robinson v. Conway*, No. 05-CV-0542 VEB, 2010 WL 3894989, at *9 (W.D.N.Y. Sept. 30, 2010) ("Scott was unavailable; his intention was to refuse to testify again under any circumstances. The issue of immunity thus never had to be reached by the prosecutor or the trial court.").

To the extent Petitioner may be arguing that a witness who refuses to testify can never be declared "unavailable" for purposes of the Confrontation Clause unless he is first offered immunity, such that the prosecutor was required to offer immunity to Hernandez, he is incorrect:

> The established content of the Sixth Amendment does not support a claim for defense witness immunity. Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination. While the prosecutor may not prevent or discourage a defense witness from testifying, it is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity.

United States v. Turkish, 623 F.2d 769, 773–74 (2d Cir. 1980) (citations omitted).[16] Nor does the record otherwise indicate that the prosecutor acted unreasonably, or that he failed to make a good-faith effort to get Hernandez to testify at trial.

Petitioner further maintains that his Confrontation Clause rights were violated when the trial court declined to place Hernandez before the jury solely for the purpose of having him refuse to testify. This claim also lacks merit. *See, e.g., United States v. George*, 778 F.2d 556, 563 (10th Cir. 1985) ("The trial court correctly permitted the invocation of the Fifth Amendment privilege by Kenneth George outside the hearing of the jury, and defendant-appellant's right of confrontation under the Sixth Amendment was not thereby violated."); *see also, United States v. Myerson*, 18 F.3d 153, 158 (2d Cir. 1994) ("[T]he district court properly rejected Myerson's attempts to call Cooper solely for the purpose of having the jury hear his invocation of the privilege.").

Finally, Petitioner contends that it violated his Confrontation Clause rights to use Hernandez's prior testimony, since Hernandez might have testified differently at the second trial. However, this argument lacks merit, since the trial court is not required

to consider how the declarant might testify at the second trial. Rather, as discussed earlier, use of the prior testimony comports with the Confrontation Clause so long as the witness is unavailable and the defendant has been afforded a prior opportunity for cross-examination. Those requirements were met here.

For all these reasons, the Confrontation Clause claim is denied.

Right to Fair Trial/Due Process

Finally, Petitioner contends that his rights to a fair trial and due process were violated by the prosecutor's summation which included the words, "you better say something." In particular, Petitioner alleges that those words "referred to [his] silence while being taken into custody." Respondent maintains that this claim lacks merit, and the Court again agrees.

Petitioner's argument on this point can be construed as raising a claim relating to his 5th Amendment rights to a fair trial and to remain silent. The legal principles applicable to such claims are well settled:

> The Supreme Court has instructed that habeas relief is appropriate based on improper prosecutorial comments in summation only where the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). We have held that "[t]he habeas court must consider the record as a whole when making this determination, because even a prosecutor's inappropriate or erroneous comments or conduct may not be sufficient to undermine the fairness of the proceedings when viewed in context." *Jackson*, 763 F.3d at 146. This standard is highly general, such that a wide range of state court applications of the standard must be considered reasonable. *Id.* at 135.

Griggs v. Lempke, 797 F. App'x 612, 616 (2d Cir. 2020). At the same time, however,

> [i]t is appropriate, on summation, to suggest inferences that could be drawn from facts in evidence and draw juror's attention to relevant factors in assessing witness credibility." *Cooper v. Costello*, No. 93-CV-5670, 1996 WL 1088929, at *4 (E.D.N.Y. July 23, 1996) (citing People v. Collins, 72 A.D.2d 431, 437-38, 424 N.Y.S.2d 954, 985 (4th Dept. 1980)). Additionally, the prosecution is permitted to rebut arguments raised during a defendant's summation, " 'even to the extent of permitting the prosecutor to inject his view of the facts to counter the defense counsel's view of the facts.' " *Readdon v. Senkowski*, No. 96-CV-4722, 1998 WL 720682, at *4 (S.D.N.Y. Oct. 13, 1998) (quoting *Orr v. Schaeffer*, 460 F. Supp. 964, 967 (S.D.N.Y. 1978)). "Where a prosecutor's statement is responsive to comments made by defense counsel, the prejudicial effect of such objectionable statements is diminished." *Pilgrim v. Keane*, No. 97-CV-2148, 2000 WL 1772653 at *3 (E.D.N.Y. Nov. 15, 2000)

(citations omitted).

Duren v. Lamanna, No. 18-CV-7218(JS), 2020 WL 509179, at *16 (E.D.N.Y. Jan. 30, 2020).

With regard to prosecutorial misconduct specifically involving comments on the accused's right to remain silent, the legal principles are similarly well settled:

> The Fifth Amendment protects individuals from self-incrimination. U.S. Const. Amend. V. It is a long-standing principle that prosecutors may not comment on a criminal defendant's silence or instruct a jury to infer that "such silence is evidence of guilt." *See Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965). "The test governing whether a prosecutor's statements amount to an improper comment on the accused's silence in violation of the Fifth Amendment looks at the statements in context and examines whether they 'naturally and necessarily' would be interpreted by the jury as a comment on the defendant's failure to testify." *U.S. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1995); *see also United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 S. Ct. 217, 54 L. Ed. 2d 151 (1977).

Duren v. Lamanna, 2020 WL 509179, at *17; *see also*, *Griggs v. Lempke*, 797 F. App'x 612, 617 ("The Fifth Amendment...forbids...comment by the prosecution on the accused's silence." *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Such comments, however, are reviewed for harmless error. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).").

Here, as discussed earlier, Petitioner focuses on the words "you better say something," which were part of the larger statement,

> I submit to you these Air Jordan are not as common as some in this courtroom need you to believe because, when they're found in your foyer only sixteen days after the owner is murdered and they are taken off his feet and your friend is saying you did it with him and others as well, well then, you better say something about why they are in your foyer. Even if it's as silly as everyone has them or maybe someone stole them.

The state court rejected Petitioner's argument that this statement referred to his silence when arrested, finding instead that it was "a fair response to defense counsel's summation," and, alternatively, that the "single remark was isolated and not so egregious as to warrant a reversal." *People v. Mejia*, 126 A.D.3d at 1365-66.

The state court's determination was not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," neither was it "contrary to," nor did it "involve an unreasonable application of," "clearly

established Federal law, as determined by the Supreme Court of the United States." Viewed in context, the statement was not so unfair as to deny due process, nor did it amount to an improper comment on the accused's silence in violation of the Fifth Amendment since it would not "naturally and necessarily" have been interpreted by the jury as a comment on the defendant's failure to testify. Instead, the statement was clearly a response to specific arguments made during defense counsel's summation minutes earlier. The statement was directed at what defense counsel said, not at what Petitioner did not say. Consequently, the claim is denied.

CONCLUSION

The application under 28 U.S.C. § 2254 is denied. The Clerk of the Court is directed to close this case. Pursuant to 28 U.S.C. § 2253, the Court declines to issue a certificate of appealability, since Petitioner has not made a substantial showing of the denial of a constitutional right. The Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith and leave to appeal to the Court of Appeals as a poor person is denied. *Coppedge v. United States*, 369 U.S. 438 (1962). Further requests to proceed on appeal *in forma pauperis* should be directed on motion to the United States Court of Appeals for the Second Circuit in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

So Ordered.

Footnotes

1 More specifically, Petitioner was "sentenced to indeterminate terms of twenty-five years to life for his murder in the second degree convictions, a determinate term of twenty-five years for his robbery conviction, fifteen years for his criminal possession of a weapon conviction, and a definite term of one year for his possession of stolen property conviction. A five-year term of post-release supervision was also imposed under all of the determinate terms." Respondent's Memo of Law at p. 3.

2 Hernandez's plea agreement called for a sentence of between 15 and 20 years, and the state court sentenced him to 20 years.

3 Petitioner's attorney at the first trial was Joseph Terranova, Esq.

4 Trial Transcript at p. 884.

5 See, 7/21/10 transcript at p. 3 ([PROSECUTOR:] [Hernandez] made it very clear to us that he does not believe his agreement includes the requirement that he testify at an additional trial – MR. HERNANDEZ: Yeah --."j)

[6] Exhibits to Petition, Appendix A to Petition for Certiorari at p. 166.

[7] *See, id.* at p. 180 ("There should be no question with respect to Mr. Hernandez's availability; rather the truth should be presented to the jury. As Mr. Hernandez has refused to testify through no fault of the defendant, the jury should at least be apprised that the defendant has not caused the witness's unavailability.").

[8] Trial Tr. at pp. 685-686.

[9] The Petition also included a fourth claim, based on alleged ineffective assistance of trial counsel, that Petitioner acknowledged was unexhausted. Petitioner withdrew that claim after the Court denied his request for stay and abeyance.

[10] Petitioner has not attempted to show cause and prejudice or actual innocence, nor does the record suggest that he could do so.

[11] As to this point, the Court additionally notes that Petitioner did not file a reply.

[12] The Court notes that defense counsel explored these discrepancies on cross-examination and argued them to the jury.

[13] The Court notes that a legal *sufficiency* argument would also lack merit, since the evidence viewed in the light most-favorable to the prosecution was clearly sufficient to allow a rational trier of fact to find Petitioner guilty beyond a reasonable doubt of the crimes for which he was convicted under New York law. *See, Gutierrez v. Smith*, 702 F.3d 103, 113 (2d Cir. 2012) ("When reviewing appeals challenging the sufficiency of the evidence supporting a state-court criminal conviction...we review the decision of the state court under the federal sufficiency standard set forth by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *See Epps v. Poole*, 687 F.3d 46, 50 (2d Cir.2012). The relevant question under *Jackson* is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781.").

[14] Again, Petitioner has not attempted to show cause and prejudice or actual innocence, nor does the record suggest that he could do so.

[15] In any event, those two aspects of the claim plainly lack merit as the prosecutor's statements concerning those points were not improper.

[16] *See also*, Thomas G. Stacy, "The Constitution in Conflict: Espionage Prosecutions, the Right to Present A Defense, and the State Secrets Privilege," 58 U. Colo. L. Rev. 177, 225 (1987) ("Courts have been virtually unanimous in holding that, at least in the absence of prosecutorial misconduct, neither courts nor prosecutors have a constitutional obligation to immunize witnesses who can provide testimony

exculpating a defendant.").

APPENDIX G — OPINION OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR WRIT OF CERTIORARI DATED JUNE 6, 2016

SUPREME COURT OF THE STATE OF NEW YORK

Jose MEJIA, petitioner,

v.

NEW YORK.

No. 15-8830

June 6, 2016

OPINION

Petition for writ of certiorari to the Appellate Division, Supreme Court of New York, Fourth Judicial Department denied.

APPENDIX H — ORDER OF THE NEW YORK COURT OF APPEALS DENYING APPLICATION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS DATED DECEMBER 2, 2015

State of New York
Court of Appeals

BEFORE: HON. JONATHAN LIPPMAN, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

JOSE MEJIA,

Appellant.

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

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: Dec 02 015

/s/ Jonathan Lippman
Chief Judge

*Description of Order: Order of the Appellate Division, Fourth Department entered March 20, 2015 affirming a judgment of the Supreme Court, Erie County, rendered March 19, 2012.

APPENDIX I — MEMORANDUM AND ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT, DATED MARCH 20, 2015

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

231
KA 12-00793
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MEJIA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO, (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 19, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), robbery in the first degree, criminal possession of a weapon in the second degree and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of robbery in the first degree (§ 160.15 [2]). We reversed

defendant's prior judgment of conviction on the ground that his statements to the police should have been suppressed (People v Mejia, 64 AD3d 1144, 1145-1146, lv denied 13 NY3d 861). On this appeal following the retrial, defendant contends that Supreme Court erred in admitting in evidence the codefendant's testimony from the first trial. We reject defendant's contention that the admission of the prior testimony violated his right of confrontation or CPL 670.10 (1) (see People v Knowles, 79 AD3d 16, 24, lv denied 16 NY3d 896). The codefendant refused to testify based on his belief that his plea agreement with the People did not require him to testify twice, and his refusal to testify constituted incapacity inasmuch as the court threatened to hold the codefendant in contempt, and indeed did hold him in contempt, for his refusal to testify (see Knowles, 79 AD3d at 24-25; People v Barber, 2 AD3d 1290, 1291, lv denied 2 NY3d 761). Contrary to defendant's further contention, the court did not abuse its discretion in not allowing the codefendant to be called to the stand and refuse to testify in front of the jury (see generally People v Thomas, 51 NY2d 466, 472; People v Dixon, 149 AD2d 613, 613, lv denied 76 NY2d 733), and in not charging the jury that the witness refused to testify (see generally People v Tatro, 53 AD3d 781, 786-787, lv denied 11 NY3d 835; People v Zanghi, 256 AD2d 1120, 1121, lv denied 93 NY2d 881). We have considered defendant's remaining contention regarding the admission of the codefendant's prior testimony in evidence and conclude that it is without merit.

As we held in the prior appeal, the court "properly admitted the trial testimony of a witness concerning an admission by silence by defendant" (Mejia, 64 AD3d at 1145). Defendant's contention that a proper foundation was not laid for that testimony is not preserved for our review (see CPL 470.05 [2]), and is without merit in any event inasmuch as "[t]he record supports the conclusion that defendant heard another person's statement accusing him of the crime" (People v Frias, 250 AD2d 495, 496, lv denied 92 NY2d 982). Viewing the evidence in light of the elements of the crimes as charged to the jury (see People v Danielson, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (see generally People v Bleakley, 69 NY2d 490, 495).

Defendant contends that he was denied a fair trial based on a comment made by the prosecutor during summation. That comment, however, was a fair response to defense counsel's summation (see People v Ross, 118 AD3d 1413, 1417, lv denied 24 NY3d 964; People v Lyon, 77 AD3d 1338, 1339, lv denied 15 NY3d 954). In any event, that single remark was "isolated and not so . . . egregious as to warrant a reversal" (People v Walker, 259 AD2d 1026, 1027, lv denied 93 NY2d 1029). The sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

APPENDIX J — CERTIFICATE OF THE NEW YORK COURT OF APPEALS DENYING APPLICATION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS DATED NOVEMBER 23, 2009

State of New York
Court of Appeals

BEFORE: HON. JONATHAN LIPPMAN, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

JOSE MEJIA,

Respondent.

CERTIFICATE DENYING LEAVE

I, JONATHAN LIPPMAN, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated: Nov 23 2009
New York, New York

/s/ Jonathan Lippman
Chief Judge

**Description of Order*: Order of the Appellate Division, Fourth Department, entered July 2, 209, unanimously reversing on the law a judgment of the Supreme Court, Erie County, rendered July 19, 2007.

APPENDIX K — MEMORANDUM AND ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT, DATED JULY 2, 2009

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

754
KA 07-01558
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MEJIA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO, (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.) rendered July 19, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the first degree, robbery in the first degree, criminal possession of a weapon in the second degree and criminal possession of stolen property in the fifth degree.

It is hereby ORDERED that the judgment so appeal from is unanimously reversed on the law, those parts of the motion seeking to suppress statements made by defendant to the police are granted and a new trial is granted on counts one through four and six and seven of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the first degree (Penal Law § 125.27 [1[] [a] [vii]; [b]) and robbery in the first degree (§ 160.15 [2]). Contrary to defendant's contention,

County Court propely admitted the trial testimony of a witness concerning an admission by silence by defendant (*see People v Olewine*, 164 AD2d 971; *see generally People v Lord*, 103 AD2d 1032, 1033, *lv denied* 63 NY2d 776). We reject the further contention of defendant that the court erred in denying that part of his omnibus motion seeking to suppress his sneakers. "In reviewing a determination of the suppression court, great weight must be accorded its decision because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous" (*People v Stokes*, 212 AD2d 986, 987, *lv denied* 86 NY2d 741). Here, the suppression court credited the testimony of the police officers that, when they arrived at defendant's house, defendant asked his mother for his sneakers, and his mother gave the sneakers to an officer. The record thus supports the court's determination that the police lawfully obtained the sneakers from defendant's mother in accordance with defendant's request.

We agree with defendant, however, that the court erred in denying those parts of his omnibus motion seeking to suppress his statements to the police. The court again credited the testimony of the police officers but, contrary to the court's determination, we conclude that their testimony establishes that defendant was in custody during the interrogation. The police officers, who had knowledge that a codefendant had implicated defendant in the murder, testified that they went to defendant's home and asked defendant to accompany them to the police station. Although defendant agreed, he was frisked and handcuffed, and the handcuffs were not removed until defendant was placed in a secure interview room. In addition, defendant was escorted when he needed to use the bathroom. The police began to question defendant about the shooting but did not administer *Miranda* warnings until after he had made incriminating statements. We agree with defendant that a reasonable person, innocent of any crime, would have believed under those circumstances that he or she was in custody (*see People v Rhodes*, 49 AD3d 668, 668, *lv denied* 10 MU3d 938; *People v Ramos*, 27 AD3d 1073, 1074-1075, *lv dismissed* 6 NY3d 897; *People v Evans*, 294 AD2d 918, 919, *lv dismissed* 98 NY2d 768; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851).

In light of our determination, we do not review defendant's remaining contentions.

Entered: July 2, 2009

Patricia L. Morgan
Clerk of the Court

APPENDIX L — STATUTORY ADDENDUM

N.Y. Crim. Proc. §440.10
Motion to Vacate Judgment
(current)

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

   (a) The court did not have jurisdiction of the action or of the person of the defendant; or

   (b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

   (c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

   (d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

   (e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

   (f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

   (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(g-1) Forensic DNA testing of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States; or

(i) The judgment is a conviction where the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law, sex trafficking of a child under section 230.34-a of the penal law, labor trafficking under section 135.35 of the penal law, aggravated labor trafficking under section 135.37 of the penal law, compelling prostitution under section 230.33 of the penal law, or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that

(i) official documentation of the defendant's status as a victim of sex trafficking, labor trafficking, aggravated labor trafficking, compelling prostitution, or trafficking in persons at the time of the offense from a federal, state or local government agency shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking, labor trafficking, aggravated labor trafficking, compelling prostitution or trafficking in persons, but shall not be required for granting a motion under this paragraph;

(ii) a motion under this paragraph, and all pertinent papers and documents, shall be confidential and may not be made available to any person or public or private entity except where specifically authorized by the court; and

(iii) when a motion is filed under this paragraph, the court may, upon the consent of the petitioner and all of the state and local prosecutorial agencies that prosecuted each matter, consolidate into one proceeding a motion to vacate judgments imposed by distinct or multiple criminal courts; or

(j) The judgment is a conviction for a class A or unclassified misdemeanor entered prior to the effective date of this paragraph and satisfies the ground prescribed in paragraph (h) of this subdivision. There shall be a rebuttable presumption that a conviction by plea to such an offense was not knowing, voluntary and intelligent, based on ongoing collateral consequences, including potential or actual immigration consequences, and there shall be a rebuttable presumption that a conviction by verdict constitutes cruel and unusual punishment under section five of article one of the state constitution based on such consequences; or

(k) The judgment occurred prior to the effective date of the laws of two thousand twenty-one that amended this paragraph and is a conviction for an offense as defined in subparagraphs (i), (ii), (iii) or (iv) of paragraph (k) of subdivision three of section 160.50 of this part, in which case the court shall presume that a conviction by plea for the aforementioned offenses was not knowing, voluntary and intelligent if it has severe or ongoing consequences, including but not limited to potential or actual immigration consequences, and shall presume that a conviction by verdict for the aforementioned offenses constitutes cruel and unusual punishment under section five of article one of the state constitution, based on those consequences. The people may rebut these presumptions.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal unless the issue raised upon such motion is ineffective assistance of counsel. This paragraph shall not apply to a motion under paragraph (i) of subdivision one of this section; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the

prescribed period or to his or her unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him or her unless the issue raised upon such motion is ineffective assistance of counsel; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right, or to a motion under paragraph (i) of subdivision one of this section; or

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five or six of this section, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

   (a) Vacate the judgment and order a new trial; or

   (b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. If the court grants a motion under paragraph (i) or paragraph (k) of subdivision one of this section, it must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances. In the case of a motion granted under paragraph (i) of subdivision one of this section, the court must vacate the judgment on the merits because the defendant's participation in the offense was a result of having been a victim of trafficking.

7. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court upon an appeal from the judgment, or by any court upon a previous post-judgment motion.

8. Upon an order which vacates a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of an express direction to the contrary, restored to its prepleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those subsequently dismissed under circumstances specified in paragraphs (b) and (c) of subdivision six. Where the plea of guilty was entered and accepted, pursuant to subdivision three of section 220.30, upon the condition that it constituted a complete disposition not only of the accusatory instrument underlying the judgment vacated but also of one or more other accusatory instruments against the defendant then pending in the same court, the order

of vacation completely restores such other accusatory instruments; and such is the case even though such order dismisses the main accusatory instrument underlying the judgment.

9. Upon granting of a motion pursuant to paragraph (j) of subdivision one of this section, the court may either:

(a) With the consent of the people, vacate the judgment or modify the judgment by reducing it to one of conviction for a lesser offense; or

(b) Vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant in accordance with the amendatory provisions of subdivision one-a of section 70.15 of the penal law.