E.D.N.Y. – Bklyn
20-cv-2382
Kuntz, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of May, two thousand twenty-two.

Present:

John M. Walker, Jr.,
Robert D. Sack,
Susan L. Carney,
Circuit Judges.

Hillary Best,*

Petitioner-Appellant,

v. 21-1190

New York City Police Department Sex Offender Unit,

Respondent-Appellee.

Appellant, pro se, moved for a certificate of appealability, in forma pauperis status, and appointment of counsel to challenge the district court's February 2021 denial of his motion under 28 U.S.C. § 2254 for habeas relief. On October 26, 2021, we denied the motions and dismissed the appeal, explaining in primary part that Appellant did not "[make] a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The order incorrectly stated, however, that Appellant argued that the absence of an indictment in his state court prosecution provided a ground for relief, an argument that the Court rejected. After entry of the order, Appellant unsuccessfully sought reconsideration and now moves the Court to recall the mandate and reinstate the appeal based on this error.

Upon due consideration, Appellant's motion is DENIED. Appellant still fails to "[make] a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). We hereby clarify

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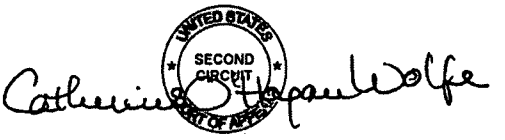
* In related filings, Appellant's name appears variably as "Hillary," "Hilary," and "Hillery." *See Best v. New York City Police Department Sex Offender Unit*, Case No. 1:20-cv-02382-WFK-LB, (E.D.N.Y.), Dkt. No. 1, Best § 2254 Petition at 1, 17, 42. We use "Hillary" here because that is the spelling used on the order at issue.

that Appellant challenged the New York criminal court's jurisdiction to prosecute him on the ground that, in his estimation, the accusatory instrument charging him with misdemeanors under New York law was defective for want of verification or an affidavit in support. Although Appellant frames his argument as a constitutional one, it relies entirely on alleged violations of New York law. As the October 26, 2021 order provided, whether a New York court erred in accepting the charging documents without an affidavit is a question of New York State law, and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). His motion therefore lacks merit.

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



E.D.N.Y. – Bklyn
20-cv-2382
Kuntz, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of October, two thousand twenty-one.

Present:

John M. Walker, Jr.,
Robert D. Sack,
Susan L. Carney,
Circuit Judges.

Hillary Best,

Petitioner-Appellant,

v. 21-1190

New York City Police Department Sex Offender Unit,

Respondent-Appellee.

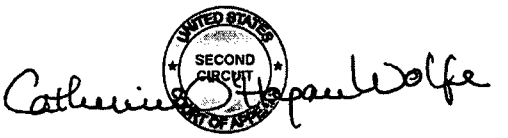
Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, and appointment of counsel. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional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

Appellant argues that the state indictment was defective. There is no federal right to an indictment in state court. *See LanFranco v. Murray*, 313 F.3d 112, 118 (2d Cir. 2002) ("[T]he Fifth Amendment's right to a grand jury indictment . . . has not been incorporated against the states."). Whether a New York court erred in in accepting the charging documents without an affidavit is a question of New York State law, and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

To the extent Best raises a due process challenge to the general sufficiency of the documents to provide notice, they were sufficient. "It is generally sufficient that the indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to

constitute the offense intended to be punished." *De Vonish v. Keane*, 19 F.3d 107, 108 (2d Cir. 1994) (per curiam) (internal citations omitted). Here, the charging documents contained the elements of the offenses and a brief factual summary of the victim's allegations; thus, they were sufficient to inform him of the charges against him. *See id.*; ROA doc. 1 at 25-27, 37-39.

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



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of November, two thousand twenty-one,

Present: John M. Walker, Jr.,
Robert D. Sack,
Susan L. Carney,
Circuit Judges.

Hillary Best,

Petitioner - Appellant,

v.

New York City Police Department Sex Offender Unit,

Respondent - Appellee.

ORDER
Docket No. 21-1190

Hillary Best filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HILLARY BEST,

Petitioner,

v.

NEW YORK CITY POLICE DEPARTMENT SEX OFFENDER UNIT,

Respondent.

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MEMORANDUM & ORDER
20-CV-2382 (WFK)(LB)

WILLIAM F. KUNTZ, II, United States District Judge:

On April 23, 2020, Petitioner Hillary Best,[1] presently residing at liberty in Queens County, filed this *pro se* petition for a writ of *habeas corpus* under 28 U.S.C. § 2254 challenging the constitutionality of his 2007 conviction in the New York Supreme Court, Queens County. Pet., ECF No. 1. By Order dated May 21, 2020, the action was transferred to this Court from the United States District Court for the Southern District of New York. ECF No. 5. By Order dated June 3, 2020, the Court explained the "in custody" standing requirement and statute of limitations applicable to § 2254 petitions, found the Petition failed to meet either requirement, and directed Petitioner to show cause by written affirmation, within thirty days of entry of the Order, why the Petition should not be dismissed because he is no longer in custody pursuant to the conviction he seeks to challenge and/or because the Petition is time-barred. ECF No. 7. The Order further stated "[i]f Petitioner fails to comply with this Order within the time allowed, the Petition shall be dismissed." *Id.* at 8.

On June 19, 2020, Petitioner filed a letter wherein he writes to request *pro bono* counsel

1 Petitioner alternates the spelling of his first name from Hillary to Hilary. *See* Petition at 1, Pl. Letter at 2.

and also asserts that (1) the reporting duties associated with his sex offender registration "subject[s him] to involuntary servitude in violation of the 13th Amendment" to the United States Constitution, and (2) 28 U.S.C. § 2244 is unconstitutional. ECF No. 8. Neither of these assertions are responsive to the Court's order to show cause. Petitioner has not otherwise responded to the Court's Order and the time for doing so has passed.

CONCLUSION

Accordingly, the Petition is dismissed for lack of jurisdiction because Petitioner was no longer "in custody" pursuant to the 2007 conviction or sentence at the time the Petition was filed on April 23, 2020. *Dhinsa v. Krueger*, 917 F.3d 70, 79 (2d Cir. 2019) ("We have characterized this statutory 'custody' requirement as 'jurisdictional,' and therefore mandatory and non-waivable.") (citing *United States v. Rutigliano*, 887 F.3d 98, 104 (2d Cir. 2018)).

The Court has reviewed Petitioner's request for the appointment of *pro bono* counsel together with his Petition and, finding the appointment of counsel is not warranted, denies his request. *Harnage v. Gerbing*, 13-CV-4598 JS, 2013 WL 5775770, at *2 (E.D.N.Y. Oct. 25, 2013) (Seybert, J.) (citing *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 635 (2d Cir. 2001) ("[C]ounsel should not be appointed in a case where the merits of the indigent's claim are thin and his chances of prevailing are therefore poor.").

The Clerk of Court is directed to mail a copy of this Order to Petitioner, *pro se*, at his address of record and note the mailing on the docket. As Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2); *Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 111–12 (2d Cir. 2000). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) any appeal from this Order would

not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal. *Coppedge v. United States*, 369 U.S. 438, 444–45 (1962).

SO ORDERED.

s/ WFK

WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: July 15, 2020
Brooklyn, New York

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