S.D.N.Y. – W.P.
18-cv-5770
Halpern, J.
McCarthy, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

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

Present:

Debra Ann Livingston,
Chief Judge,
Barrington D. Parker,
Michael H. Park,
Circuit Judges.

Atiq Weston,

Petitioner-Appellant,

v. 22-1688

Michael Capra, Michael Capra Superintendent of Sing Sing C.F.,

Respondent-Appellee.

Appellant, pro se, moves for in forma pauperis ("IFP") status and a certificate of appealability ("COA"). Upon due consideration, it is hereby ORDERED that the IFP motion is DENIED as unnecessary. Fed. R. App. P. 24(a). It is further ORDERED that a COA is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

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

2022 WL 2914506
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

ATIQ WESTON, Petitioner,

v.

MICHAEL CAPRA, Respondent.

18-CV-05770 (PMH)

Filed 07/25/2022

ORDER ADOPTING REPORT AND RECOMMENDATION

PHILIP M. HALPERN United States District Judge

***1** Atiq Weston ("Petitioner"), on May 1, 2014, after entering into a plea agreement, pled guilty to two counts of Robbery in the First Degree and, as a juvenile offender, one count of Manslaughter in the First Degree in the County Court of the State of New York, County of Orange. (Doc. 27 ¶ 17-18). Petitioner was sentenced to concurrent determinate terms of fifteen years' imprisonment to be followed by five years of supervised release for the robbery convictions and a concurrent indeterminate term of three and one-third to ten years' imprisonment for the manslaughter conviction. (Doc. 28-11 at 22-23).

Petitioner commenced the current action, a Petition for a Writ of *Habeas Corpus* under 28 U.S.C. § 2254 ("Petition"), on June 26, 2018, requesting that his guilty plea and corresponding sentences be vacated. (Doc. 2). Judge Román referred the Petition on July 10, 2018 to Magistrate Judge Judith C. McCarthy. (Doc. 8). This matter was pending before Judge Román prior to its reassignment to this Court on April 13, 2020.

On April 13, 2022, Judge McCarthy issued a Report and Recommendation ("Report"), recommending that the Petition be denied. (Doc. 65, "R&R"). Petitioner filed a timely objection to the Report ("Objection") pursuant to 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b)(2) on April 26, 2022. (Doc. 66, "Obj."). The Government responded to Petitioner's objection on June 9, 2022. (Doc. 69).

The Court, in reviewing a magistrate judge's report and recommendation, "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Parties may object to a report and recommendation "[w]ithin fourteen days after being served with a copy ...." *Id.* "A party that objects to a report and recommendation must point out the specific portions of the report and recommendation to which they object." *J.P.T. Auto., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 659 F. Supp. 2d 350, 352 (E.D.N.Y. 2009). If a party timely objects to the findings or recommendations of the magistrate judge, the court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *United States v. Male Juvenile (95-CR-01074)*, 121 F.3d 34, 38 (2d Cir. 1997) (quoting 28 U.S.C. § 636(b)(1)). "If a party fails to object to a particular portion of a report and recommendation, further review thereof is generally precluded." *Clemmons v. Lee*, No. 13-CV-04969, 2022 WL 255737, at *1 (S.D.N.Y. Jan. 27, 2022) (citing *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002)). The district court "may adopt those portions of the report to which no 'specific, written objection' is made, as long as the factual and legal bases supporting the findings and conclusions set forth in those sections are not clearly erroneous or contrary to law." *Id.* (quoting *Adams v. N.Y. State Dep't of Educ.*, 855 F. Supp. 2d 205, 206 (S.D.N.Y. 2012)). Where a party "makes only conclusory or general objections, or simply reiterates the original arguments made below, a court will review the report only for clear error." *Id.* (citing *Alaimo v. Bd. Of Educ.*, 650 F. Supp. 2d 289, 291 (S.D.N.Y. 2009)).

***2** Petitioner advances three arguments in support of his request that the Court hold a hearing with respect to his Petition: (1) that his guilty plea was not knowing and voluntary; (2) that he was denied effective assistance of counsel; and (3) prosecutorial misconduct. (Doc. 2). Petitioner, in his Objection, raises no new arguments, but "simply reiterates the original arguments made below," making only conclusory, general objections to the Report. *Clemmons*, 2022 WL 255737, at *1. Accordingly, the Report is reviewed for clear error. *See id.*

I. The Validity of the Guilty Plea

The Report correctly concludes that, despite exhaustion in state court, Petitioner's claim that his guilty plea was not knowing and voluntary is procedurally barred because Petitioner failed to preserve such claim by making appropriate motions in the Orange County Court. (R&R at 26).

Where, as here, the state court made "an adequate and independent finding of procedural default," habeas review is barred "unless the habeas petitioner can show 'cause' for the default and 'prejudice attributable thereto,' or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage of justice.' " *Harris v. Reed*, 489 U.S. 255, 262 (1989) (internal citation omitted). "A fundamental miscarriage of justice only occurs when 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.' " *Swanton v. Graham*, 07-CV-04113, 2009 WL 1406969, at *7 (E.D.N.Y. May 19, 2009) (Bianco, J.) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Petitioner argues in his Objection that this claim is not procedurally barred because "trial counsel ... raised valid objections to *the court orders*." (Obj. at 1 (emphasis added)). However, it was not the court orders to which Petitioner needed to object in order to preserve this argument. [1] Rather, Petitioner had to object to the guilty plea, through "a motion to withdraw the plea before sentencing, a post-judgment New York Criminal Procedure Law ('C.P.L.') § 440.10 motion in the trial court, or on direct appeal if the record permits." *McCormick v. Hunt*, 461 F. Supp. 2d 104, 109 (W.D.N.Y. 2006) (citing *People v. Lopez*, 525 N.E.2d 5, 6 (N.Y. 1988)). Petitioner made no such motion. Because Petitioner failed to make the appropriate motions in the trial court, he has not demonstrated cause for failing to raise this claim at the appropriate time, [2] and because this claim is not one of "actual innocence," it is procedurally barred.

Alternatively, in addition to the procedural bar, Petitioner's argument that his guilty plea was not knowing and voluntary fails on the merits. Both Judge McCarthy and the Appellate Division found that this claim was "belied by the record." (R&R at 31; *People v. Weston*, 43 N.Y.S.3d 413, 414 (App. Div. 2016)).

***3** The Court finds no clear error in Judge McCarthy's thorough and well-reasoned analysis as to Petitioner's guilty plea and, accordingly, adopts it in full.

II. Ineffective Assistance of Counsel

There is likewise no clear error in Judge McCarthy's finding that, although Petitioner successfully exhausted his ineffective assistance of counsel claims, all but one are procedurally barred. (R&R at 35). "[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). The Appellate Division found that, because Petitioner waived his right to appeal as part of his plea deal, review of Petitioner's ineffective assistance of counsel claims was precluded except to the extent it "may have affected the voluntariness of the pleas." *Weston*, 43 N.Y.S.3d at 415. Therefore, the claims unrelated to Petitioner's guilty plea were rejected on "an adequate foundation of state substantive law," and are barred from federal habeas review. *Wainwright*, 433 U.S. at 81. Petitioner has failed to show cause, prejudice, or a fundamental miscarriage of justice to permit this Court to hear these claims. (R&R at 36). Regardless, any impact of Petitioner's counsel on the voluntariness of his plea is "belied by [Petitioner's] statements during the plea proceeding." *Weston*, 43 N.Y.S.3d at 415.

The only claim that relates to Petitioner's decision to plead guilty and is not procedurally barred is Petitioner's claim that his counsel improperly advised him to waive the statute of limitations defense with regard to his manslaughter conviction as part of his plea deal. (*See* R&R at 34-35, 36-37 n.26). However, there is no error in Judge McCarthy's finding that the Appellate Division's decision with regard to this claim was not "contrary to, or an unreasonable application of, clearly established federal law." (*Id.* at 37; 28 U.S.C. § 2254(d)).

To establish an ineffective assistance of counsel claim, Petitioner must show that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). For the first element, "counsel is strongly presumed to have rendered adequate assistance ...." *Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005) (quoting *Strickland*, 466 U.S. at 690). The waiver of the statute of limitations by Petitioner was part of a plea deal that secured him a more favorable sentence and helped him avoid conviction for additional crimes. (R&R at 40). As Petitioner himself points out, he faced "a possible prison sentence of up to nearly 75 years" if he did not plead guilty. (Obj. at 6). His counsel, through the plea agreement, was able to secure a sentence of fifteen years. (R&R at 10). Coupled with Petitioner's "marginal likelihood of success at trial with respect to the two robberies," Petitioner's counsel acted reasonably in advising Petitioner to waive this defense. (*Id.* at 40-41).

*4 "The second prong focuses on prejudice to the defendant." *Swanton*, 2009 WL 1406969, at *10. As Judge McCarthy noted, "it can hardly be said that [Petitioner] would not have pled guilty but for the alleged error." (R&R at 41-42 (alteration in original) (quoting *Swanton*, 2009 WL 1406969, at *10)). Petitioner is unable to show how a different approach by his counsel would have changed the outcome in his favor. (*Id.* at 43). Furthermore, Petitioner was in no way prejudiced by waiving the statute of limitations defense. Waiving this defense helped Petitioner receive a more favorable sentence and, regardless, Petitioner's manslaughter sentence runs concurrently with his other sentences. *See Feliz v. United States*, Nos. 01-CV-05544, 00-CR-00053, 2002 WL 1964347, at *7 (S.D.N.Y. Aug. 22, 2002) ("No prejudice exists when a plea agreement lessens the severity of the sentence the defendant would face if convicted at trial.").

The Court, accordingly, finds no error in Judge McCarthy's Report as to Petitioner's ineffective assistance of counsel claims and adopts her analysis in full.

III. Prosecutorial Misconduct Claim

Finally, there is no error in Judge McCarthy's finding that, although deemed exhausted, Petitioner's prosecutorial misconduct claim relating to "Molina Discovery" is procedurally barred because Petitioner's argument was not made in state court.[3] Because Petitioner did not cite this evidence in support of his prosecutorial misconduct claim in state court, he cannot rely on it in this Petition. *Bossett*, 41 F.3d at 828-29. Petitioner contends that he did not use this evidence in state court because it was not available to him until after his sentencing. (Obj. at 18). But the Molina Discovery was available to Petitioner when he filed N.Y. Crim. Proc. Law § 440.10 Motions in 2015 and 2017. (R&R at 45). Petitioner failed to cite this evidence in either of his § 440.10 motions. (*Id.*). Therefore, Petitioner is barred from relying on the Molina Discovery in this Petition. *Bossett*, 41 F.3d at 828. As with his other claims, Petitioner cannot show cause and prejudice or a fundamental miscarriage of justice to overcome the procedural bar. (R&R at 46).

Moreover, Petitioner's claim concerning prosecutorial misconduct and the Molina Discovery relates only to the grand jury proceedings in his case and not the validity of his guilty plea. (R&R at 46). "[A]lleged defects in a state grand jury proceeding generally cannot provide grounds for habeas relief." *Swanton*, 2009 WL 1406969, at *11. And "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). As discussed *supra*, Petitioner entered a guilty plea knowingly and voluntarily. Consequently, Petitioner is also barred from obtaining habeas relief based on alleged prosecutorial misconduct. *Tollett*, 411 U.S. at 268.

There is also no clear error in the Report's finding that, in the alternative, Petitioner's prosecutorial misconduct claim fails on the merits. Petitioner claims that Molina's "entire grand jury testimony was false and coached by the district attorney" based on a January 31, 2015 affidavit that Molina submitted. (Obj. at 19). "To establish prosecutorial misconduct premised upon the presentation of perjury, [petitioner] must first establish that perjury was committed .... [and] must also establish that the prosecution knew, or should have known, of the perjury." *Gantt v. Martuscello*, No. 12-CV-00657, 2014 WL 112359, at *14 (N.D.N.Y. Jan. 10, 2014) (first alteration in original; citation omitted; internal quotation marks omitted). Molina does not admit in her affidavit to providing false grand jury testimony and, even if she did, Petitioner cannot demonstrate how it is material to his guilty plea. (*See* Doc. 28-6 at 44-48; *see also* R&R at 48). Moreover, recantations such as that alleged here are generally "looked upon with the utmost suspicion." *Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988) (quoting *United States ex rel Sostre v. Festa*, 513 F.2d 1313, 1318 (2d Cir. 1975)).

*5 The Court, accordingly, finds no error in Judge McCarthy's Report as to Petitioner's prosecutorial misconduct claim and adopts her analysis in full.

Petitioner's Objection to the Report is overruled, and the Court adopts the Report in full. The Petition is, accordingly, DENIED. Because the petition makes no substantial showing of a denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253. The Clerk of the Court is respectfully directed to mail a copy of this Order to Petitioner and close this case.

SO ORDERED:

All Citations

Slip Copy, 2022 WL 2914506

Footnotes

1 Before trial, the Orange County Court imposed protective orders, temporarily barring the Petitioner from accessing certain evidence; imposed lockdown orders, separating Petitioner from other inmates at the Orange County Jail; and restricted Petitioner's visitation and communication rights. (Doc. 27 ¶¶ 11-12). The lockdown orders were implemented because there was credible evidence Petitioner had attempted to organize the killing of a prosecution witness in connection to his robbery charges. (*Id.* ¶ 12).

2 Petitioner further contends that the cause of this procedural default was "the result of ineffective assistance of counsel." (Obj. at 2) (quoting *Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994)). As more fully discussed *infra*, the Report correctly concluded that Petitioner's counsel was not ineffective, but "advocated doggedly and strategically for Petitioner's interests." (R&R at 39).

3 "Molina Discovery" includes a cooperation agreement, plea minutes, and recordings of the jail phone calls of a cooperating witness—here Deanna Molina ("Molina"). (Doc. 27 ¶ 10). It also includes the witness's grand jury testimony and a January 31, 2015 affidavit filed by Molina asserting that her previous grand jury testimony was "coached." (R&R at 4, 14).

End of Document

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ATIQ WESTON,

Petitioner,

-against-

MICHAEL CAPRA,

Respondent.

----------X

REPORT AND RECOMMENDATION

18 Civ. 05770 (PMH)(JCM)

To the Honorable Philip M. Halpern, United States District Judge:

Petitioner Atiq Weston ("Petitioner"), filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on June 26, 2018 ("Petition"). (Docket No. 2). On December 7, 2018, Respondent Michael Capra ("Respondent") opposed the Petition. (Docket Nos. 27-28). Petitioner replied to Respondent's opposition on January 2, 2019. (Docket Nos. 34, 37-38). For the reasons set forth below, I respectfully recommend that the Petition be denied in its entirety.

I. BACKGROUND

A. The Crimes, Indictments, Plea Negotiations, and Other Pre-Trial Proceedings

Petitioner's convictions arise out of four incidents that occurred in 2008, 2012 and 2014 in Orange County, New York.

On April 30, 2008, Robert Kwiatkowski was stabbed and killed while walking in the area of Wickham Avenue in the City of Middletown ("Middletown"). (Docket No. 27 ¶ 2). On November 10, 2011, Petitioner was charged in the County Court, Orange County with Murder in the Second Degree; Manslaughter in the First Degree; and Criminal Possession of a Weapon in the Fourth Degree, in connection with the killing (the "Kwiatkowski Killing"). (Docket No. 28-1 at 2). The next month, the indictment was dismissed on the People's motion, based on their

determination that a witness who had implicated Petitioner lied in the grand jury proceeding. (Docket No. 27 ¶ 2). The investigation of the Kwiatkowski Killing was left open. (*Id.*).

About four years later, at approximately 1:35 a.m. on May 6, 2012, Petitioner's then-partner and co-defendant, Deanna Molina ("Molina"), asked a woman named Maria Ramirez ("Ramirez") to pick her up on Rowan Street in Middletown. (*Id.* ¶ 3). When Ramirez arrived in her vehicle, Petitioner approached the driver's side window with a loaded pistol and demanded money. (*Id.*). When Ramirez refused, Petitioner struck her face with the butt of the pistol, grabbed her purse, and fled, firing a shot in the process. (*Id.*).

Weeks later, between 11:15 p.m. on May 21, 2012 and just after midnight on May 22, 2012, Molina, a dancer at a strip club, offered to go home with a customer named Walter Klein ("Klein"). (*Id.* ¶ 4). In return, Molina convinced Klein to give Petitioner a ride and drop Petitioner off on the way. (*Id.*). However, Petitioner and Molina gave Klein false directions, leading him to a secluded area in Middletown. (*Id.*). As Klein drove, Petitioner fired a pistol inside the vehicle and pistol-whipped Klein in the face, breaking his jaw. (*Id.*). Molina offered to drive Klein to the hospital, but instead, drove to a dead-end street. (*Id.*). Petitioner then dragged Klein out of the car and slammed his head against a boulder on the side of the road. (*Id.*). When Klein attempted to stand up, Petitioner ran into him with the car and drove away with Molina in the passenger's seat. (*Id.*). In addition to his fractured jaw, Klein sustained injuries to his face, head and ribs, which required reconstructive surgery and the insertion of a metal plate to protect his skull. (*Id.*).

When Molina was arrested for the second robbery on May 23, 2012, she admitted her involvement[1] and identified Petitioner. (*Id.* ¶ 5). In turn, Petitioner was arrested. (*Id.*). Pursuant

[1] In connection with the robbery, pursuant to a cooperation agreement with the Orange County District Attorney's Office, Molina pled guilty to one count of Robbery in the First Degree. (Docket No. 27 ¶ 6 n.1).

to a search warrant executed at the residence where he was found, police recovered a black sweatshirt with blood on it that matched Klein's blood found in the car. (*Id.*). On August 15, 2012, a grand jury indicted Petitioner by Orange County Indictment 2012-441, charging him with Attempted Murder in the First Degree; Attempted Murder in the Second Degree; two counts of Robbery in the First Degree; three counts of Robbery in the Second Degree; four counts of Assault in the First Degree; nine counts of Assault in the Second Degree; Criminal Possession of a Weapon in the Second Degree; and Criminal Possession of a Weapon in the Third Degree. (*Id.*; *see also* Docket No. 28-1 at 7). Petitioner was arraigned in the County Court, Orange County on August 17, 2012. (Docket No. 27 ¶ 6).

On November 5, 2012, the People moved *ex parte* pursuant to N.Y. Crim. Proc. Law § 240.50 for a protective order authorizing delayed disclosure of certain *Rosario* and *Giglio* material pertaining to a cooperating witness, until Molina's public testimony was scheduled (the "First Protective Order"). (Docket No. 27 ¶¶ 7-8; *see also* Docket No. 28-1 at 81). On November 19, 2012, the County Court granted the People's application and directed that the First Protective Order and the application be sealed. (Docket No. 27 ¶ 7; *see also* Docket No. 28-2 at 2).[2] Petitioner's counsel moved to unseal Molina's file twice, on January 22, 2013 and May 4, 2013, to no avail. (Docket No. 27 ¶ 8; *see also* Docket No. 28-2 at 3-9, 16-37). Petitioner also filed two applications, dated February 28, 2013 and March 7, 2013, for his attorney to be reassigned after disclosing certain confidential information. (Docket No. 27 ¶ 8; *see also* Docket No. 28-2 at 10-11). The Court denied those applications in a decision and order on April 1, 2013. (Docket No. 28-2 at 14).

[2] Courtesy copies of the unsealed versions of these documents have been provided to the Court, and to Petitioner in redacted form. (Docket Nos. 27 ¶ 7 n.2; 31). They were also eventually produced to the defense in the course of Petitioner's state criminal action. (Docket No. 27 ¶ 7 n.2).

Meanwhile, the People obtained a superseding indictment charging Petitioner for the May 6, 2012 robbery in addition to the May 21, 2012 robbery. (Docket No. 27 ¶ 9). On August 23, 2013, by Orange County Indictment 2013-494, Petitioner was charged with Attempted Murder in the First Degree; Attempted Murder in the Second Degree; five counts of Robbery in the First Degree; five counts of Robbery in the Second Degree; six counts of Assault in the First Degree; twelve counts of Assault in the Second Degree; two counts of Criminal Possession of a Weapon in the second degree; and Criminal Possession of a weapon in the third degree. (Docket No. 28-2 at 38). During Petitioner's arraignment on this superseding indictment on August 30, 2013, the trial court continued defense counsel's assignment. (Docket No. 27 ¶ 9). In addition, the People withdrew the First Protective Order and agreed to provide Petitioner's counsel the discovery they had withheld pursuant thereto. (Docket No. 27 ¶ 9; August 30, 2013 Transcript at 4).[3] The discovery included copies of Molina's grand jury testimony, her cooperation agreement, her plea minutes, and certain recordings of her jail phone calls (the "Molina Discovery"). (Docket No. 27 ¶ 10; *see also* Docket No. 28-2 at 51). Although the People produced the discovery to defense counsel on September 16, 2013, during a court appearance on September 18, 2013, they asked that Petitioner be barred from maintaining personal copies of the Molina Discovery while he remained incarcerated at Orange County Jail. (Docket No. 27 ¶ 10; *see also* September 18, 2013 Transcript at 4). Defense counsel objected to this application. (September 18, 2013 Transcript at 5). The trial court permitted Petitioner to maintain only a personal copy of the superseding indictment, and directed that the Molina Discovery remain in defense counsel's possession with the caveat that Petitioner could review it in his presence. (September 18, 2013 Transcript at 7).

[3] Copies of the transcripts of the state court proceedings were provided to this Court and served on Petitioner. (Docket No. 27 at 13).

On September 23, 2013, Petitioner again moved for new counsel, (Docket No. 28-3 at 14), which the trial court rejected on November 14, 2013, (November 14, 2013 Transcript at 6). At that hearing, Petitioner's counsel renewed his objection to the September 18, 2013 order barring him from providing copies of the Molina Discovery to Petitioner. (*Id.* at 3-4). The trial court denied that application as well. (*Id.* at 5).

Over the next few months, law enforcement discovered that Alyssa Thompson ("Thompson") tried to get someone to kill Kadejah Zwart ("Zwart"),[4] a witness against Petitioner in the two robbery cases. (Docket No. 27 ¶ 12). Law enforcement connected Petitioner to Thompson, and to a conspiracy to kill Zwart. (*Id.*). At another hearing on December 18, 2013, the trial court signed a new protective order (the "Second Protective Order") permitting the People to delay disclosing additional *Rosario* material until the day before the testimony of certain witnesses—namely, Kadejah Zwart and her mother, Maria Zwart—and directing that defense counsel not share or discuss with Petitioner certain other information and records pertaining to those witnesses that had previously been provided to the defense. (Docket No. 27 ¶ 11).[5]

Thompson was arrested on January 2, 2014. (Docket No. 27 ¶ 11). The next day, the People moved *ex parte* for a lockdown order, which the trial court granted on January 3, 2014 (the "Lockdown Order"). (*Id.*).[6] The Lockdown Order required that Petitioner be separated from all other inmates at Orange County Jail at all times; that Petitioner be denied visitation as well as

[4] Zwart has a child in common with Petitioner. (Docket No. 27-3 at 30).

[5] Copies of this application and order were filed under seal and provided to Petitioner in redacted form. (Docket No. 27 ¶ 12 n.3).

[6] Copies of the application were filed under seal, and provided to Petitioner in redacted form. (Docket Nos. 27 ¶ 12 n.4; 31).

telephone and other electronic communication with anyone other than defense counsel; and that Petitioner's incoming and outgoing mail be inspected to ensure that his forwarded mail exclude any correspondence related to the alleged conspiracy. (Docket No. 28-3 at 25). The order explained that Petitioner's "isolation from other prisoners and outside visitors [wa]s reasonably related to a legitimate governmental purpose to protect the safety of individuals, including witnesses in the prosecution of [Petitioner's] case . . . , and to prevent the commission of an ongoing crime within the Orange County Correctional Facility." (*Id.*). According to Petitioner, as a result of this order, he was placed in solitary confinement for twenty-three hours per day. (Docket No. 2 at 37).

At a conference on January 6, 2014, defense counsel objected to the Lockdown Order on the grounds that it unfairly restricted Petitioner's ability to prepare for trial and access the law library. (January 6, 2014 Transcript at 3-6). The court ordered that Petitioner be provided with a copy of the Lockdown Order, but otherwise overruled the objection. (*Id.* at 6). At the People's request, the court also adjourned Petitioner's trial—which was originally scheduled for the next day—with the time chargeable to the People. (*Id.* at 2-3). By letter two days later, Petitioner's counsel reiterated his objection to the Lockdown Order and argued that the Lockdown Order and Second Protective Order prevented him from effectively representing Petitioner, and prevented Petitioner from assisting in his own defense. (Docket No. 28-3 at 27-29). The letter explained:

> The directives of the Court have placed me in a precarious position ethically wherein I have evidence which is directly relevant to my client's case yet I am forbidden from disclosing even that I have the evidence. Given the close proximity in time to Mr. Weston's trial, these Orders are unduly burdensome on the defendant and it is my position that he is rendered incapable of assisting in his own defense.
>
> . . .
>
> On the eve of trial, Atiq Weston is denied the right to communicate with friends and, more importantly, family members for guidance on decisions that he is making regarding major decisions in his life (i.e. going to trial or pleading guilty, etc.).

. . .

> Further, . . . [due to the Second Protective Order], much of the material in my possession (which the People will likely use against my client) is not even something that I may discuss with my client. When asked about these materials specifically by my client I have been put in a position in which I must, for lack of a better word, lie to him and inform him that I am not in possession of these documents at this time.
>
> Given the time constraints on when I may disclose this information to my client, I feel I am likely unable to effectively defend my client as there will be little, if any, time to collect impeachment materials with respect to the[] witness[] [material covered by the Second Protective Order] or locate and interview possible rebuttal witnesses.

(*Id.* at 28-29). Defense counsel further moved to modify the trial court's Protective Orders to permit visits by family members on January 29, 2014. (January 29, 2014 Transcript at 6-7). The court denied the motion. (*Id.* at 8).

Despite the court's initial refusal to modify the above orders, an amended lockdown order, dated January 10, 2014 (the "Second Lockdown Order"), "permitted" Petitioner to use the jail's law library "as long as he [wa]s accompanied by an officer" who monitored Petitioner's behavior to ensure compliance with the same requirements as in the original Lockdown Order.[7] (Docket No. 63-1). Furthermore, on February 11, 2014, on the People's motion, the court issued another protective order superseding the First and Second Protective Orders, and relaxing some additional restrictions (the "Third Protective Order"). (Docket Nos. 63-2; 63-3). The Third Protective Order required that "all discovery materials, *Rosario* materials, and *Giglio* materials, and any and all other materials previously provided" and provided in the future be made available to Petitioner solely through his counsel. (Docket No. 63-2). Although the order precluded Petitioner, his family and associates from maintaining personal copies of these

[7] The Second Lockdown Order also mandated that with respect to Petitioner's telephone usage, "arrangements be made to ensure that any person called by [Petitioner] [wa]s in fact his defense attorney." (Docket No. 63-1).

documents, it no longer restricted Petitioner from viewing the *Rosario* materials pertaining to the witnesses addressed by the previous Protective Orders. (*See id.*). Moreover, it did not require counsel to withhold any information regarding the alleged conspiracy or threats. (*See id.*).

Meanwhile, around the same time, a grand jury returned an indictment implicating Petitioner in the alleged conspiracy to kill Zwart. (Docket No. 27 ¶ 14). On January 28, 2014, by Orange County Indictment 2014-100, Petitioner was charged with two counts of Conspiracy in the Second Degree and two counts of Criminal Solicitation in the Second Degree.[8] (Docket No. 28-3 at 30). The following day, Petitioner was arraigned and the People moved to consolidate Indictments 2013-494 and 2014-100 for trial, (Docket No. 28-3 at 41), which Petitioner's counsel opposed on March 11, 2014, (*id.* at 47). (*See generally* January 29, 2014 Transcript). The trial court granted the motion in a decision and order dated April 2, 2014. (Docket No. 28-3 at 50).

On April 16, 2014, after obtaining evidence that Petitioner had further attempted to threaten and tamper with witnesses under the pending indictments, the People obtained[9] an additional lockdown order (the "Third Lockdown Order"). (Docket Nos. 27 ¶ 16; 28-4 at 17). The Third Lockdown Order required, in part, that Petitioner be "denied incoming and outgoing mail" except for legal mail "as [Petitioner] ha[d] surreptitiously attempted to send outgoing mail while using another inmate's identity;" and that Petitioner directly hand deliver all outgoing legal mail to a Correction Officer, rather than depositing mail into a mailbox, basket, slot or other receptacle. (Docket No. 28-4 at 17-18). On April 22, 2014, the court issued a further order that Petitioner remain in "lockdown and that" the previous Lockdown Orders be modified so that

[8] Thompson was charged under the same indictment, and pled guilty to one count of Criminal Solicitation in the Second Degree on May 13, 2014. (Docket No. 27 ¶ 14 n.5).

[9] The People's *ex parte* application is filed under seal and was provided to Petitioner in redacted form. (Docket Nos. 27 ¶ 16 n.6; 31).

"[Petitioner] . . . be permitted to conduct legal counsel visits with his attorney . . . in the Parole Room, which are individual rooms surrounded by glass and locked doors, though there may be other Inmates in the adjacent rooms similarly situated, so long as there is no contact between [Petitioner], and any other inmate at the Orange County Jail, at a time agreed upon by [his attorney], and any agent of the Orange County Jail."[10] (Docket No. 28-6 at 35).

In April 2014, Petitioner's counsel contacted the prosecution and offered to meet with members of the District Attorney's Office to discuss a negotiated plea agreement that would resolve the still-open investigation of the Kwiatkowski Killing in 2008. (Docket No. 27 ¶ 17). At a meeting on April 29, 2014, Petitioner signed a sworn statement—in the presence of in his counsel—admitting to stabbing Kwiatkowski. (*Id.*; *see also* Docket No. 28-4 at 19). As part of the plea agreement, Petitioner agreed to waive the statute of limitations and plead guilty to Manslaughter in the First Degree as a juvenile offender for the killing. (Docket No. 27 ¶ 17). The next day, Petitioner was charged with Manslaughter in the First Degree via a felony complaint in the City Court, County of Middletown. (Docket No. 28-4 at 20). Further to the plea agreement, on May 1, 2014, Petitioner waived prosecution by indictment and consented to prosecution by Superior Court Information 2014-297 in the County Court, County of Orange. (Docket Nos. 27 ¶ 18; 28-4 at 21; *see also* May 1, 2014 Transcript at 10-14).

B. The Plea Proceeding

On May 1, 2014, Petitioner pled guilty to two counts of Robbery in the First Degree in satisfaction of Indictment 2013-494, and to Manslaughter in the First Degree in satisfaction of Superior Court Information 2014-297, before the Honorable Robert Freehill in the County Court, County of Orange. (Docket No. 27 ¶ 18; *see also* May 1, 2014 Transcript). The plea also

[10] Petitioner alleges that the glass room was devoid of "protection from conversations being overheard and all the conversations between the client and attorney . . . [could] be observed by a law enforcement officer." (Docket No. 2 at 37-38).

covered the charges filed under Indictment 2014-100. (*See* Docket No. 27 ¶ 18; May 1, 2014 Transcript at 3, 14, 46). In exchange for the plea, the People agreed to a sentence of a determinate term of fifteen years followed by five years of post-release supervision for the two counts of Robbery in the First Degree, running concurrently with a three and one-third to ten-year sentence as a juvenile offender for the Manslaughter charge. (May 1, 2014 Transcript at 3-4). The plea was conditioned on (1) waiver of the statute of limitations on the Manslaughter charge; and (2) waiver of Petitioner's right to appeal. (*Id.*).

After the People put these terms on the record, the trial court requested argument regarding the propriety of the plea and concurrent sentencing, in light of the fact that Kwiatkowski was killed, and a concurrent sentence with the robberies may "mak[e] [his death] more or less an asterisk." (*Id.* at 5). The People responded that although they did not wish to diminish the importance of Kwiatkowski's death, the Kwiatkowski case had been pending since 2011, and "ha[d] some fundamental errors in it that c[ould] never ever be corrected." (*Id.* at 6-8). Therefore, the plea was the "best disposition" they could hope for. (*Id.* at 6-9). The court agreed to "begrudgingly . . . go along with the sentences." (*Id.* at 9).

The court then explained the terms of the plea and confirmed that Petitioner understood the ramifications of his waiver of indictment with respect to Superior Court Information 2014-297. (*Id.* at 10-19). Petitioner affirmed that the waiver of indictment was not precipitated by threats or promises, and that he understood he was forfeiting his trial and appellate rights. (*Id.* at 13-18).

Petitioner told the court that he had sufficient time to discuss with his counsel, Peter W. Green, Esq., the elements of the three offenses to which he would plead guilty, as well as any potential defenses thereto. (*Id.* at 1, 14-15, 33). He also stated that he was satisfied with Mr. Green's legal advice and representation "in these several cases." (*Id.* at 15). Petitioner denied

having any mental or physical conditions, or consuming alcohol or any drugs, that could affect his ability to knowingly participate in the plea proceedings. (*Id.* at 16). He affirmed that his willingness to plead guilty and waive any statute of limitations defense was not coerced, threatened, intimidated or forced, nor was it induced by "different promises or representations" than those placed on the record. (*Id.* at 16-17, 34). Petitioner executed appellate waivers for all of the above indictments, confirmed that he had reviewed them with Mr. Green and understood their contents, and declined to ask any questions that "Mr. Green could not answer to [his] satisfaction." (*Id.* at 31-32, 45). He reiterated that his appellate waivers were voluntary and not compelled by any promises or threats. (*Id.* at 32, 45).

Petitioner further concurred that (1) "on or about the 21st day of May 2012, . . . [he] did forcibly steal property from Walter Klein, and in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime . . . did cause serious injury to a person, to wit, Walter Klein who was not a participant in this crime;" (2) "on or about the 6th day of May, 2012 . . . [he] did forcibly steal property from Maria Ramirez, and in the course of the commission of the crime or immediate flight therefrom, [he] or another participant in the crime did cause serious physical injury to a person, to wit, Maria Ramirez, who was not a participant in the crime;" and (3) "as a juvenile offender . . . on or about the 30th day of April, 2008 . . . with attempt to cause serious physical injury to another person, to wit, Robert Kwiatkowski, [he] did cause the death of such person." (*Id.* at 20-22, 32).

At the conclusion of the plea colloquy, Mr. Green requested that, in light of Petitioner's plea and acceptance of responsibility, the Lockdown Orders "be relaxed" and that he be permitted visitation with his mother. (*Id.* at 47). The People agreed to permit such visitation with "no contact" and "in the glass house." (*Id.* at 47-48). The court granted this visitation "under the terms as stated by the People." (*Id.* at 48; *see also* Docket No. 28-4 at 27).

C. The Sentencing Proceeding

On June 6, 2014, Judge Freehill sentenced Petitioner as a second violent felony offender to concurrent determinate terms of fifteen years' imprisonment and five-year terms of post-release supervision for the robberies, and as a juvenile offender to a concurrent indeterminate term of three[11] and one-third to ten years' imprisonment for the manslaughter. (Docket No. 27 ¶ 18; June 6, 2014 Transcript at 9).

At sentencing, the People reiterated the "senseless" violence of these crimes and the pre-planned nature of the robberies, explaining that Molina admitted to assisting Petitioner in the robberies in order "to be the best girlfriend." (June 6, 2014 Transcript at 7-14). Similarly, although "the level of [Petitioner]'s involvement [in the conspiracy] [wa]s something up for debate," Thompson admitted that she "took it upon herself to hire someone to" kill Zwart due to Zwart's importance as a witness against Petitioner, and Petitioner's desire to "eliminate[]" her. (*Id.* at 13-15). Indeed, the recommended sentence was "the best [the People] c[ould] do" because Petitioner "ha[d] an ability" to manipulate young women into following his orders and helping him "hide evidence of his crimes." (*See id.* at 13-15). The People also noted that due to the evidentiary issues with the Kwiatkowski case, this disposition was "the only option" to resolve that investigation and bring closure to the victims. (*See id.* at 8-9). Petitioner declined to address the court. (*Id.* at 18).

During sentencing, the court stated that it would accept this disposition, although it wished Petitioner could be sentenced consecutively, because Petitioner was "the most dangerous individual that . . . ever . . . had come before [it]," and because Petitioner was "at the apex of [a] list" of several homicide cases. (*Id.* at 18-22). At the People's request, the court also issued three

[11] Respondent's papers assert that Petitioner received one and one-third to ten years as a juvenile offender, but that appears to be a typographical error. (Docket No. 27 ¶ 18).

orders of protection against Petitioner for Klein as well as Kadiesha and Maria Zwart.[12] (*Id.* at 23-26). In addition, at Mr. Green's request, the court permitted Petitioner to maintain personal copies of the documents that were previously restricted from his possession. (*Id.* at 27-30). However, it declined to permit Petitioner to leave solitary confinement or lift any of the other restrictions. (*Id.* at 30).

D. Direct Appeal of Conviction

Petitioner timely filed notice of appeal. (Docket No. 27 ¶ 19). Through counsel,[13] Petitioner filed an appellate brief on October 15, 2015 to the New York State Appellate Division for the Second Department ("Appellate Division") arguing that (1) the trial court's Protective and Lockdown Orders denied Petitioner due process and interfered with his ability to communicate with counsel as well as assist in his own defense; and (2) he was denied effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). (Docket No. 28-4 at 28-87). The People responded on December 14, 2015. (Docket No. 28-5 at 2-34). On January 11, 2016, the Appellate Division granted Petitioner leave to file a *pro se* supplemental brief. (Docket No. 28-5 at 35). In that submission, dated February 12, 2016, Petitioner further argued that his guilty plea was not knowing or voluntary because the trial court also denied his motions to change counsel, and the same restrictive orders interfered with Petitioner's ability to review key documents and communicate with counsel. (*Id.* at 36-58). The People responded on April 20, 2016. (*Id.* at 59-72).

[12] On September 21, 2020, this Court received a letter from Petitioner indicating that Maria Zwart requested removal of the protective order. (Docket No. 54). There is no indication whether the trial court granted the request.

[13] Petitioner's counsel on appeal was Michele Marte-Indzonka. (Docket No. 28-4 at 71).

E. First Motion to Vacate Judgment

On July 2, 2015, while his direct appeal was pending, Petitioner moved to vacate the judgment pursuant to N.Y. Crim. Proc. Law § 440.10, requesting relief on the same grounds listed above ("First 440.10 Motion"). (Docket No. 28-6 at 2-48). Petitioner further asserted that these actions constituted a "concerted effort" by the trial court, trial counsel, and the prosecution to obtain a guilty plea; requested that Judge Freehill disqualify himself; and claimed that the People engaged in prosecutorial misconduct by presenting false testimony to the grand jury. (*See id.*). Petitioner attached an affidavit from Molina, dated January 31, 2015, asserting that Assistant District Attorney Karen Edelman Reyes ("ADA Reyes"), who prosecuted Molina and Petitioner, used the threat of a higher sentence as well as food, cigarettes, free housing and money to coerce her to cooperate in Petitioner's case and testify falsely before a grand jury. (*See id.* at 44-48). Molina also stated that ADA Reyes used "false statement[s]" about Petitioner and his relationship with his new partner to pressure Molina to incriminate him. (*See id.* at 45-47). Although Molina alleged that ADA Reyes "coached" her grand jury testimony and became angry if she "sa[id] the wrong things," she did not specify what was untrue about her testimony. (*See id.*).

The People opposed the motion on September 8, 2015, (*id.* at 49-56), and Petitioner replied on September 22, 2015, (*id.* at 57-62). The County Court denied the First 440.10 Motion on December 16, 2015, concluding that Petitioner could not raise his record-based arguments via N.Y. Crim. Proc. Law § 440, and in any event, his claims were meritless. (*Id.* at 63-67). On July 22, 2016, the Appellate Division denied Petitioner's motion for leave to appeal. (Docket No. 28-7 at 2-90).

F. Decision on Direct Appeal

On December 7, 2016, the Appellate Division affirmed Petitioner's judgments of conviction. *See People v. Weston*, 43 N.Y.S.3d 413 (2d Dep't 2016). The Appellate Division found that Petitioner's claims regarding the restrictive nature of the Protective and Lockdown Orders were unpreserved for appellate review, and in any event, belied by the record. *See id.* at 414. Furthermore, his waiver of the right to appeal and guilty plea precluded appellate review of his ineffective assistance claims, except to the extent it was relevant to the voluntariness of his plea or counsel's assistance during the plea bargaining process. *See id.* at 415. The Appellate Division concluded that Petitioner's pleas were knowing and voluntary. *See id.* Petitioner requested leave to appeal on January 26, 2017, (Docket No. 28-8 at 14), which the Court of Appeals denied on June 8, 2017. *People v. Weston*, 29 N.Y.3d 1088 (2017).

G. Second Motion to Vacate Judgment

On August 2, 2017, Petitioner filed another motion to vacate the judgment pursuant to N.Y. Crim. Proc. Law § 440.10 ("Second 440 Motion"). (Docket No. 28-8 at 22-80). Petitioner recycled many of the arguments raised in the First 440 Motion. He asserted that these claims were not record-based, and that the grand jury proceeding was defective because Molina had recanted her testimony. (*Id.* at 22-56). The People opposed the Second 440 Motion on September 13, 2017, (*id.* at 81-87), and Petitioner replied on September 27, 2017, (*id.* at 88-93). In a decision dated October 12, 2017, the trial court denied the motion, finding that the majority of Petitioner's arguments were raised in the First 440 Motion. (*Id.* at 94-95). The court also concluded that Molina's alleged recantation "d[id] not destroy the basis of the conviction," in light of the voluntary nature of Petitioner's plea, the wealth of other evidence of Petitioner's guilt, and the fact that recantations are generally unreliable. (*Id.* at 95-96).

Petitioner requested leave to appeal to the Appellate Division on October 23, 2017, (Docket No. 28-9 at 2-93), which the People opposed on December 19, 2017, (*id.* at 94-99). The Appellate Division denied leave on May 2, 2018. (*Id.* at 100).

H. Federal Habeas Corpus Proceedings

Petitioner filed the instant Petition on June 26, 2018, raising the following grounds for relief: (1) Petitioner's guilty plea was not knowing and voluntary; (2) Petitioner received ineffective assistance of counsel; and (3) the People engaged in prosecutorial misconduct, rendering the grand jury proceeding defective. (Docket No. 2). Respondent opposed the Petition on December 7, 2018. (Docket Nos. 27-28). Petitioner replied on January 2, 2019. (Docket Nos. 34, 37-38).

On March 22, 2022, the Court ordered Respondent to provide copies of the January 10 and February 11 Lockdown and Protective Orders, as they were not included in the records originally provided. (Docket No. 62). Respondent complied and also filed a copy of the *ex parte* application for the February 11 order. (Docket Nos. 63–63-3). In response, on March 30, 2022, Petitioner asserted that he had never been provided copies of these documents and requested that Respondent file certain laboratory documents referenced in the application for the Court's consideration. (Docket No. 64 at 1-3). Petitioner also argued that his trial counsel's unauthorized disclosure of certain information mentioned in the application further supports his ineffective assistance claim. (*See id.* at 3).

II. APPLICABLE LAW

"The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"). *Harrington v. Richter*, 562 U.S. 86, 97 (2011). "Before a federal district court may review the merits of a state criminal judgment in a habeas corpus

action, the court must first determine whether the petitioner has complied with the procedural requirements set forth in 28 U.S.C. §§ 2244 and 2254." *Visich v. Walsh*, No. 10 Civ. 4160 (ER)(PED), 2013 WL 3388953, at *9 (S.D.N.Y. July 3, 2013).[14] The procedural and substantive standards are summarized below.

A. Exhaustion as a Procedural Bar

A habeas petition may not be granted unless the petitioner has exhausted his claims in state court. *See* 28 U.S.C. § 2254(b). As the statute prescribes:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or
> >
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
> >
> > . . .
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(b)–(c).

Exhaustion requires a prisoner to have "fairly presented to an appropriate state court the same federal constitutional claim that he now urges upon the federal courts." *Turner v. Artuz*, 262 F.3d 118, 123 (2d Cir. 2001) (internal quotations omitted). If a petitioner "cites to specific provisions of the U.S. Constitution in his state court brief, the petitioner has fairly presented his constitutional claim to the state court." *Davis v. Strack*, 270 F.3d 111, 122 (2d Cir. 2001); *see*

[14] If Petitioner does not have access to cases cited herein that are available only by electronic database, then he may request copies from Respondent's counsel. *See* Local Civ. R. 7.2 ("Upon request, counsel shall provide the pro se litigant with copies of such unpublished cases and other authorities as are cited in a decision of the Court and were not previously cited by any party.").

also Reid v. Senkowski, 961 F.2d 374, 376 (2d Cir. 1992) (even "a minimal reference to the Fourteenth Amendment" presents a federal constitutional claim to the state courts). A petitioner may fairly present his claim even without citing to the U.S. Constitution, by, *inter alia*: "(a) [relying] on pertinent federal cases employing constitutional analysis, (b) [relying] on state cases employing constitutional analysis in like fact situations, (c) [asserting] . . . [a] claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) [alleging] . . . a pattern of facts that is well within the mainstream of constitutional litigation." *Daye v. Attorney Gen. of State of N.Y.*, 696 F.2d 186, 194 (2d Cir. 1982). Fair presentation includes petitioning for discretionary review in the state's highest appellate court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 839–40 (1999) ("[A] state prisoner must present his claims to a state supreme court in a petition for discretionary review in order to satisfy the exhaustion requirement[.]").

However, "a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997) (internal quotations omitted). In such cases, although the claim is technically unexhausted, the district court may deem the claim to be exhausted but procedurally barred from habeas review. *See id.* at 140 ("[A] claim is procedurally defaulted for the purposes of federal habeas review where '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.'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 (1991)).

Under New York law, defendants are permitted only one direct appeal. *See Dasney v. People of the State of New York*, No. 15 Civ. 5734 (RJS), 2017 WL 253488, at *5 (S.D.N.Y. Jan.

19, 2017) (citing N.Y. Ct. App. R. § 500.20);[15] *see also Roa v. Portuondo*, 548 F. Supp. 2d 56, 78 (S.D.N.Y. 2008) ("Any attempt to raise these claims at this stage as part of a direct appeal would be rejected because a criminal defendant is entitled to only one direct appeal and one application for leave to appeal to the Court of Appeals."). Petitioners must raise record-based claims by direct appeal rather than by a collateral motion in state court. *See, e.g.*, *O'Kane v. Kirkpatrick*, No. 09 Civ. 05167 (HB)(THK), 2011 WL 3809945, at *7 (S.D.N.Y. Feb. 15, 2011) ("[A]ll claims that are record–based must be raised in a direct appeal . . . . It is only when a defendant's claim hinges upon facts outside the trial record, that he may collaterally attack his conviction by bringing a claim under CPL § 440.10."), *report and recommendation adopted*, 2011 WL 3918158 (S.D.N.Y. Aug. 25, 2011); *Lowman v. New York*, No. 09 Civ. 0058T, 2011 WL 90996, at *9 (W.D.N.Y. Jan. 11, 2011) ("Collateral review of this claim—by way of another CPL § 440 motion—is also barred because the claim is a matter of record that could have been raised on direct appeal, but unjustifiably was not.") (citing N.Y. C.P.L. § 440.10(2)(c)).[16]

To avoid the procedural default of an unexhausted claim, a petitioner may show "cause for the default and prejudice, or that failure to consider the claim will result in miscarriage of justice, *i.e.*, the petitioner is actually innocent." *Sweet v. Bennett*, 353 F.3d 135, 141 (2d Cir. 2003).

---

[15] This rule states, in relevant part, that a letter application for leave to appeal "shall indicate . . . (2) that no application for the same relief has been addressed to a justice of the Appellate Division, as *only one application is available*." N.Y. Ct. App. R. 500.20(a) (emphasis added).

[16] N.Y. Crim. Procedure Law § 440.10(2)(c) states, in relevant part, that a court must deny a § 440.10 motion to vacate judgment when "[a]lthough 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 unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him."

B. Adequate and Independent State Grounds as a Procedural Bar

"It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that 'is independent of the federal question and adequate to support the judgment.'" *Cone v. Bell*, 556 U.S. 449, 465 (2009) (quoting *Coleman*, 501 U.S. at 729). This preclusion applies even if the state court alternatively rules on the merits of the federal claim, so long as there is an adequate and independent state ground that would bar the claim in state court. *See, e.g.*, *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *accord Garcia v. Lewis*, 188 F.3d 71, 77 (2d Cir. 1999).

"A state court decision will be 'independent' when it 'fairly appears' to rest primarily on state law." *Taylor v. Connelly*, 18 F. Supp. 3d 242, 253 (E.D.N.Y. 2014) (quoting *Jimenez v. Walker*, 458 F.3d 130, 138 (2d Cir. 2006)). Typically, a ground is adequate "only if it is based on a rule that is 'firmly established and regularly followed' by the state in question." *Garcia*, 188 F.3d at 77 (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)); *see also Cotto v. Herbert*, 331 F.3d 217, 239 (2d Cir. 2003). A decision that a state procedural rule is inadequate should not be made "lightly or without clear support in state law." *Garcia*, 188 F.3d at 77 (internal quotations omitted). However, "there are 'exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.'" *Cotto*, 331 F.3d at 240 (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). In determining whether a case is "exceptional" in that the state ground should be held inadequate, the Second Circuit uses the following factors as "guideposts":

> (1) whether the alleged procedural violation was actually relied on in the trial court, and whether perfect compliance with the state rule would have changed the trial court's decision; (2) whether state caselaw indicated that compliance with the rule was demanded in the specific circumstances presented; and (3) whether petitioner had substantially complied with the rule given the realities of trial, and, therefore, whether demanding perfect compliance with the rule would serve a legitimate governmental interest.

Id. (internal quotations omitted).

To avoid a procedural default based on independent and adequate state grounds, a petitioner must "show 'cause' for the default and 'prejudice attributable thereto,' . . . or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage of justice.'" *Harris*, 489 U.S. at 262 (quoting *Murray v. Carrier*, 477 U.S. 478, 485, 495 (1986)).

C. AEDPA Standard of Review

When a federal court reaches the merits of a habeas petition, AEDPA prescribes a "highly deferential" standard for reviewing state court rulings. *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); *see also Fischer v. Smith*, 780 F.3d 556, 561 (2d Cir. 2015). An application for a writ of habeas corpus:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).

Courts have interpreted the phrase "adjudicated on the merits" in AEDPA as meaning that a state court "(1) dispose[d] of the claim on the merits, and (2) reduce[d] its disposition to judgment." *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001) (internal quotations omitted). Courts examine the "last reasoned decision" by the state courts in determining whether a federal claim was adjudicated on the merits. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

If a state court adjudicates a federal claim on the merits, the Court must apply AEDPA deference to that state court ruling.[17] 28 U.S.C. § 2254(d)(1)–(2). In the context of AEDPA deference, the phrase "clearly established Federal law" means "the holdings, as opposed to the dicta, of [the Supreme Court of the United States'] decisions as of the time of the relevant state–court decision." *Williams v. Taylor*, 529 U.S. 362, 365 (2000). "A state court decision is contrary to such clearly established federal law if it 'applies a rule that contradicts the governing law set forth in the Supreme Court's cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from its precedent.'" *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015) (quoting *Boyette v. Lefevre*, 246 F.3d 76, 90 (2d Cir. 2001)). A state court decision involves an "unreasonable application" of Supreme Court precedent if: (1) "the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent unreasonable, the state court's decision must have been more than "incorrect or erroneous" — it must have been "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). In other words, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of [the state court's] decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004)). However, "the trial court's decision need not teeter on 'judicial incompetence' to

[17] If, by contrast, a state court does not adjudicate a federal claim on the merits, "AEDPA deference is not required. . . . [and] conclusions of law and mixed findings of fact and conclusions of law are reviewed de novo." *DeBerry v. Portuondo*, 403 F.3d 57, 66–67 (2d Cir. 2005).

warrant relief under § 2254(d)." *Alvarez v. Ercole*, 763 F.3d 223, 229 (2d Cir. 2014) (quoting *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000)). If a state court decision does not contain reasons for the dismissal of a defendant's federal claim, the Court must "consider 'what arguments or theories . . . could have supported[] the state court's decision,' and may grant habeas only if 'fairminded jurists could [not] disagree that those arguments or theories are inconsistent with the holding in a prior decision of' the Supreme Court." *Lynch v. Superintendent Dolce*, 789 F.3d 303, 311 (2d Cir. 2015) (alterations in original) (quoting *Richter*, 562 U.S. at 102).

When reviewing an application for a writ of habeas corpus, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The petitioner has the burden of rebutting the state court's factual holding by "clear and convincing evidence." *Id.*; *see also Chapman v. Vanzandt*, No. 96 CIV. 6940(JGK), 1997 WL 375668, at *4 (S.D.N.Y. July 8, 1997).

III. DISCUSSION

The Petition and its supporting memorandum of law advance the following grounds for relief: (1) Petitioner's guilty plea was not knowing and voluntary due to: (a) the court's coercive Lockdown and Protective Orders; (b) the court's failure to assign new counsel; (c) Petitioner's conditions of confinement; and (d) the ineffectiveness of his trial counsel; (2) Petitioner's trial counsel was ineffective; and (3) the People committed prosecutorial misconduct in connection with the grand jury proceeding, as evidenced by Molina's affidavit recanting her testimony. (Docket No. 2 at 41-77). Petitioner further alleges that the state courts committed error by

declining to hold an evidentiary hearing regarding the above claims,[18] and requests such a hearing before this Court.[19] (Docket No. 2 at 57, 73, 77).

A. Guilty Plea

Petitioner argues that his guilty plea was not knowing, voluntary and intelligent because the combined effect of the Lockdown and Protective Orders precluded him from adequately evaluating the evidence against him as well as communicating with counsel and others regarding whether to plead guilty. (Docket No. 2 at 42, 45-46). Petitioner also argues that these orders prevented his counsel from providing adequate representation—thus compounding Petitioner's predicament—and, therefore, the trial court further erred by refusing to reassign this attorney at Petitioner's request. (*Id.* at 54, 58-61). Respondent contends that this claim is procedurally barred and in any event, meritless. (Docket No. 28 at 19-40). The Court agrees with Respondent.

1. Procedural Bar

Petitioner sufficiently exhausted this claim before the state courts. "In New York, claims about the voluntariness of a guilty plea must be presented to the state court in one of three ways:

---

[18] The Court notes that the state court's findings of fact with respect to Petitioner's claims may not be entitled to AEDPA deference because, where "the state courts declined to hold an evidentiary hearing, no presumption of correctness applies to the state court factual 'findings' under 28 U.S.C. § 2254(e)(1)." *See Turner v. Schriver*, 327 F. Supp. 2d 174, 183 (E.D.N.Y. 2004) (citing *Channer v. Brooks*, 320 F.3d 188, 195 (2d Cir. 2003); *Drake*, 321 F.3d at 345); *see also Ferguson v. Griffin*, No. 13 Civ. 4528 (CS)(JCM), 2017 WL 9802841, at *11 (S.D.N.Y. Dec. 4, 2017), *report and recommendation adopted*, 2018 WL 1229734 (S.D.N.Y. Mar. 6, 2018). However, neither party makes this argument. In any event, the Court need not resolve this issue because it would arrive at the same conclusions if it were to apply *de novo* review. *Cf. Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies.").

[19] Under 28 U.S.C. § 2254(d), the district court may not rely on new evidence produced at an evidentiary hearing to address habeas claims first adjudicated on the merits in state court, and must instead limit its review to "the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Furthermore, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); *cf. Lopez v. Miller*, 906 F. Supp. 2d 42, 53 (E.D.N.Y. 2012) (noting that court's discretion to hold a hearing "is typically exercised when a new hearing would have the potential to advance the petitioner's claim") (quoting *Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000)) (internal quotations omitted). Because Petitioner's claims that were not addressed on the merits in state court are procedurally barred, not cognizable, or baseless, the Court declines to hold a hearing. *See Merritt v. Chappius*, No. 9:14-CV-1481 (LEK), 2015 WL 5711961, at *19 (N.D.N.Y. Sept. 29, 2015); *see also Miller v. Graham*, 14-cv-5901 (KAM), 2018 WL 3764257, at *12 n.9 (E.D.N.Y. Aug. 8, 2018).

a motion to withdraw the plea before sentencing, a post-judgment New York Criminal Procedure Law ('C.P.L.') § 440.10 motion in the trial court, or on direct appeal if the record permits." *McCormick v. Hunt*, 461 F. Supp. 2d 104, 109 (W.D.N.Y. 2006) (citing *People v. Lopez*, 529 N.Y.S.2d 465, 466 (1988)). It is well-settled that a habeas petitioner alerts the state courts to the constitutional nature of his claim by, among other things, presenting facts that are "well within the mainstream of due process adjudication." *See Daye*, 696 F.2d at 194–96.

Here, on direct appeal, Petitioner argued that the above circumstances rendered his plea not knowing and voluntary in violation of the Due Process Clause of the Fourteenth Amendment. (*See, e.g.*, Docket Nos. 28-4 at 32-64; 28-5 at 38). Similarly, Petitioner's request for leave to appeal to the Court of Appeals states that Petitioner's "pleas were a direct result of the [Protective and Lockdown] orders a[s well as] duress and coercion" in violation of his "due process rights." (Docket No. 28-8 at 18). Courts within in this Circuit have held that such "challenges to the voluntariness of a guilty plea are firmly within the mainstream of due process claims," and thus, are sufficient for *Daye*'s "fair presentation" requirement. *See Rodriguez v. Lamanna*, 2:18-CV-07196 (ENV), 2020 WL 4926358, at *3 (E.D.N.Y. Aug. 19, 2020), *appeal dismissed*, 2021 WL 1408397 (2d Cir. Mar. 19, 2021); *see also Daye*, 696 F.2d at 194–96; *Cosey v. Walsh*, No. 02 Civ. 6251(SAS), 2003 WL 1824640, at *3 (S.D.N.Y. Apr. 8, 2003). Moreover, "where the petitioner has appealed his conviction to the highest state court, and throughout the course thereof has fairly presented the claim that is now the gravamen of his federal habeas corpus petition, he has satisfied the exhaustion requirement." *See Klein v. Harris*, 667 F.2d 274, 282 (2d Cir. 1981); (Docket No. 28-8 at 18). Petitioner's consistent references to "due process" and the Fourteenth Amendment, combined with his factual assertions throughout the appellate

process, were therefore sufficient to exhaust this claim in the state courts.[20] *See Daye*, 696 F.2d at 194–95.

Nonetheless, the Court agrees with Respondent that this claim must be rejected as procedurally barred. The Appellate Division denied this claim on independent and adequate state law grounds, explicitly concluding that it was unpreserved for appellate review because Petitioner "did not move to withdraw his pleas or otherwise raise this issue before the [trial] court."[21] *See Weston*, 43 N.Y.S. at 414. The court cited caselaw holding that with some narrow exceptions,[22] appellate challenges to the adequacy of a plea allocution must be preserved by an appropriate objection in the trial court. *See Weston*, 43 N.Y.S. at 414–15 (citing *People v. Toxey*, 631 N.Y.S.2d 119 (1995)). Although the court "went on to deny" the claim on the merits using the phrase "in any event," its "primary reliance on this state procedural law constitutes an independent ground for its decision." *See Serrano v. Kirkpatrick*, No. 11 Civ. 2825(ER)(PED), 2013 WL 3226849, at *11 (S.D.N.Y. June 25, 2013); *see also Harris*, 489 U.S. at 264 n.10 (finding that a state court decision relying on a procedural rule to dismiss a claim, but that, in the alternative, also proceeds to dismiss the claim on the merits, relies on the independent state law

[20] The Court disagrees with Respondent's contention that Petitioner did not exhaust this claim because he failed to file an Article 78 petition contesting the conditions of his confinement. (Docket No. 28 at 24-25). The Court is unaware of any requirement that objections to lockdowns or protective orders implicating the validity of a guilty plea be raised through that mechanism, in addition to motion practice, direct appeal, or collateral attack of the criminal proceedings. To the contrary, Article 78 is not the proper vehicle to attack the constitutionality of a plea. *See Cobb v. Sheahan*, 21 N.Y.S.3d 901, 901–02 (4th Dep't 2015); *Wisniewski v. Michalski*, 979 N.Y.S.2d 745, 747 (4th Dep't 2014).

[21] Because Petitioner thereafter unsuccessfully moved for leave to appeal, *Weston*, 29 N.Y.3d at 1088, the Appellate Division's ruling was the "last reasoned decision" on record rejecting this claim. *See Ylst*, 501 U.S. at 803.

[22] *People v. Lopez*, 529 N.Y.S.2d 465 (1988), sets forth a narrow exception to this rule where a defendant may raise a deficiency in the plea proceedings on direct appeal if his "factual recitation" at the proceedings "negates an essential element of the crime pleaded to," and the trial court accepts the plea without further inquiring to ensure that he understands the nature of the charge and that the plea is intelligently entered. *See id.* at 466–67. However, that exception is inapplicable here, where Petitioner's statements at the plea proceeding did not call into question any elements of his conviction. (*See generally* May 1, 2014 Transcript); *see also People v. Beverly*, 34 N.Y.S.3d 245, 247 (3d Dep't 2016).

ground for dismissal); *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 810 & n.4 (2d Cir. 2000) (noting that when a state court opines that a claim is "not preserved for appellate review" and then rules "in any event" that the claim also fails on the merits, the claim rests on independent state law rule which precludes federal habeas review).

Under N.Y. Crim. Proc. Law § 470.05(2), a legal question is only preserved for appellate review "when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same." *See* N.Y. C.P.L. § 470.05(2). The Second Circuit has held that § 470.05(2) is "firmly established and regularly followed," and "New York courts consistently interpret § 470.05(2) to require that a defendant specify the grounds of alleged error in sufficient detail so that the trial court may have a fair opportunity to rectify any error." *Garvey v. Duncan*, 485 F.3d 709, 715–16 (2d Cir. 2007). With respect to the error alleged here, "a defendant's challenge to his guilty plea is unpreserved unless he *first* moves to withdraw his plea or vacate the judgment." *See Fuller v. Schultz*, 572 F. Supp. 2d 425, 438 (S.D.N.Y. 2008) (emphasis added) (collecting cases); *see also Vibbert v. Superintendent*, No. 09-CV-506 (GTS/DRH), 2010 WL 1817821, at *3 (N.D.N.Y. Mar. 26, 2010), *report and recommendation adopted*, 2010 WL 1838739 (N.D.N.Y. May 5, 2010); *People v. Wilner*, 487 N.Y.S.2d 97, 98 (2d Dep't 1985). Although Petitioner eventually attempted to attack his plea by moving to vacate his conviction, (Docket No. 28-6 at 2-48), that was insufficient to preserve the argument because he did not do so until *after* filing his direct appeal. *See Fuller*, 572 F. Supp. 2d at 438. In addition, Petitioner never moved to withdraw his guilty plea. "[H]abeas courts have recognized that [such] a failure to withdraw a guilty plea before sentencing" or move to vacate "constitutes an independent and adequate ground for the state court decision." *See Garcia v. Boucaud*, No. 09 Civ.5758 (RJH)(GWG), 2010 WL 1875636, at *7 (S.D.N.Y. May 11, 2010), *report and recommendation*

adopted, 2011 WL 1794626 (S.D.N.Y. May 11, 2011); *see also Haynes v. New York*, No. 10-CV-5867 (JFB), 2012 WL 6675121, at *10 (E.D.N.Y. Dec. 21, 2012). Thus, this objection is procedurally barred. *See Harris*, 489 U.S. at 262.

Moreover, Petitioner fails to show cause or prejudice flowing from his procedural default, nor does he demonstrate that a failure to consider this claim will result in a fundamental miscarriage of justice. *See id.* To demonstrate cause, a petitioner must point to "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule," such as the unavailability to counsel of the factual or legal basis for a claim, or that "'some interference by officials' . . . made compliance impracticable." *Murray*, 477 U.S. at 488 (quoting *Brown v. Allen*, 344 U.S. 443, 486 (1953)). With respect to prejudice, the petitioner must show that that counsel's procedural failures both "created a *possibility* of prejudice, [and] that they worked to his *actual* and substantial disadvantage . . . ." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). Alternatively, to demonstrate a fundamental miscarriage of justice, a petitioner must demonstrate "actual innocence," a factual "'show[ing] that it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.'" *See Dunham v. Travis*, 313 F.3d 724, 730 (2d Cir. 2002) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

Petitioner has not pointed to any "objective factor external to the defense" that "impeded [his] counsel's efforts to comply with the State's procedural rule[s]." *See Murray*, 477 U.S. at 488. As a result, Petitioner has not demonstrated cause, and the Court need not consider the issue of prejudice. *See id.* at 488, 494. Although Petitioner argues that his counsel's ineffective assistance qualifies as cause, (*see* Docket No. 34 at 10), "a petitioner may not bring an ineffective assistance [of counsel] claim as cause for a default when that ineffective assistance claim itself is procedurally barred" or meritless." *See Reyes,* 118 F.3d at 140; *Tinsley v. Woods*,

No. 08 CIV.1332 (VB)(PED), 2011 WL 3251527, at *7 (S.D.N.Y. June 16, 2011), *report and recommendation adopted*, 2011 WL 4472468 (S.D.N.Y. Sept. 28, 2011).

Petitioner further argues that any default is excused because he "was unaware that he could challenge" the Lockdown and Protective Orders, and imposition of these orders prevented him from reviewing key legal documents and contacting the court himself. (Docket No. 34 at 9-11). However, "ignorance of the law do[es] not constitute cause that will excuse a habeas petitioner's failure to exhaust state remedies." *McNeil v. Annucci*, 18 Civ. 1560 (VSB) (HBP), 2019 WL 2437687, at *2 (S.D.N.Y. May 9, 2019), *report and recommendation adopted*, 2019 WL 2433595 (S.D.N.Y. June 11, 2019); *see also Hunter v. Annucci*, 19-CV-1321 (MKB), 2020 WL 9816004, at *7 (E.D.N.Y. Dec. 18, 2020). Petitioner's inability to access the above records also does not excuse his default because the basis of his complaint was evident throughout the plea-bargaining process, and was not contingent on any specific language in the Lockdown and Protective Orders or any other document. *See Lovacco v. Stinson*, No. 97CV5307SJ, 2004 WL 1373167, at *3 (E.D.N.Y. June 11, 2004) (declining to excuse procedural default based on inaccess to transcript because the basis for Petitioner's claim "was known at [his] trial"); *see also Vibbert*, 2010 WL 1817821, at *4 (finding no cause where petitioner "ha[d] not demonstrated that [the] factual or legal basis for his default was not available to him at the time of [the relevant filing]"); *Glover v. Burge*, No. 05-CV-0393(VEB), 2007 WL 9183249, at *4 (W.D.N.Y. Oct. 22, 2007) (finding "no basis for finding that . . . conclusory allegations of a prison lockdown" constituted cause to excuse procedural default). Furthermore, Petitioner ignores that (a) his counsel had continuous access to the record; (b) months before he pled guilty, Petitioner was permitted to access the law library and review all documents in the record when he met with counsel; and (c) the trial court restored Petitioner's personal access to the record immediately

after he was sentenced on June 6, 2014. *See supra* Section I.A-C. In addition, because this claim is meritless as explained below, he cannot demonstrate prejudice.

Petitioner also has not presented any new evidence of his innocence that would support a finding of a fundamental miscarriage of justice. *See Dunham*, 313 F.3d at 730. Petitioner's conclusory assertions that such a finding is warranted are insufficient. *See Grant v. Bradt*, No. 10 Civ. 394(RJS), 2012 WL 3764548, at *5 (S.D.N.Y. Aug. 30, 2012); (Docket No. 34 at 11). Simply put, the Court cannot review this defaulted claim.

2. Merits

In addition, even if the Court were to forgive Petitioner's procedural default, Petitioner's objection to his guilty plea is meritless. Because a defendant who pleads guilty "waives a number of fundamental constitutional rights," *Spence v. Sup't, Great Meadow Corr. Facility*, 219 F.3d 162, 167 (2d Cir. 2000), the Due Process Clause requires that a guilty plea be voluntary, knowing and intelligent. *See Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). Thus, "[t]he standard for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Urena v. State of N.Y.*, 160 F. Supp. 2d 606, 610 (S.D.N.Y. 2001) (quoting *Ventura v. Meachum*, 957 F.2d 1048, 1058 (2d Cir. 1992)). A plea is voluntary when it is "entered by one fully aware of the direct consequences." *Brady v. United States*, 397 U.S. 742, 755 (1970). The plea "must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. [] bribes)." *Id.*

A plea is also voluntary if "it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his

options rationally." *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988). Where, as here, a habeas petitioner's representations at the plea allocution demonstrate a knowing and voluntary plea, courts have rejected the notion that lockdown orders, conditions of confinement, and other restrictions constitute coercion implicating due process concerns. *See, e.g.*, *Clark v. Solem*, 693 F.2d 59, 61–62 (8th Cir. 1982) (concluding that sixty days of solitary confinement did not invalidate subsequent guilty plea); *U.S. ex rel. Rhyce v. Richmond*, 273 F.2d 29, 29–30 (2d Cir. 1959) (finding that solitary confinement in a "dark cell, known as 'the hole'" did not render plea involuntary); *Browder v. United States*, 10-CR-263(LJV), 14-CV-17(LJV), 2017 WL 262604, at *7 (W.D.N.Y. Jan. 20, 2017) (noting that "if [petitioner]'s plea can be attacked by assertions that it was coerced [by pretrial detention] . . . despite the evidence to the contrary in the plea hearing transcript, then no guilty plea will ever be safe from attack by a defendant who has second thoughts"); *Jacks v. Lempke*, No. 09 Civ. 8768(DAB)(FM), 2012 WL 3099069, at *4 (S.D.N.Y. July 24, 2012), *report and recommendation adopted*, 2012 WL 3930098 (S.D.N.Y. Sept. 10, 2012) (holding that "lock-in-feed" orders and preclusion of telephone calls and visits other than those from defense counsel did not render plea involuntary). This is because a petitioner's "statements made under oath at his plea allocution 'carry a strong presumption of verity,' . . . and are generally treated as conclusive in the face of the defendant's later attempt to contradict them." *See Adames v. United States*, 171 F.3d 728, 732 (2d Cir. 1999) (quoting *United States v. Maher*, 108 F.3d 1513, 1530 (2d Cir. 1997)).

As the Appellate Division concluded, Petitioner's objections to the validity of his plea are belied by the record. *See Weston*, 43 N.Y.S.3d at 415. Petitioner readily admitted his guilt under oath, confirming numerous times that he was doing so voluntarily; that he had discussed the plea with counsel; and that he "understood in plain [E]nglish what the People, the District Attorney sa[id] that [he] did in each of th[e] three counts." (May 1, 2014 Transcript at 13, 15, 17, 20-30,

32-33, 45). He further affirmed that he was satisfied with Mr. Green's representation, and had specifically discussed with Mr. Green his decision to waive his potential statute of limitations defense as well as his trial and appellate rights—which the court also explained in detail.[23] (*Id.* at 13, 15, 17-19, 33-34, 45). Petitioner denied possessing any physical or mental conditions that impacted his ability to understand and knowingly participate in the plea proceedings. (*Id.* at 16). Moreover, he explicitly and repeatedly denied that his plea or any of these waivers were coerced, threatened or forced, or entered into based on any promises or representations other than those on the record. (*Id.* at 13, 17, 32, 34, 45). Petitioner responded appropriately to the court and the People's questions regarding the facts underlying the subject charges, indicating that he was generally alert and engaged. *See McBride v. Perez*, No. 13 CV 4792(VB), 2015 WL 5231509, at *3 (S.D.N.Y. Sept. 8, 2015) (denying habeas relief when petitioner "appear[ed] to have been active and alert" during the plea proceeding). Throughout the colloquy, Petitioner declined to ask his counsel any questions. (*Id.* at 31, 34).

Petitioner argues that the Lockdown and Protective Orders interfered with the voluntariness of his plea because they "prohibited trial counsel from discussing the contents of important material documents with Petitioner;" limited his ability to understand the evidence against him; and "severely impacted . . . [his] mental state." (Docket No. 2 at 45-50). However, when a defendant "has explicitly stated in his allocution that he fully understands the consequences of his plea and that he has chosen to plead guilty after a thorough consultation with his attorney, a district court on habeas review may rely on the defendant's sworn statements and hold him to them." *Padilla v. Keane*, 331 F. Supp. 2d 209, 217 (S.D.N.Y. 2004). The plea minutes indicate that Petitioner was fully aware of the consequences of his plea, and refused

[23] Petitioner also executed written waivers of indictment and appeal, which the court confirmed he understood. (*Id.* at 11-13, 31-32).

numerous opportunities to raise any issues of coercion, duress or deficient representation. Petitioner's self-serving statements at this juncture do not neutralize his affirmative representations of guilt and satisfaction with counsel's advice. Moreover, his conclusory assertions that the orders interfered with his defense strategy[24] and right to counsel are belied by the undisputed fact that Petitioner was allowed to communicate and visit with Mr. Green; review his entire case file in Mr. Green's presence; and consult the law library. *See, e.g.*, *Jacks*, 2012 WL 3099069, at *11; *Taylor v. Poole*, No. 07 Civ. 6318(RJH)(GWG), 2009 WL 2634724, at *26 (S.D.N.Y. Aug. 27, 2009); *cf. Blackledge v. Allison*, 431 U.S. 63, 74 (1997) ("The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."); *see also supra* Section I.A-C.

Furthermore, with respect to Petitioner's mental state, the Court is unpersuaded that solitary confinement and the other restrictions interfered with his decision-making to the extent that he pled guilty unknowingly or involuntarily. *See Clark*, 693 F.2d at 62 ("Although the evidence showing that the police mistreated Clark is disturbing, it does not establish that Clark's guilty plea was involuntary."). Orders curtailing or prohibiting visitation, "modest[ly] interfer[ing] with attorney-client communications," and requiring inspection of mail for pre-trial detainees, are constitutionally permissible for security purposes. *See Jacks*, 2012 WL 3099069, at *10 (quoting *Alvarez v. Snyder*, 702 N.Y.S.2d 5, 13–14 (1st Dep't 2000)) (internal quotations omitted); *see, e.g.*, *Browder*, 2017 WL 262604, at *6; *Taylor*, 2009 WL 2634724, at *26. Petitioner's contention that the orders here violated his due process rights under *Bell v. Wolfish*,

[24] To the extent Petitioner argues that the temporary delay of his ability to review certain witness materials violated the *Rosario* rule, such a violation is not cognizable in this habeas proceeding because it is "purely" an issue of "state law." *See Green v. Artuz*, 990 F. Supp. 267, 274 (S.D.N.Y. 1998); *see also Morrison v. McClellan*, 903 F. Supp. 428, 429 (E.D.N.Y. 1995).

441 U.S. 520 (1979) and *United States v. Basciano*, 369 F. Supp. 2d 344 (S.D.N.Y. 2005), (Docket No. 2 at 46-47), is misplaced because those cases did not address the voluntariness of guilty pleas in connection with conditions of confinement. Petitioner also cannot rely on those cases because, by pleading guilty, Petitioner waived any objection to the conditions of his confinement relating to constitutional rights unconnected with his plea. *See Jacks*, 2012 WL 3099069, at *11 n.4. Indeed, a knowing and voluntary guilty plea precludes habeas review of non-jurisdictional defects in the pre-plea proceedings.[25] *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Lebowitz v. United States*, 877 F.2d 207, 209 (2d Cir. 1989); *infra* n.26. Moreover, Petitioner does not cite any clearly established federal law providing pretrial detainees the right to communicate with family or associates. *See* 28 U.S.C. 2254(d).

Finally, Petitioner fails to demonstrate that his counsel was ineffective or that the court's refusal to assign new counsel was erroneous under AEDPA. *See infra* Section III.B. Therefore, I respectfully recommend denying Petitioner's claim that his plea was not knowing and voluntary.

B. Ineffective Assistance

Petitioner argues that his trial counsel was ineffective because (a) counsel shared confidential and privileged information with third parties without Petitioner's consent; (b) the Protective Orders created a conflict of interest between Petitioner and his counsel; (c) the

[25] For this reason, the Court denies Petitioner's request for production of the laboratory documents referenced in the People's *ex parte* application for the Third Protective Order. (Docket No. 64). Habeas petitioners are "not entitled to discovery as a matter of ordinary course," *Bracy v. Gramley*, 520 U.S. 899, 904 (1997), but rather, may be granted discovery in the exercise of judicial discretion and "for good cause shown," *see* Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts. Courts routinely deny discovery when the requested documents "would not corroborate Petitioner's arguments." *See Wynn v. Lee*, 11-CV-3650 (VSB) (SDA), 2020 WL 2489733, at *7 (S.D.N.Y. May 13, 2020); *see also Hirschfeld v. Comm'r of the Div. of Parole*, 215 F.R.D. 464, 465 (S.D.N.Y. 2003). Here, the requested documents are only relevant to the evidentiary basis of the Third Protective Order, an issue that Petitioner has waived the right to pursue. *See Jacks*, 2012 WL 3099069, at * 10–11 & n.4; (*cf.* Docket Nos. 2 at 47; 64 at 2). Because the documents are not relevant to his claims, Petitioner lacks good cause for this discovery. *See* Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts; *see also Lewis v. Bennett*, No. 01 Civ.7193 (MBM) (HBP), 2002 WL 1300052, at *1 (S.D.N.Y. June 12, 2002) (denying requested discovery where it was "irrelevant" to the merits of habeas claim).

Protective and Lockdown Orders prevented counsel from communicating with Petitioner and effectively preparing his defense; (d) counsel failed to file enough motions, an Article 78 petition and a state habeas petition challenging these orders; (e) counsel advised Petitioner to waive the statute of limitations with respect to the Manslaughter charge and failed to preserve a statute of limitations defense; and (f) counsel did not "care" about Petitioner's case. (Docket No. 2 at 58-73; *see also* Docket No. 64 at 3-4). Petitioner further argues that cumulative effect of these limitations was *per se* prejudicial, and the court failed to conduct a proper inquiry when he moved for substitution of counsel. (Docket No. 2 at 64, 72). Respondent contends that this claim is procedurally barred and, in any event, meritless. (Docket No. 28 at 41-57). The Court rejects the bulk of this claim as procedurally barred, and finds that to the extent the claim challenges the voluntariness of Petitioner's plea, it is meritless.

1. Procedural Bar

The Court agrees with Respondent that several of Petitioner's ineffective assistance arguments are procedurally barred. Petitioner's briefs throughout direct appeal contend that his counsel was ineffective for the above reasons under the Sixth Amendment and *Strickland*, 466 U.S. at 668, and therefore, this constitutional claim is exhausted. (Docket Nos. 28-4 at 64-71; 28-5 at 36-52; 28-8 at 19-20); *see also Daye*, 696 F.2d at 194–95; *supra* n.21. However, the Appellate Division rejected it on independent and adequate state law grounds, finding that by waiving his appellate rights and pleading guilty, Petitioner forfeited the right to raise any ineffective assistance claim that did not implicate the plea bargaining process or the voluntariness of his plea. *See Weston*, 43 N.Y.S.3d at 415. For example, the Appellate Division held that Petitioner's "pre-plea requests to relieve his assigned counsel" were precluded from appellate review. *See id.* The Appellate Division also found that to the extent counsel's alleged

misconduct affected the voluntariness of Petitioner's plea, these claims were belied by the record. *See id.*

"[F]irmly established New York state law mandates that a guilty plea results in the forfeiture of all claims unrelated to the validity of a petitioner's plea." *Silent v. Perlmann*, No. 07-CV-4524 (JFB), 2008 WL 5113418, at *6 (E.D.N.Y. Nov. 25, 2008). It also "recognizes the validity of waivers of appeal, and federal courts have thus found valid waivers of the right to appeal to constitute an independent and adequate state-law ground that precludes review." *Haynes*, 2012 WL 6675121, at *9 (collecting cases); *see also Oddy v. Gonyea*, No. 9:18-cv-00425-JKS, 2020 WL 3574633, at *7–8 (N.D.N.Y. July 1, 2020); *Colon v. New York*, No. 08 Civ. 0170(DC), 2009 WL 1116478, at *4 (S.D.N.Y. Apr. 27, 2009); *People v. Lopez*, 811 N.Y.S.2d 623, 626–27 (2006). Of course, New York courts exempt from such waivers ineffective assistance claims that "directly pertain to the [petitioner]'s decision to plead guilty—in other words, . . . claim[s] [that] . . . 'go to the very heart of the process,'" such that "the resulting plea cannot be truly 'knowing and voluntary.'" *See Cross v. Perez*, 823 F. Supp. 2d 142, 153–54 (E.D.N.Y. 2011) (quoting *People v. Parilla*, 838 N.Y.S.2d 824, 827 (2007)). However, that exception is inapplicable here, where Petitioner otherwise pled guilty knowingly and voluntarily, and as explained further below, Petitioner's ineffective assistance claim regarding the voluntariness of his plea fails on the merits. *See id.*; *supra* Section III.A.2. Petitioner cannot show cause and prejudice, nor a fundamental miscarriage of justice, and therefore, the non-plea-related-portion of this claim[26] is procedurally barred. *See supra* Section III.A.1.

[26] This includes Petitioner's ineffective assistance claim based on (a) counsel's alleged disclosures of confidential and/or privileged information to his family; (b) the court's orders relating thereto; (c) counsel's disclosure of Petitioner's communications with a corrections officer; (d) counsel's allegedly insufficient objections to the Lockdown and Protective Orders; (e) counsel's alleged conflict of interest; and (f) counsel's alleged lack of "care" for Petitioner's case, as there is no indication that any of these circumstances played a role in the plea bargaining

2. Merits

With respect to the merits of Petitioner's ineffective assistance claim as it relates to his plea, Petitioner cannot demonstrate that the Appellate Division's decision was contrary to, or an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d). "Courts evaluate ineffective assistance of counsel claims related to the plea bargaining process under the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984)." *Patel v. Martuscello*, No. 10 CV 5695 (CBA)(LB), 2015 WL 11401853, at *6–9 (E.D.N.Y. May 12, 2015), *report and recommendation adopted*, 2016 WL 4223404 (E.D.N.Y. Aug. 9, 2016) (citing *Missouri v. Frye*, 566 U.S. 134, 140 (2012)).

There are two elements of an ineffective assistance of counsel claim under *Strickland*. First, a successful ineffective assistance claim requires a showing that "counsel's representation fell below an objective standard of reasonableness," and second, it requires that "there [be] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 688, 694. With respect to the first element, a petitioner must show that "counsel's performance was deficient," taking account of "the reasonableness of counsel's actions under all circumstances, [and] keeping in mind that a 'fair assessment of attorney performance requires that every effort be made to eliminate the

---

process or decision whether or not to accept the plea. (Docket Nos. 2 at 58-73; 64 at 3). Indeed, according to Petitioner's own submissions, counsel's alleged inappropriate and unspecified disclosures to his family occurred in 2013, several months before defense counsel approached the prosecution with the information that led to Petitioner's guilty plea in April 2014. (*See* Docket Nos. 28-2 at 10-11; 28-3 at 14). The same is true with regard to counsel's disclosure of Petitioner's conversations with a corrections officer in early 2014. (*See* Docket No. 64 at 3). Similarly, the orders that created an alleged conflict of interest by requiring him to withhold certain witness materials from Petitioner were relaxed on February 11, 2014. (Docket Nos. 63-2; 63-3). In addition, even if the Court excused Petitioner's default with respect to these allegations, his claim would still fail because "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *See Tollett*, 411 U.S. at 267; *see also Beckary v. Chappius*, No. 11-CV-00850 (MAT), 2012 WL 3045691, at *10 (W.D.N.Y. July 25, 2012) (finding that ineffective assistance claim based on alleged conflict of interest and privilege violation was precluded by petitioner's guilty plea); *Fuller v. Schultz*, 572 F. Supp. 2d 425, 439 (S.D.N.Y. 2008) (concluding that claims "relat[ing] to events occurring before [petitioner] entered his guilty plea" could not support habeas relief unless plea was involuntary).

distorting effects of hindsight.'" *Swanton v. Graham*, No. 07-CV-4113 (JFB), 2009 WL 1406969, at *10 (E.D.N.Y. May 19, 2009) (quoting *Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005)). In evaluating this prong, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See Strickland*, 466 U.S. at 689.

The second element "focuses on prejudice to the defendant." *Swanton*, 2009 WL 1406969, at *10. *Strickland*'s "reasonable probability" standard for this element entails errors serious enough to "undermine confidence in the outcome." *See* 466 U.S. at 694. To demonstrate prejudice in connection with a guilty plea, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Petitioner cannot demonstrate deficient performance or prejudice in connection with any of trial counsel's alleged misbehavior that could have affected the plea process.[27] *See Strickland*, 466 U.S. at 688, 694. Petitioner argues that counsel rendered his plea involuntary by (a) failing to challenge the court's Lockdown and Protective Orders, which, in turn, imposed conditions of confinement that prevented him from communicating with counsel and knowingly pleading

[27] This Court is unaware of any authority supporting Petitioner's contention that this alleged misconduct—either individually or cumulatively—is *per se* ineffective such that no particularized showing of prejudice is required. (Docket No. 2 at 72-73). Indeed, the Second Circuit has applied a *per se* ineffectiveness rule in only two situations: where counsel is "(1) not duly licensed to practice law because of a failure ever to meet the substantive requirements for the practice of law, . . . or (2) implicated in the defendant's crimes." *United States v. Rondon*, 204 F.3d 376, 379–80 (2d Cir. 2000) (citing *Bellamy v. Cogdell*, 974 F.2d 302, 306 (2d Cir. 1992); *United States v. Novak*, 903 F.2d 883, 890 (2d Cir. 1990); *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984); *Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 1983)); *accord Lobacz v. United States*, 764 F. App'x 1, 2–3 (2d Cir. 2019) (summary order). Petitioner also improperly relies on Justice Marshall's concurrence in *Geders v. United States*, 425 U.S. 80 (1976), for the proposition that "a defendant who claims that an order prohibiting communication with his lawyer impinges upon his Sixth Amendment right to counsel need not make a preliminary showing of prejudice." *See* 425 U.S. at 92 (Marshall, J., concurring); (Docket No. 2 at 72). Even if this concurrence were binding, it is inapposite because *Geders* does not govern ineffective assistance claims. *See id.* at 92; (Docket No. 2 at 72). To the extent Petitioner argues based on *Geders* that the trial court's orders violated his Sixth Amendment right to counsel, *Geders* is distinguishable because none of the orders before this Court precluded Petitioner from consulting with counsel. *See* 425 U.S. at 92–93.

guilty; (b) pursuant to such Protective Orders, misrepresenting or withholding from Petitioner important information regarding the case against him, causing a conflict of interest; (c) improperly advising him to waive a potential statute of limitations defense to the Kwiatkosky Killing; and (d) failing to assert that statute of limitations defense. (Docket No. 2 at 58-73). Construing the Petition liberally, Petitioner also seems to argue that counsel's disclosure of privileged and/or confidential information to the prosecution for purposes of "negotiation" also constitutes a conflict of interest and ineffective assistance. (*See id.* at 58-59).

As to the Lockdown and Protective Orders, the record is clear that trial counsel advocated doggedly and strategically for Petitioner's interests. Contrary to Petitioner's contentions, Petitioner's counsel requested that the orders be lifted numerous times as the case progressed—both orally and in writing—and in January and February 2014, the court modified these orders to permit Petitioner to review his entire case file in counsel's presence and use the law library. (Docket Nos. 28-2 at 3-9, 16-37; 28-3 at 27-29; 63-1–63-3; September 18, 2013 Transcript at 5; November 14, 2013 Transcript at 3-4; January 6, 2014 Transcript at 3-6; January 29, 2014 Transcript at 6-7). After Petitioner pled guilty, counsel also obtained permission for Petitioner to visit with his mother and regain possession of his case file. (May 1, 2014 Transcript at 47-48; June 6, 2014 Transcript at 27-30). The trial court was initially unpersuaded by counsel's objections, and likely would have rejected any further arguments in light of its specific findings that Petitioner was involved in the "commission of an ongoing crime" from within the correctional facility. (Docket No. 28-3 at 25). New York courts have "discretion . . . to issue such orders when demanded by security concerns," and have found that the conditions of confinement resulting therefrom "do not justify reversal of a conviction." *See Taylor*, 2009 WL 2634724, at *20 (citing *People v. Whitt*, 758 N.Y.S.2d 37, 38 (1st Dep't 2003); *Alvarez*, 702 N.Y.S.2d at 12–14). As a result, counsel's failure to challenge the orders further was not

unreasonable. *See id.* (rejecting ineffective assistance claim based on failure to challenge lockdown order in light of petitioner's attempts to injure or intimidate potential witnesses); *see also Chue v. United States*, Nos. 04 Civ. 8668(RLC), 94 Cr. 626(RLC), 2010 WL 2633861, at *2 (S.D.N.Y. June 29, 2010) (declining to "find fault with" attorney's decision not to request downward departure based on conditions of confinement). Moreover, an attorney is "not deficient for having failed to make a baseless objection" because there can be "no prejudice stemming" therefrom. *See United States v. Martinez*, 475 F. Supp. 2d 154, 165 (D. Conn. 2007); *see also United States v. Crespo*, 651 F. App'x 10, 15 (2d Cir. 2016) (summary order).

Counsel's representation with regard to the statute of limitations defense was also reasonable, and arguably an important factor in securing a beneficial plea agreement. *See Strickland*, 466 U.S. at 688–89. Petitioner received two determinate and concurrent sentences of fifteen years followed by five years of supervision as a second violent felony offender for the two robberies, to run concurrently with a three and one-third to ten-year sentence for the 2008 manslaughter. (June 6, 2014 Transcript at 9). However, Petitioner could have received consecutive sentences of up to twenty-five years for each robbery as originally charged. *See* N.Y. Penal Law §§ 160.15, 170.03(3); (May 1, 2014 Transcript at 19). Petitioner signed a sworn statement admitting to killing Kwiatkowski, and also agreed in writing to waive prosecution by indictment for this offense. (Docket No. 28-4 at 19, 21-26). As explained during the plea colloquy, the plea was specifically conditioned on this waiver and waiver of the statute of limitations defense. (May 1, 2014 Transcript at 3-4). Petitioner affirmed several times that he agreed to forfeit this defense based on discussions with counsel. (*Id.* at 16-17, 34).

Thus, counsel failed to raise a statute of limitations defense because Petitioner knowingly and expressly waived it. *See Javier v. United States*, 590 F. Supp. 2d 560, 561 (S.D.N.Y. 2008) (denying ineffective assistance claim based on failure to raise statute of limitations defense

where petitioner agreed to waive statute of limitations as part of his plea agreement); *see also Ocasio v. United States*, No. 01 Civ. 6650(DAB), 2004 WL 405942, at *6 (S.D.N.Y. Mar. 4, 2004) (holding that ineffective assistance claim regarding waiver of statute of limitations defense was belied by sworn statements that petitioner agreed to this waiver based on advice of counsel). Moreover, by agreeing to this waiver, Petitioner avoided conviction on numerous other crimes for which he was charged and obtained a more favorable sentence on the charges of conviction than he could have received at trial. *See Georges v. United States*, No. 08-CV-3611 (CBA), 2011 WL 477672, at *8 (E.D.N.Y. Feb. 4, 2011); *see also Roman v. United States*, 741 F. Supp. 43, 44 (E.D.N.Y. 1990). In light of this reduced exposure, Petitioner cannot show that counsel's advice to follow this course of action fell below constitutional standards, or caused any prejudice. *See Feliz v. United States*, Nos. 01 Civ. 5544(JFK), 00 Cr. 53(JFK), 2002 WL 1964347, at *7 (S.D.N.Y. Aug. 22, 2002) ("No prejudice exists when a plea agreement lessens the severity of the sentence the defendant would face if convicted at trial.").

This is especially so in light of Petitioner's marginal likelihood of success at trial with respect to the two robberies. Indeed, "the Second Circuit has often rejected ineffectiveness claims by determining that, in view of the strength of the prosecution's case, the defendant is unable to establish prejudice." *Boakye v. United States*, No. 09 Civ. 8217, 2010 WL 1645055, at *4 (S.D.N.Y. Apr. 22, 2010) (citing *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir. 1991); *United States v. Reiter*, 897 F.2d 639, 645 (2d Cir. 1990)). Molina implicated Petitioner in both crimes when she was arrested, and investigators identified Klein's blood on Petitioner's sweatshirt. (Docket Nos. 27 ¶ 5; 28 at 58). In light of Petitioner's affirmative admissions of guilt on the record, and this robust evidence against him, "it can hardly be said that [Petitioner] would

not have pled guilty but for the alleged error."[28] *See Swanton*, 2009 WL 1406969, at *10; *see also Contant v. Sabol*, 987 F. Supp. 2d 323, 355 (S.D.N.Y. 2013) (denying habeas relief based on absence of prejudice in light of physical evidence against petitioner and "[p]etitioner's having acknowledged his guilt" on the record before pleading guilty); *Velasquez v. Ercole*, 878 F. Supp. 2d 387, 407–08 (E.D.N.Y. 2012) (finding no prejudice despite attorney's failure to advise petitioner of affirmative defense due to DNA evidence and a confession implicating petitioner).

Petitioner also cannot establish prejudice because he does not explain how any alleged lapses in communication with counsel, or any illicit disclosures or other alleged misconduct, interfered with his decision whether or not to plead guilty. *See Hill*, 474 U.S. at 59. Indeed, "[s]elf-serving, conclusory allegations are insufficient to establish ineffective assistance of counsel." *See Ramirez v. United States*, No. 10 Civ. 4343 (WHP), 2011 WL 2419884, at *3 (S.D.N.Y. June 7, 2011); *see also Jones v. Conway*, 442 F. Supp. 2d 113, 125 (S.D.N.Y. 2006) (rejecting "vague and unsubstantiated claim" based on trial counsel's "alleged lapses" in communication because petitioner's conclusory allegations did not support prejudice); *supra* Section III.A.2. The same is true with regard to Petitioner's unspecific complaint that counsel did not "care" about his case, (Docket No. 2 at 59), and thereby interfered with his decision to take the plea. *See Blackledge*, 431 U.S. at 74; *see also Rosario v. United States*, 348 F. Supp. 2d 288, 294 (S.D.N.Y. 2004) (holding that counsel's alleged "bad advice" was "unsupported by the record" and too "conclusory" to support relief).

Similarly, although prejudice may be "presumed" when a conflict of interest "adversely affect[s]" counsel's performance, *see generally Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (internal quotations omitted)); (Docket No. 2 at 58, 72), that

[28] The Court rejects Petitioner's argument that he was prejudiced because the prosecution had little evidence against him with respect to the alleged conspiracy. (*See* Docket No. 2 at 52). The extent of this evidence is irrelevant because Petitioner did not plead guilty to any of the charges relating to that offense.

doctrine is inapplicable because Petitioner fails to provide any details explaining how any conflict of interest caused an "actual lapse in representation" or would have changed the outcome of his case. *See LoCascio v. United States*, 395 F.3d 51, 56 (2d Cir. 2005) (quoting *Cuyler*, 446 U.S. at 349) (internal quotations omitted). Indeed, to recover on an ineffective assistance claim based on a conflict of interest, a petitioner must "establish (1) an actual conflict of interest that (2) adversely affected his counsel's performance." *United States v. Schwarz*, 283 F.3d 76, 91 (2d Cir. 2002). To prove a lapse in representation, a petitioner must "demonstrate that some plausible alternative defense strategy or tactic might have been pursued" but was not pursued because "the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993) (quoting *United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988)). Petitioner cannot establish an actual conflict based on improper disclosures during plea negotiations because he does not specify what confidential information counsel provided. *See Shaw v. United States*, 371 F. Supp. 2d 265, 271 (E.D.N.Y. 2005) (rejecting ineffective assistance claim based on illicit disclosure because petitioner did not specify the "content of the alleged disclosure"). Furthermore, Petitioner's "general, unsubstantiated allegations" of conflicts stemming from such disclosures as well as the Protective and Lockdown Orders, do not support a finding that any such conflicts prevented counsel from pursuing a viable alternative defense strategy. *See United States v. Felzenberg*, Nos. 97 Civ. 2800(SS), 93 CR. 460(SS), 1998 WL 152569, at *16 (S.D.N.Y. Apr. 2, 1998); *see also Shaw*, 371 F. Supp. 2d at 271. To the contrary, as discussed above, the record demonstrates that because of counsel's skillful advocacy, the court amended its initial restrictions to permit more open communication with Petitioner, which, in turn, led to counsel's negotiation of a favorable plea.

Accordingly, I respectfully recommend denying Petitioner's ineffective assistance of counsel claim.

C. Prosecutorial Misconduct

Petitioner further argues that the grand jury proceeding was defective due to prosecutorial misconduct. (Docket No. 2 at 74). Petitioner claims that based on Molina's affidavit, the prosecution coerced Molina into testifying falsely by "bribing" her with food, cigarettes, money and housing, and threatening to increase Molina's sentence if she testified to "the wrong things." (*Id.* at 74-75). Petitioner also contends that Molina's grand jury testimony is inconsistent with her prior statements, and because the Molina Discovery is still under seal and unavailable to him, asks this Court to review those materials *in camera*. (*Id.* at 76-77). Respondent argues that this claim is partially unexhausted because Petitioner did not present the Molina Discovery to the state courts. (Docket No. 28 at 58-61). Respondent further maintains that this aspect of Petitioner's claim must be deemed exhausted, and in any event, the claim is meritless. (*Id.* at 61-63). The Court agrees with Respondent.

1. Procedural Bar

As an initial matter, this claim is partially unexhausted because Petitioner did not present to the state courts the entire universe of facts on which he now relies. "A petitioner satisfies the 'fair presentation' aspect of the exhaustion requirement by presenting the essential factual and legal premises of his federal constitutional claim to the highest state court capable of reviewing it." *Cotto*, 331 F.3d at 237 (citing *Ramirez v. Attorney Gen. of N.Y.*, 280 F.3d 87, 94 (2d Cir. 2001)). Although Petitioner's collateral motions and briefs consistently referenced due process and Fourteenth Amendment violations in connection with ADA Reyes' alleged misconduct,[29]

[29] Respondent does not dispute that Petitioner's prosecutorial misconduct claim is exhausted to the extent it does *not* rely on the Molina Discovery materials. (Docket No. 28 at 59). Indeed, allegations of prosecutorial misconduct based on false grand jury testimony under the Fourteenth Amendment sufficiently invoke the constitutional import

Petitioner's papers did not cite the Molina Discovery material as factual support for this claim, as he does here. (*See generally* Docket Nos. 28-6 at 2-48; 28-7 at 2-90; 28-8 at 22-80; 28-9 at 2-93). Moreover, contrary to Petitioner's representations, (*see* Docket Nos. 2 at 76; 34 at 18), Petitioner was given personal access to these records at the conclusion of his sentencing proceeding on June 16, 2014. (*See* June 16, 2014 Transcript at 27-30). Thus, they were available to him when he filed his First and Second 440.10 Motions in 2015 and 2017. Because Petitioner could have submitted the Molina Discovery in conjunction with these proceedings, but did not, any attempt to raise them in state court would fail under N.Y. Crim. Proc. Law § 440.10(3)(c). *See* N.Y. C.P.L. § 440.10(3)(c).[30]

Absent any state "remedies available" to address this unexhausted claim in state court, this aspect of Petitioner's claim is deemed exhausted but procedurally barred.[31] *See Bossett v. Walker*, 41 F.3d 825, 828 (2d Cir. 1994) (quoting 28 U.S.C. § 2254(b)) (internal quotations omitted); *see also Pinckney v. Lee*, No. 10-CV-01312 (KAM), 2020 WL 6136302, at *20 n.20 (E.D.N.Y. Oct. 19, 2020) (deeming claim exhausted under N.Y. Crim. Proc. Law 440.10(3)(c)

---

of this claim under *Daye*. *See, e.g.*, *Bowers v. Walsh*, 277 F. Supp. 2d 208, 215 (W.D.N.Y. 2003); *Cerio v. State of N.Y.*, No. 85 Civ. 6074 (CBM), 1986 WL 571, at *2 (S.D.N.Y. Dec. 16, 1986); *see also Daye*, 696 F.2d at 194.

[30] N.Y. Crim. Proc. Law § 440.10 permits denial of a motion to vacate where "[u]pon 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." N.Y. C.P.L. § 440.10(3)(c).

[31] Although New York courts may grant a motion to vacate pursuant to N.Y. Crim. Proc. Law § 440.10(3)(c) when there is "good cause shown," Petitioner cannot meet this standard several years after he was granted access to the Molina Discovery supporting his prosecutorial misconduct claim. *See* N.Y. C.P.L. § 440.10(3)(c); *see also Connelly v. Senkoswki*, No. 07-CV-4616 CBA, 2012 WL 5463915, at *8 n.5 (E.D.N.Y. Nov. 8, 2012). In addition, notwithstanding Petitioner's failure to exhaust this aspect of his claim, the Court may also deny it if it is "plainly meritless." *See* 28 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. 269, 277 (2005). A *de novo* review of Petitioner's unexhausted argument compels dismissal because, even assuming the Molina Discovery revealed inconsistent statements, as Petitioner alleges, that would not demonstrate that Molina in fact perjured herself. *See Gantt v. Martuscello*, No. 9:12-cv-657 MAD/CFH, 2014 WL 112359, at *14 (N.D.N.Y. Jan. 10, 2014) (on *de novo* review, rejecting prosecutorial misconduct claim where petitioner did not establish that grand jury testimony "was actually . . . false"); *Mayes v. Donnelly*, No. 03-CV-417, 2009 WL 2601106, at *9–11 (W.D.N.Y. Aug. 21, 2009) (rejecting prosecutorial misconduct claim based on false grand jury testimony because record revealed mere inconsistencies); *infra* Section III.C.2; *see also Connelly*, 2012 WL 5463915, at *8 n.5.

where petitioner could have raised it in previous § 440.10 motion); *Caicedo v. Garvin*, No. 95 CV 3896(SJ), 1999 WL 221648, at *2 (E.D.N.Y. Apr. 9, 1999) ("Petitioner's unexhausted Sixth Amendment claim should be deemed exhausted because his failure to raise it in his [previous] § 440.10 motion bars further review in state court."). As previously explained, Petitioner cannot overcome this procedural default by showing cause and prejudice, or a fundamental miscarriage of justice. *See supra* Section III.A.1.

2. Merits

This Court affords AEDPA deference to the rest of Petitioner's prosecutorial misconduct claim, as the state courts dismissed it on the merits. (Docket No. 28-8 at 95-96); *see also supra* n.21. To start, because Petitioner's guilty plea is valid, *see supra* Section III.A.2, he cannot obtain habeas relief based on the grand jury proceedings, which occurred well-before his allocution. *See Tollett*, 411 U.S. at 267; *see, e.g.*, *Belle v. Superintendent*, No. 9:11-CV-0657 (NAM), 2013 WL 992663, at *7 (N.D.N.Y. Mar. 13, 2013) (denying habeas claim that indictment "was obtained through false evidence" in light of valid guilty plea); *Mayes*, 2009 WL 2601106, at *9–10 (denying habeas relief based on perjured testimony before grand jury because petitioner pled guilty); *Smith v. Burge*, No. 03 Civ.8648 (RWS), 2005 WL 78583, at *7–8 (S.D.N.Y. Jan. 12, 2005) (finding prosecutorial misconduct claim based on false grand jury testimony not cognizable when petitioner pled guilty); *supra* Section III.A.2. These alleged defects also are not reviewable because, absent a constitutional right to indictment by a state grand jury, they do not constitute a cognizable habeas claim. *See Rivers v. Costello*, Civ. No. 9:08-CV-0107 (TJM/RFT), 2011 WL 4592041, at *9 (N.D.N.Y. Sept. 9, 2011), *report and recommendation adopted*, 2011 WL 4593972 (N.D.N.Y. Sept. 30, 2011); *People v. Iannone*, 412 N.Y.S.2d 110 (1978); *see also* 28 U.S.C. 2254(d).

Despite these doctrines, Respondent states that under "[a] narrow exception," habeas relief may be available despite a valid guilty plea if "the prosecution knowingly allowed a witness to commit perjury while giving grand jury testimony." (Docket No. 28 at 61). The Court has located only one federal case from this Circuit that seems to support this proposition, based on *People v. Pelchat*, 62 N.Y.2d 97, 106 (1984), a New York Court of Appeals case. *See Nordahl v. Rivera*, No. 08-CV-5565 (KMK) (LMS), 2013 WL 1187478, at *6 (S.D.N.Y. Mar. 21, 2013) (in *dicta*, suggesting that habeas petitioner who pled guilty could have succeeded by showing that "the indictment was jurisdictionally invalid or that the prosecutor's conduct was so egregious as to create a constitutional violation going to the heart of the process"). However, "*Pelchat* rested on state, not federal grounds, and thus a violation would not be cognizable in a federal habeas corpus proceeding." *Smith*, 2005 WL 78583, at *9 (quoting *Jordan v. Dufrain*, No. 98 Civ. 4166(MBM), 2003 WL 1740439, at *4 (S.D.N.Y. Apr. 2, 2003)) (internal quotations omitted).

Even under such an exception, however, Petitioner's claim fails because there is no indication that Molina committed perjury. Indeed, to warrant reversal based on a government witness's perjured testimony, a petitioner "must first demonstrate that the witness in fact committed perjury." *See Mayes*, 2009 WL 2601106, at *10 (quoting *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001) (internal quotations omitted)). "A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory." *See Monteleone*, 257 F.3d at 219 (citing *United States v. Dunnigan*, 507 U.S. 87, 94–95 (1993)). "Simple inaccuracies or inconsistencies in testimony do not rise to the level of perjury." *Id.* (citing *United States v. Sanchez*, 969 F.2d 1409, 1414–15 (2d Cir. 1992)). Nor do vague and conclusory allegations of perjury—without reference to a specific

false statement—meet this high standard. *See, e.g.*, *Gantt*, 2014 WL 112359, at *14; *Mayes*, 2009 WL 2601106, at *11.

Here, no portion of Molina's affidavit indicates that she provided false information to the grand jury, or identifies any untrue statement made. *See Monteleone*, 257 F.3d at 219. Nor does Petitioner explain how any allegedly false testimony was material. *See id.* Rather than substantiating these claims, Molina's affidavit expresses regret for eventually acquiescing to the prosecution and incriminating Petitioner, despite her initial unwillingness to do so, and at most, creates a credibility issue that would have been decided by the factfinder. *See Mayes*, 2009 WL 2601106, at *9–11; (Docket No. 28-6 at 44-48). This confirms courts' long-established recognition that this type of recantation evidence is inherently suspect and generally cannot support habeas relief. *See, e.g.*, *Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988); *Mohsin v. Ebert*, 626 F. Supp. 2d 280, 305 (E.D.N.Y. 2009).

Accordingly, I respectfully recommend denying Petitioner's prosecutorial misconduct claim.

IV. CONCLUSION

For the foregoing reasons, I conclude and respectfully recommend that the Petition be denied. Further, because reasonable jurists would not find it debatable that Petitioner has failed to demonstrate by a substantial showing that he was denied a constitutional right, I recommend that no certificate of appealability be issued. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

V. NOTICE

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts, the parties shall have fourteen (14) days from the receipt of this Report and Recommendation to serve and file written objections. If copies of this

Report and Recommendation are served upon the parties by mail, the parties shall have seventeen (17) days from receipt of the same to file and serve written objections. *See* Fed. R. Civ. P. 6(d). Objections and responses to objections, if any, shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Philip M. Halpern at the United States District Court, Southern District of New York, 300 Quarropas Street, White Plains, New York 10601, and to the chambers of the undersigned at the same address.

Requests for extensions of time to file objections must be made to the Honorable Philip M. Halpern and not to the undersigned. Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be rendered. *See* 28 U.S.C. § 636(b)(1); *Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008).

Dated: April 13, 2022
White Plains, New York

RESPECTFULLY SUBMITTED,

Judith C. McCarthy

JUDITH C. McCARTHY
United States Magistrate Judge

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