APPENDIX

A

MANDATE

W.D.N.Y.
14-cv-6168
Geraci, 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 8th day of September, two thousand twenty-two.

Present:

John M. Walker, Jr.,
Barrington D. Parker,
Eunice C. Lee,
Circuit Judges.

Steven Janakievski,

Petitioner-Appellant,

v. 21-2933

Executive Director, Rochester Psychiatric Center,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability ("COA"). A prior panel directed the parties to advise the Court whether Appellant had been granted an unconditional discharge, and if so, whether the habeas claims were moot. 2d Cir. 21-2933, doc. 32. The parties have now responded and informed the Court that Appellant was unconditionally discharged from custody.

Upon due consideration, it is hereby ORDERED that the COA motion is GRANTED for the limited purpose of VACATING the district court's judgment denying Appellant's 28 U.S.C. § 2254 petition and REMANDING the matter to the district court with instructions to dismiss the petition as moot. Appellant's claims became moot when he was unconditionally discharged from state custody. *See Janakievski v. Exec. Dir., Rochester Psychiatric Ctr.*, 955 F.3d 314, 319 (2d Cir. 2020).

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

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

MANDATE ISSUED ON 10/06/2022

APPENDIX

B

Other Orders/Judgments

6:14-cv-06168-FPG Janakievski v. State of New York **CASE CLOSED on 10/28/2021**

CLOSED,HABEAS,ProSe

U.S. DISTRICT COURT

U.S. District Court, Western District of New York

Notice of Electronic Filing

The following transaction was entered on 10/17/2022 at 4:40 PM EDT and filed on 10/17/2022

Case Name: Janakievski v. State of New York
Case Number: 6:14-cv-06168-FPG
Filer:
WARNING: CASE CLOSED on 10/28/2021
Document Number: 62(No document attached)

Docket Text:
TEXT ORDER: Pursuant to the Second Circuit's instructions in its order dated September 8, 2022, and issued as a mandate on October 12, 2022, ECF No. [61], this Court's judgment ECF No. [55] denying the petition is VACATED, and the petition ECF No. [1] is DISMISSED AS MOOT in light of Petitioner's unconditional discharge from Respondent's custody. No certificate of appealability shall issue under 28 U.S.C. § 2253(c). IT IS SO ORDERED. Signed by Hon. Frank P. Geraci, Jr. on 10/17/2022. (SFR)

This was mailed to: Steven Janakievski.

6:14-cv-06168-FPG Notice has been electronically mailed to:

Jonathan Isidor Edelstein jonathan9@earthlink.net

Andrew William Amend andrew.amend@ag.ny.gov, CriminalAppealsHabeas@ag.ny.gov

6:14-cv-06168-FPG Notice has been delivered by other means to:

Steven Janakievski
233 Harpington Drive
Rochester, NY 14624

APPENDIX

C

Form 450 MED (MH) (9-92)

State of New York
OFFICE OF MENTAL HEALTH

PROGRESS NOTES
(INPATIENT)

Patient's Name (Last, First, M.I.) "C"/Id. No.

Yanakievski, Steven

Sex: Male

Date of Birth: 6-8-75

Facility/Agency Name: RPC-015

Unit/Ward No.: FOR-059

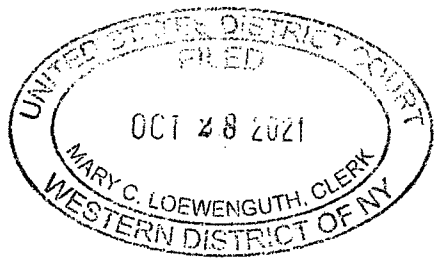
Instructions: The physician, nurse, social worker and, when appropriate, other staff significantly involved in the patient's treatment must record progress at least weekly for the first two months of admission and at least once a month thereafter. Include signature, title and date of each entry.

- Note the patient's progress in meeting the goals/objectives of the Treatment Plan, any changes in the patient's problems/needs/circumstances, and any recommendations for revising the Treatment Plan.

Date/Time	Goal/Obj. I.D.	
1-6-09 5PM:		Psychiatrist Admit Note: Detailed note dictated. Pt. is in stable condition - no evidence of psychosis. He has very good insight. No physical complaints. No concerns about his/others safety. A/P -- Continue on Seroquel 175 mg/day. - Tx team meeting scheduled for Friday. R Humphrey
1/6/09 2330		RN Evening note Cooperative & pleasant. Ate well. Visit from parents this eve. Quiet.
1-7-09	N	SHTA Note: Pt asleep upon start of shift. Pt appeared to have slept through the night without incidt. Will continue to monitor. Matt Smith SHTA -
1/7/2009 0515A		RN Note #1 NIGHTS - Pt appeared to sleep well. Awake to BR, at 0445 - asked for ibuprofen for headache scale #10 (on a 1-10). Attempted to contact on-call physician via phone # and pager # - no answer. Notified S. Lucas NAI of inability to notify MD. Writer offered him a cold pack for his head while we awaited MD - pt refused. Asked if there's anything else that he could think of to help start pain relief - pt said "no, I'll be OK, I'll just lay here." Pleasant, smiling, appears calm. Will monitor & attempt to locate MD. Unable to locate allergies - pt reports he can take Ibuprofen without problem — Julith Sodata RN 2 —
1/7/2009 0700		138/80 - 72 - 16, Stated ⊕ relief from PR(R) stat Motrin → see next page. Pleasant and calm — Julius Sodata RN II

APPENDIX

D



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

STEVEN JANAKIEVSKI,

Petitioner,

v.

EXECUTIVE DIRECTOR, ROCHESTER PSYCHIATRIC CENTER,

Respondent.

Case # 14-CV-06168-FPG
DECISION AND ORDER

INTRODUCTION

On April 8, 2014, Steven Janakievski ("Petitioner") filed a *pro se* Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("§ 2254") challenging his involuntary civil commitment in Respondent's custody.[1] ECF No. 1. On September 28, 2018, the Court (Telesca, D.J.) dismissed the Petition as moot because the commitment orders at issue had expired and Petitioner had been conditionally released from the Rochester Psychiatric Center ("RPC") on June 18, 2018. ECF No. 38. Petitioner appealed, and the Second Circuit granted a certificate of appealability on the question of whether the District Court erred in dismissing the Petition as moot.[2]

On April 10, 2020, the Second Circuit issued a decision finding that the Petition was not moot, vacating the judgment, and remanding the case for further proceedings. *Janakievski v. Exec. Dir., Rochester Psychiatric Ctr.*, 955 F.3d 314 (2d Cir. 2020); ECF No. 47 (Mandate). The Second

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[1] *See Duncan v. Walker*, 533 U.S. 167, 176 (2001) (stating that a state court order of civil commitment satisfies § 2254's "in custody" requirement).

[2] *See Janakievski v. Exec. Dir., Rochester Psychiatric Ctr.*, No. 18-3235 (2d Cir.), Dkt. 30. The Circuit also appointed counsel pursuant to the Criminal Justice Act, 18 U.S.C. §3006A to represent Petitioner on appeal. *See id.*, Dkt. 31. This Court has continued appellate counsel's appointment for purposes of the remand. ECF No. 45.

Circuit declined to address Respondent's arguments that Petitioner's challenges to the commitment and retention orders were untimely, unexhausted, and procedurally barred, since those issues were outside the scope of the certificate of appealability and had not been addressed by the District Court. The Second Circuit directed that Petitioner be provided an opportunity to file an amended petition challenging the 2018 order of conditions. It left the issues of timeliness, exhaustion, and procedural default, as well as the viability of a potential challenge to the 2018 order of conditions, to the District Court to consider in the first instance.

In accordance with the Circuit's directions, this Court issued a scheduling order directing Petitioner to file an amended petition. ECF No. 45. Petitioner's counsel sought an extension of time in which to do so, ECF No. 48, but later elected to proceed on the original Petition. ECF No. 50. Since the original Petition was already fully submitted, neither party filed additional briefing. *See* ECF Nos. 51-53. For the reasons discussed below, the application for a writ of habeas corpus is DENIED; the Petition, ECF No. 1, is DISMISSED; and a certificate of appealability is DENIED.

BACKGROUND

I. Statutory Framework Governing the State Court Proceedings

In New York, a criminal defendant may plead that "he lacked criminal responsibility by reason of mental disease or defect [('NRRMDD')]." N.Y. Penal Law § 40.15; *see also* N.Y. Crim. Proc. Law § 220.15 (outlining the procedure for NRRMDD plea, which requires a showing that the charge could be proven beyond a reasonable doubt and that the defendant would prove the affirmative defense of insanity by a preponderance of the evidence). In such cases, New York Criminal Procedure Law ("C.P.L.") § 330.20 mandates that an initial commitment hearing be held to determine the "degree of confinement and/or supervision necessary to treat the insanity

acquittee's condition and to safeguard both the acquittee and the public." *Jamie R. v. Consilvio*, 6 N.Y.3d 138, 142 (2006).

As a result of this hearing, the insanity acquittee is slotted into one of three "tracks." *Id.* (citing *Matter of Norman D.*, 3 N.Y.3d 150, 153 n.1 (2004)). Individuals who are found to have a "dangerous mental disorder" as defined in C.P.L. § 330.20(1)(c) are placed on track one and confined in secure facilities operated by the Office of Mental Health ("OMH"). *Id.* at 142-43 & n.4. "Those who are 'mentally ill' as that term is defined in CPL 330.20(1)(d) are classified as track two patients and confined in nonsecure facilities under an order of conditions." *Jamie R.*, 6 N.Y.3d at 142-43. Individuals who neither suffer from a "dangerous mental disorder," N.Y. Crim. Proc. Law § 330.20(1)(c), nor are "mentally ill," *id.* § 330.20(1)(d), are placed on track three and released from OMH custody, usually with an order of conditions. *Jamie R.*, 6 N.Y.3d at 143.

An acquittee determined to have a "dangerous mental disorder" as defined in C.P.L. § 330.20(1)(c) must be committed to a secure OMH facility for a period not exceeding six months, *see* N.Y. Crim. Proc. Law § 330.20(1)(f), (6). This commitment may be extended by a retention order. *Id.* § 330.20(8), (9). A first retention order may not last for more than one year from the expiration of the initial commitment order, and subsequent retention orders cannot exceed two years from the expiration of the prior retention order. *See id.* § 330.20(1)(g), (h)-(i).

"[T]o obtain a retention order, OMH must establish at a minimum that an insanity acquittee is 'mentally ill' (which, by definition [set out in C.P.L. § 330.20(1)(d)], means the patient suffers from a mental illness and needs inpatient treatment), but a retention order can be obtained *without* a showing that the patient suffers from a dangerous mental disorder[.]" *Jamie R.*, 6 N.Y.3d at 152 (citing N.Y. Crim. Proc. Law § 330.20(8)); emphasis supplied). Where a court finds that an acquittee no longer suffers from a "dangerous mental disorder," N.Y. Crim. Proc. Law §

330.20(1)(c), but remains "mentally ill," *id.* § 330.20(1)(d), it must order the acquittee's transfer from a secure to a nonsecure facility. *See id.* §§ 330.20(9), (11). And, if the court finds that the acquittee neither suffers from a "dangerous mental disorder" nor is "mentally ill," it must order the acquittee's release under an "order of conditions." *See id.* §§ 330.20(9), (12).

II. Petitioner's Criminal Proceedings, Insanity Plea, and April 2, 2009 Commitment Order

On December 10, 2007, while working as a temporary employee at Bausch & Lomb, Petitioner stabbed a coworker in the face and neck with a knife, causing severe injuries. At the time of the assault, he heard voices telling him to attack and apprehend the co-worker, whom he mistakenly believed was a Soviet agent engaged in corporate espionage. In the weeks prior to the incident, Petitioner had been heavily using controlled substances including LSD, cocaine, and marijuana, and had been experiencing auditory and visual hallucinations. *See* SR.022-032.[3]

After Petitioner was arrested and charged with first-degree assault, he was found not competent to participate in his defense and was admitted to the RPC's forensic (secure) unit for restoration of competency. SR.028. Once his competency was restored, Petitioner entered a plea of NRRMDD in New York State, Monroe County Court (Keenan, J.) on December 23, 2008. Judge Keenan subsequently issued an examination order pursuant to C.P.L. § 330.20(2). SR.2657-2658; 2669-2673.

Forensic psychiatrist Dr. Alison Deem examined Petitioner and issued a report diagnosing him with Psychotic Disorder Not Otherwise Specified ("NOS") and Polysubstance Dependence in Sustained Remission in a Controlled Environment. Dr. Deem opined that Petitioner was dangerous and should be confined to a secure facility. SR.022-032. Forensic psychiatrist Dr. Janelle Lundgren

[3] Citations to "SR.__" refer to the Bates-stamped page numbers at the bottom of the State Court Records which were not filed electronically and are maintained in paper form.

concurred in Dr. Deem's finding of dangerousness and recommendation of secure commitment. SR.2691-2699. Based on these reports, Judge Keenan found that Petitioner suffered from a "dangerous mental disorder" as defined in C.P.L. § 330.20(1)(c).[4] Accordingly, Petitioner was required to be committed to a secure OMH facility for a period not exceeding six months, *see* N.Y. Crim. Proc. Law § 330.20(1)(f), (6). The six-month commitment order was issued on April 2, 2009. *See* SR.193-196.

III. Retention Orders Issued in 2009, 2010, and 2011

Judge Keenan granted OMH's request for a first retention order on October 26, 2009, finding that Petitioner still had a "dangerous mental disorder" and that continued hospitalization in RPC's secure unit was necessary to ensure he did not suffer from another relapse into substance abuse. This order was set to expire October 2, 2010. SR.193-196.

In August 2010, OMH applied to extend Petitioner's commitment in a secure facility for two years. Judge Keenan held a hearing at which Dr. Gary Rosenberg testified for OMH. Represented by retained counsel, Petitioner was the only witness for the defense. Judge Keenan issued a second retention order on October 19, 2010, crediting Dr. Rosenberg's testimony and finding that OMH had proven, by a preponderance of the evidence, the continued existence of a "dangerous mental disorder." SR.051-052. By letter order dated December 31, 2010, Judge Keenan advanced the expiration date of the second retention order to July 2, 2011. SR.054.

OMH applied in September 2011 for a subsequent order of retention, asserting that Petitioner continued to suffer from a dangerous mental disorder. In his supporting affidavit and

[4] "Dangerous mental disorder" as defined in C.P.L. § 330.20(1)(c) means that "a defendant currently suffers from a 'mental illness' as that term is defined in [N.Y. Mental Hyg. Law § 1.03(20)]," N.Y. Crim. Proc. Law § 330.20(1)(c)(i), that is, he has "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation[,]" N.Y. Mental Hyg. Law § 1.03(20), and "that because of such condition he currently constitutes a physical danger to himself or others[,]" N.Y. Crim. Proc. Law § 330.20(1)(c)(ii).

report, treating psychiatrist Dr. Guillermo Portillo diagnosed Petitioner with Psychotic Disorder, NOS; and Polysubstance Dependence in Sustained Remission in a Controlled Setting. SR.010-015; SR.278-283. Dr. Portillo opined that Petitioner had delusions of paranoia—in particular, that his previous treating psychiatrist, Dr. Rosenberg, was a "sociopathic killer and a liar" and had killed four patients by overmedicating them—and that these delusions were unrelated to past substance abuse. SR.2716-2717. In Dr. Portillo's view, Petitioner lacked insight into his mental health; this was demonstrated by, among other things, his refusal over the course of the past year to engage meaningfully in treatment or talk to his treatment team because he believed they were all conspiring to keep him confined. Dr. Portillo opined that Petitioner should be treated with an antipsychotic medication, and that he required inpatient group and individual substance abuse treatment to gain insight into his mental illness and prevent a relapse. OMH also submitted a recommendation from RPC's Forensic Committee echoing Dr. Portillo's opinion. SR.270.

Although the previous retention order had expired in July 2011, Petitioner, who was represented by retained counsel, did not contest his continued retention pending the County Court's decision on OMH's most recent application. Petitioner agreed to an order of temporary retention, which the County Court issued in September 2011. SR.2727-2728.

IV. June 2012 Hearing on OMH's Application for a Subsequent Retention Order

Over the course of four days in June 2012, the County Court (DiNolfo, J.) conducted a hearing on OMH's September 2011 request for a subsequent retention order extending Petitioner's commitment in a secure facility as well as its request for a treatment-over-objection order to administer Risperidone, an antipsychotic medication. Prior to hearing testimony, the County Court admitted Petitioner's medical records into evidence.

OMH called treating psychiatrist Dr. Portillo, who diagnosed Petitioner with Schizoaffective Disorder, Bipolar Type, a refinement of an earlier, more general diagnosis of Psychotic Disorder NOS. SR.327-328. Dr. Portillo opined that Petitioner continued to suffer from paranoid delusions about Dr. Rosenberg and the rest of his RPC treatment team, and that these delusions were unrelated to his past substance abuse. SR.341-342; 355-357.

Dr. Portillo explained that Petitioner had suffered a setback in treatment beginning in the spring of 2010, when he withdrew from participating meaningfully in group therapy by reducing disclosures about himself. Petitioner's insight into his mental illness began "deteriorating" at that time; he started "denying he had a psychotic illness" because he had "remained sober" in the secure unit. SR.347. He then refused to speak to his psychiatrists at all, invoking his Fifth Amendment privilege against self-incrimination. Finally, and most recently, he refused to speak to his social worker. SR.356. Dr. Portillo opined that Petitioner's noncompliance with treatment was fueled by his paranoia and paranoid delusions—that his RPC treatment team, who are in an alliance with the District Attorney and Attorney General, are attempting to punish him for successfully pleading NRRMDD and avoiding prison. SR.356. According to Petitioner, their goal was to confine him for the length of time he would have served had he been convicted of first-degree assault.

In Dr. Portillo's view, Petitioner remained dangerous because he had an active psychotic illness which was currently untreated due to his refusal to take medication or to participate in his therapy. *See* SR.347-366. Dr. Portillo stressed the continuing need for Petitioner to participate in group therapy to treat his mental illness and substance abuse, noting that the underlying criminal offense was the culmination of Petitioner relapsing into substance abuse after being discharged from an earlier course of inpatient treatment. Dr. Portillo did not believe Petitioner would comply

with treatment in an outpatient setting or that he understood why it was important to abstain from drugs and remain in treatment. SR.351-354, 357.

Petitioner, represented by retained counsel Donald Thompson, Esq. ("Thompson"), called psychiatrist Dr. Rory Houghtalen as an expert witness for the defense. After conducting approximately twelve hours of interviews with Petitioner, Dr. Houghtalen authored a report stating, in relevant part, that Petitioner's "current mental status is consistent with the CPL 330.20 definition of mental illness." SR.3095. Dr. Houghtalen diagnosed Petitioner with Substance Induced Psychotic Disorder, Hallucinogen Persisting Perception Disorder (flashbacks), and Polysubstance Dependence, all in remission. SR.572, 3094-3095. Dr. Houghtalen also testified at various points during the hearing that he did not see any evidence of "mental illness" during his interviews with Petitioner. *See, e.g.*, SR.564.

Dr. Houghtalen disagreed with Dr. Portillo that Petitioner was experiencing paranoid delusions about Dr. Rosenberg. SR.547, SR.571-572. Instead, Dr. Houghtalen attributed them to a severe personality conflict between Petitioner and Dr. Rosenberg. SR.529-530. Dr. Houghtalen did not believe Petitioner's May 2010 letters accusing Dr. Rosenberg of murdering patients were delusional; rather, they were routine medical grievances punctuated with "hyberbole" that had been misinterpreted. SR.534-540.

Dr. Houghtalen opined that Petitioner should "continue to have attention to abstinence or substance abuse treatment," SR.572-573, and that Petitioner had to be "very, very watchful" about a "risk of a recurrence" of psychosis if he resumed using controlled substances, since he had "demonstrated that potential twice" SR.575, 596-597. Dr. Houghtalen did not believe that Petitioner was dangerous unless he resumed heavy substance abuse. SR.574-576. Dr. Houghtalen viewed Petitioner's refusal to "cooperate with [RPC staff]" and to instead "hope for a judicial

remedy" as "stubbornness" rather than the product of a paranoid delusion or a lack of insight. SR.578-579.

Dr. Houghtalen testified that if Petitioner were placed in the civil (nonsecure) unit at RPC, he could be managed safely even if he experienced another psychotic episode, unless he became dangerous. He noted that transferring Petitioner to the nonsecure unit would provide an opportunity to work with a new treatment team, although he admitted that Petitioner had threatened not to communicate with new treatment providers if he did not think they were being genuine. SR.3596, SR.631-632.

V. August 6, 2012 Subsequent Retention and Transfer Order

In an order dated August 6, 2012, the County Court (DiNolfo, J.) denied OMH's application for a medication-over-objection order[5] and granted OMH's application for a subsequent retention order in part. SR.059-075. Judge DiNolfo rejected Dr. Portillo's opinion that Petitioner continued to suffer from a "dangerous mental disorder" as defined in C.P.L. § 330.20(1)(c) but found Petitioner was "mentally ill" as defined in C.P.L. § 330.20(1)(d), meaning that he "currently suffers from a mental illness for which care and treatment as a patient, in the in-patient services of a psychiatric center under the jurisdiction of [OMH], is essential to such defendant's welfare and that his judgment is so impaired that he is unable to understand the need for such care and treatment.'" *Jamie R.*, 6 N.Y.3d at 142-43, n.5 (brackets in original). Accordingly, Judge DiNolfo issued an order directing OMH to transfer Petitioner from the secure unit at RPC to the nonsecure unit. The order was retroactive to July 2011, and it was set to expire on July 2, 2013. SR.260-262.

[5] This ruling is not at issue in this proceeding.

VI. The Appeal of the August 6, 2012 Order

Represented by Thompson, Petitioner timely filed an application for leave to appeal the August 6, 2012 order to the Appellate Division, Fourth Department, of New York State Supreme Court ("Appellate Division"). *See* SR.240-241. Permission was granted, SR.3347-3348, and the appeal was perfected in April of 2013. OMH filed a motion to dismiss the appeal as moot based on the expiration of the August 6, 2012 order; this motion was denied with leave to renew in OMH's appellate brief. SR.3373-3374.

Thompson filed an appellate brief on Petitioner's behalf arguing that the appeal was not moot, and that the transfer order was against the weight of the credible evidence and violative of due process. SR.076-113. Petitioner filed a *pro se* supplemental appellate brief that challenged prior retention orders in addition to the August 6, 2012 order. SR.114-263. OMH's brief reasserted the mootness argument and contended that the subsequent retention order was properly supported by a preponderance of the evidence. SR.3352-3388. Thompson and Petitioner each filed reply briefs. *See* SR.3396-3454.

On November 15, 2013, the Appellate Division issued an order dismissing the appeal as moot because "[t]he order has expired by its own terms and was superseded by an order subsequently entered, and the issues raised are not sufficiently substantial or novel to warrant invoking the exception to the mootness doctrine[.]" *S.J. v. State*, 974 N.Y.S.2d 856, 856 (4th Dep't 2013) (citations omitted). The Appellate Division further held that, "even assuming . . . the exception to the mootness doctrine applies, . . . a fair interpretation of the evidence supports [the] County Court's determination[.]" *Id.* (citation omitted).

Petitioner sought leave to appeal, SR.3458-3490, which OMH opposed, SR.3491-3525. On February 20, 2014, the New York Court of Appeals *sua sponte* dismissed the appeal "upon the

ground that no substantial constitutional question is directly involved." *S.J. v. State*, 22 N.Y.3d 1128 (2014).

VII. Subsequent Retention Proceedings

While the appeal was pending, OMH applied on July 3, 2013, for a subsequent order of retention. On September 6, 2013, the County Court issued a temporary retention order, pending its decision on the July 2013 application. On January 30, 2014, the County Court granted OMH's application to permit escorted community furloughs. *See* ECF No. 15 at 14.

VIII. The Habeas Petition

On April 8, 2014, Petitioner filed his *pro se* Petition, ECF No. 1, asserting nineteen enumerated "Grounds" that challenged all the commitment and retention orders issued from 2009 to 2012. *See also* Petitioner's Memorandum of Law ("Pet'r Mem.") (not docketed on CM/ECF; submitted in paper form). Respondent filed a Response, ECF No. 15, and Memorandum of Law ("Resp't Mem.") (not docketed on CM/ECF; submitted in paper form). Petitioner filed a Reply, ECF No. 18, with Exhibits, ECF Nos. 18-1 through 18-3.

For the reasons set forth below, the Court finds that Grounds Two, Three, Four, Six, Seven, Eight, and Nine are untimely; Grounds One, Ten, Twelve, and Fourteen are unexhausted but are deemed exhausted and are also procedurally defaulted; Ground Five is exhausted but meritless; Ground Eleven's weight of the evidence claim, Ground Eighteen, and Ground Nineteen assert errors of state law that are not cognizable on federal habeas review; and Ground Eleven's due process claim and Ground Thirteen are procedurally defaulted as a result of the Appellate Division's reliance on an adequate and independent state ground for dismissal. Grounds Sixteen and Seventeen fail to state colorable claims for habeas relief. Grounds Fifteen's claim of actual innocence is insufficient as a gateway claim of actual innocence to overcome the statute of

limitations bar or the procedural defaults. To the extent Ground Fifteen asserts a freestanding claim of actual innocence, such a claim is not cognizable on federal habeas review.

DISCUSSION

I. The Claims Challenging the 2009 and 2010 Orders: Grounds One Through Nine

A. Overview

Grounds One and Five assert errors by the County Court in connection with the April 2, 2009 commitment order. *See* ECF No. 1 at 6, ¶ 22(A) (Ground One); *id.* at 8, ¶ 22(E) (Ground Five). Grounds Two, Three, Six, Seven, and Eight allege errors by the County Court in connection with the October 19, 2010 and December 31, 2010 retention orders. *See* ECF No. 1 at 7, ¶ 22(B) (Ground Two); *id.* ¶ 22(C) (Ground Three); *id.* at 8, ¶ 22(F) (Ground Six); *id.* ¶ 22(G) (Ground Seven) *id.* at 9, ¶ 22(H) (Ground Eight). Grounds Four and Nine assert that Petitioner's retained attorneys performed defectively in connection with the 2010 orders. *See* ECF No. 1 at 7, ¶ 22(D) (Ground Four); *id.* at 9, ¶ 22(I) (Ground Nine). Respondent argues that these claims are untimely because they were filed more than one year after the respective judgments became final. *See* Resp't Mem. at 16, 20-21.

B. Timeliness

1. The Statute of Limitations

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), contains a one-year limitations period which begins running on the latest of the following four events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The Second Circuit has not considered the question of whether courts should evaluate the timeliness of each asserted claim individually, or the timeliness of the petition as a whole. The consensus circuit view is that . . . 'Congress meant for courts to determine timeliness [under § 2244(d)] on a claim-by-claim basis.'" *Bonner v. Superintendent, Five Points Corr. Fac.*, No. 20-CV-6906-FPG, 2021 WL 1946703, at *4 (W.D.N.Y. May 14, 2021) (quoting *DeCoteau v. Schweitzer*, 774 F.3d 1190, 1192 (8th Cir. 2014) (further quotation and citations omitted)). Respondent contends that the claims challenging the 2009 commitment order and the 2010 retention orders, i.e., Grounds One through Nine, are untimely under § 2244(d)(1)(A) because they became final more than one year before the filing of the Petition on April 8, 2014.

Because Petitioner does not suggest that he was impeded from filing in a timely fashion by any state action, subsection (B) of § 2244(d)(1) does not apply. Nor is Petitioner relying on any right made retroactively applicable on collateral review, which means that subsection (C) of § 2244(d)(1) is inapplicable. Finally, Petitioner has not come forward with newly discovered evidence that might warrant application of subsection (D). Therefore, the Court agrees with Respondent that only possible start-date for the limitations period is set forth in subsection (A). *See, e.g., Trombley v. Bosco*, No. 9:14-CV-01118-JKS, 2016 WL 6238576, at *3 (N.D.N.Y. Oct. 25, 2016) (applying § 2244(d)(1)(A) to determine date civil commitment order became final). Accordingly, the Court must ascertain the date the commitment and retention orders became final.

2. Grounds One Through Nine Were Filed Outside the Limitations Period

For purposes of § 2244(d)(1)(A), a state judgment becomes "final" when the United States Supreme Court denies an application for a writ of *certiorari* or when the time to seek *certiorari* has expired, which is 90 days following the date on which direct review by the state's highest court is complete. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) ("For petitioners who pursue direct review all the way to this Court, the judgment becomes final at the 'conclusion of direct review'—when this Court affirms a conviction on the merits or denies a petition for *certiorari*. For all other petitioners, the judgment becomes final at the 'expiration of the time for seeking such review'—when the time for pursuing direct review in this Court, *or in state court*, expires.") (emphasis supplied); U.S. Sup. Ct. R. 13(1) ("A petition for a writ of *certiorari* seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.").

Appeals under C.P.L. § 330.20 are "deemed civil in nature" and "shall be governed by the laws and rules applicable to civil appeals. . . ." N.Y. Crim. Proc. Law § 330.20(1)(c). Under New York Civil Practice Law and Rules ("C.P.L.R.") § 5513, "[t]he time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry. . . . A motion for permission to appeal must be made within thirty days." N.Y. Civ. Prac. Law & Rules § 5513(b). If the service of the judgment or order with notice of entry, which starts the appeal period running, was accomplished by mail, C.P.L.R. § 2103(b)(2) allows for additional days to be added to the basic thirty-day period. *E.g.*, *Messner v. Messner*, 347 N.Y.S.2d 589, 589-90 (1st Dep't 1973) (*per curiam*). Presently, the statute provides that "where a period of

time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state[.]" N.Y. Civ. Prac. Law & Rules § 2103(b)(2).

The time-periods prescribed under C.P.L.R. § 5513 are nonwaivable and jurisdictional. *See Haverstraw Park, Inc. v. Runcible Properties Corp.*, 33 N.Y.2d 637, 637 (1973) ("Motion for leave to appeal dismissed upon the ground it was not made within the time prescrived [sic] by statute. (CPLR [§] 5513.) A stipulation of the parties cannot confer jurisdiction on this Court to consider an untimely motion."); *accord Fid. Nat. Title Ins. Co. v. Regent Abstract Servs., Ltd.*, 15 N.Y.3d 799, 799 (2010) ("Motion for leave to appeal dismissed as untimely (*see* CPLR 5513(b)[.]"); *see generally* Siegel, N.Y. Prac. § 534 (6th ed.) ("stress[ing] the great rigidity of the time for taking an appeal or for moving for leave to take an appeal," and noting that "the passing of the period is even deemed to divest the appellate court of jurisdiction") (footnotes and citations omitted). C.P.L.R. § 5513 itself has been described as "a statute of limitations that cannot be extended, except upon the "narrow grounds" set forth in C.P.L.R. § 5514.[6] *See* Siegel, N.Y. Prac. § 534 & nn. 5-7 (6th ed.); *see also* Stecich, M., 8 N.Y. Prac., Civil Appellate Practice § 6:5 (3d ed.) (June 2021 update).

Here, Petitioner did not pursue an appeal of the April 2, 2009 commitment order or the October 19, 2010, or December 31, 2010 retention orders. Giving Petitioner the benefit of the extra five days provided by C.P.L.R. § 2103(b)(2), the "expiration of the time for seeking such review" was thirty-five days after service of a copy of the order at issue. *See Gonzalez*, 565 U.S. at 152

[6] C.P.L.R. § 5514(a) applies when the appellant uses the wrong method of appeal initially, but only if the mistaken method was used in the statutorily prescribed time frame. C.P.L.R. § 5514(b) applies when the appellant's attorney suffers a disabling event (e.g., death or suspension from practice). The other two exceptions apply when there is a need to substitute a party, C.P.L.R. §§ 5514(c), 1022; or where the appellant has timely filed or served a notice of appeal or motion for leave to appeal, but through mistake or excusable neglect did not do the other required step, C.P.L.R. §§ 5514(c), 5520(a).

("[W]e look to state-court filing deadlines when petitioners forgo state-court appeals. Referring to state-law procedures in that context makes sense because such deadlines are inherently court specific."). Based on the copies contained in the State Court Record, the orders were served by mail on the date they were filed. Thus, the time to move for leave to appeal expired thirty-five days later, that is, on May 7, 2009 for the April 2, 2009 commitment order; November 23, 2010, for the October 19, 2010 retention order; and February 4, 2011, for the December 31, 2010 retention order. *See Gonzalez*, 565 U.S. at 150 ("[B]ecause Gonzalez did not appeal to the State's highest court, his judgment became final when his time for seeking review with the State's highest court expired."). The one-year statute of limitations expired on May 7, 2010, for the April 2, 2009 commitment order; on November 23, 2011, for the October 19, 2010 retention order; and February 4, 2012, for the December 31, 2010 retention order. The claims relating to these orders plainly were filed outside the statute of limitations.

3. Statutory Tolling May Be Available as to Grounds One and Five

AEDPA allows for the limitations period to be tolled during "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending. . . ." 28 U.S.C. § 2244(d)(2). "[A]n application for post-conviction review is pending from the time it is filed, during the intervals between disposition and appeal, and until further appellate review is unavailable[.]" *Hizbullahankhamon v. Walker*, 255 F.3d 65, 72 (2d Cir. 2001). Federal habeas petitions such as the instant proceeding do not toll the statute of limitations. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) ("[A]n application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2).").

Respondent argues that Petitioner's *pro se* state habeas proceeding challenging the initial commitment order cannot provide tolling under § 2244(d)(2) because he "abandoned" that application. However, it does not necessarily follow that the application is no longer "pending" in the state court. Respondent has not provided any documentation from the state court indicating that, for instance, the application has been dismissed for failure to prosecute. Because the Court does not have sufficient information about the status of the state habeas proceeding, it cannot properly determine the timeliness of the claims pertaining to the April 2, 2009 commitment order. However, because satisfying the AEDPA limitations period is not a jurisdictional prerequisite, *Pough v. United States*, 442 F.3d 959, 965 (6th Cir. 2006), the Court may consider Respondent's other arguments regarding Grounds One and Five.

4. Statutory Tolling Is Unavailable as to Grounds Two, Three, Four, Six, Seven, Eight, and Nine

The only application that potentially could provide statutory tolling under § 2244(d)(2) was Petitioner's state habeas proceeding challenging the initial commitment order. However, he did not file any such applications challenging the 2010 retention orders. Therefore, the statute of limitations for the claims based on the 2010 orders was not tolled pursuant to § 2244(d)(2).

5. Petitioner Has Not Demonstrated Entitlement to Equitable Tolling

The limitations period set forth in § 2244(d) is "subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). However, such cases are "rare and exceptional. . . ." *Doe v. Menefee*, 391 F.3d 147, 159 (2d Cir. 2004). "To be entitled to equitable tolling, [a petitioner] must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (citation and quotation marks omitted; alteration in original). The term "prevented" requires the petitioner to "demonstrate a causal relationship between the

extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances." *Valverde v. Stinson*, 224 F.3d 129, 133-34 (2d Cir. 2000).

The burden is on the habeas petitioner to demonstrate extraordinary circumstances and diligence. *See Lawrence*, 549 U.S. at 336. Thus, "[a] petitioner claiming extraordinary circumstances must support that claim with evidence and not simply with 'personal conclusions or assessments.'" *Gibson v. Artus*, No. 9:04-CV-820 LEK, 2008 WL 9434482, at *25 (N.D.N.Y. Mar. 21, 2008) (quoting *Bellamy v. Fisher*, No. 05 CIV. 2840, 2006 WL 2051038, at *5 (S.D.N.Y. July 24, 2006); citation omitted), *aff'd*, 407 F. App'x 517 (2d Cir. 2010). "A petitioner must also show that he was unable to pursue his legal rights during the entire period that he seeks to toll." *Id.* (citing *Barbosa v. United States*, No. 01 CIV. 7522, 2002 WL 869553, at *5 (S.D.N.Y. May 3, 2002)). Here, Petitioner has not attempted to show either extraordinary circumstances or diligence, which is a sufficient basis to find that he is not entitled to equitable tolling. *Cf. Mendez v. Artuz*, No. 99 CIV. 2472, 2000 WL 991336, at *2 (S.D.N.Y. Jul. 18, 2000) (holding that conclusory allegations do not meet the high burden required to justify tolling). Furthermore, he clearly cannot show that he was unable to pursue his rights during the relevant period because, despite his *pro se* status and involuntary civil commitment, he was able to conduct copious legal research, file a *pro se* state habeas petition, and review and make suggested revisions to proposed pleadings sent to him by his attorneys. *See* Exhibits to Pet'r Mem. Therefore, equitable tolling is unwarranted in this case.

6. Petitioner Has Not Shown "Actual Innocence" For Purposes of the Fundamental Miscarriage of Justice Exception

In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the Supreme Court extended the "fundamental miscarriage of justice" exception to cases involving AEDPA's limitations period. Thus, "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . , or, as in this case, expiration of the statute of limitations." *Id.* at 386. To pass through the actual innocence "gateway" and obtain review of an otherwise time-barred claim, the petitioner must present "new, reliable evidence" of his factual innocence, and "'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Id.* at 399 (quotation omitted). The gateway actual innocence standard is "demanding" and satisfied only in the "rare" and "extraordinary" case. *Id.* at 392, 401.

In Ground Fifteen, Petitioner asserts that due to the myriad constitutional violations he has sustained as delineated in the other Grounds, and because he is "actually innocent of the allegations and charges for which he was convicted," the "failure to entertain this Habeas Corpus will result in a 'miscarriage of justice.'" ECF No. 1 at 11, ¶ 22(O) (Ground Fifteen). This purported "newly discovered evidence" is comprised of counsel's failures to comply with Petitioner's directives about how to litigate the 2012 hearing on OMH's application for a subsequent retention order. *See* Pet'r Mem. at 121-124. For instance, Petitioner claims that contrary to his express instructions, counsel refused to raise an issue pertaining to what he believed was the correct standard of proof; to have Dr. Houghtalen correct alleged errors in his report; to submit evidence that purportedly demonstrated Petitioner's meaningful participation in his therapy groups; and to demand new hearings regarding the 2010 retention orders. *See id.* Thus, Petitioner appears to suggest that he is "actually innocent" of being "mentally ill" under C.P.L. § 330.20(1)(d), and that if counsel had

performed as instructed, the County Court would not have "convicted" him of being "mentally ill" and in need of nonsecure confinement.

Petitioner's argument misses the mark, for "[t]he actual-innocence gateway is firmly grounded . . . 'in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the *incarceration* of *innocent* persons.'" *Rivas v. Fischer*, 687 F.3d 514, 549 (2d Cir. 2012) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993); emphases supplied). Petitioner's attempt to equate his civil commitment to being forced to serve a "hypothetical prison sentence" has been explicitly rejected by the Supreme Court. *See Jones v. United States*, 463 U.S. 354 (1983). In *Jones*, the Supreme Court found no due process violation in confining an insanity acquittee "for a period longer than he could have been incarcerated if convicted." *Id.* at 368. *Jones* explained that the goals of incarceration of a convicted criminal are "retribution, deterrence, and rehabilitation[,]" *id.* at 369, while civil commitment of an insanity acquittee is based on his or her "continuing illness and dangerousness." *Id.* Because "[t]here simply is no necessary correlation between the severity of the offense and length of time necessary for recovery[,]" *id.*, "[t]he length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment." *Id.* Indeed, an individual adjudged not guilty by reason of insanity could be confined in "a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society" without violating due process. *Id.* at 370.

Moreover, "[s]ince a NRRMDD plea admits factual guilt, in entering such a plea a defendant consents to a finding that he or she could be found guilty beyond a reasonable doubt of each of the crimes charged in the indictment." *Makas v. Holanchock*, No. 9:02-CV-00836-JKS, 2007 WL 1651830, at *6–7 (N.D.N.Y. June 7, 2007). "[B]efore a New York trial judge may accept a NRRMDD plea[,] N.Y. Crim. Proc. Law § 220.15 requires the judge to address the defendant

personally and determine whether there is an evidentiary basis for the plea." *Id.* Since the County Court accepted his NRRMDD plea, Petitioner necessarily was required to consent to a finding that the prosecution could prove his guilt beyond a reasonable doubt. *See id.* He has not come forward with any new, reliable evidence that is relevant to his factual innocence and thus he has not undermined the stipulation he made at the time of his NRRMDD plea. Accordingly, the Court finds that Petitioner cannot satisfy the demanding standard for a gateway claim of actual innocence.

7. Summary

For the foregoing reasons, the Court does not have sufficient information to determine conclusively that Grounds One and Five are untimely. Accordingly, the Court will proceed to consider Respondent's other arguments as to these two grounds. Because statutory tolling is unavailable, equitable tolling is unwarranted, and Petitioner has not demonstrated actual innocence for purposes of bypassing the limitations bar, Grounds Two, Three, Four, Six, Seven, Eight, and Nine are dismissed as untimely under § 2244(d)(1)(A).

C. Exhaustion

Respondent alternatively contends that the claims attacking the 2009 and 2010 retention orders are unexhausted because Petitioner did not pursue a timely appeal pursuant to C.P.L. § 330.20(21)(a). Resp't Mem. at 16-17. Since the Court could not find Grounds One and Five to be untimely, the Court will consider Respondent's failure-to-exhaust argument as to these claims.

"[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In general, the exhaustion requirement is satisfied "when a petitioner has: (i) presented the federal constitutional claim asserted in the

petition to the highest state court (after preserving it as required by state law in lower courts) and (ii) informed that court (and lower courts) about both the factual and legal bases for the federal claim." *Ramirez v. Att'y Gen. of State of N.Y.*, 280 F.3d 87, 94 (2d Cir. 2001) (citations omitted). "[A] habeas petitioner 'shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.'" *O'Sullivan*, 526 U.S. at 844 (quoting 28 U.S.C. § 2254(c)).

1. Ground Five Is Exhausted but Meritless Even Under a *De Novo* Standard

Ground Five asserts that the County Court violated his "right to 'allocution'" and Fourteenth Amendment due process rights by "not allow[ing] [him] the opportunity to speak" before he was "sentenced," i.e., committed to the secure unit at RPC on April 2, 2009. ECF No. 1 at 8, ¶ 22(E). Petitioner raised Ground Five as Point 3 of his *pro se* supplemental appellate brief. SR.116. He also included it in his *pro se* application for leave to appeal. SR.3465-3466. He therefore "invoke[ed] one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845.

Whether a petitioner's claim was "adjudicated on the merits," 28 U.S.C. § 2254(d), by the state court is a threshold question in a habeas corpus proceeding because it "dictates the standard of review." *Bennett v. Sup't Graterford SCI*, 886 F.3d 268, 282 (3d Cir. 2018). Because Ground Five is meritless even under a less deferential, pre-AEDPA standard, the Court need not determine whether it was "adjudicated on the merits" by the Appellate Division on appeal. *See Messiah v. Duncan*, 435 F.3d 186, 198 (2d Cir. 2006) ("We need not . . . determine whether Messiah's claims were subject to a ruling on the merits in state court, as those claims fail under the more forgiving pre-AEDPA standards of review.").

Petitioner relies on *United States v. Prouty*, 303 F.3d 1249 (11th Cir. 2002), which noted that Fed. R. Crim. P. 32(c)(3)(C) codified "the right of a federal criminal defendant to make a final plea on his own behalf to the sentencer before the imposition of sentence." *Id.* at 1251. Here, however, Petitioner was not sentenced after a criminal conviction; rather, he was acquitted following his plea of not responsible by reason of mental disease or defect. Furthermore, by their terms, the Federal Rules of Criminal Procedure do not apply to state court proceedings. *See* Fed. R. Crim. P. 1(a)(1) ("These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.").

Moreover, the Supreme Court clearly has rejected the notion that the "right to allocution" is constitutional in nature and has explicitly stated that the denial of such right does not give rise to a cognizable habeas claim. *See Hill v. United States*, 368 U.S. 424, 428 (1962) ("The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. . . .") (collecting cases).

2. Ground One Was Not Fairly Presented but Should Be Deemed Exhausted and Procedurally Defaulted

Petitioner did not raise Ground One in his opening brief. Instead, he first raised it as Point 9 of his *pro se* reply brief. *See* SR.3409; 3450-3453. As the Second Circuit has observed, "[u]nder New York law, . . . a claim of error first raised in a reply brief is not properly presented to the reviewing court." *Lurie v. Wittner*, 228 F.3d 113, 124 (2d Cir. 2000) (habeas petitioner did not properly present his rule-of-lenity argument on his state appeal as of right so as to satisfy

exhaustion requirement for federal habeas review, where it was first raised in a reply brief, and thus not properly presented under state law) (citations omitted). By failing to raise the allegations supporting Ground One in his opening appellate brief, Petitioner did not fulfill the fair presentation requirement for that claim. *See id.*

Respondent argues that Petitioner would face procedural bars if he returned to state court to try to exhaust Ground One, and therefore the Court should deem it exhausted because he has no corrective processes available to him. *See* Resp't Mem. at 16-17. "For exhaustion purposes, 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) (quotations omitted). "In such a case, a petitioner no longer has 'remedies available in the courts of the State' within the meaning of 28 U.S.C. § 2254(b)." *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991) (citing 28 U.S.C. § 2254(c)).

If Petitioner were to return to state court to attempt to exhaust Ground One, he would face an absence of corrective process because he can no longer move for leave to appeal the 2009 commitment order. Since none of the exceptions to C.P.L.R. § 5513(b)'s strict time limit possibly could apply in Petitioner's case, he faces a mandatory procedural bar to filing another permissive appeal pursuant to C.P.L. § 330.20(21)(a) in state court. *See Thomas v. Greiner*, 111 F. Supp. 2d 271, 276-77 (S.D.N.Y. 2000) (petitioner's sentencing and speedy trial claims would be deemed exhausted and were procedurally barred for purposes of federal habeas review, where petitioner failed to timely seek leave to appeal denial of his C.P.L. § 440.10 motion to vacate judgment and set aside his sentence in state court and petitioner did not allege improper conduct, inability to communicate or other facts which would support motion to extend time limit to appeal under C.P.L. §§ 460.10(4)(a), 460.30) (citing *Wedra v. LeFevre*, 988 F.2d 334, 339-40 (2d Cir.1993)

(failure to timely seek leave to appeal C.P.L. § 440.10 motion is an independent and adequate state ground barring habeas relief)).

While there is one other avenue for reviewing a commitment or retention order, it does not provide an avenue for exhausting Ground One. Under C.P.L. § 330.20(16), "[a]ny defendant who is in the custody of the commissioner pursuant to a commitment order, a retention order, or a recommitment order, if dissatisfied with such order, may, within thirty days after the making of such order, obtain a rehearing and review of the proceedings and of such order in accordance with the provisions of section 9.35 or 15.35 of [N.Y. Mental Hyg. Law]." *Jamie R.*, 6 N.Y.3d at 149 (quotation omitted; alteration in original). The only issue that may be addressed in such a proceeding is "the factual 'question of the mental [illness] and the need for retention of the [patient][.]'" *Id.* (quoting *Norman D.*, 3 N.Y.3d at 155 (further quotation omitted)). Rehearing and review "does not encompass the dangerous mental disorder determination that justifies track one classification and placement in a secure facility." *Id.*

"Significantly, 'rehearing and review under CPL 330.20(16) is not a substitute for appellate review of a recommitment order.'" *Evans v. Rochester Psychiatric Ctr.*, 801 N.Y.S.2d 233 (Sup. Ct. 2005) (quoting *Jamie R.*, 790 N.Y.S.2d at 100 (citing *Norman D.*, 3 N.Y.3d at 153-54)). "Unlike an appellate proceeding, which reviews the record on appeal for error, a rehearing and review seeks to ascertain an insanity acquittee's mental condition at the time the rehearing and review is conducted." *New York State Off. of Mental Health v. Marco G.*, 167 A.D.3d 49, 58, 85 N.Y.S.3d 441, 449 (1st Dep't 2018) (quotation and emphasis omitted). Thus, a rehearing and review cannot be used to exhaust claims involving record-based errors in a commitment or retention hearing. *See id.*

"For exhaustion purposes, a petitioner 'must have employed the proper state law procedural vehicle so that the state courts were afforded the opportunity to consider the claims raised on their merits.'" *Camarano v. Irvin*, 902 F. Supp. 358, 365 (S.D.N.Y. 1994) (quoting *Walker v. Dalsheim*, 669 F. Supp. 68, 70 (S.D.N.Y. 1987) (citing *Dean v. Smith*, 753 F.2d 239 (2d Cir. 1985); other citation omitted), *aff'd*, 122 F.3d 1055 (2d Cir. 1995). Even if Petitioner still could file a timely application for a rehearing and review, such a proceeding would not allow him to fairly present his unexhausted claims for purposes of fulfilling the exhaustion requirement. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Unexhausted claims that face a state procedural bar are "deemed exhausted" by the federal courts. *Grey*, 933 F.2d at 120-21. The rationale is that because Petitioner no longer has "remedies available" in the New York State courts under 28 U.S.C. § 2254(b), he has met the statutory exhaustion requirement. *Id.* (citing 28 U.S.C. § 2254(c)). "However, the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim . . . ." *Gray v. Netherland*, 518 U.S. 152, 162 (1996) (citations omitted).

To overcome the procedural default, the petitioner must demonstrate cause for the default, and prejudice attributable thereto; or that the failure to consider the claims will "result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). To show "prejudice," the petitioner must show that the default has "worked to his actual and substantial disadvantage. . . ." *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (quotation omitted). To establish "cause," the petitioner must "show that some objective factor external to the defense," that "cannot fairly be attributed to" the petitioner, prevented compliance with the state procedural rule. *Murray*, 477 U.S. at 488; *Coleman*, 501 U.S. at 753. Attorney error can be cause for excusing a procedural

default, but only where that error amounted to an actual deprivation of the petitioner's constitutional right to counsel. *See Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000) (holding that "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim" that must be first raised in state court and exhausted). However, "in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default." *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (citing *Coleman*, 501 U.S. at 755 (holding that attorney error during state postconviction proceedings, wherein counsel is not constitutionally guaranteed, cannot supply cause to excuse a procedural default that occurs in those proceedings)).

Here, as discussed above, two of Petitioner's ineffective assistance of counsel claims—Grounds Four and Nine—were dismissed as untimely and, as discussed below, the third ineffective assistance claim—Ground Fourteen—has not been exhausted. Further, Petitioner has not cited, and this Court has not found, any support for the proposition that retention orders issued following the initial commitment order are considered "critical stages"[7] at which the insanity acquittee is constitutionally entitled to the effective assistance of counsel. The sparse amount of case law that exists is to the contrary. *See, e.g., United States v. Nakamoto*, 2 F. Supp. 2d 1289, 1290 (D. Haw. 1998) ("The Due Process Clause does not require the appointment of counsel throughout an insanity acquittee's commitment. . . .'") (quoting *United States v. LaFromboise*, 836 F.2d 1149, 1152 (8th Cir.1988); citations omitted). Since C.P.L. § 330.20 hearings on retention orders are

[7] Courts in New York have held that the initial commitment hearing under C.P.L. § 330.20 following an insanity plea is "a critical stage of the proceedings during which [a] respondent [is] entitled to the effective assistance of counsel. . . ." *In re Brian HH.*, 833 N.Y.S.2d 718, 720 (2d Dep't 2007) (citations omitted). The rationale is that the "vitally important" question, *Norman D.*, 3 N.Y.3d at 152, of the insanity acquittee's "track status" is determined by the initial commitment order and may be overturned only on appeal from that order. *Matter of Matheson KK.*, 76 N.Y.S.3d 645, 647 (3d Dep't 2018).

civil in nature, Petitioner clearly did not have a Sixth Amendment right to counsel. *See Turner v. Rogers*, 564 U.S. 431, 441 (2011) ("[T]he Sixth Amendment does not govern civil cases.").

Petitioner therefore has not demonstrated "cause" to excuse the default. Petitioner likewise is unable to demonstrate "prejudice" resulting from the default of Ground One because it is not a cognizable claim for habeas relief upon which the Court could grant the writ. *See Jones*, 463 U.S. at 369-70. As discussed above in connection with the discussion of timeliness, Petitioner has not shown actual innocence and thus cannot rely on the fundamental miscarriage of justice exception. Therefore, Ground One is dismissed as procedurally defaulted.

II. Grounds Relating to the 2012 Retention Order: Grounds Ten, Eleven, Twelve, Thirteen, Fourteen, Eighteen, and Nineteen

A. Overview

Respondent concedes that the Grounds based on the 2012 retention order and subsequent appeal are timely. Respondent argues that Ground Ten is unexhausted because it was not raised in the appeal of that order. Because Petitioner would face a procedural bar if he returned to state court to try to exhaust it, Respondent urges the Court to deem it exhausted but procedurally defaulted. Respondent argues that Ground Eleven, to the extent it asserts a weight of the evidence claim, is not cognizable on federal habeas review. Similarly, Respondent contends that Grounds Eighteen and Nineteen assert only issues of state law and are not cognizable. Respondent asserts that Ground Fourteen is meritless; and that Ground Eleven, to the extent it asserts a due process claim, is procedurally defaulted due to the Appellate Division's reliance on an adequate and independent state ground to dismiss it. In the alternative, Respondent argues, it is meritless. Respondent does not specifically address Grounds Twelve or Thirteen.

As discussed further below, the Court agrees that Ground Eleven's weight of the evidence claim, Ground Eighteen, and Ground Nineteen are not cognizable on federal habeas review. The

Court further agrees that Ground Ten is unexhausted but must be deemed exhausted and procedurally defaulted. In addition, the Court finds that Grounds Twelve and Fourteen are unexhausted but must be deemed exhausted and procedurally defaulted. The Court determines that Ground Thirteen asserts a due process challenge to the County Court's "mentally ill" finding, and that Ground Eleven also includes a due process argument. The Court further finds that Ground Thirteen and the due process aspect of Ground Eleven are procedurally defaulted pursuant to the adequate and independent state ground doctrine.

B. Ground Eleven's "Weight of the Evidence" Claim, Ground Eighteen, and Ground Nineteen Are Not Cognizable

1. Ground Eleven's "Weight of the Evidence' Claim

Ground Eleven asserts that the County Court's August 6, 2012 finding that he was "mentally ill" was against the weight of the evidence because Dr. Houghtalen "testified that [Petitioner] was not 'mentally ill' at all" and "was found by the court to be credible in all aspects." ECF No. 1 at 10, ¶ 22(K). Petitioner's counsel raised this argument in his opening appellate brief as Point I(A)(1)-(3), arguing that the County Court's findings as to each element of the "mentally ill" finding under C.P.L. § 330.20(1)(d) were against the weight of the credible evidence. *See* SR.077-078, SR.092-108.

"[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The Supreme Court has reiterated numerous times that "federal habeas corpus relief does not lie for errors of state law[.]" *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (citations omitted).

A weight of the evidence claim derives from New York State statutory law, which empowers intermediate appellate courts "to review questions of law and questions of fact . . . in both civil cases . . . and criminal cases[.]" *People v. Bleakley*, 69 N.Y.2d 490, 493-94 (1987). *See* N.Y. Civ. Prac. Law & Rules § 5501(c) ("The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal."). Unlike a legal insufficiency of the evidence claim, which is based upon federal due process principles, *see Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), a weight of the evidence claim is based solely on state law. *Bleakley*, 69 N.Y.2d at 495 (weight of the evidence claim is based on court's factual review power; sufficiency of evidence claim based on the law).

Since a "weight of the evidence" claim is purely a matter of state statutory law, it is not cognizable on federal habeas review. *McKinnon v. Sup't, Great Meadow Corr. Fac.*, 422 F. App'x 69, 75 (2d Cir. 2011) (unpublished opn.). Therefore, this Court is precluded from considering it on the merits. *See Lewis*, 497 U.S. at 780; *see also Maldonado v. Scully*, 86 F.3d 32, 35 (2d Cir. 1996) ("[A]ssessments of the weight of the evidence or the credibility of witnesses are for the jury and not grounds for reversal on appeal; [the court] defer[s] to the jury's assessments of both of these issues.") (citations omitted).

2. Grounds Eighteen and Nineteen

Petitioner contends that his challenge to the August 6, 2012 transfer order was not mooted by the subsequently issued temporary retention order. He argues that the Appellate Division's finding that the appeal was moot, based on New York state law, violated his Fourteenth Amendment due process rights. *See* ECF No. 1 at 12 ¶¶ 22(R) (Ground Eighteen); 22(S) (Ground Nineteen).

Whether the Appellate Division "correctly determined that, under [state] law, the expiration of Petitioner's [2012 retention order] mooted his state court appeal is not a question that implicates his federal constitutional rights." *King v. DeMorales*, No. CV 08-4984-TJH JEM, 2010 WL 4916624, at *12 (C.D. Cal. May 3, 2010) (rejecting as not cognizable due process claim by civilly committed petitioner that he was denied due process when the state appellate court dismissed appeal of commitment order as moot because the term of commitment had expired) (citing *Campbell v. Blodgett*, 997 F.2d 512, 522 (9th Cir. 1992) (whether state appellate court conducted statutorily mandated review was not a federal issue)), *report and recommendation adopted*, No. CV 08-4984-TJH JEM, 2010 WL 4916623 (C.D. Cal. Dec. 1, 2010).

C. Grounds Ten, Twelve, and Fourteen Were Not Fairly Presented to the State Courts but Should Be Deemed Exhausted and Procedurally Defaulted

In his *pro se* supplemental appellate brief, Petitioner raised ten "questions presented," SR.123-125, but it was not until his *pro se* reply brief that he articulated the arguments asserted in Grounds Ten and Twelve. *See* SR.3409; 3438-3431; 3446-3449. Ground Ten was asserted as Point 5, and Ground Twelve was asserted as Point 6. *Id.* As the Second Circuit has observed, "[u]nder New York law, . . . a claim of error first raised in a reply brief is not properly presented to the reviewing court." *Lurie v. Wittner*, 228 F.3d 113, 124 (2d Cir. 2000) (habeas petitioner did not properly present his rule-of-lenity argument on his state appeal as of right so as to satisfy exhaustion requirement for federal habeas review, where it was first raised in a reply brief, and thus not properly presented under state law) (citations omitted). By failing to raise the allegations supporting Grounds Ten and Twelve in his opening appellate brief, Petitioner did not fulfill the fair presentation requirement for these claims. *See id.*

Petitioner asserts in Ground Fourteen that his retained attorney violated his Sixth and Fourteenth Amendment rights to the effective assistance of counsel in connection with the August

6, 2012 retention order; and that the errors were so egregious that they affected all the other retention orders and the commitment order. ECF No. 1 at 11, ¶ 22(N). Petitioner raised this in his *pro se* supplemental appellate brief as Point 10. SR.178-179. However, in his *pro se* application for leave to appeal to the New York Court of Appeals, he only included allegations of ineffective assistance of counsel in connection with the 2010 retention orders; he did not identify any specific errors by counsel in regard to the 2012 retention hearing and subsequent order. *See* SR.3465-3466. Therefore, Petitioner did not fairly present his 2012 ineffective assistance claims to the New York Court of Appeals. *See Jordan v. Lefevre*, 206 F.3d 196, 198-99 (2d Cir. 2000) (holding that "arguing one claim in his leave letter while attaching an appellate brief without explicitly alerting the state court to each claim raised does not fairly present such claims for purposes of the exhaustion requirement" because petitioners "may not transfer to the state courts the duty to comb through an applicant's appellate brief to seek and find arguments not expressly pointed out in the application for leave").

"For exhaustion purposes, 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*, 118 F.3d at 139 (quotations omitted). For the same reasons discussed above in connection with Ground One, the Court finds that Grounds Ten, Twelve, and Fourteen must be deemed exhausted and, as a result, they are procedurally defaulted.

Petitioner cannot show "prejudice" attributable to the default of Ground Ten because the Appellate Division would have found that the County Court correctly applied the preponderance of the evidence standard of review. *See People v. Escobar*, 61 N.Y.2d 431, 434-35, 440 (1984) (holding that "the People's statutorily placed burden of proof—'to the satisfaction of the court'—is fulfilled when the People establish *by a fair preponderance of the credible evidence, rather than*

by clear and convincing evidence, that the defendant continues to suffer from a dangerous mental disorder or is mentally ill" and that this standard "provides greater due process protection to the defendant than is required under the Federal Constitution") (citing *Jones*, 463 U.S. at 367-68); *Matter of Michael RR*, 663 N.Y.S.2d 317, 319-20 (3d Dep't 1997) (finding *Escobar* "no less applicable" to a subsequent retention hearing than an initial commitment or first retention hearing because "because the court was analyzing the phrase 'to the satisfaction of the court' in determining the applicable burden of proof—language which appears in CPL 330.20(6), (8) and (9)").

Likewise, Petitioner cannot show "actual prejudice" attributable to his default of Ground Twelve, in which he asserts that the County Court violated his Fourteenth Amendment due process rights without finding that he has serious difficulty in controlling dangerous behavior. According to Petitioner, this omission violated the Second Circuit's holding in *Richard S. v. Carpinello*, 589 F.3d 75 (2d Cir. 2009). In *Richard S.*, the insanity acquittee argued, as Petitioner does here, that the Supreme Court's decision in *Kansas v. Crane*, 534 U.S. 407 (2002), "refined the constitutional standard for his continued involuntary commitment by requiring the state to prove that he has serious difficulty in controlling his dangerous behavior," *Richard S.*, 589 F.3d. at 83, in addition to proving mental illness and dangerousness, *see id.* The Second Circuit disagreed, finding that *Crane* did not "mandate[ ] an additional due process requirement for involuntary confinement," "specifically[,] that a state must also prove that the [committed individual] has serious difficulty in controlling behavior[.]" *Id.* at 83-84. Thus, the fact that the County Court did not make "a specific finding with respect to lack-of-control[,]" *id*, in Petitioner's case does not amount to a due process violation. *See id.*

As to Ground Fourteen, "the right to *effective* assistance of counsel is dependent on the right to counsel itself[,]" *Evitts v. Lucey*, 469 U.S. 387, 396 n.7 (1985) (emphasis supplied), Petitioner has not established that he *has* a constitutional right to counsel, as discussed above. Even assuming for the sake of argument that Petitioner does have a constitutional right to the effective assistance of counsel in connection with the retention proceedings, he has not stated a meritorious claim. "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,'" *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (quotation omitted), "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Id.* Here, Petitioner has not identified any errors by either of his attorneys, let alone an error that was egregious or prejudicial. The Court has reviewed the entire record, which indicates that both attorneys were "active and capable," *id.*, advocates for Petitioner throughout the C.P.L. § 330.20 proceedings.

Because Petitioner cannot demonstrate actual prejudice, it is unnecessary to consider whether "cause" exists. *See Stepney v. Lopes*, 760 F.2d 40, 45 (2d Cir. 1985) ("Since a petitioner who has procedurally defaulted in state court must show both cause and prejudice in order to obtain federal habeas review, we need not, in light of our conclusion that there was no showing of cause, reach the question of whether or not Stepney showed prejudice."). Finally, as discussed above, Petitioner has not demonstrated "actual innocence" for purposes of the miscarriage of justice exception. Grounds Ten, Twelve, and Fourteen are procedurally defaulted.

D. Ground Thirteen and Ground Eleven's Due Process Claim Are Procedurally Defaulted Under the Adequate and Independent State Ground Doctrine

Respondent has raised the affirmative defense of procedural default, arguing that the claims raised on appeal that related to the evidence supporting the County Court's August 6, 2012 order are barred from habeas review because the Appellate Division relied on an adequate and

independent state ground—the mootness doctrine—to dismiss the appeal. These claims are Ground Thirteen and Ground Eleven's due process claim.

Ground Thirteen asserts that the County Court violated Petitioner's Fourteenth Amendment due process rights in the August 6, 2012 order by committing him "without any 'symptomatology' and by failing to release him into outpatient treatment." ECF No. 1 at 10, ¶ 22(M). In the section of his opening appellate brief arguing that OMH failed to establish the minimum level of dangerousness to satisfy due process concerns, *see* Point I(A)(1)(4), Petitioner's counsel appeared to raise a similar argument based on Petitioner's lack of active "symptomatology." SR.108-110. Counsel pointed out to the County Court's observations that Petitioner had not been on anti-psychotic medications for the previous two years, during which time his mental condition had not worsened; that he had not committed any acts of violence since the underlying offense, SR.109; and that Dr. Houghtalen saw no evidence of "any mental disease . . . that would render [Petitioner] a danger to himself or a danger to anyone else in society," SR.110 (quotation to record omitted). Therefore, counsel argued, OMH had not established the "constitutionally required minimum level of dangerous to oneself or others that must be shown before an insanity acquittee may be retained in a non-secure facility[.]" SR.108 (quotation omitted). Petitioner's Ground Eleven incorporates counsel's entire appellate brief; thus, it includes both the weight of the evidence argument, *see* SR.092-108, and the due process argument, *see* SR.108-110. *See* Pet'r Mem. at 83-104.

A federal habeas court is precluded from reviewing "a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quotation omitted; emphases and alteration in original). "Even where the state court has ruled on

the merits of a federal claim 'in the alternative,' federal habeas review is foreclosed where the state court has also expressly relied on the petitioner's procedural default." *Murden v. Artuz*, 497 F.3d 178, 191-92 (2d Cir. 2007) (citing *Green v. Travis*, 414 F.3d 288, 294 (2d Cir. 2005) (citation omitted in original)). "The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits." *Walker v. Martin*, 562 U.S. 307, 315 (2011) (citation omitted).

The Appellate Division "expressly relied," *Murden*, 497 F.3d at 191, on New York's mootness doctrine in disposing of the appeal. That ruling was clearly an independent basis for the judgment. "To bar federal habeas review, however, the state court's decision must rest not only on an independent procedural bar under state law, but also on one that is 'adequate to support the judgment.'" *Id.* at 191-92 (quoting *Jimenez v. Walker*, 458 F.3d 130, 138 (2d Cir. 2006)). Because "the adequacy of state procedural bars . . . 'is itself a federal question[,]'" *Lee*, 534 U.S. at 375 (quotation omitted), this Court must examine "whether application of the procedural rule is 'firmly established and regularly followed' in consideration of the specific circumstances presented in a case." *Monroe v. Kuhlman*, 433 F.3d 236, 241 (2d Cir. 2006) (quoting *Cotto v. Herbert*, 331 F.3d 217, 240 (2d Cir. 2003) (citation omitted)). Put another way, "[a] claimed procedural bar is adequate only if state courts have applied the rule 'evenhandedly to all similar claims.'" *Id.* (quoting *Cotto*, 331 F.3d at 239 (internal quotation marks omitted in original)). "[A] discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. . . even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). After surveying the case law, the Court finds that the New York state courts have applied the mootness doctrine "evenhandedly" to similar cases.

Before a New York appellate court will review an order that no longer affects either party, an appellant must meet "three critical conditions to the mootness exception." *Chenier v. Richard W.*, 82 N.Y.2d 830, 832 (1993). The appeal must "present[] an issue that (1) is likely to recur, (2) will typically evade review and (3) is substantial and novel[.]" *Id.* (citation omitted). The New York Court of Appeals has condoned the application of the mootness doctrine in appeals of expired retention orders that were of substantially shorter duration than the order in Petitioner's case. *See, e.g.*, *id.* ("[T]he proceeding before us is now moot, since the 60-day retention order that is the subject of this appeal has expired and there are no indications that either party is still being affected in some way by that order.").

The New York Court of Appeals also has rejected the proposition "that all [C.P.L. § 330.20] retention proceedings—because they are necessarily short-lived and therefore typically evade review—should be subject to review irrespective of mootness." *David C.*, 69 N.Y.2d at 798. The court in *David C.* explained that even accepting the contention that retention orders typically evade review, "no blanket rule could be made for retention proceedings." *Id.* Rather, "[t]he determination whether to consider particular issues despite their mootness *must depend additionally* on the recurring, novel and substantial nature of those issues as they are presented." *Id.* (emphasis supplied).

The grounds for reversal presented in Petitioner's counseled appellate brief were as follows: (1) the County Court's retention order was against the weight of the credible evidence and (2) the evidence that Petitioner was "mentally ill" was insufficient to satisfy due process. Evidentiary claims such as those raised by Petitioner do not involve novel or substantial questions but instead require only the application of well-settled legal principles to the facts of the case. *See, e.g.*, *Boggs v. New York City Health & Hosps. Corp.*, 70 N.Y.2d 972, 974 (1988) ("The only issue

presented for this court's determination is whether the findings of the Trial Justice or the Appellate Division more nearly comport with the weight of the evidence. . . . Petitioner's challenge to her involuntary commitment is not the kind of litigation inherently and typically evading appellate review, and the narrow jurisdictional context of this case presents no novel, constitutional or substantial legal question for this court's review[.]") (citations omitted); *In re Stephen G.*, 799 N.Y.S.2d 587, 589 (3d Dep't 2005) ("[T]he only issue presented on this appeal concerns whether Supreme Court's determination that petitioner suffers from a dangerous mental disorder was supported by sufficient evidence. Since this order has expired, that issue is moot[.]") (citation omitted). Furthermore, such fact-bound challenges are necessarily specific to the evidence presented in connection with a particular application for a retention order and, consequently, unlikely to recur between the parties. Thus, Petitioner failed to demonstrate the three factors necessary to invoke the exception to the mootness doctrine.

The Court finds that New York's mootness doctrine, even though it entails some exercise of discretion, "is 'firmly established and regularly followed,'" *Monroe*, 433 F.3d at 241 (quoting *Cotto*, 331 F.3d at 240), by the state's appellate courts "in consideration of the specific circumstances presented," *id.*, by Petitioner's case. Because this is not one of the "exceptional cases" involving the "exorbitant application of a generally sound rule," *Lee*, 534 U.S. at 376, the Court concludes that the state ground relied on by the Appellate Division, in addition to being "independent," is also "adequate" to support the judgment.[8]

[8] Consideration of the issues raised by Petitioner in his *pro se* supplemental appellate brief do not change the result, because those claims were not even cognizable, let alone novel, constitutional, or substantial. For instance, Petitioner asserted that the County Court violated various Federal Rules of Civil Procedure in connection with his 2009 and 2010 retention orders. SR.116-117. However, "[i]t is axiomatic that state rules of civil procedure apply to state court actions, and the federal rules of civil procedure do not." *Lang v. Social Sec. Admin.*, 612 F.3d 960, 866 (8th Cir. 2010). Petitioner also contended that the County Court violated his constitutional "right to allocution" and due process by not allowing him the opportunity to speak before he was "sentenced," i.e., committed to the secure unit in 2009. SR.141. This argument, also raised in Ground Five of the Petition, is entirely meritless for the reasons discussed above.

Petitioner cannot show prejudice resulting from the procedural default because, notwithstanding the Appellate Division's finding of mootness, it went on to consider the merits of the appeal. *See, e.g., Robinson v. Artus*, 664 F. Supp. 2d 247, 261 (W.D.N.Y. 2009) ("[P]rejudice is singularly lacking as a result of the defense's non-compliance with the preservation rule because the Appellate Division examined the merits of Robinson's claim of insufficient evidence.") (collecting cases). Petitioner's inability to demonstrate prejudice obviates the need for the Court to consider "cause." *See Stepney*, 760 F.2d at 45. And, as discussed above, Petitioner has not demonstrated "actual innocence" for purposes of the miscarriage of justice exception. Ground Eleven's due process claim and Ground Thirteen are thus subject to an unexcused procedural default.

III. Grounds Unrelated to a Particular Retention Order: Grounds Fifteen, Sixteen, and Seventeen

A. Ground Fifteen

The Court has already discussed the allegations in Ground Fifteen in connection with the timeliness analysis and has found that Petitioner failed to establish the "fundamental miscarriage of justice" exception. To the extent Petitioner is asserting a freestanding claim of actual innocence in Ground Fifteen, such a claim has never been held to be a cognizable basis for release via a writ of habeas corpus. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution-not to correct errors of fact."). Petitioner's failure to meet the standard for a gateway "actual innocence" claim necessarily means has not met "the higher threshold for a freestanding innocence claim, assuming such a claim

exists." *House v. Bell*, 547 U.S. 518, 556 (2006) (Roberts, Ch. J., concurring) (citing *Herrera v. Collins*, 506 U.S. 390, 417 (1993)).

B. Ground Sixteen

Petitioner asserts that "[a]ll of the grounds in the Petition are reviewable under Fed. R. Civ. P. 52(b)'s plain error rule because the County Court, the District Attorney, the Attorney General, and Trial Counsel "were all derelict in their duties in countenancing" the "plain error" "committed in all of the grounds raised in this petition." ECF No. 1 at 11, ¶ 22(P) (Ground Sixteen).

The Federal Rules of Civil Procedure have no applicability in the context of Petitioner's commitment and retention proceedings, which were governed solely by state law. *See Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1122 (7th Cir. 2001) ("The Federal Rules [of Civil Procedure] make clear that they do not apply to filings in state court, even if the case is later removed to federal court. . . .") (citations omitted). The County Court was not required to abide by the Federal Rules of Civil Procedure and any purported noncompliance with those rules does not state a colorable ground for federal habeas relief. *See Santasino v. Karnuth*, 41 N.Y.S.2d 459, 464 (Sup. Ct. 1943) ("[T]he [Federal Rules of Civil Procedure] themselves by their terms are limited to matters of procedure in the district courts. It would be inconsistent with the plain language quoted to apply those rules to the courts of the State of New York.").

C. Ground Seventeen: Mode of Proceedings Error and Structural Error

In Ground Seventeen, Petitioner contends that the Petition is reviewable under the "mode of proceedings" error exception to New York State's preservation rule and the "structural error" exception to the harmless error rule because each of the alleged constitutional deprivations is a "similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." ECF No. 1 at 12, ¶ 22(Q) (Ground Seventeen).

Contrary to Petitioner's repeated contention, his retention proceedings were not criminal prosecutions. *See Escobar*, 61 N.Y.2d at 438 (noting that defendant had abandoned argument that hearings pursuant to C.P.L. § 330.20 are not civil proceedings and "correctly" stated that such hearings "were intended to conform to the requirements for civil commitments"). Therefore, neither the "mode of proceedings" error exception nor the "structural error" exception has any relevance here. *See People v. Rivera*, 23 N.Y.3d 827, 831 (2014) (mode of proceedings errors are exempted from the "general rule . . . [that] errors in *criminal* cases are reviewable on appeal only if they are adequately preserved by the appellant") (quotation omitted; emphasis supplied); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907-08 (2017) ("The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any *criminal* trial. Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'") (quotation omitted; emphasis supplied). Moreover, Petitioner has not established that any constitutional errors occurred during his retention hearings, much less any errors that have ever been classified as structural in nature by the Supreme Court. *See Lainfiesta v. Artuz*, 253 F.3d 151, 157 (2d Cir. 2001) (structural errors found in only a "limited class of cases" involving defective reasonable doubt instructions, racial discrimination in selection of grand jury, denial of public trial, denial of self-representation at trial, complete denial of counsel, and a biased trial judge) (citations omitted).

IV. Certificate of Appealability

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court denies relief on the merits, a petitioner may meet the "substantial showing" threshold by

demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a district court denies relief on procedural grounds without addressing the merits, a certificate of appealability requires the petitioner to show that jurists of reason would find debatable both the validity of the constitutional claim and the correctness of the procedural ruling. *Id.* at 484-85. With regard to the Grounds dismissed on procedural bases, Petitioner has not shown that jurists of reason would find debatable either the validity of the constitutional claims or the correctness of the procedural rulings. With regard to the Grounds dismissed on the merits, Petitioner has not shown that the Court's assessments of the claims were debatable or wrong.

CONCLUSION

For the foregoing reasons, the request for a writ of habeas corpus is DENIED, and the Petition, ECF No. 1, is DISMISSED. A certificate of appealability is DENIED.

SO ORDERED.

Dated: October 27, 2021
Rochester, New York.

HON. FRANK P. GERACI, JR.
District Judge
United States District Court