UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Wilson Laboriel,

Petitioner,

-against-

William Lee,[1]

Respondent.

1:18-cv-03616 (RA) (SDA)

REPORT AND RECOMMENDATION

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.

TO THE HONORABLE RONNIE ABRAMS, UNITED STATES DISTRICT JUDGE:

INTRODUCTION

Pro se Petitioner Wilson Laboriel[2] ("Laboriel" or "Petitioner"), currently incarcerated at the Eastern Correctional Facility in New York State, seeks a writ of habeas corpus as authorized by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Laboriel was convicted in the Supreme Court of the State of New York, County of New York, of second-degree criminal sale of a firearm, six counts of third-degree criminal sale of a firearm and four counts of second-degree criminal possession. (Answer, ECF No. 17, ¶ 1.) He is serving a 15-year prison sentence for that conviction. (*Id.*)

[1] At the time that this action was commenced, Petitioner was confined at the Downstate Correctional Facility ("Downstate"), and Petitioner listed Respondent Robert Morton ("Respondent"), the Superintendent of Downstate, as the then-authorized person having custody of Petitioner. (*See* Pet., ECF No. 1, at 1.) However, Petitioner currently is incarcerated at the Eastern Correctional Facility. (*See* Change of Address, ECF No. 27.) Accordingly, William Lee, the Superintendent of the Eastern Correctional Facility, is substituted as Respondent, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. The Clerk of the Court shall amend the caption to reflect the substitution.

[2] As noted in a decision of the Appellate Division of the State of New York, Petitioner also is known as Wilson Labriel and Labriel Wilson. *See People v. Laboriel*, 146 A.D.3d 631 (1st Dep't 2017).

In his Petition and Amended Petition, Laboriel seeks habeas relief on the following grounds: (1) a search warrant issued to Facebook was not supported by probable cause (Ground One); (2) the trial court erred in denying his request for new counsel (Ground Two); and (3) trial counsel was ineffective in that counsel failed to: (a) disclose legal papers to Laboriel; (b) request a *Gethers* hearing;[3] (c) challenge a Metro PCS subpoena; (d) object to the admission of his birth certificate and his sister's birth certificate in evidence; and (e) challenge the arrest warrant (Ground Three). (Pet. ¶ 12 & Attachments A, C & D; Am. Pet., ECF No. 19-1, ¶ 12 & Attachments A, C & D; Letter Supplement, ECF No. 20.)[4]

On December 21, 2018, Respondent filed an Answer to the Petition.[5] (*See* Answer.) Respondent's opposition memorandum of law was filed concurrently. (Opp. Mem., ECF No. 17-1.) On April 25, 2019, Laboriel filed a document entitled "First Amended Complaint Traverse," which is in the nature of a reply in further support of his Petition and Amended Petition. (Traverse, ECF No. 26.)

For the reasons set forth below, I respectfully recommend that the Petition and Amended Petition be DENIED in their entirety.

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[3] "A *Gethers* hearing is held to determine whether the detaining officer had probable cause to detain the suspect to allow the undercover officer to confirm the suspect's identity." *Olba v. Unger*, 637 F. Supp. 2d 201, 204 (S.D.N.Y. 2009) (citing *People v. Gethers*, 86 N.Y.2d 159 (1995)).

[4] On January 15, 2019, Petitioner filed an Amended Petition and a letter supplement, which the Court accepted. (2/1/19 Mem. End., ECF No. 21.)

[5] Although the Answer was filed prior to the filing of the Amended Petition, it addresses the grounds raised in the Amended Petition. In its February 1, 2019 Memo Endorsement, the Court granted Respondent leave to respond to any new allegations contained in the Amended Petition by March 1, 2019, but Respondent made no additional submission.

BACKGROUND

I. Facts Giving Rise To Petitioner's Conviction

According to testimony presented by the prosecution at trial,[6] on four occasions in early 2012 (*i.e.*, January 2, January 5, March 26 and April 5, 2012), Laboriel[7] and Dario Wynerman ("Wynerman") sold firearms to an undercover police detective (referred to as "UC 180") inside his car in Manhattan.[8] (Tr. 90-92, 102-03, 163 (Det. Lansing); Tr. 284-85, 367-68, 376, 384, 396-97 (UC 180).) A hidden video camera in the undercover detective's car recorded the sales. (Tr. 284-85 (UC 180).) Video recordings of the gun sales were introduced into evidence. (Tr. 81-82 (Det. Lansing); Tr. 285-86 (UC 180).)

In telephone calls and text messages before each sale, Wynerman told UC 180 which weapons were available, and they would arrange a time and location to meet. (Tr. 32-46 (Venable);[9] 52-61 (Collins);[10] 287-88, 316-19, 367-68, 382, 388-90 (UC 180).) Prior to the March

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[6] Citations to pages of the trial transcript, which is filed at ECF No. ECF No. 17-12 (starting at PDF page 88), 17-13, 17-14 and 17-15 (ending at PDF page 245), are made using the prefix "Tr." prior to the page number, *e.g.*, Tr. 1. If the citation is to witness testimony, then the surname of the witness is included in parentheses after the transcript page(s), unless the context of the citation makes clear who was testifying.

[7] Laboriel had been assigned a "John Doe" number, *i.e.*, "JD Green." (Tr. 89 (Det. Lansing).) Thus, Laboriel sometimes is referred to in the trial transcript as JD Green.

[8] After the January 5, 2012 sale, Detective Lansing followed Laboriel as he walked from UC 180's car to a Duane Reade on First Avenue between 102nd and 103rd Streets (Tr. 95-96, 164-65 (Det. Lansing).) Once Laboriel left the store, Detective Lansing stopped him and asked him for identification, explaining that the police were looking for a robbery suspect. After Laboriel produced a driver's license bearing his name, Detective Lansing pretended to receive a radio transmission and announced that Laboriel was not the assailant. Detective Lansing wrote down Laboriel's name and address and permitted Laboriel to leave. (*Id.* 95-99, 166-67, 169.)

[9] Steven Venable testified as the custodian of records for Metro PCS, a cellular phone service provider. (Tr. 27 (Venable).)

[10] Charles Collins was an investigative analyst with the New York County District Attorney's office who performed analysis of telephone records. (Tr. 51-52 (Collins).)

26, 2012 sale, UC 180 spoke to Laboriel at a telephone number that was registered to Laboriel's sister, Jacqueline Laboriel. (Tr. 42-43 (Venable); 60-63, 70 (Collins); 288, 316-19, 388-90 (UC 180).) Metro PCS telephone records indicated that Wynerman also had called this number. (Tr. 33-34, 42-43 (Venable); 52-53, 56-58 (Collins); 106-07 (Det. Lansing).)

Facebook records associated with Laboriel's account under the profile name "Carnage NY,"[11] showed Wynerman listed among Laboriel's "Facebook friends" and messages between Laboriel and Wynerman. (Tr. 532 (Kang);[12] SR. 783-96[13] (People's Exhibit 29H).) In some of the messages, Laboriel and Wynerman discussed "bitches" (SR. 784-85, 790, 793, 795-96), which is common slang for firearms. (Tr. 300 (UC 180).)

II. Relevant State Court Proceedings

A. Indictment And Arrest

A New York County grand jury charged Laboriel with Criminal Sale of a Firearm in the second Degree, criminal sale of a firearm in the third degree (six counts) and criminal possession of a weapon in the third degree (four counts). (SR. 663-69.) The same indictment charged twelve other people with firearms-related crimes, including Jessica Nova. (*See id.*) All codefendants

[11] Laboriel acknowledged that the Carnage NY account belonged to him. (Tr. 921 (Laboriel).)

[12] Yujin Kang testified as Facebook's custodian of records. (Tr. 520-21 (Kang).)

[13] References to pages from documents filed in state court, which are contained at ECF Nos. 17-2 through 17-8, are made using the prefix "SR." prior to the page number being cited.

pleaded guilty, with the exception of co-defendant Nova, who proceeded to trial with Laboriel and was acquitted of all charges. (Tr. 1204-05.)

The indictment was filed on October 5, 2012, six months after Laboriel's last firearms sale.[14] (SR. 663-69.) On October 11, 2012, the police arrested him at his girlfriend's apartment, pursuant to an arrest warrant. (Tr. 162-63, 189, 191 (Det. Lansing).)

B. Motion For Substitution Of Court-Appointed Attorney

On November 21, 2012, Laboriel submitted a motion for reassignment of his court-appointed attorney.[15] (SR. 11, 111.) The motion consisted of a pre-printed, two-page form with blank spaces for a defendant to fill in his name and the indictment number. One of the pre-printed paragraphs stated that:

> Defendant is charged with very serious offenses as the Court will judicially note yet, present counsel does not visit with him to discuss law or facts relative to this defendant's case, nor is he ever available when I phone his office. Thus, the only time defendant has spoken with counsel is in the holding cells for 3-4 minutes only during court appearance date at which time counsel's only concern seems to be with extracting guilty plea from this defendant[.]

(SR. 111; *see also* SR. 11-12.)

After Laboriel was not produced at the next court date (1/7/13 Tr. at 2),[16] on January 15, 2013, Laboriel was present at a hearing before Justice McLaughlin and requested new counsel.

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[14] A separate New York County indictment, filed on June 15, 2011, charged Laboriel with third-degree criminal sale of a controlled substance and second-degree conspiracy. (*See* Opp. Mem. at 3, n. 4.) Laboriel was arrested on both indictments at the same time. (*Id.*) He pled guilty in the drug case and received a one-year prison sentence. (*Id.*)

[15] Since no copy of Laboriel's motion was retained (*see* Opp. Mem. at 14 n.7), the Court's discussion of the motion is based upon the description of the motion that was contained in the briefs submitted by the parties in the Appellate Division of the State of New York.

[16] The transcript of proceedings from January 7, 2013 is filed at PDF page numbers 1 to 3 of ECF No. 17-11.

(1/15/13 Tr. at 5 ("I'd like to have a reassignment of counsel.").)[17] Justice McLaughlin responded that he would "deal with that January 31st." (*Id.*)

At the court hearing on January 31, 2013, Laboriel was present (see 1/31/13 Tr. at 5),[18] but he did not raise the issue of new counsel with Justice McLaughlin, and the issue was not addressed by the court. At the January 31st hearing, the prosecutor conveyed a plea offer of 12 years' incarceration to cover both the gun and drug cases. (1/31/13 Tr. at 3-4.) Justice McLaughlin appeared to indicate that he would sentence Laboriel to a total 10-year prison term in exchange for his guilty plea on both of his cases. (*See* 1/31/13 Tr. at 6-7.)

At the next court hearing on April 23, 2013, it was noted on the record that Laboriel rejected "the Court's offer of ten years." (4/23/13 Tr. at 2.)[19] Justice McLaughlin asked defense counsel whether Laboriel "[knew] what he [was] doing," and counsel responded that he had discussed the offer with Laboriel, and Laboriel "requested a trial." (4/23/13 Tr. at 2.)

C. Facebook Search Warrant

On March 6, 2013, a prosecutor applied to the New York County Supreme Court for a warrant to seize information from Facebook accounts of Laboriel a/k/a "Carnage NY" and co-defendants Wynerman and Nova. (SR. 388-407; *see also* SR. 752-58.) In a supporting affidavit, the prosecutor explained that, since December 2011, there had been a protracted investigation of Laboriel, Wynerman and Nova, among others (including an individual named Terrell Dews and

[17] The transcript of proceedings from January 15, 2013 is filed at PDF page numbers 4 to 9 of ECF No. 17-11.

[18] The transcript of proceedings from January 31, 2013 is filed at PDF page numbers 10 to 16 of ECF No. 17-11.

[19] The transcript of proceedings from April 23, 2013 is filed at PDF page numbers 17 to 18 of ECF No. 17-11.

an individual named Jeremiah Dent), in connection with unlawful firearms sales. (SR. 391-92.) As part of that investigation, UC 180 had purchased 41 guns in 38 transactions. (*Id.*) For these acts, the targets had been indicted for first-degree sale of a firearm and related crimes. (SR. 390-91.)

The prosecutor also explained that publicly available information indicated that Laboriel, Wynerman, Nova and Dews had Facebook accounts and that Nova and Dews were "friends" on Facebook. (SR. 392.) The prosecutor asserted that it was common for users of Facebook to save digital data of their "friends," including sent and received messages and "chats." (*Id.*) The prosecutor asserted that search of the Facebook profiles of Laboriel, Wynerman and Nova "will provide evidence [of] members of the firearms trafficking crew and [certain firearms-related crimes]." (SR. 393.) The prosecutor sought permission to seize subscriber information, contact lists, messages and photographs. (SR. 389-90.) Justice McLaughlin signed the warrant. (SR. 394, 398.)

During trial, before the Facebook representative (Kang) testified, Laboriel moved to controvert the search warrant on the grounds that the prosecutor's affidavit did not establish probable cause. (Tr. 469S-469T.) Justice McLaughlin denied the motion, noting that he had reviewed the warrant and determined that it was "issued appropriately." (Tr. 517.)

D. Trial

Commencing on June 26, 2013, Petitioner was tried by jury before Justice McLaughlin. A summary of the trial testimony in the prosecution's case is set forth in Background Section I, *supra*. In his defense, Laboriel testified that an unidentified look-alike acquaintance had assumed Laboriel's identity on social media and had engaged in the gun sales. (Tr. 917-25, 932-39, 942-45, 976-77, 979-87, 997-99 (Laboriel).) He admitted that he was born on November 16, 1989, and

that he had an older sister named Jacqueline Laboriel. (*Id.* 905, 945.) He also admitted that, while incarcerated and awaiting trial, he discussed deactivating his Facebook account with his sister. (*Id.* 968.)

The Petition and Amended Petition implicate one additional aspect of the trial, *i.e.*, the admission into evidence of the birth certificates of Laboriel and his sister. During the testimony of DA investigative analyst Collins, the prosecution admitted these birth certificates into evidence. (Tr. 61-62.) Defense counsel asked to review the birth certificates, which he did, and then raised no objection to them. (Tr. 62.)

E. Jury Verdict And Sentencing

The jury convicted Laboriel of one count of second-degree criminal sale of a firearm, six counts of third-degree criminal sale of a firearm and four counts of third-degree criminal possession of a weapon. (Tr. 1197-200.) On June 25, 2013, Justice McLaughlin sentenced Laboriel to an aggregate 30-year prison term. (Sentencing Tr. 11.)[20]

F. Direct Appeal

Laboriel, represented by counsel, filed an appeal to the Appellate Division on the following grounds, among others: (1) the affidavit submitted in support of the Facebook search warrant did not establish probable cause; (2) the court failed to conduct a proper inquiry into a request for new counsel; and (3) the sentence was illegal and excessive. (SR. 1-62.)

In a decision dated January 24, 2017, the Appellate Division adjusted Laboriel's sentence, but otherwise unanimously affirmed the conviction. *People v. Laboriel*, 146 A.D.3d 631 (1st Dep't 2017). The court held that Laboriel's "standard form motion for assignment of new counsel did

[20] The sentencing transcript is filed at ECF No. 17-15 at pages 246 to 257.

not contain the specific factual allegations of serious complaints about counsel necessary to trigger the court's obligation to make a minimal inquiry." *Id.* at 632 (citation omitted). The First Department found that "[a]lthough the court accorded [Laboriel] several opportunities to be heard, [he] failed to amplify his conclusory complaints about his attorney with any case-specific allegations." *Id.*

The First Department found that the affidavit in support of the Facebook warrant set forth probable cause. The court held: "The affidavit in support of the warrant demonstrated that there was sufficient information to support a reasonable belief that evidence of the charged weapons crimes could be found in defendant's Facebook page, particularly in light of a pattern of Facebook connections among other members of the weapons-trafficking operation." *Laboriel*, 146 A.D.3d at 632. Alternatively, the court found that "the Facebook evidence was a minor component of the People's overwhelming case, and any error in receiving this evidence was harmless." *Id.*

On February 15, 2017, Laboriel sought leave to appeal to the New York Court of Appeals. (SR. 148-53.) Leave was denied on April 27, 2017. (SR. 155.)

G. Section 440 Motion To Vacate Conviction

In a lengthy *pro se* motion to vacate his conviction, filed on August 13, 2015, pursuant to New York State Criminal Procedure Law ("C.P.L.") § 440.10, Laboriel argued, *inter alia*, that his trial counsel was ineffective in that counsel failed to: (1) challenge the Metro PCS subpoena; (2) challenge the arrest warrant; (3) disclose legal papers to him from the court file; (4) request a *Gethers* hearing; and (4) object to the admission of his and his sister's birth certificates in evidence. (SR. 156-449.)

On September 20, 2016, Justice McLaughlin denied the motion. (SR. 572-86.) The court set forth the legal standards it applied, *i.e.*, to establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice." (SR. 575-76 (citing *Strickland v. United States*, 466 U.S. 668, 687-88 (1984)).

The court held that counsel was not ineffective for failing to challenge the Metro PCS subpoena that was issued because Laboriel lacked standing to object to a subpoena served on a third party. (SR. 577-78.) The court stated: "Defense counsel cannot be ineffective for not making an objection that had no legal merit." (SR. 577.)

With respect to Laboriel's claim that counsel should have challenged the arrest warrant, Justice McLaughlin held that Laboriel's arrest had been "lawful based on the two separate arrest warrants." (SR. 579.) The court found that the arrest had been lawfully executed in that "[o]nce the police learned of [Laboriel's] presence at his girlfriend's apartment, where he allegedly resided, they could enter the apartment, if they had not been admitted after announcing their authority and purpose, 'by a breaking if necessary.'" (*Id.* (quoting C.P.L. § 120.80[5]).[21]) The court held that there was "no statutory requirement that a Supreme Court arrest warrant be subscribed by a judge." (*Id.* (comparing C.P.L. § 210.10[3] with C.P.L. § 120.10[2]).[22]) Justice

[21] This section provides: "If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary." C.P.L. § 120.80[5].

[22] The court was noting that, while local criminal court warrants needed to be subscribed by a judge, *see* C.P.L. § 120.10[2], Supreme Court warrants did not need to be so subscribed. *See* C.P.L. § 210.10[3].

McLaughlin also noted that there was "no requirement that the arresting officer possess the arrest warrant and show it during the arrest. (*Id.* (citing C.P.L. § 120.80[2]).[23])

With respect to Laboriel's claim that counsel did not provide him with the complete case file, Justice McLaughlin held that counsel's failure to provide a defendant with his case file does not establish that counsel was ineffective. (SR. 580.) The court found that counsel did not deprive Laboriel of "information that would have enabled him to alert counsel that some of the evidence offered at trial was inadmissible or had been illegally obtained." (*Id.*)

With respect to Laboriel's claim that counsel should have moved for a *Gethers* hearing on the grounds that Detective Lansing unlawfully stopped him outside of Duane Reade, the court held that there were no legal grounds for a *Gethers* motion because Laboriel "ha[d] not demonstrated that the stop was illegal." (SR. 580.) Justice McLaughlin also held that Laboriel failed to "demonstrate[] that the police obtained any suppressible evidence from the stop." (SR. 581.) The court noted that Laboriel's "identity could not have been suppressed as the fruit of an illegal stop." (*Id.*)

The court also concluded that "even if the stop had been illegal, or the detective had said or done something to taint the photographic identification procedure, the record does not support [Laboriel's] claim that there was no independent source for the undercover officer to make an in-court identification." (SR. 581.) Justice McLaughlin noted that "the gun-sale in the automobile on January 5 . . . lasted several minutes, [and] would have given the undercover

[23] This section provides in relevant part: "Upon request of the defendant, the officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show it to the defendant upon request as soon after the arrest as possible." C.P.L. § 120.80[2].

officer an independent source to make an in-court identification." (*Id.*) The court concluded that UC 180's other purchases from Laboriel provided an independent source for an identification. (*Id.*)

Justice McLaughlin rejected Laboriel's claim that his counsel should have objected to the introduction of his birth certificate and his sister's birth certificate in evidence based on the absence of the subpoenas for those documents from the court file, calling the claim "baseless." (SR. 583.) The court noted that there was "nothing suspicious or nefarious" about the subpoenas not being in the court file since, when the subpoenas were returned to the court, they were given to the prosecutor. (*Id.*)

Laboriel sought leave to appeal to the Appellate Division on the grounds stated above. (SR. 612-27.) On February 9, 2017, the Appellate Division denied leave. (SR. 632.)

III. Habeas Petition

On April 20, 2018, Laboriel filed his Petition in this Court, which later was amended. The Court addresses in this Report and Recommendation the three grounds contained in the Petition and Amended Petition: (1) the Facebook search warrant (Ground One); (2) Petitioner's request for new counsel (Ground Two); and (3) ineffective assistance of counsel (Ground Three). (Pet. ¶ 12 & Attachments A, C & D.)

DISCUSSION

I. Legal Standards

A. AEDPA Generally

"[F]ederal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Rather, "28 U.S.C. § 2254 allows a court to entertain a habeas petition 'only

on the ground that [an individual] is in custody in violation of the Constitution or laws or treaties of the United States.'" *Garner v. Lee*, 908 F.3d 845, 860 (2d Cir. 2018) (quoting 28 U.S.C. § 2254(a)).

Section 2254(d) provides, in relevant part, that a court may grant a writ of habeas corpus on a claim that has been previously adjudicated on the merits by a state court only if the state court adjudication: (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). A claim is considered "adjudicated on the merits" when it is decided based on the substance of the claim advanced, rather than on a procedural, or other, ground. *See Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001). Further, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits[.]" *Johnson v. Williams*, 568 U.S. 289, 301 (2013).

Under AEDPA, federal courts reviewing habeas petitions must accord substantial deference to state court decisions. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). A state court decision is "contrary to" clearly established federal law where the state court either applies a rule that "contradicts the governing law" set forth in Supreme Court precedent or "confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision," and arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable

application" of clearly established federal law pursuant to this provision occurs when the state court identifies the correct governing legal principle, but unreasonably applies that principle to "a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

In addition, federal habeas courts must presume that the state courts' factual findings are correct unless a petitioner rebuts that presumption with "clear and convincing evidence." *Schriro*, 550 U.S. at 473-74 (quoting 28 U.S.C. § 2254(e)(1)). "A state court decision is based on a clearly erroneous factual determination if the state court failed to weigh all of the relevant evidence before making its factual findings." *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015) (internal quotation marks omitted).

B. Ineffective Assistance Of Counsel

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that his counsel's representation 'fell below an objective standard of reasonableness,' and (2) that he suffered prejudice[.]" *Momplaisir v. Capra*, 718 F. App'x 91, 92 (2d Cir. 2018) (citing *Strickland*, 466 U.S. at 688, 694).

Under the first *Strickland* prong, there is a "strong presumption" that a lawyer's conduct "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Id.* at 689; *see also Silva v. Keyser*,

271 F. Supp. 3d 527, 546 (S.D.N.Y. 2017) ("a defendant has the burden of proving 'that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.'") (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1985) (citing *Strickland*, 466 U.S. at 688-89)). "In considering whether counsel 'failed to exercise the skills and diligence that a reasonably competent attorney would provide under similar circumstances,' *Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996) (emphasis omitted), the Court looks to the totality of the record and must make 'every effort . . . to eliminate the distorting effects of hindsight.'" *Guerrero v. United States*, No. 07-CR-00248 (GHW), 2017 WL 1435743, at *6 (S.D.N.Y. Apr. 20, 2017) (quoting *Strickland*, 466 U.S. at 688-89).

Under the second *Strickland* prong, the petitioner must demonstrate that the ineffective assistance prejudiced the defense, which means showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

"The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001). Moreover, under AEDPA, a petitioner must show that the state court's application of the *Strickland* standard was not simply incorrect, but was objectively unreasonable. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011); *see also Fischer v. Smith*, 780 F.3d 556, 561 (2d Cir. 2015) ("The standards created by Strickland and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.") (internal citations omitted). Thus, on habeas review, a federal court may reverse a state court ruling "only where it was so

lacking in justification that there was . . . no possibility for fair-minded disagreement." *Fischer*, 780 F.3d at 562 (internal quotation omitted).

Finally, because Petitioner is *pro se*, the court must liberally construe his petition and interpret it "to raise the strongest arguments that [it] suggest[s]." *Green v. United States*, 260 F.3d 78, 83 (2d Cir. 2001) (internal citation omitted).

II. Petitioner's Claim Regarding The Facebook Warrant (Ground One) Is Not Cognizable

Petitioner claims that the Facebook warrant was unsupported by probable cause and therefore unconstitutional in violation of the Fourth Amendment. (*See* Pet., Attachment A; Traverse at 16-17.) This claim is not cognizable on federal habeas review.

"[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 482 (1976); *accord Graham v. Costello*, 299 F.3d 129, 133-34 (2d Cir. 2002) ("As a general rule, Fourth Amendment claims are not reviewable by the federal courts when raised in a petition brought under § 2254 unless the state prisoner shows that he or she has not had a full and fair opportunity to litigate that claim in the state court.") (citations omitted). A federal court therefore will review a Fourth Amendment claim in a habeas petition only: "(a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process." *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir. 1992).

There is no question that New York has provided corrective procedures for litigating alleged Fourth Amendment violations. Indeed, federal courts have approved New York's procedure for litigating Fourth Amendment claims. *See Capellan*, 975 F.2d at 70. In addition, Petitioner has failed to establish that he was "precluded from using that mechanism because of an unconscionable breakdown in the underlying process." *Id.* at 70. "An unconscionable breakdown occurs when the state court fails to conduct a reasoned inquiry into the petitioner's claim." *Valtin v. Hollins*, 248 F. Supp. 2d 311, 317 (S.D.N.Y. 2003). By contrast, "a mere disagreement with the outcome of a state court ruling is not the equivalent of an unconscionable breakdown in the state's corrective process." *Capellan*, 975 F.2d at 72.

Petitioner had a full and fair opportunity to raise his claim regarding the Facebook warrant both in the trial court and before the Appellate Division. Thus, I recommend that the claim asserted in Ground One of the Petition be denied.

III. Petitioner's Claim Regarding Substitute Trial Counsel (Ground Two) Should Be Denied

In Ground Two, Petitioner challenges the trial court's denial of his motion for substitute trial counsel and the Appellate Division's affirmance. (*See* Pet., Attachment C.) The Appellate Division held that Petitioner's "standard form motion for assignment of new counsel did not contain the specific factual allegations of serious complaints about counsel necessary to trigger the court's obligation to make a minimal inquiry" and that Petitioner "failed to amplify his conclusory complaints about his attorney with any case-specific allegations." *Laboriel*, 146 A.D.3d

at 632. This holding was neither contrary to, nor an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d).

The Sixth Amendment to the Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. 6. The Supreme Court has observed that, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). Thus, "[w]hile a defendant has a right to counsel of his choice under the Sixth Amendment, it is not an absolute right." *United States v. Brumer*, 528 F.3d 157, 160 (2d Cir. 2008) (per curiam) (quoting *United States v. Paone*, 782 F.2d 386, 392 (2d Cir. 1986)). In particular, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). "[I]ndigent defendants do not have a veto over who is appointed to defend them, provided that appointed counsel's representation is adequate." *Felder v. Goord*, 564 F. Supp. 2d 201, 220 (S.D.N.Y. 2008) (citing *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989)); *see also United States v. Schmidt*, 105 F.3d 82, 89 (2d Cir. 1997) ("Because the right to counsel of one's choice is not absolute, a trial court may require a defendant to proceed to trial with counsel not of defendant's choosing; although it may not compel defendant to proceed with incompetent counsel.").

The decision to permit substitution of counsel lies within the discretion of the trial court. *See McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981). "It is not sufficient for a defendant simply

to request a new lawyer." *Muhammad v. Artus*, 08-CV-00216 (MAT), 2010 WL 3092165 at *5 (W.D.N.Y. Aug. 5, 2010). "[A] defendant seeking substitution of assigned counsel must . . . afford the court with legitimate reasons for the lack of confidence." *McKee*, 649 F.2d at 932.

The Appellate Division's holding about the lack of "specific factual allegations of serious complaints about counsel," *Laboriel*, 146 A.D.3d at 632, was not contrary to clearly established federal law as determined by the Supreme Court. Petitioner's written motion was made on November 21, 2012. (SR. 11, 111.) His trial did not conclude until June 2013. (Tr. 1178.) From the time of his written motion until the conclusion of the trial, there is no record of Petitioner ever having articulated legitimate reasons for the substitution of counsel. Thus, I recommend that the claim asserted in Ground Two of the Petition be denied.

IV. Petitioner's Claims Regarding Ineffective Assistance of Counsel (Ground Three) Should Be Denied

In the Petition and Amended Petition, Petitioner claims that counsel was ineffective on the five bases raised in his motion to vacate in the trial court. (Pet. ¶ 12 & Attachment D; Am. Pet. ¶ 12 & Attachment D.) The trial court's findings with respect to the various aspects of counsel's performance that were challenged by Petitioner in his motion to vacate were not objectively unreasonable:

First, with respect to Petitioner's counsel's purported failure to disclose legal papers to Laboriel, Justice McLaughlin found that counsel did not deprive Laboriel of "information that would have enabled him to alert counsel that some of the evidence offered at trial was inadmissible or had been illegally obtained." (SR. 580.) This was a reasonable finding in view of the record evidence that Petitioner had received copies of "all documents" in both criminal cases

that were pending against him, except for "the box of search warrant wiretap material" from the drug case. (1/31/13 Tr. at 2.)

Second, with respect to Petitioner's claim that his counsel should have moved for a *Gethers* hearing on the grounds that Detective Lansing unlawfully stopped him outside of Duane Reade, the court held that Petitioner had not demonstrated that the stop was illegal and that, even if the stop had been illegal, UC 180's other purchases from Petitioner provided an independent source for UC 180's in-court identification of Petitioner. (SR. 580-81.) This was a reasonable finding based on irrefutable record evidence.

Third, Justice McLaughlin found that Petitioner's counsel was not ineffective for failing to challenge the Metro PCS subpoena that was issued because Petitioner lacked standing to object to a subpoena served on a third party. (SR. 577-78.) This finding was a reasonable one inasmuch as the Metro PCS cell phone records related to a telephone that did not belong to Petitioner.

Fourth, Justice McLaughlin rejected Petitioner's claim of ineffectiveness based on his counsel's failure to object to the introduction of his birth certificate and his sister's birth certificate in evidence on the ground that the subpoenas for those documents were absent from the court file since, when the subpoenas were returned to this court, they were given to the prosecutor. (SR. 583.) This too was a reasonable finding, especially in view of the fact that Petitioner admitted at trial that Jacqueline Laboriel, the owner of the cell phone to which certain gun sale-related calls were made, was his sister. (Tr. 905, 945.) The obvious purpose of putting the birth certificates into evidence was to establish this admitted familial connection.

Finally, with respect to Petitioner's claim that his counsel was ineffective because he failed to challenge the arrest warrant, Justice McLaughlin found that Petitioner's arrest had been

lawfully executed. (SR. 579.) This finding was a reasonable one in view of the fact that it was based on New York statutory law that the court cited in its decision. (*See id.*) At bottom, Petitioner's ineffective assistance of counsel claim is predicated upon his counsel's failure to make meritless arguments. However, as the state court recognized, "[f]ailure to make a meritless argument does not amount to ineffective assistance." *United States v. Arena*, 180 F.3d 380, 396 (2d Cir. 1999).

For these reasons, I find that the state court's application of the *Strickland* standard was not objectively unreasonable. Thus, I recommend that Ground Three of the Petition be denied.

CONCLUSION

For the reasons set forth above, I respectfully recommend that Laboriel's Petition and Amended Petition for a Writ of Habeas Corpus be DENIED in their entirety. My Chambers shall mail this Report and Recommendation to the *pro se* Plaintiff at the address indicated on the docket.

SO ORDERED.

DATED: June 22, 2020
New York, New York

Stewart D. Aaron

STEWART D. AARON
United States Magistrate Judge

* * *

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1)

and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Abrams.

FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn*, 474 U.S. 140 (1985).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILSON LABORIEL,

Petitioner,

v.

WILLIAM LEE,

Respondent.

18-CV-3616 (RA)

MEMORANDUM
OPINION & ORDER

RONNIE ABRAMS, United States District Judge:

Petitioner Wilson Laboriel, proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his New York convictions for one count of second-degree criminal sale of a firearm, six counts of third-degree criminal sale of a firearm, and four counts of third-degree criminal possession of a weapon. *See* Dkt. 1, 26. On June 22, 2020, Magistrate Judge Stewart D. Aaron issued a Report and Recommendation (the "Report") recommending that the Court dismiss the Petition in its entirety. *See* Dkt 29. Plaintiff filed timely objections to the Report, arguing that (1) Petitioner's Fourth Amendment claim regarding a warrant for his Facebook page was reviewable, and that the warrant was not supported by probable cause; (2) the trial court improperly denied his request for substitution of counsel; and (3) his trial counsel was ineffective on several grounds. *See* Petitioner's Objections ("Objections"), Dkt. 30.

The Court assumes the parties' familiarity with the facts and procedural history of this case, as outlined in the Report. Having reviewed the Report, Petitioner's objections, and the parties' underlying filings, the Court denies Petitioner's application for a writ of habeas corpus.

LEGAL STANDARDS

A district court 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). Pursuant to Rule 72(b), a court may accept portions of a report to which no objections are made as long as those portions are not "clearly erroneous." *Greene v. WCI Holdings Corp.*, 956 F. Supp. 509, 513 (S.D.N.Y. 1997). A court must undertake a *de novo* review of those portions to which specific objections are made. See 28 U.S.C. § 636(b)(1); *Greene*, 956 F. Supp. at 513 (citing *United States v. Raddatz*, 447 U.S. 667, 676 (1980)). "[T]o the extent that the party makes only conclusory or general objections, or simply reiterates the original arguments, the Court will review the Report strictly for clear error." *See, e.g., Alam v. HSBC Bank USA, N.A.*, No. 07-CV-3540 (LTS), 2009 WL 3096293, at *1 (S.D.N.Y. Sept. 28, 2009). "Objections of *pro se* litigants are generally accorded leniency and construed to raise the strongest arguments that they suggest." *Quinn v. Stewart*, No. 10-CV-8692 (PAE) (JCF), 2012 WL 1080145, at *4 (S.D.N.Y. Apr. 2, 2012) (internal quotation marks omitted).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that when a state court has previously adjudicated the merits of petitioner's habeas claim, a federal district court may grant relief only where the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented." *Id.* § (d)(2). *See Harrington v. Richter*, 562 U.S. 86, 103 (2011) (noting that 28 U.S.C. § 2254(d) is "part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions"). To be contrary to clearly established federal law, the relevant state-court decision must be "opposite" to

a conclusion the U.S. Supreme Court has made on a matter of law, or "decide[ ] a case differently" than the Supreme Court "on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 364-65 (2000). A state court unreasonably applies clearly established federal law when it construes Supreme Court holdings in a "not merely wrong" but "objectively unreasonable" manner. *White v. Woodall*, 572 U.S. 415, 419 (2014). Federal habeas courts must also "presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (quoting 28 U.S.C. § 2254(e)(1)).

DISCUSSION

I. Petitioner's Fourth Amendment Claim

Petitioner first objects to Judge Aaron's recommendation that his Fourth Amendment challenge to a warrant for his Facebook account be dismissed on the ground that it is "not cognizable on federal habeas review." Report at 16. The Report found that Petitioner had a "full and fair opportunity to raise his claim regarding the Facebook warrant both in the trial court and before the Appellate Division," *id.* at 17, and that the claim was therefore unreviewable by a federal court. *See Graham v. Costello*, 299 F.3d 129, 133-34 (2d Cir. 2002) ("As a general rule, Fourth Amendment claims are not reviewable by the federal courts when raised in a petition brought under § 2254 unless the state prisoner shows that he or she has not had a full and fair opportunity to litigate that claim in the state court.") (citations omitted); *Capellan v. Riley,* 975 F.2d 67, 70 (2d Cir. 1992) (federal habeas review of Fourth Amendment claims is available only "(a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant

was precluded from using that mechanism because of an unconscionable breakdown in the underlying process.").

Upon *de novo* review, the Court finds that Judge Aaron did not err in concluding that Laboriel had a full and fair opportunity to litigate the Facebook warrant. As Laboriel acknowledges, the state trial and appellate courts each considered and rejected his claim that there was no probable cause for the issuance of the Facebook warrant. *See* First Amended Complaint Traverse ("FAC"), Dkt. 33, at 10, 12. Laboriel correctly points out that the trial court's rejection of his oral challenge to the warrant was cursory, consisting only of the trial judge's statement that he "actually reviewed the stuff" and was "satisfied [that the warrant] was issued appropriately." FAC at 10. Laboriel further asserts that such a cursory explanation violated New York Criminal Procedure Law ("CPL") § 710.60(6), which requires a trial court ruling on a suppression motion made during trial to set forth on the record the factual and legal basis for its conclusion. *See* FAC at 9–10. But even if the trial court's cursory explanation of its decision violated CPL § 710.60, Laboriel cannot establish that such a failure constituted "an unconscionable breakdown in the underlying process," *Capellan*, 975 F.2d at 70, where the "alleged procedural errors . . . effectively thwarted the petitioner's ability to present [his] Fourth Amendment claims." *Gomez v. LeFevre*, No. 87 CIV 2341(MJL), 1989 WL 63030, at *5 (S.D.N.Y. June 2, 1989).

An "unconscionable breakdown" occurs only "where the petitioner demonstrates that *no state court* conducted a reasoned method of inquiry into relevant questions of fact and law, or any inquiry at all into the Fourth Amendment claim." *Washington v. Walsh*, No. 10-CV-7288

(RJS), 2015 WL 4154103, at *18 (S.D.N.Y. July 9, 2015) (emphasis added) (citation omitted).[1] Here, it is plain that the Appellate Division gave full consideration to, and rejected, Laboriel's Fourth Amendment claim. Although Laboriel argues that the trial court's failure to follow CPL 710.60(6) "preclude[d] informed appellate review," Objections at 3, the record indicates that the First Department fully considered the merits of this claim. The Appellate Division held that the "affidavit in support of the warrant demonstrated that there was sufficient information to support a reasonable belief that evidence of the charged weapons crimes could be found in defendant's Facebook page, particularly in light of a pattern of Facebook connections among other members of the weapons-trafficking operation." *People v. Laboriel*, 146 A.D.3d 631, 632 (2017). The Appellate Division also found that any error would be harmless, in that "the Facebook evidence was a minor component of the People's overwhelming case." *Id.* Under these circumstances, it cannot be said that "no state court conducted a reasoned method of inquiry" into the Fourth Amendment claim. *Washington*, 2015 WL 4154103, at *18. Because Laboriel had a full and fair opportunity to—and did in fact—litigate his Fourth Amendment claim, the claim is now unreviewable. *Graham*, 299 F.3d at 133-34.

II. Petitioner's Request for Substitution of Counsel

Laboriel next argues that the Report erred in concluding that he was not entitled to habeas relief stemming from the state courts' denial of his request for substitution of counsel. *See* Objections at 3–5.

In his underlying criminal proceedings, the trial court declined to grant Laboriel's request for a substitution of counsel, finding that his initial request for new counsel "appear[ed] to be a

[1] *Cf. Allah v. LeFevre,* 623 F.Supp. 987, 991–92 (S.D.N.Y.1985) (other examples of "unconscionable breakdowns" include bribery of a judge, use of torture, and use of perjured testimony).

form, fill-in-the-blanks motion" with "generic" factual allegations that are not "clearly identifiable as specific to this case." SR 12, Dkt. 17-3. In affirming his conviction, the Appellate Division agreed that Laboriel had not made specific enough complaints about his relationship with his lawyer to require the trial court to conduct an inquiry into the counsel's adequacy. The First Department held that Petitioner's "standard form motion for assignment of new counsel did not contain the specific factual allegations of serious complaints about counsel necessary to trigger the court's obligation to make a minimal inquiry" and that Petitioner "failed to amplify his conclusory complaints about his attorney with any case-specific allegations." *Laboriel*, 146 A.D.3d at 632. Judge Aaron determined that these decisions were neither clearly contrary to, nor an unreasonable application of, clearly established federal law, which provides that the right to choice of counsel is "not an absolute right," *United States v. Brumer*, 528 F.3d 157, 160 (2d Cir. 2008) (per curiam), that indigent defendants do not have a "veto over who is appointed to defend them," *Felder v. Goord*, 564 F. Supp. 2d 201, 220 (S.D.N.Y. 2008), and that "a defendant seeking substitution of assigned counsel" must "afford the court with legitimate reasons for the lack of confidence," *McKee v. Harris*, 649 F.2d 927, 932 (2d Cir. 1981). *See* Report at 17–19.

Laboriel now objects that the Report overlooked a component of his argument, in that it analyzed his claim solely under 28 U.S.C. § 2254(d)(1) (i.e., by asking whether the state courts' decisions were contrary to clearly established federal law) instead of under § 2254(d)(2) (i.e., by asking whether the state courts' factual determinations were unreasonable). *See* Objections at 3; Report at 17–19. Laboriel is correct that his petition asserted not only that the state courts misapplied Sixth Amendment *law*, but also that the Appellate Division unreasonably reached the *factual* conclusion that Laboriel failed to make sufficiently specific complaints about his attorney. *See* FAC at 23–24.

Having reviewed the state courts' decisions and the factual record *de novo*, the Court concludes that these decisions were not "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). The factual record of Laboriel's request for new counsel is as follows: On November 21, 2012, several weeks after arraignment, Laboriel submitted a form motion for substitution of his court-appointed attorney. SR 11, Dkt. 17-3. On January 7, 2013, the trial court deferred decision on the motion to the next court date, but noted that Laboriel's submission "appears to be a form, fill-in-the-blanks motion available to prisoners at Rikers Island" with "generic" factual allegations that are not "clearly identifiable as specific to this case." SR 12, Dkt. 17-3. On January 15, Laboriel again requested reassignment of counsel, stating that he "need[ed] a lawyer that can speak with me and communicate with me." The trial court stated that it would "deal with" that request at Laboriel's next court appearance on January 31. SR 13, Dkt. 17-3. At that appearance, Laboriel did not raise his request for new counsel. *See* Report at 6. On May 21, 2013, on the eve of trial, the trial court refused to allow Laboriel to speak when he requested to do so. SR 13, Dkt. 17-3. In his habeas petition, Laboriel argues that the Appellate Division unreasonably construed this factual record to conclude that he had "failed to amplify his conclusory complaints" about his lawyer. *See* FAC at 23.

The Court disagrees. Laboriel has not pointed to clear and convincing evidence that he raised specific allegations about his attorney's conduct that would have necessitated an inquiry into the adequacy of his trial counsel's representation. *See Schriro*, 550 U.S. at 473–474 ("AEDPA . . . requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" (quoting 28 U.S.C. § 2241(e)(1)). Although the trial court denied him the opportunity to speak on one occasion, *see* FAC at 23, Laboriel had several other opportunities to raise concerns about his trial

counsel, and has not pointed to evidence that he raised or attempted to raise complaints beyond his generic assertions that he was having difficulty communicating with his lawyer. Against this backdrop, giving the requisite level of deference to the state courts' factual determinations, the Court declines to disturb the Appellate Division's finding that "the court accorded defendant several opportunities to be heard" and that "defendant failed to amplify his conclusory complaints about his attorney with any case-specific allegations." *Laboriel*, 146 A.D.3d at 632. For the same reason, the Court finds that the Appellate Division's determination that Laboriel was not entitled to a substitution of counsel was not contrary to, or an unreasonable application of, clearly established federal law. *See McKee*, 649 F.2d at 931–932 ("[A] defendant seeking substitution of assigned counsel must . . . afford the court with legitimate reasons for the lack of confidence.").

III. Petitioner's Ineffective Assistance of Counsel Claims

Finally, Laboriel argues that the Report erred in finding that he had received effective assistance from his trial counsel, a claim the trial court reached on the merits in adjudicating Laboriel's motion to vacate his convictions under CPL § 440.10(1)(h). *See* Objections at 5; SR 573, Dkt. 17-6. Reviewing petitioner's ineffective assistance of counsel claims *de novo*, the Court agrees with Judge Aaron that they should be denied.

To prevail on an ineffective assistance of counsel claim, a petitioner must show both that counsel's performance "fell below an objective standard of reasonableness" and that the petitioner was prejudiced by it. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). To show prejudice, petitioner must demonstrate a "substantial" likelihood that, but for counsel's errors, the result of the trial would have been different. *Harrington*, 562 U.S. at 111–12; *Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005). As the Supreme Court has explained:

> In assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. *The likelihood of a different result must be substantial*, not just conceivable.

Harrington, 562 U.S. at 111–12 (emphasis added) (citations omitted). "Taking both AEDPA and *Strickland* together, the question when reviewing a state court's *Strickland* determination is thus 'not whether a federal court believes the state court's determination was incorrect[,] but [rather] whether that determination was [objectively] unreasonable—a substantially higher threshold.'" *Riley v. Noeth*, 802 F. App'x 7, 10 (2d Cir. 2020) (quoting *Schriro*, 550 U.S. at 473). *See also Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (a "doubly deferential judicial review" applies to *Strickland* claims evaluated under § 2254(d)).

Laboriel argues that his trial counsel was ineffective in that he failed to (1) provide Laboriel with his complete case file; (2) request a suppression hearing to challenge the lawfulness of a police stop, which provided a basis for a detective's eyewitness identification of him; (3) challenge a subpoena to Metro PCS for cell phone records; (4) object to the introduction of his birth certificate; and (5) challenge the warrant for his arrest. Judge Aaron found that the trial court reasonably disposed of each of these challenges in denying Laboriel's motion to vacate his conviction. *See* Report at 19–21. Laboriel now objects to the Report's findings with respect all but one of them.[2] *See* Objections at 5–13. The Court agrees with Judge Aaron that,

[2] Laboriel does not object to Judge Aaron's finding that trial counsel did not render ineffective assistance by failing to object to the introduction of Laboriel's birth certificate and that of his sister on the ground that those records had not been subpoenaed. Report at 20. The trial court held this claim to be "baseless," SR 583, Dkt. 17-7, a finding Judge Aaron found to be reasonable, especially in view of the fact that the prosecution's "obvious purpose" in introducing the birth certificates was to establish Laboriel's familial connection to his sister, a relationship

under the "doubly deferential judicial review" the Court must conduct, *Knowles*, 556 U.S. at 123, the trial court's determinations were not "objectively unreasonable," Report at 19.

Laboriel first asserts that defense counsel was ineffective in failing to provide him his complete case file before and after the trial. The trial court found that any such failure was not prejudicial, as it "did not deny [Laboriel] information that would have enabled him to alert counsel that some of the evidence offered at trial was inadmissible or had been illegally obtained." SR 580, Dkt. 17-6. Laboriel speculates that, with access to the complete case file, he "may have had the opportunity to suppress evidence before trial, or at the very least, preserve my issues for appellate review." FAC at 41. He notes that certain "withheld documents that [he] managed to obtain [after trial] established [the] unlawfulness" of his arrest and the government's evidence, *id.*, but he does not identify those documents or explain how they would have been likely to alter the result at trial. Laboriel has thus failed to carry his burden to "affirmatively prove prejudice." *Strickland*, 466 U.S. at 493.

Second, Laboriel argues that his trial counsel was ineffective in that he should have moved to suppress Detective Douglas Lansing's eyewitness identification testimony, as he asserts that it was the fruit of an unlawful stop. *See* FAC at 32. The stop occurred on January 5, 2012, when Detective Lansing followed a suspect from the site of an undercover officer's car (inside of which a weapons sale had taken place) to outside a Duane Reade; when Laboriel subsequently exited that Duane Reade, the detective stopped him and asked him to produce identification. *See* Objections at 8. The state court rejected the claim that trial counsel's decision not to seek a suppression hearing constituted ineffective assistance of counsel, finding, *inter alia*,

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Laboriel himself admitted. Report at 20. Reviewing this finding for clear error, *see Greene*, 956 F. Supp. at 513, the Court discerns none.

that (a) the stop was not illegal, as it was supported by reasonable suspicion; and (b) the undercover officer could separately have made in-court identifications of the defendant based on four independent interactions. *See* SR 580–581, Dkt. 17-6. In light of these reasonable conclusions, Laboriel has not shown that an attempt by counsel to suppress the eyewitness identification testimony would have had merit, much less that it would have been reasonably likely to alter the outcome at trial.

Laboriel's next assertion is that his counsel was ineffective for failing to challenge a subpoena for cellphone records to Metro PCS. But the trial court found that such a challenge would have lacked merit, as Defendant's position was that the phone in question did not belong to him, *see* Dkt. 17-1 at 22, and therefore he would have been unable to assert standing to challenge the subpoena. *See* SR 577, Dkt. 17-6. Laboriel's assertion that his trial counsel could have investigated the Metro PCS subpoena and identified "information that could have been obtained in order to assert standing," FAC at 39, amounts to unsubstantiated speculation which, in the Court's view, is insufficient to establish a substantial likelihood that investigating or challenging the subpoena would have altered the outcome of the proceedings. The Court accordingly agrees with Judge Aaron's conclusion that the trial court's finding was reasonable. *See* Report at 20.

Fourth, Laboriel argues that his counsel was ineffective for failing to "investigate and challenge" his arrest. FAC at 35. Laboriel argues that his arrest at his girlfriend's apartment, where he resided, was unlawful in that the arrest warrant itself was not possessed by the officers who carried out the arrest and, that, when Laboriel later obtained a copy of the warrant, it had not been subscribed by a judge. Objections at 11; FAC at 35–38. The trial court rejected this claim. It held that the arrest was lawful based on "two separate arrest warrants issued by Supreme Court,"

and that "[t]here is no statutory requirement that a Supreme Court arrest warrant be subscribed by a judge" or be possessed by the arresting officer at the time of the arrest. SR 579, Dkt. 17-6. The court further held that "even if the arrest warrant contained a defect that made the police entry into the apartment illegal, there were no suppressible fruits of the arrest," as Laboriel's "arrest was still supported by probable cause based on the fact that two indictments had been filed against him," and as the only evidence introduced as a result of the arrest—two photographs of Laboriel at the precinct—would not have been suppressible under New York law. *Id.* Judge Aaron rightly concluded that these findings were reasonable, and that any challenge to the arrest raised by Laboriel's trial counsel would have been meritless. Report at 21. Even if the trial court was wrong about the legality of the arrest and the possibility of suppressing the photographs, however, Laboriel's claim would still fail under *Strickland*, as he has not shown that suppression of the photographs of him in the precinct (coupled with the detective's testimony about the arrest) would have been likely to affect the outcome at trial. *Harrington*, 562 U.S. at 112. Laboriel notes that the precinct photographs "had a match in clothing from the surveillance video," FAC at 37, but he cannot show that suppression of this evidence could reasonably have resulted in acquittal, in light of the several other independent bases for in-court identification of Laboriel. *See* Report at 11–12; *see also* Dkt. 17-1 (Resp. Mem.) at 23 ("During the firearms sales, the undercover had four lengthy, in-person meetings with petitioner inside a car. Three of these meetings took place in broad daylight. A high-quality recording clearly captured petitioner's image and voice during these meetings."). This claim thus fails.

Finally, Laboriel asserts in fairly general terms that his trial counsel was ineffective for "fail[ing] to investigate derivation of evidence," which "did not premise sound strategy." Objections at 12; FAC at 41–42. To the extent that Laboriel has identified specific instances of

his trial counsel's purported failures to challenge certain evidence, the Court has addressed those above. Considering the record of "[trial] counsel's overall performance throughout the case," *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986), the Court does not find an overarching failure of strategy sufficient to overcome the "strong presumption that counsel's performance falls within the wide range of professional assistance." *Strickland*, 477 U.S. at 381. The Court further rejects Laboriel's assertion that the trial court misapplied *Strickland* by "refus[ing] to consider counsel's strategic thinking." Objections at 13. He refers to the fact that the trial court declined to order trial counsel to provide an affirmation on the grounds that Laboriel's motion could "be decided without having to consider counsel's strategic thinking about any of the complaints raised in this motion." SR 576, Dkt 17-6. The Court agrees that Laboriel's ineffective assistance claims can be disposed of without an affirmation from trial counsel, and thus discerns no objectively unreasonable application of *Strickland*.

IV. Certificate of Appealability

Although the Court finds that Laboriel is not entitled to habeas relief, in its view Laboriel's thorough and well-reasoned *pro se* submissions have presented at least one issue "that reasonable jurists could debate." *Miller–El v. Cockrell,* 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see* 28 U.S.C. § 2253(c)(2) (providing that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right"). The Court grants Laboriel a certificate of appealability limited to the question as to whether, with respect to Laboriel's Sixth Amendment claim, the trial court "adequately inquired into" Laboriel's motion for substitution of counsel and subsequent oral statements, *see United States v. John Doe No. 1*, 272 F.3d 116, 122 (2d Cir. 2001).

CONCLUSION

For the foregoing reasons, the Court overrules Laboriel's objections to Judge Aaron's Report and Recommendation. The Petition is denied. Laboriel is entitled to a certificate of appealability on the issue described above, and he is granted *in forma pauperis* status for purposes of that appeal, should he choose to take one. The Clerk of Court is respectfully directed to mail a copy of this order to Laboriel, and to close the case.

SO ORDERED.

Dated: January 7, 2021
New York, New York

Ronnie Abrams
United States District Judge

21-338-pr
Laboriel v. Lee

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 27th day of September, two thousand twenty-two.

Present:

REENA RAGGI,
RICHARD C. WESLEY,
WILLIAM J. NARDINI,
Circuit Judges.

WILSON LABORIEL,

Petitioner-Appellant,

v. 21-338-pr

WILLIAM LEE, Superintendent of the Eastern Correctional Facility

Respondent-Appellee.

For Petitioner-Appellant: LAWRENCE GERZOG, Law Offices of Lawrence Gerzog, New York, NY

For Respondent-Appellee: MICHELLE MAEROV, Assistant Attorney General (Barbara D. Underwood, Solicitor General, Nikki Kowalski, Deputy Solicitor General for Criminal Matters, *on the brief*), for Letitia James, Attorney General, State of New York, New York, NY

Appeal from a judgment of the United States District Court for the Southern District of New York (Ronnie Abrams, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Petitioner-Appellant Wilson Laboriel appeals from the district court's judgment, entered January 7, 2021, denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Pursuant to a judgment of the New York Supreme Court rendered June 25, 2013, as amended July 24, 2013, Laboriel was convicted of one count of second-degree criminal sale of a firearm (N.Y. Penal Law § 265.12(2)), six counts of third-degree criminal sale of a firearm (N.Y. Penal Law § 265.11(1)), and four counts of second-degree criminal possession of a loaded weapon (N.Y. Penal Law § 265.03(3)). He unsuccessfully sought a writ of habeas corpus in the district court, arguing that the state trial court deprived him of his right to counsel and due process by failing to adequately inquire into his request to replace his court-appointed attorney, and that the state appellate court improperly denied relief on those claims. The Court assumes the parties' familiarity with the case.

A district court's denial of a § 2254 petition is reviewed *de novo*. *Bierenbaum v. Graham*, 607 F.3d 36, 47 (2d Cir. 2010). When a state court adjudicates a habeas petitioner's claim on the merits, a district court may grant relief only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1)–(2). These standards are "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Courts should "not lightly conclude that a State's criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy." *Burt v. Titlow*, 571 U.S. 12, 20 (2013) (cleaned up).

Under the "clearly established Federal law" clause, § 2254(d)(1), a state court adjudication is "contrary to" Supreme Court precedent if it "contradicts the governing [Supreme Court] law" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). As relevant here, an unreasonable application of federal law occurs when a "state court identifies the correct governing legal rule. . . but unreasonably applies it to the facts of [a petitioner's] case." *Id.* at 407. If there are no Supreme Court holdings that squarely address a petitioner's claim, "it cannot be said that the state court unreasonably applied clearly established Federal law." *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (cleaned up).

Laboriel identifies no Supreme Court precedent (1) addressing the type of inquiry a state trial court must make to evaluate a pre-trial motion for reassignment of court-appointed counsel; or (2) holding that a state trial court erred by denying a defendant's pre-trial request to replace his court-appointed attorney in a case involving materially indistinguishable facts from the present case. He mentions *McMann v. Richardson*, 397 U.S. 759 (1970), and *Schriro v. Landrigan*, 550 U.S. 465 (2007), but these cases are unavailing because neither involved a defendant's request for reassignment of court-appointed counsel before or during trial. Laboriel's reliance on precedent from this Court is also misplaced because "circuit precedent does not constitute clearly established Federal law" under § 2254(d)(1). *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (internal quotation marks omitted). Given Laboriel's failure to identify any directly relevant Supreme Court precedent, the state appellate division's rejection of his claim was not contrary to or an unreasonable application of federal law under § 2254(d)(1).

Nor can Laboriel avoid this conclusion by arguing that he is complaining of state court errors of fact rather than law. Whether a court *adequately* reviewed alleged facts—Laboriel's

complaint—raises a question of law about the appropriate standard, a matter on which, as we have already observed, there is no clearly established Supreme Court precedent governing the circumstances here. Under the "unreasonable determination of the facts" clause, § 2254(d)(2), a federal court will "presume the correctness of state courts' factual findings unless [petitioners] rebut this presumption with 'clear and convincing evidence.'" *Schriro*, 550 U.S. at 473–74 (quoting 28 U.S.C. § 2254(e)(1)). "If reasonable minds . . . might disagree about the finding in question, . . . that does not suffice to supersede the trial court's determination." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (cleaned up).

Laboriel has not identified clear and convincing evidence to disturb the appellate division's findings that he (1) made generic complaints about his attorney that would not necessitate an inquiry into the adequacy of his representation; and (2) had several opportunities to be heard but failed to amplify his complaints with case-specific allegations. The basis for Laboriel's initial request for reassignment of counsel was a pre-printed form affidavit that contained non-case-specific complaints about an incarcerated defendant's attorney. Laboriel apparently added to this form only by hand-writing basic identifying information (such as his name and signature) in the relevant blanks. Moreover, despite the trial court's refusal to hear him on the eve of trial, Laboriel had several opportunities to substantiate the form's generic allegations during other hearings, but he did not do so.

Finally, even assuming the trial court's inquiry was inadequate, any error would have been harmless because Laboriel does not contend that he did not wish to stand trial rather than accept a proposed guilty plea, and, as the district court found, Laboriel was competently represented by court-appointed counsel throughout his trial. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (noting that indigent defendants have "no cognizable complaint" under

the Sixth Amendment if they are adequately represented by court-appointed attorneys).

* * *

For the reasons stated above, the judgment of the district court is **AFFIRMED**.

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

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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

Wilson Laboriel,

Petitioner - Appellant,

v.

William Lee, Superintendent of the Eastern Correctional Facility,

Respondent - Appellee.

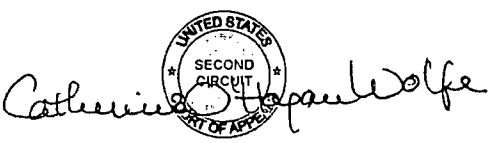
ORDER

Docket No: 21-338

Appellant, Wilson Laboriel, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX L

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