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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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

Ralph Hall,

Petitioner - Appellant,

v.

Darwin Le Claire, Norman Bezio,

Respondent - Appellee.

ORDER

Docket No: 22-172

Appellant, Ralph Hall, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

(Appendix "A-1")

Received
07/19/2022

S.D.N.Y. – N.Y.C.
10-cv-3877
Preska, J.
Fox, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of July, two thousand twenty-two.

Present:

Debra Ann Livingston,
Chief Judge,
José A. Cabranes,
Raymond J. Lohier, Jr.,
Circuit Judges.

Ralph Hall,

Petitioner-Appellant,

v. 22-172

Darwin Le Claire, Norman Bezio,

Respondents-Appellees.

Appellant, pro se, moves for a certificate of appealability and other relief. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has failed to show that "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the [Fed. R. Civ. P.] 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a constitutional right." *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam).

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

Catherine O'Hagan Wolfe

(Appendix "A-2")

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH HALL,

Petitioner,

-against-

DARWIN LeCLAIR (AND) NORMAN BEZIO,

Respondents.

10-CV-3877 (LAP)

ORDER

LORETTA A. PRESKA, United States District Judge:

By order dated January 29, 2018, the Court denied Petitioner Ralph Hall's ("Hall") motion for reconsideration, brought under Rule 60(b) of the Federal Rules of Civil Procedure, and construed it as also brought under Rule 59(e). (ECF No. 370.) In that motion, Hall sought reconsideration of the Court's October 21, 2015 order denying his petition for a writ of *habeas corpus* brought under 28 U.S.C. § 2254, where Hall challenged his 2005 state-court conviction. (ECF No. 330.)

The Court is now in receipt of Hall's second motion for reconsideration. (ECF No. 378.) For the following reasons, the Court denies the motion.

I. BACKGROUND

The Court assumes familiarity with the full background of this case but recounts some of the case's procedural history.

A. Section 2254 proceedings

In its order adopting the report and recommendation and denying Hall's § 2254 petition, the Court overruled Hall's objection to the availability of trial court records and the Appellate Division's alleged failure to review those records. Hall claimed that the Appellate Division had not reviewed his N.Y. C.P.L. § 330.30 motion before rendering its decision. In overruling this

(Appendix "B")

objection, the Court found that Hall's claim was unsupported by any factual allegations. The Court also found that the record showed that the § 330.30 motion and other trial court records "were on the record." (ECF 330, at 13) (emphasis in original).

The Court also overruled Hall's objection to Magistrate Judge Kevin N. Fox's use of the Supreme Court case, *Estelle v. McGuire*, 502 U.S. 52 (1991), in his report and recommendation (the "*Estelle* ground").

B. First Motion for Reconsideration

In Hall's November 5, 2015 motion for reconsideration, he argued that the Court had not considered all of his *habeas corpus* grounds, raised in various submissions, when the Court denied his § 2254 petition. In denying the reconsideration motion, the Court noted that it had "considered and adjudicated all of Petitioner's asserted grounds for *habeas corpus* relief" and concluded that Hall failed to show that the Court overlooked any controlling law or factual matters that would cause the Court to vacate its denial of his petition, or stated any facts demonstrating that extraordinary circumstances existed to warrant relief. (ECF No. 370, at 10.)

C. Second Motion for Reconsideration

In his new motion, Hall alleges that the

> habeas proceeding was assertedly 'undermined' by [the] District Court's interpretation that 330.30 motion was part of the appealable extrinsic record, rather than was relegated to the 'unappealable' intrinsic judgment roll record. The District Court's failure to distinguish pro-se Petitioner's denial of due process claims as a 5th and 14th U.S. Const. Amendment violation – relates to the integrity of the federal habeas proceeding . . . .
>
> . . .
>
> Where the District Court determined Petitioner's habeas corpus rest[ed] upon[ ] state court's violation of state law . . . the District Court failed to realize[ ] [the] state court did not record the requested stenographic summary of [the] 330.30 motion for purposes of Appellate Review.

(ECF No. 377, at 3, 4.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH HALL,

Petitioner,

-against-

DARWIN LeCLAIRE (AND) NORMAN BEZIO,

Respondents.

10-CV-3877 (LAP) (KNF)

ORDER

LORETTA A. PRESKA, United States District Judge:

Petitioner, who is incarcerated and proceeds *pro se*, brings this motion in which he seeks reconsideration, and relief under Rule 60(b) of the Federal Rules of Civil Procedure. (ECF No. 335.) He seeks relief from the Court's October 20, 2015 order and subsequent judgment adopting an October 3, 2014 Report and Recommendation ("Report" or "R&R") by Magistrate Judge Kevin Nathaniel Fox, and denying Petitioner's amended petition for a writ of *habeas corpus* on the merits. (ECF Nos. 330 & 331.) The Court construes Petitioner's motion as one seeking relief from the Court's order and judgment under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, and under Local Civil Rule 6.3. For the reasons discussed below, the Court denies the motion.

BACKGROUND

Below is a short summary of this action's procedural history. It is necessary to recount this procedural history to demonstrate the Court's reasons for denying the present motion.

A. The amended petition and subsequent state-court criminal appeal

On June 3, 2010, the Court received from Petitioner an amended petition seeking relief under 28 U.S.C. § 2254. (ECF No. 4.) In it, Petitioner asserted the following grounds for *habeas*

corpus relief: (1) the Appellate Division's excessive delay in deciding Petitioner's direct appeal violated his right to due process, and his appeal was prejudiced by the delay; (2) the trial court erred when it failed to incorporate into the trial record at sentencing Petitioner's *pro se* motion to vacate the judgment of conviction; (3) the grand jury proceeding was defective, and (4) Petitioner's appellate counsel was ineffective.

This action was subsequently reassigned to the Honorable Richard Owen of this Court. By order dated September 14, 2010, Judge Owen ruled that the delay in Petitioner's then-pending direct criminal appeal in the New York Supreme Court, Appellate Division, First Department, did not, at that time, violate Petitioner's right to due process. (ECF No. 10.) But in that same order, Judge Owen allowed Petitioner leave to reassert that claim if, "one year from [the date of that order,] Petitioner's appeal is still adjourned." (*Id.* at 7.) Less than one year later, on April 21, 2011, the Appellate Division affirmed Petitioner's conviction. *People v. Hall*, 84 A.D.3d 79 (1st Dept. 2011). On February 24, 2012, the New York Court of Appeals denied Petitioner leave to appeal. *People v. Hall*, 18 N.Y.3d 924 (2012). And on October 1, 2012, the Supreme Court of the United States denied Petitioner *certiorari*. *Hall v. New York*, 568 U.S. 855 (2012).

B. The "Refile Petition" and the "Petition to Refile"

On July 28, 2011, after the Appellate Division had affirmed the conviction, but before the New York Court of Appeals has denied leave to appeal, this Court received a document titled "Refile Petition" from Petitioner.[1] (ECF No. 17.). Petitioner asserted that that submission "constitute[d] [the] refiling of [his] petition." (*Id.* at 5.) He stated that "the absence of [his] pre-

[1] Petitioner has filed numerous submissions in this action. The Court will only address those submissions it deems significant for this purposes of this order.

sentence motion and proceedings from [the] record on appeal [is a] . . . constitutional default [that] . . . clearly constitute[s] grounds for federal intervention." (*Id.* at 2, ¶ 3.)

On September 28, 2011, apparently while Petitioner's leave petition was still pending in the New York Court of Appeals, this Court received a "Petition to Refile" from Petitioner.[2] In it, Petitioner asserted that: (1) the "state court deprived [him] of due process and [a] meaningful direct appeal"; (2) the "state court failed to review [an] adequate record on direct appeal to include [sic]" a state-court motion filed on October 7, 2005; (3) the "state court [] deprived [him] of [his] right to [include in the] timely appeal [his] pre-sentence motion . . . [and a] rebut[tal] [of] the absence of [that] motion from [the] record on appeal"; and (4) his "appellate counsel failed to advocate on direct appeal [about] the absence of the [pre-sentence motion from the] record for appellate review." (ECF No. 21, at 5-6.)

In an order dated June 26, 2013, Judge Owen noted that Petitioner had filed numerous submissions in the state courts "alleging misconduct by the state courts and . . . improper delay." (ECF No. 171, at 2.) Judge Owen also directed the respondent to answer the amended petition. (*Id.* at 3.) In another June 26, 2013 order, Judge Owen referred the action to Magistrate Judge Fox. (ECF No. 170.) The action was subsequently reassigned back to me.

In August 2013, respondent filed an answer (ECF Nos. 195-197), and Petitioner filed a traverse in response to the respondent's answer (ECF No. 198). On October 3, 2014, Magistrate

[2] This submission was initially filed as another § 2254 *habeas corpus* petition commencing *Hall v. Bezio*, No. 11-CV-6850 (LAP). By order dated November 17, 2011, the Court directed the Clerk of Court to administratively close *Hall*, No. 11-CV-6850 (LAP), and file this submission in this action as a "Petition to Refile," with a file date of September 28, 2011.

Judge Fox issued his R&R. (ECF No. 253.) It recommended that the Court deny the amended petition.

C. The Report's findings

The Report concluded that Petitioner was not entitled to *habeas corpus* relief on the ground of excessive appellate delay. This was because he had "not established that the . . . delay caused substantial prejudice to the disposition of his appeal." (*Id.* at 13-14.)

The Report also concluded that Petitioner was not entitled to *habeas corpus* relief as to his ground concerning the trial court's failure to incorporate into the trial record his *pro se* motion filed at sentencing. It stated that because Petitioner was asserting that the trial court had only violated state law, there was no basis to grant federal *habeas corpus* relief under § 2254. (*Id.* at 15.) In addition, it stated that "absence of a stenographic record of the contents of [Petitioner's] . . . motion" did not prejudice his ability to appeal, as his motion's arguments "were known to his appellate counsel and incorporated into the appellate brief," and also "were made part of the appellate record[,] . . . reviewed by the Appellate Division[,] and denied." (*Id.* at 16.)

The Report further concluded that Petitioner was not entitled to *habeas corpus* relief as to his ground that the grand jury proceeding was defective. It noted that Petitioner was precluded from asserting a claim about a defective grand jury proceeding because he had been subsequently convicted by a petit jury. (*Id.*)

And the Report concluded that Petitioner was not entitled to *habeas corpus* relief as to his ground that his appellate counsel was ineffective. It stated that Petitioner's appellate counsel's representation was not constitutionally inadequate. (*See id.* at 18.) It also stated that, but for such representation, the result of his appeal would not have been different. (*Id.* at 19.)

D. The order adopting the R&R

Petitioner filed timely objections to the R&R. (ECF Nos. 255 & 256.) In an order dated October 20, 2015, the Court overruled them, adopted the R&R in its entirety, and denied the amended petition on the merits. (ECF. No. 330.)

The Court found no merit to Petitioner's objection that the respondent failed to answer the amended petition. (*Id.* at 10-11.) It also found no merit to his objection to the Report's reliance on *Estelle v. McGuire*, 502 U.S. 62 (1991), for the proposition that a violation of a state statute is not a basis for granting federal *habeas corpus* relief. (*Id.* at 11-13.)

In addition, the Court overruled Petitioner's objection "that his due process rights ha[d] been violated by the failure of the appellate court to review the trial court records." (*Id.* at 13.) The Court specifically understood his objection "to allege that the Appellate Division, in reviewing Petitioner's case upon direct appeal, did not have a record of the trial proceedings" that included his "*pro se* motions." (*Id.*) The Court held that he failed "to provide support for this allegation beyond conclusory statements[,]" and that "evidence in fact show[ed] that such motions *were* on the record." (*Id.*) (emphasis in original). The Court noted that Petitioner's "[a]ppellate counsel was . . . provided with those motion papers as part of the record on appeal[,]" and that "the Appellate Division decision in Petitioner's direct appeal note[d] that it had received and reviewed [Petitioner's] *pro se* brief, though it rejected the claims on the merits." (*Id.* at 14.)

The Court also overruled Petitioner's objection regarding his assertion that his appellate counsel had been ineffective. It held that Petitioner had failed to satisfy the Supreme Court's test for such a claim, as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). (*See id.* at 14-18.) The Court specifically held that "Petitioner ha[d] not made more than conclusory allegations

of prejudice as a result of any procedural deficiency." (*Id.* at 17.) It noted that "the Appellate Division . . . . apparently found no procedural error, as the case was adjudicated on the merits." (*Id.*) It also noted that, as to Petitioner's claim that his appellate counsel failed to advocate his chosen grounds, his counsel was not required to do so. (*Id.* at 18.) It further noted, as did the R&R, that many of the grounds Petitioner raised in his *pro se* state-court submissions were duplicative of those raised by his appellate counsel, and that the Appellate Division also considered the grounds raised in his *pro se* appellate brief but rejected them on the merits. (*Id.*) Thus, in overruling that objection, the Court held that Petitioner failed to establish that his appeal was prejudiced as a result of his appellate counsel's actions. (*See id.*)

As to Petitioner's claim of excessive appellate delay, the Court noted that Petitioner did not object to that portion of the R&R, and thus abandoned that claim. (*See id.* at 18-19.)

Petitioner objected "that the state court corrective process was rendered ineffective." (*Id.* at 19.) He asserted that the Appellate Division's delay in deciding his direct appeal was an example of state-court ineffectiveness. But the Court again noted that Petitioner had abandoned his claim of excessive appellate delay. (*See id.*) It also held that "Petitioner ha[d] not supported his contention that the corrective process was rendered ineffective by anything other than conclusory allegations." (*Id.* at 19-20.) The Court thus overruled that objection.

Petitioner also objected on equal protection and privileges and immunities grounds. The Court rejected his assertion that his rights under the equal protection and privileges and immunities clauses had been violated when the trial court allegedly failed to comply with state law, and failed to include his *pro se* motion in the trial record. (*Id.* at 20-21.) The Court noted that Petitioner's appellate counsel has stated in an affirmation that she had received a copy of that motion as part of the record on appeal. (*Id.* at 21.) Petitioner also asserted another such

constitutional violation arising from the trial court's alleged failure to comply with state law and make a record when it issued a decision on a motion to suppress evidence. (*Id.* at 21.) The Court found that the trial court had actually made such a record. (*Id.* at 21-22.) Petitioner further asserted another such constitutional violation as to the appellate court's alleged failure to comply with state law and order the trial court to provide certain information concerning the trial court's decisions. (*Id.* at 22.) The Court found the cited state law inapplicable, and that Petitioner had brought "forth nothing substantive from which the Court could conclude that he is the victim of constitutional violations somehow related to this law." (*Id.*)

Finally, Petitioner objected to the Report's consideration of his amended petition, rather than his "Refile Petition" or his "Petition to Refile." (*Id.* at 23.) In overruling that objection, the Court noted that Judge Owen, in his September 14, 2010 order, only granted Petitioner leave to refile as to his claim of excessive appellate delay – which he later abandoned – and that his "Refile Petition" and his "Petition to Refile" "were not limited to" that claim. (*Id.*) The Court held that the Report "was warranted in responding to the [a]mended [p]etition, as that is the petition filed in accordance with proper procedure and with the Court's leave." (*Id.*)

E. The present motion

On November 5, 2015, the Court received from Petitioner the present *pro se* motion and a notice of appeal. (ECF Nos. 334 & 335.) Petitioner's motion is not very clear. He seems to argue that the Court's November 17, 2011 order in *Hall*, No. 11-CV-6850 (LAP), which directed the Clerk of Court to administratively close that action and file the "Petition to Refile" in this action, "modified" Judge Owen's September 14, 2010 order to allow Petitioner to assert additional *habeas corpus* grounds, not just a claim of excessive appellate delay. (*See* ECF No. 335, at 2, ¶ 3.) He also seems to assert that in his "Petition to Refile," he has asserted *habeas corpus* grounds

that were not previously appropriate for consideration because he had not exhausted state-court remedies as to those grounds until after Judge Owen had issued his September 14, 2010 order. (*See id.* at 5, ¶¶ 8-9.) And he apparently contends that the Court recognized that his "Petition to Refile" constituted a supplement to his amended petition when the Court recognized, in its October 20, 2015 order, that the "Petition to Refile" had been "consolidated with the current case." (*See id.* ¶¶ 8-11; ECF No. 330, at 5 n.1.)

Petitioner asserts that the respondent's answer and the R&R both "failed[,] for the most part[,] to address claims raised in" the "Petition to Refile," which he describes as his "modified[] consolidated amended petition." (ECF No. 335, at 7, ¶ 11.) He also asserts that the Court's October 20, 2015 order informed him, "for the first time," that his "Petition to Refile had been dismissed . . . ." (*Id.* at 4, ¶ 6.) And he apparently argues that the Court's "consolidation" of his additional *habeas corpus* grounds in his "Petition to Refile" should have allowed Magistrate Judge Fox to consider them in the R&R (*id.* at 5, ¶ 8), and that he "should not be penalized for [the Court's] consolidation of his claims" (*id.* ¶ 9).

Petitioner then asserts allegations concerning his appellate counsel's ineffectiveness, the trial court's failure to incorporate his *pro se* motion into the trial-court record, and the state court's failure to correct the record on appeal. (*See id.* at 7-28.) He seems to argue that Magistrate Judge Fox erred in not considering the additional grounds raised in his "Petition to Refile," and that the Court erred by not considering them either.

DISCUSSION

A. Rule 59(e) & Local Civil Rule 6.3

The standards governing a motion to alter or amend a judgment under Rule 59(e) and a motion for reconsideration under Local Civil Rule 6.3 are the same. *R.F.M.A.S., Inc. v. Mimi So*,

640 F. Supp. 2d 506, 508-09 (S.D.N.Y. 2009). The movant must demonstrate that the Court overlooked controlling decisions or factual matters that had been previously put before it. *Id.* at 509; *see Padilla v. Maersk Line, Ltd.*, 636 F. Supp. 2d 256, 258-59 (S.D.N.Y. 2009). "Such motions must be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000); *see also SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 206, 210 (S.D.N.Y. 2009) ("[A] motion for reconsideration is not an invitation to parties to treat the court's initial decision as the opening of a dialogue in which [a] party may then use such a motion to advance new theories or adduce new evidence in response to the court's ruling.") (internal quotation marks and citation omitted).

B. Rule 60(b)

Under Rule 60(b), a party may seek relief from a district court's order or judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason justifying relief.

Fed. R. Civ. P. 60(b).

"[A] Rule 60(b)(6) motion must be based upon some reason other than those stated in clauses (1)-(5)." *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009) (quoting *Smith v. Sec'y of HHS*, 776 F.2d 1330, 1333 (6th Cir. 1985)) (alteration in original, internal quotation marks omitted). A Rule 60(b)(6) motion must show both that the motion was filed within a

"reasonable time" and that "extraordinary circumstances [exist] to warrant relief." *Old Republic Ins. Co. v. Pac. Fin. Servs. of Am., Inc.*, 301 F.3d 54, 59 (2d Cir. 2002) (internal quotation marks and citation omitted).

C. Analysis

The operative pleading for this action is Petitioner's amended petition. (ECF No. 4.) Judge Owen, in his September 14, 2010 order, only granted Petitioner leave to refile his claim of excessive appellate delay. (ECF No. 10.) The Court's November 17, 2011 order in *Hall*, No. 11-CV-6850 (LAP), while directing the Clerk of Court to file the "Petition to Refile" in this action, did not modify, rescind, or vacate Judge Owen's September 14, 2010 order. Thus, because the amended petition is the operative pleading, Magistrate Judge Fox only considered those grounds raised in the amended petition.

The Court, at no point, considered the "Refile Petition" or the "Petition to Refile" as a supplement to the amended petition. But in any event, the grounds asserted in both of them are duplicative of those asserted in the amended petition or in Petitioner's objections to the R&R. Thus, in the Court's October 20, 2015 order adopting the R&R, the Court considered and adjudicated all of Petitioner's asserted grounds for *habeas corpus* relief

In the present motion, Petitioner has failed to show that the Court has overlooked controlling decisions or factual matters that would cause the Court to vacate its October 20, 2015 order and subsequent judgment. The Court therefore denies Petitioner's motion, to the extent that he seeks relief under Rule 59(e) and Local Civil Rule 6.3.

And as to Rule 60(b) relief, even under a liberal interpretation of the present motion, Petitioner has failed to allege facts demonstrating that any of the grounds listed in the first five clauses of Rule 60(b) apply. In addition, as to Rule 60(b)(6) relief, Petitioner has failed to allege

any facts demonstrating that extraordinary circumstances exist to warrant relief. Thus, to the extent that Petitioner seeks any relief under Rule 60(b), the Court denies the motion.

CONCLUSION

The Clerk of Court is directed to mail a copy of this order to Petitioner and note service on the docket. The Court construes the present motion as one for relief from the Court's October 20, 2015 order and subsequent judgment under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, as well as under Local Civil Rule 6.3. (ECF No. 335.) The Court denies the present motion.

Because the amended petition makes no substantial showing of a denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253. Thus, to the extent that Petitioner seeks a certificate of appealability, the Court also denies that request. (ECF No. 362.)

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: January 29, 2018
New York, New York

Loretta A. Preska

LORETTA A. PRESKA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

RALPH HALL,

Petitioner,

-against-

DARWIN LE CLAIRE & NORMAN BEZIO,

Respondents.

----------X

10 **CIVIL** 3877 (LAP)

JUDGMENT

Whereas on October 3, 2015, the Honorable Kevin Nathaniel Fox, United States Magistrate Judge, to whom this matter was referred, having issued a report and recommendation (the "Report") recommending that this Court deny the petition for habeas relief; Petitioner having timely submitted objections; Respondents did not submit formal objections to the Report but did submit a response to Petitioner's objections, and the matter having come before the Honorable Loretta A. Preska, Chief United States District Judge, and the Court, thereafter, on October 20, 2015, having rendered its Order adopting the Report in its entirety, denying Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. 2254, denying a certificate of appealability to the Court of Appeals pursuant to 28 U.S.C. 2253(c), overruling Respondent's objections, and directing the Clerk of the Court to mark this matter closed and denying all pending motions as moot, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated October 20, 2015, the Report is adopted in its entirety, and Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied; a Certificate of Appealability to the Court of Appeals pursuant to 28 U.S.C. § 2253(c) is denied; and Petitioner's objections are overruled; accordingly, the case is closed and all pending motions denied as moot.

DATED: New York, New York
October 22, 2015

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH HALL, Petitioner, v. DARWIN LE CLAIRE & NORMAN BEZIO Respondents.	10 Civ. 3877 (LAP) ORDER ADOPTING REPORT & RECOMMENDATION

LORETTA A. PRESKA, Chief United States District Judge:

Petitioner Ralph Hall ("Petitioner" or "Hall"), pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his 2005 New York State court conviction. (See Amended Petition, dated May 24, 2010 [dkt. no. 4].) On October 7, 2005, Petitioner was sentenced by the New York State Supreme Court, New York County, to an indeterminate prison term of twenty-five years to life each on one murder and one attempted murder count, as well as additional prison terms for assault, robbery, and weapon possession. (See Sentencing before Justice Charles Tejada, dated Oct. 7, 2005 [dkt. no. 195 app'x 9], at 102-26.)

The conviction was the result of the robbery and murder of Nnandi Ben-Jochannan, as well as the attempted murder of Mr. Ben-Jochannan's young son.

This Petition was referred to United States Magistrate Judge Kevin Nathaniel Fox. (Order Referring Case to Magistrate Judge, dated July 1, 2013 [dkt. no. 170].) On October 3, 2014, Judge Fox issued a Report and Recommendation. (See Report and Recommendation, dated Oct. 3, 2014 [dkt. no. 253] (the "Report").) The Report recommends that this Court deny Petitioner habeas relief. (Report at 19.)

Petitioner submitted timely objections to the Report pursuant to Rule 72(b)(2) of the Federal Rules of Civil Procedure. (Pro Se State Petitioner's Objection and Response to U.S. Magistrate's Report Recommendations, dated Oct. 13, 2014 [dkt. no. 255] (the "Objections")); Cover Letter to Petitioner's Objections, dated Oct. 13, 2014 [dkt. no. 256] (the "Cover Letter").) Petitioner has also continued to send to the Court voluminous correspondence, but for purposes of reviewing the Report the Court will consider only the Objections and Cover Letter which were timely submitted to constitute Petitioner's formal objections, as even a pro se litigant is expected to be in "compliance with relevant rules of procedural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quoting Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981)).

Respondents did not submit formal objections to the Report but did submit a response to Petitioner's objections. (Response to Petitioner's Objections, dated Oct, 27, 2014 [dkt.

no. 258]; see also Fed. R. Civ. P. 72(b)(2) ("A party may respond to another party's objections within 14 days after being served with a copy.").)

In light of Petitioner's objections, and upon de novo review of the objected-to portions of the Report, see Fed. R. Civ. P. 72(b), the Report [dkt. no. 253] is ADOPTED in full. Respondent's Objections [dkt. nos. 255-56] are OVERRULED. Further, the Court denies Petitioner a certificate of appealability, pursuant to 28 U.S.C. § 2253(c), to the Court of Appeals. See 28 U.S.C. § 2253(c)(2) ("A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.").

I. BACKGROUND

The Court assumes familiarity with the full background of this case as set forth in the Report and in its prior Orders but recounts some of the case's procedural history. (See Report at 2-7.)

After Petitioner's conviction, he pursued a direct appeal in state court with the assistance of appointed counsel. While counsel raised four separate grounds for relief, Petitioner nonetheless submitted a pro se brief outlining a number of other grounds. (Supplemental Pro Se Brief to Appellate Division, dated Jan. 6, 2010 [dkt. no. 195 app'x 1],

at 67-84.) The Supreme Court, Appellate Division, ultimately affirmed the judgment against Petitioner, rejecting both the claims by counsel as well as the pro se claims. People v. Hall, 923 N.Y.S.2d 428 (N.Y. App. Div. 2011). Leave to appeal that decision to the New York Court of Appeals was denied, and the United States Supreme Court denied certiorari. Id., lv. denied, 965 N.E.2d 965 (N.Y. 2012), cert. denied, 133 S. Ct. 193 (2012).

On October 25, 2007, Hall filed his initial petition for a writ of habeas corpus, challenging his conviction. That petition was dismissed as premature because Hall's direct appeal was still pending. (Order of Dismissal, dated Jan. 14, 2008, No. 08 Civ. 294 [dkt. no. 3].) On October 16, 2009, Hall filed an application with the United States Court of Appeals for the Second Circuit for permission to file a second and successive petition. (Application for Leave to File a Second or Successive Habeas Corpus Petition, dated Oct. 16, 2009, No. 09-4291-pr.) The Court of Appeals held that Hall's application was not a second and successive petition because the original petition was dismissed as premature and, thus, not adjudicated on the merits. (Amended Order, dated Jan. 15, 2010, No. 09-4291-pr, No. 08 Civ. 294 [dkt. no. 5].)

On May 11, 2010, this Court directed Hall to file an amended petition listing all grounds he planned to pursue and whether those grounds were exhausted in state court. (Order,

dated May 11, 2010 [dkt. no. 2].) On June 3, 2010, while his direct appeal was still pending, Hall filed an amended petition as directed by the court. (Amended Petition, dated May 25, 2010 [dkt. no. 4].)

The Court denied the Amended Petition's excessive delay claims, finding that the state appellate court's delay did not violate Hall's right to due process. (Order, dated Sept. 15, 2010 [dkt. no. 10].) The order also stated, however, that "[i]f one year from now Petitioner's appeal is still adjourned, he may refile the claim of excessive delay . . . ." (Id. at 7.) Petitioner subsequently filed two documents, one titled a "Refile Petition," [dkt. no. 17], and another titled "Petition to Refile," [dkt. no. 21];[1] these were purportedly submitted in accordance with the Court's September 15, 2010 order, but they contained claims in addition to the permitted excessive delay claim.

Throughout the pendency of this case Hall has filed a number of additional letters, petitions, and other documents with the Court. To the extent that any of them has been construed as a motion, each has been denied by the Court. (See Order, dated Sept. 6, 2010 [dkt. no. 201] (denying motions to

[1] The "Petition to Refile" was initially filed as a separate habeas petition under a different docket number, but that case was dismissed, and the pleadings therein were consolidated with the current case. (See Order of Dismissal, dated Nov. 17, 2011, No. 11 Civ. 6850 [dkt. no. 3].)

appoint counsel, to further prosecute, to compel state court action, and for reconsideration); Order, dated Sept. 26, 2013 [dkt. no. 205] (denying renewed motion for appointment of counsel); Order, dated Aug. 20, 2014 [dkt. no. 250] (denying motions for reconsideration of denial of appointment of counsel, for writ of mandamus, and for recusal); Order, dated Sept. 22, 2015 [dkt. no. 323] (denying motions for appointment of counsel, for writ of mandamus, and for production of documents).) The Court also notes that, as stated in its previous Orders, these repeated filings have been in violation of multiple Orders by this Court and have resulted in the delay of Petitioner's underlying habeas application.

II. STANDARD OF REVIEW

A. District Court's Review of the Report

A district judge may reconsider any pretrial matter decided by a magistrate judge "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Additionally, a "district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate

judge with instructions." Fed. R. Civ. P. 72(b)(3); see also 28 U.S.C. § 636(b)(1).

The parties also have a right to file objections to the proposed findings and recommendations, and a party may respond to another party's objections. Fed. R. Civ. P. 72(b)(2); see also 28 U.S.C. § 636(b)(1).

B. Construal of Pro Se Pleadings

Here, Petitioner appears pro se, and, because he acts without the benefit of counsel, this Court must construe his pleadings liberally and is "constrained to conduct our examination with 'special solicitude,' interpreting the complaint to raise the 'strongest [claims] that [it] suggest[s].'" Hill v. Curcione, 657 F.3d 116, 122 (2d Cir. 2011) (quoting Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474-75 (2d Cir. 2006)). However, the Court is still required to "examine such complaints for factual allegations sufficient to meet the plausibility requirement," id., and, as noted supra, a pro se litigant is still expected to be in "compliance with relevant rules of procedural and substantive law." Traguth, 710 F.2d at 95 (quoting Birl, 660 F.2d at 593).

C. 28 U.S.C. § 2254 Claims

The present petition is brought pursuant to 28 U.S.C. § 2254, which allows "a person in custody pursuant to the judgment of a State court" to seek a writ of habeas corpus, but "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).

In addition the requirement that habeas only be granted for violation of the Constitution or federal laws or treaties, there are also a number of procedural bars to granting a habeas writ pursuant to § 2254.

First, the petitioner must have exhausted his state court remedies or there must be "an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(A)-(B). "State remedies are deemed exhausted when a petitioner has: (i) presented the federal constitutional claim asserted in the petition to the highest state court . . . and (ii) informed that court (and lower courts) about both the factual and legal bases for the federal claim." Ramirez v. Attorney Gen. of N.Y., 280 F.3d 87, 94 (2d Cir. 2001). The court may also deny an application on the merits, without reaching the issue of exhaustion. 28 U.S.C. § 2254(b)(2).

Further, in order for a court to grant a writ pursuant to § 2254, any claim which has been "adjudicated on the merits in State court proceedings" must have either

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

A state court decision is considered an "adjudication on the merits" when it "(1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment." Fischer v. Smith, 780 F.3d 556, 560 (2d Cir. 2015) (quoting Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001)). In analyzing whether a state court disposition is "on the merits," the court looks to "(1) the state court's opinion, (2) whether the state court was aware of a procedural bar, and (3) the practice of state courts in similar circumstances." Id. (quoting Spears v. Greiner, 459 F.3d 200, 203 (2d Cir. 2006)).

III. DISCUSSION

As noted above, this Court construes Petitioner's pleadings liberally. To that end, the Court attempts to address Petitioner's objections, whether or not they directly relate to

a finding of the Report. However, the Court also limits its analysis below to those objections that were timely filed with the Court in response to the Report, namely the Objections, [dkt. no. 255], and the Cover Letter, [dkt. no. 256]. See Fed. R. Civ. P. 72(b).

A. Objection Pursuant to Federal Rule of Civil Procedure 5(b)

Petitioner's first objection is that Respondents failed to answer his petition as required by Federal Rule of Civil Procedure 5(b). (See Objections ¶ 1.[2]) That Rule states, in relevant part: "A paper is served under this rule by . . . mailing it to the person's last known address—in which event service is complete upon mailing." Fed. R. Civ. P. 5(b)(2)(C). Here, Respondents filed an Affidavit of Service stating that Respondent's answer, as well as the accompanying memorandum of law and attached exhibits, were served upon Petitioner via the United States Postal Service. (Affidavit of Service, dated Aug. 16, 2013 [dkt. no. 197].) Absent a more concrete allegation by Petitioner as to how Respondents have failed to meet the

[2] The paragraphs in Petitioner's Objections are numbered inconsistently, and so in the interests of clarity the Court refers to the Objections' page numbers or paragraph numbers.

requirements of Rule 5(b), the Court finds no merit in this objection.

Petitioner further contends that the Court should deem his petition unopposed because of Respondent's purported failure to serve an answer. (See Objections at 12.) In support of this contention, he refers to the footnote on page two of the Report, stating that this footnote "implies Respondent's answer fails to address the allegations, grounds or claims raised by petition for federal habeas corpus." (Id.) That footnote reads, in its entirety: "The respondents interpret Hall's Amended Petition to allege, in addition to these claims, those raised on his direct appeal. However, a review of the Amended Petition indicates that Hall's application for habeas corpus relief is based on the claims set forth above." (Report at 2 n.1.) The Report does not state or imply that the petition was unopposed. Rather, it merely indicates that Respondents' grounds for opposition were overly broad.

Accordingly, for the reasons stated above, Petitioner's objection is OVERRULED.

B. Objection Regarding Report's Use of Estelle v. McGuire

Petitioner next objects to a particular case cited by the Report. Petitioner alleges that the Report's use of Estelle v. McGuire, 502 U.S. 62 (1991), was inappropriate and that

Jefferson v. Upton, 560 U.S. 284 (2010), is the "controlling substantive law." (Objections ¶ 1.)

The Report cites Estelle for the proposition that "the violation of a state statute is not a basis for granting federal habeas corpus relief." (Report at 15.) The Report continues on to note that "[r]elief on the basis of a petition for habeas corpus is available to a state prisoner only if the prisoner is 'in custody in violation of the Constitution or laws or treaties of the United States.'" (Id. (quoting 28 U.S.C. § 2254(a)).)

Petitioner's objection may have stemmed from a misunderstanding of the Report's conclusion. The Court understands the Report correctly to find that the violation of a state statute is not a sufficient condition to grant federal habeas relief. Rather, a "violation of the Constitution or laws or treaties of the United States" must be found, though such a violation may also parallel the violation of a state law.

Further, though Jefferson was decided by the Supreme Court in 2010, the analysis in that case pertains to an older version of § 2254 and thus is largely inapplicable to the present case. Jefferson, 560 U.S. at 295 (Scalia, J., dissenting) (discussing the application of "[t]he prior version of 28 U.S.C. § 2254(d) (1994 ed.) applicable in this case")). In Jefferson, the Court found that the lower court had acted improperly in that it applied only one of eight potential

exceptions to a § 2254 claim and ignored the other seven; however, those eight exceptions do not appear in the current version. Id. at 292-94; see also 28 U.S.C. § 2254(d).

Accordingly, Petitioner's objection is OVERRULED.

C. Objection Regarding Trial Record Availability

Petitioner also objects that his due process rights have been violated by the failure of the appellate court to review the trial court records. In support, Petitioner cites New York Judiciary Law § 295. (Objections ¶ 3.) This law requires that a stenographer "take complete stenographic notes of each ruling or decision of the presiding judge, and when the trial is by jury each and every remark or comment of such judge during the trial" and "each and every exception taken . . . by or on behalf of any party to the action." N.Y. Jud. Law § 295. The Court understands Petitioner's objections to allege that the Appellate Division, in reviewing Petitioner's case upon direct appeal, did not have a record of the trial proceedings. Similarly, Petitioner makes various references to pro se motions which were not included on the record. (See, e.g., Objections at 6 (referencing "the unrecorded CPL 330.30 [motion]").)

However, Petitioner fails to provide support for this allegation beyond conclusory statements. Further, the evidence in fact shows that such motions were on the record. For

example, the affirmation of Petitioner's appellate counsel, attached to the Respondent's Answer along with a transcript of the trial itself, shows that the 330.30 motion was included as part of the appellate record. (See Affirmation of Kelly Elgarten, dated Feb. 7, 2008 [dkt. no. 195 app'x 4], at 10-19 ("Mr. Hall's motion appears to be predicated on the notion that appellate counsel is not in possession of C.P.L.§ 330.30 motion papers dated October 7, 2005. Appellate counsel was, however, provided with those motion papers as part of the record on appeal. (A copy is annexed as ex. A).").) Additionally, the Appellate Division decision in Petitioner's direct appeal notes that it had received and reviewed his pro se brief, though it rejected the claims on the merits. People v. Hall, 923 N.Y.S.2d at 433 ("We have considered defendant's remaining claims, including those in his supplemental pro se brief, and find them unavailing.").

Petitioner's objection is therefore OVERRULED.

D. Objection Regarding Ineffective Assistance of Appellate Counsel

Petitioner also alleges ineffective assistance of appellate counsel based on an allegation that his appellate "counsel failed to advance and serve as active advocate regarding pro-se motion." (Objections ¶ 15.) Petitioner

further alleges ineffective assistance based on the contention that his appeal "should have been taken by affidavit of error." (Id. (citing People v. Bartholomew, 918 N.Y.S.2d 859 (Broome County Ct. 2011)).)

Claims that counsel provided ineffective assistance are analyzed under the framework established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a movant must demonstrate both that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the movant. Id. at 687. A court may reject an ineffective assistance claim if it fails either prong of the Strickland test. Id. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

A movant satisfies the first prong of the Strickland standard by showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688. However, "[u]nder Strickland, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Palacios v. Burge, 589 F.3d 556, 561 (2d Cir. 2009) (quoting Strickland, 466 U.S. at 689). A movant can overcome this presumption by demonstrating that "counsel's

performance was unreasonably deficient under prevailing professional standards." Nosov v. United States, 526 F. App'x 127, 128 (2d Cir. 2013) (summary order) (citing Strickland, 466 U.S. at 687). In the appellate context, "a petitioner may establish constitutionally inadequate performance [of appellate counsel] if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." Lynch v. Dolce, 789 F.3d 303, 311 (2d Cir. 2015) (quoting Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir.1994)).

To satisfy the second prong of the Strickland standard, a movant must show that he has suffered prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687. To establish prejudice the movant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. To establish prejudice in the appellate context, a movant "must show that, had his claim been raised on appeal, there is a reasonable probability that it would have succeeded before the state's highest court." Lynch, 789 F.3d at 311.

As noted above, a violation of state law or procedure is insufficient to warrant federal habeas review, absent a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Although a successful showing of

ineffective assistance would warrant habeas relief, Petitioner has not made such a showing here.

First, with regards to Petitioner's claim that the appeal "should have been taken by affidavit of error," even assuming that Petitioner's interpretation of the law is correct, Petitioner has not made more than conclusory allegations of prejudice as a result of any procedural deficiency. Accordingly, Petitioner has not met the Strickland ineffective assistance standard. See Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."). Further, the Appellate Division did hear Petitioner's appeal and apparently found no procedural error, as the case was adjudicated upon the merits. People v. Hall, 923 N.Y.S.2d 428. And finally, though this Court need not and does not interpret state procedural requirements on this point, the Court notes that the holding in Bartholomew, cited by Petitioner, does not seem to be applicable here, as the statute interpreted by that case pertained to "local criminal courts" not including the New York State Supreme Court where Petitioner was tried. See Bartholomew, 918 N.Y.S.2d 859; see also N.Y. Crim. Proc. Law § 10.10 (defining "superior court" as including Supreme Court, and "local criminal court" as including other local courts).

With regard to Petitioner's allegation of ineffective appellate counsel due to failure to advocate on Petitioner's chosen grounds, it is well established that an appellate attorney has no duty to raise every possible issue on appeal. See Lynch, 789 F.3d at 311 ("In [the appellate] context, counsel has no duty to raise every non-frivolous issue that could be raised. . . . Nevertheless, appellate counsel's performance must meet prevailing professional norms."). Further, as the Report notes, "many of the claims raised by Hall in his pro se supplemental appellate brief, state habeas corpus petition and C.P.L. § 440.30 motion are duplicative of those raised by appellate counsel, thus undermining Hall's contention that appellate counsel omitted them improperly." (Report at 18-19.) And finally, Petitioner does not establish prejudice as required by Strickland, particularly given that the state Appellate Division considered the claims made in his pro se brief and rejected them on their merits.

Therefore, for the reasons stated above Petitioner's objection is OVERRULED.

E. Petitioner's Excessive Delay Claim

Petitioner initially pursued a claim of excessive delay with regard to the amount of time before his direct appeal was heard by the state appellate court. The Report devotes

significant discussion to this claim. (Report at 9-14.) However, in his Objections Petitioner has made clear that he no longer wishes to pursue this claim; at the very least, Petitioner did not object to this portion of the Report, and so the Court need not review it de novo. (See Objections at 25 ("[T]he ground alleging 'excessive delay' . . . was resolved . . . .").)

F. Allegation of "Ineffective" State Correction Process

Petitioner further objects that the state court corrective process was rendered ineffective. (See Objections ¶ 6.) This appears to be a reference to a subsection of § 2254 which states that a writ of habeas corpus is not to be granted unless, inter alia, "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii).

One example of such circumstances "that render such process ineffective" is "substantial delay in the state criminal appeal process," but here Petitioner has withdrawn that claim. Roberites v. Colly, 546 F. App'x 17, 19 (2d Cir. 2013) (summary order) (quoting Cody v. Henderson, 936 F.2d 715, 718 (2d Cir. 1991)).

Further, Petitioner has not supported his contention that the corrective process was rendered ineffective by anything

other than conclusory allegations. Accordingly Petitioner's objection is OVERRULED.

G. Objection on Equal Protection and Privileges and Immunities Grounds

Petitioner alleges that "[s]tate court deprived Petitioner of equal protection, or equal privileges, and immunities." (Objections ¶ 8.) Petitioner cites three state statutes which he contends create "due process entitlements," and which were, he alleges, violated by the state courts: N.Y. C.P.L.R. 5525(c) and N.Y. Crim. Proc. Law §§ 710.60(6) and 460.10(3)(e). (Id.) Petitioner fails to detail facts to support these assertions and does little more than make conclusory allegations, but the Court nevertheless addresses the applicability of these statutes.

First, C.P.L.R. 5525 is a procedural rule governing the preparation and amendment of a trial transcript for purposes of an appeal. N.Y. C.P.L.R. 5525. Subsection (c) concerns the amendment of a transcript. N.Y. C.P.L.R. 5525(c). Based on other sections of Petitioner's Objections, it seems likely that this objection relates to his allegation that his New York Criminal Procedure Law § 330.30 motion to set aside the verdict, made at trial, was improperly excluded from the transcript. (See, e.g., Objections at 6 (referencing "the unrecorded CPL

330.30 [motion]").) However, as discussed above, the affirmation of his appellate counsel states that she received a copy of the motion as part of the record on appeal. (See Affirmation of Kelly Elgarten, dated Feb. 7, 2008 [dkt. no. 195 app'x 4], at 10-19.) Therefore, without any further supporting facts or more substantive allegations, the Court cannot find a violation of the equal protection or privileges and immunities clauses as they relate to C.P.L.R. 5525 in this case.

The second statute cited by Petitioner in this objection is Criminal Procedure Law § 710.60, which governs the procedural requirements for a motion to suppress evidence. N.Y. Crim. Proc. Law § 710.60. Subsection (6) reads, in full: "Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." N.Y. Crim. Proc. Law § 710.60(6).

Without more specific allegations, the Court can only presume that Petitioner is alleging that the trial court either sustained or overruled a motion to suppress without making such a record; however, it is impossible to determine which evidence Petitioner alleges was wrongfully admitted or suppressed. Moreover, upon a review of the trial transcript, it is clear that the trial court did set forth, on the record, comprehensive findings of fact in relation to a suppression hearing before

issuing its determination. (See Transcript of Wade Hearing before Justice Tejada, dated Aug. 24, 2005 [dkt. no. 195 app'x 5], at 58-67.) Accordingly, the Court does not find that any constitutional violations related to that statute occurred.

The third statute cited by Petitioner in this objection is Criminal Procedure Law § 460.10, which governs some procedural aspects of the state appeal process. N.Y. Crim. Proc. Law § 460.10. Subsection (3)(e), to which the Petitioner cites, states that if the local criminal court fails to provide certain information concerning its decisions, then the appellate court can order it to do so; however, this is only applicable to "a local criminal court in a case in which the underlying proceedings were not recorded by a court stenographer." N.Y. Crim. Proc. Law § 460.10(3). Petitioner has cited to this statute elsewhere in his objections as well. (E.g. Objections ¶ 7.)

Once again, Petitioner makes only conclusory allegations and brings forth nothing substantive from which the Court could conclude that he is the victim of constitutional violations somehow related to this law. Further, as noted above, this statute is inapplicable to Petitioner's case because he was tried in the state Supreme Court, which does not fall within the statute's definition of "local criminal court." See N.Y. Crim. Proc. Law § 10.10.

Accordingly, Petitioner's objection on these grounds is OVERRULED.

H. Objection to Report's Use of Amended Petition

Finally, Petitioner has generally objected to the Report having analyzed Petitioner's amended petition, [dkt. no. 4], rather than having performing an analysis of the "Refile Petition," [dkt. no. 17] or "Petition to Refile," [dkt. no. 21]. (See Objections at 27; Cover Letter at 1). Petitioner also seems to conflate the latter two, referring interchangeably to the "Refile Petition at docket entry no. 17" and to the "Sept. 23, 2011 petition," which is the "Petition to Refile" at docket number 21. (Objections at 27.)

As noted above, Petitioner was given leave to refile his excessive delay complaint at a later date. (Order, dated Sept. 14, 2010 [dkt. no. 10].) However, when Petitioner did submit additional filings purportedly pursuant to that Order, the new petitions were not limited to the excessive delay claim. (See Refile Petition, dated Aug. 1, 2011 [dkt. no. 17]; Petition to Refile, dated Sept. 23, 2011 [dkt. no. 21].) Indeed, although the excessive delay claim is the only claim that Petitioner received leave to refile, Petitioner has since abandoned that claim as indicated in his Objections. (See Objections at 25.) Therefore, the Report was warranted in

responding to the Amended Petition, [dkt. no. 4], as that is the petition filed in accordance with proper procedure and with the Court's leave. Though the Court does construe Petitioner's pleadings liberally, he is still constrained by the Orders of this Court and by procedural rules. See Traguth, 710 F.2d at 95.

Therefore, for the reasons stated above, Petitioner's objection on this ground is OVERRULED.

IV. CONCLUSION

For the foregoing reasons, the Report [dkt. no. 253] is ADOPTED in its entirety, and Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED. A Certificate of Appealability to the Court of Appeals pursuant to 28 U.S.C. § 2253(c) is DENIED. Petitioner's objections [dkt. nos. 255-56] are OVERRULED. The Clerk of the Court shall mark this matter closed and all pending motions denied as moot. IT IS FURTHER ORDERED that the Clerk of Court mail a copy of this judgment to Petitioner and note service on the docket.

SO ORDERED.

DATED: New York, New York
October 20, 2015

Loretta A. Preska

LORETTA A. PRESKA
Chief U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH HALL, Petitioner, -against- DARWIN LE CLAIRE and NORMAN BEZIO Respondents.	**REPORT AND RECOMMENDATION** 10-CV-3877 (LAP) (KNF)

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LORETTA A. PRESKA, UNITED STATES DISTRICT JUDGE

INTRODUCTION

Petitioner Ralph Hall ("Hall"), who is proceeding pro se, filed an amended petition ("Amended Petition") for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for, inter alia, first-degree murder. Hall asserts the following claims: (1) the excessive delay on the part of the state court in deciding his appeal from his criminal conviction violated his right to due process and the appeal itself was "prejudiced by state delay;" (2) his conviction was obtained wrongfully because the trial court, at the time of sentencing, failed to incorporate into the trial record his pro se motion to vacate the judgment of conviction, made pursuant to New York's Criminal Procedure Law ("C.P.L.") § 330.30; (3) the grand jury proceeding was defective because his "indictment was based on incompetent evidence" given by a "witness who was not present at the time the incident occurred;" and (4) he received ineffective assistance from appellate counsel when counsel refused to raise on appeal issues previously raised in, inter alia, Hall's state habeas corpus petition, and when counsel failed to

file the brief on appeal timely.[1] The respondents oppose the Amended Petition.

BACKGROUND

On May 27, 2004, at approximately 8:15 p.m., Hall, who was armed, along with two other armed men, entered the Manhattan apartment of Nnandi Ben-Jochannan ("Ben-Jochannan"). Ben-Jochannan's eleven-year-old son, Nnandi Ben-Jochannan Junior ("Nnandi"), was also present in the apartment. Hall was known to Ben-Jochannan through his girlfriend, Chandra Carston ("Carston"). Some months earlier, Carston had bought a car and Hall had registered and insured the car in his name. Thereafter, Carston accumulated several tickets on the car, including two parking tickets. When Hall entered Ben-Jochannan's apartment, he said that he had come for payment of the tickets. Ben-Jochannan at first argued with Hall, protesting that the parking tickets were not his; he then produced $200 in cash, which was taken by one of Hall's accomplices. At that point, Hall shot at Ben-Jochannan, striking him in the head, shoulder and neck. Hall then shot at Nnandi but the bullet missed and Nnandi fell to the floor and lay still with his eyes closed, pretending to be dead. Someone approached and put a gun to the back of Nnandi's head; Nnandi heard the trigger being pulled but there was a click and the gun did not fire.

After Hall and his accomplices left, Nnandi got up and ran out of the building and across the street to his father's store where he met Carston. Carston left Nnandi with a friend and went to Ben-Jochannan's apartment where she found his body. Nnandi later explained that he knew Hall as his father's friend "Ratton." Based on information provided by Nnandi and Carston,

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[1]The respondents interpret Hall's Amended Petition to allege, in addition to these claims, those raised on his direct appeal. However, a review of the Amended Petition indicates that Hall's application for habeas corpus relief is based on the claims set forth above.

police personnel were able to locate and arrest Hall later the same night. The next day, Nnandi identified Hall at a lineup as the man who had killed his father.

A grand jury charged Hall with first-degree murder, attempted first-degree murder and other offenses relating to the incident at the apartment. Hall proceeded to trial. At the conclusion of the trial, the jury found Hall guilty of first-degree murder, second-degree murder, attempted first-degree murder, attempted first-degree assault, two counts of first-degree robbery, second-degree robbery, second-degree criminal possession of a weapon, and third-degree criminal possession of a weapon. On October 7, 2005, Hall was sentenced to indeterminate prison terms having a maximum of life and a minimum of twenty-five years on each of the murder and attempted murder counts, and to a determinate prison term of fifteen years on each of the attempted first-degree assault, robbery and second-degree weapon possession counts. Hall was sentenced to a prison term of seven years on the third-degree weapon possession count.

At the start of the sentencing proceeding, Hall presented the court an affidavit in support of his motion to set aside the verdict and for a new trial, pursuant to C.P.L. § 330.30. Hall had prepared the affidavit using a preprinted form and without the assistance of an attorney. As set forth in the transcript of the sentencing proceeding, Hall's trial attorney, George Goltzer, Esq. addressed the court as follows:

> MR. GOLTZER: Your Honor, Mr. Hall has prepared a pro se motion and has asked us to adopt it as his own. If I may, I'd like to hand it up to the court. I do not have a copy for the prosecutor, he just handed it to me now. He's raised issues which were raised at the trial and preserved for purposes of appeal. It might be easier since there are not copies for everybody, if I summarize his points for the record

so that there is a stenographic transcript of it.

THE COURT: I'm going to have copies made so that you can have a copy and the People can have a copy.

MR. GOLTZER: Thank you, your Honor.

THE COURT: Let's proceed. Give [prosecutor] Ms. Hobbs an opportunity, Ms. Hobbs and [prosecutor] Mr. Whitt to look it over and make a response and then they can respond.

MS. HOBBS: You want me to address – well, Judge, I think this will be properly heard perhaps in a 440.10.

THE COURT: You oppose the motion?

MS. HOBBS: Yes, we do.

THE COURT: Motion denied.

MR. GOLTZER: Your Honor, before you deny the motion, Mr. Hall has indicated that there is a witness that he's just learned about and if it is a 440.10, it would require diligence on the defense so I'm going to request a short continuance of these proceedings for about a week so that I can dispatch my investigator to attempt to interview the witness referred to on page five.

COURT: Do you want to be heard on that?

MS. HOBBS: Your Honor, can you direct our attention to where that is?

MR. GOLTZER: It's on the side of the page.

MS. HOBBS: Where are you referring to?

MR. GOLTZER: Paragraph nine.

MS. HOBBS: I don't know what he's referring to, your Honor, I don't see, it says something about the prosecution witness mentioned her corroborating.

MR. GOLTZER: He's referring to a witness named Smith.

MS. HOBBS: This says nothing about who this person is.

THE COURT: Counsel?

MS. HOBBS: We oppose.

THE COURT: Motion denied, counsel. The application for an adjournment denied.

Thereafter, on November 6, 2006, Hall was granted leave by the New York State Supreme Court, Appellate Division, First Department, to file a direct appeal. The court also enlarged the time within which Hall was required to perfect his appeal to 120 days from the date of filing the record. Appellate counsel was appointed for Hall by order dated November 16, 2006.

On direct appeal, Hall, through his appellate counsel, argued that: (1) the identification of Hall, during the lineup conducted following his arrest, was inadmissible and should have been suppressed because the lineup was impermissibly suggestive; (2) Hall was deprived of his right to a public trial when his girlfriend was excluded from the courtroom on the basis that she might be a witness; (3) Hall was denied his due process right to a fair trial and the right to confront the witnesses against him when the court would not allow into evidence Carston's prior written statement, because the jury had already learned about the two prior inconsistencies it contained; and (4) the admission of an unredacted autopsy report at trial violated Hall's Sixth Amendment right to confrontation, because the testifying doctor was not present for the autopsy and did not

prepare the autopsy report on which her testimony was based. In addition, Hall filed a pro se supplemental brief, in which petitioner presented twenty claims, including issues raised by his appellate counsel, and he argued that counsel had taken too long to file the brief on appeal.

On April 21, 2011, the New York State Supreme Court, Appellate Division, First Department, determined that the admission of the autopsy report at trial did not violate the petitioner's rights under the Confrontation Clause of the Sixth Amendment, which prohibits the prosecution from introducing testimonial statements of a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination, because, inter alia, the autopsy report could not fairly be viewed as "formalized testimonial material." People v. Hall, 84 A.D.3d 79, 81-86, 923 N.Y.S.2d 428, 430-33 (App. Div. 1st Dep't 2011). Moreover, any error in admitting the autopsy report was harmless because the evidence of the cause of death and the peititioner's guilt was overwhelming. See id. at 85, 923 N.Y.S.2d at 432-33. The Appellate Division also found that the trial court: (1) denied properly the petitioner's motion to suppress identification testimony, where the lineup photographs established that the lineup was not suggestive; and (2) exercised its discretion properly in excluding defendant's girlfriend from the courtroom on the ground that she was a potential witness. The court also found that the petitioner's other claims, including those presented in his supplemental pro se brief, were unavailing. Id. at 85-86, 923 N.Y.S.2d at 433.

On February 24, 2012, the New York Court of Appeals denied Hall's request for leave to appeal. People v. Hall, 18 N.Y.3d 924, 942 N.Y.S.2d 463 (2012). Hall's pro se petition for a writ of certiorari was denied by the United States Supreme Court on October 1, 2012. Hall v. New York, __ U.S. __, 133 S. Ct. 193 (2012).

Hall filed his first petition for a writ of habeas corpus on October 25, 2007. The petition was dismissed as premature because the petitioner's direct appeal was still pending in state court. On October 16, 2009, the Second Circuit Court of Appeals received an application from Hall for leave to file a second or successive petition. The Court of Appeals remanded the application to this court finding that it did not constitute a second or successive petition because the earlier petition had not been adjudicated on the merits. On May 11, 2010, Hall was granted leave to file an amended petition and was directed to state all the grounds he planned to pursue and whether those grounds had been exhausted in state court.

On June 3, 2010, while his direct appeal was still pending, Hall filed the Amended Petition. By order dated September 15, 2010 ("September 2010 Order") (Docket Entry No. 10), the assigned district judge at that time, the Honorable Richard Owen, denied Hall's excessive delay claim, finding that the state appellate court's delay did not violate Hall's right to due process but that Hall could re-file his excessive delay claim if his appeal had not been adjudicated by one year from the date of the order.

Thereafter, by order dated June 26, 2013 (filed on July 1, 2013) (Docket Entry No. 171), Judge Owen concluded that Hall's Amended Petition should not be summarily dismissed and directed the respondents to file an answer. On August 20, 2013, the respondents answered the petition, by filing a Memorandum of Law in Support of Answer Opposing Petition and an Opposing Declaration with exhibits. Prior to this, on August 15, 2013, Hall filed, prematurely, a reply styled a "Traverse Reply to the Answer." Thereafter, between August 28 and September 4, 2013, Hall submitted an "Additional Reply to Respondent's Answer," a "Final Reply," and a "Memorandum (to Final Reply)."

DISCUSSION

Legal Standard

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides:

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

28 U.S.C. § 2254(d).

A state-court decision is contrary to clearly established Supreme Court precedent if its conclusion on a question of law is "opposite to that reached by [the Supreme] Court," or if the state court reaches a conclusion different from that of the Supreme Court "on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 1523 (2000). A state-court decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Id. at 407-08, 120 S. Ct. at 1520. "[The] relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." White v. Woodall, __ U.S.__, 134 S. Ct. 1697, 1706-07 (2014)(citation omitted). On a petition for a writ of federal habeas corpus, "[t]he petitioner carries the burden of proof." Cullen v. Pinholster, __ U.S. __, 131 S. Ct. 1388, 1398 (2011). "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

AEDPA requires a petitioner to exhaust all remedies available in the state courts. See 28 U.S.C. § 2254(b)(1)(A). A state court adjudicates a constitutional claim on the merits when it: (a) disposes of the claim on substantive grounds; and (b) "reduces its disposition to judgment." Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001). No articulation of the state court's reasoning for disposing of the claim is required, as long as a substantive ground is a basis for the disposition. See id. When a claim has not been presented to a state court for adjudication, a federal court reviewing a habeas corpus petition may deem the claim exhausted "if it is clear that the unexhausted claim is procedurally barred by state law and, as such, its presentation in the state forum would be futile." Aparicio v. Artuz, 269 F.3d 78, 90 (2d Cir. 2001). [2]

Application of Legal Standard

1. Appellate Delay

Hall contends that his conviction was "procured in violation of constitutional safeguards . . . to include: inordinate delay in direct appeal constitut[ing] a denial of due process." Hall contends further that his direct appeal was "prejudiced by state delay and state condoning of delay."

A judgment convicting Hall was entered on October 7, 2005. On November 6, 2006, the Appellate Division, First Department, issued an order granting Hall leave to prosecute a direct appeal. Hall was appointed appellate counsel on November 16, 2006, and the record on appeal was filed on September 24, 2007. Hall's assigned appellate counsel, Kerry Elgarten, Esq. of the Legal Aid Society, perfected the appeal by filing an appellate brief in February 2010. Hall filed

[2]For the purposes of habeas corpus review, Hall has adequately exhausted the remedies available in state court.

his Amended Petition on June 3, 2010. In his Amended Petition, Hall stated that his direct appeal was adjourned to the September 2010 term of the court and that this delay violated his right to due process. As noted above, Judge Owen found that the delay in the petitioner's appeal in state court had not violated his constitutional right to due process but stated that if Hall's appeal was still adjourned one year from the date of the order, he could refile the claim of excessive delay and the court would review the claim at that time.[3] See September 2010 Order at 7.

On April 21, 2011, five and one-half years after sentence was imposed and almost one year after Hall filed the Amended Petition, the Appellate Division, First Department, issued its written opinion denying all grounds for the appeal.

"[O]nce a state has provided defendants in criminal cases with the right to appeal, 'due process requires that an appeal be heard promptly.'" Elcock v. Henderson, 947 F.2d 1004, 1007 (2d Cir. 1991) (quoting Mathis v. Hood, 937 F.2d 790, 794 (2d Cir. 1991)). "[A] state court's decision denying [a] petitioner's appeal does not moot a petition for *habeas* relief." Vazquez v. Bennett, No. 00 Civ. 3070, 2002 WL 619282, at *2 (S.D.N.Y. Apr. 17, 2002) (citing Diaz v. Henderson, 905 F.2d 652, 653 (2d Cir. 1990)). "Even where a habeas petitioner has demonstrated that his due process rights have been violated by a delay in the appellate process, we have not considered the delay, without more, to be a sufficient basis for release from

[3] At the time Hall's excessive delay claim was adjudicated by Judge Owen, the Appellate Division, First Department, had not decided Hall's direct appeal. Consequently, there has been no consideration, in the context of Hall's application for habeas corpus relief, of whether a due process violation, if any, arising from excessive appellate delay prejudiced the appeal, such that the remedy of relief from illegal custody is appropriate. Moreover, at the time of the September 2010 Order, the delay involved was less than five years, whereas by the time the Appellate Division had rendered its decision, the delay was five and one-half years. Accordingly, the Court has determined that a review of Hall's excessive delay claim is warranted here.

custody. . . . [rather] some showing of prejudice *to the appeal* is necessary for habeas relief; such a petitioner is not entitled to unconditional release on account of delay in his appeal unless he can demonstrate that the appellate delay caused substantial prejudice to the disposition of his appeal." Elcock, 947 F.2d at 1008 (citations and internal quotation marks omitted) (emphasis in original). "In defining substantial prejudice, we have stated that the petitioner must show a reasonable probability that, but for the delay, the result of the appeal would have been different." Id. (citation and internal quotation marks omitted).

To determine whether any delay has been excessive, the court must consider four factors: (1) was the delay excessive; (2) if so, is there an acceptable excuse for such delay; (3) did the petitioner assert his right to appeal; and (4) whether the petitioner was prejudiced by the delay. See Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972); see also Elcock, 947 F.2d at 1007 (Barker analysis applies to claims of excessive appellate delay). In applying the Barker factors, "no one factor is dispositive and all are to be considered together with the relevant circumstances." Simmons v. Reynolds, 898 F.2d 865, 868 (2d Cir. 1990) (citing Barker, 407 U.S. at 530-33, 92 S. Ct. at 291-93).

In this case, the five-and-one-half-year delay between the date of conviction and the date on which the state appellate court issued its decision is only slightly less than the six year delay found to be excessive in other Second Circuit cases. See Vazquez, 2002 WL 619282, at *2 (collecting cases involving delays of between six and thirteen years); Mathis, 937 F.2d 790 (six-year delay); Simmons, 898 F.2d 865 (six-year delay). At the same time, as Judge Owen noted, the delay in this case was a small fraction of the petitioner's sentence. Cf. Simmons v. Reynolds, 708 F. Supp. 505, 509 (E.D.N.Y. 1989) (six year delay on appeal found to violate right to due process where defendant had been sentenced to nine years' imprisonment). On

balance, therefore, although the delay in this case was long, the first Barker factor does not weigh in Hall's favor.

Turning to the second factor, it does not appear that an acceptable excuse exists for the delay in this case, even though some of the delay may have been caused by the petitioner. As noted earlier, the appeal was not perfected until February 2010, suggesting that the delay was due, at least in part, to inaction on the part of Hall's appellate counsel. The respondents argue that Hall himself was responsible for the delay because he failed to seek assignment of counsel and in forma pauperis relief promptly following his conviction. However, this assertion is doubtful because it does not take into account that leave to prosecute the direct appeal was not granted until November 6, 2006, just ten days before appellate counsel was assigned. Hence, it does not appear that Hall can be faulted for not obtaining counsel sooner. On the other hand, on more than one occasion Hall sought to have his assigned counsel replaced, proceedings which caused additional delay of the appeal process.[4] However, although Hall and his appellate counsel may have been partly responsible for the delay, as Judge Owen pointed out, the state court bears most of the blame because it has the power to supervise its attorneys and regulate the time within which briefs must be filed. See Vazquez, 2002 WL 619282, at *3. Accordingly, as

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[4]In an affirmation dated May 15, 2007, appellate attorney Bonnie Goldberg, Esq. stated that Hall had applied for an order relieving the Legal Aid Society as counsel on appeal and that her office had not yet received the record on appeal, but that her office was doing "everything we can to obtain the record as quickly as possible." In an affidavit dated October 24, 2008, Kerry Elgarten, Esq. stated that he had been unable to perfect the appeal to date because "Mr. Hall has made a number of motions to this Court and currently has before this Court a motion claiming ineffective assistance of appellate counsel and apparently seeking new counsel. I will not proceed with the appeal unless and until that motion is resolved and new counsel is not assigned."

Judge Owen concluded, the second Barker factor weighs in Hall's favor but not heavily.

The third factor, whether Hall actively pursued his appeal, also weighs in Hall's favor. As Judge Owen noted, after his conviction, Hall made several pro se submissions, including a motion to set aside the verdict pursuant to C.P.L. § 330.30, a motion attacking his conviction collaterally, a petition for a writ of error coram nobis in which he claimed, inter alia, a violation of his rights due to excessive appellate delay, and an application for state habeas corpus relief. While these motions did not constitute a direct appeal of the conviction, they demonstrate Hall's intention to pursue his rights.

In connection with the fourth factor, whether Hall was prejudiced by the delay, Judge Owen, finding that the only prejudice Hall suffered was anxiety resulting from the delay, determined that this factor weighed only weakly in Hall's favor. Judge Owen concluded that, while the Barker factors weighed in Hall's favor, no violation of due process occurred, primarily because the delay was not as long as in other cases in which courts have found a violation of due process.

Since Judge Owen decided Hall's claim of excessive delay, the Appellate Division denied his appeal on the merits. As noted above, a state-court decision denying a petitioner's appeal does not moot a petition for habeas corpus relief. Thus, it must be determined whether the delay of his appeal caused substantial prejudice to the appeal itself such that Hall's confinement is constitutionally defective. If the delay prejudiced his appeal, the remedy Hall seeks through his application for habeas corpus relief, that is, a finding that his custody is unlawful, would be appropriate.

In this case, however, Hall has put forth no evidence showing a reasonable probability that, but for the delay, the result of the appeal would have been different. As a result, Hall has

not established that the appellate delay caused substantial prejudice to the disposition of his appeal. Therefore, Hall is not entitled to a writ of habeas corpus on this ground.

2. C.P.L. § 330.30 Motion

Hall contends that his conviction was obtained wrongfully because the trial court failed to include in the record the content of his motion to set aside the verdict, pursuant to C.P.L. § 330.30. As evidenced in the portion of the transcript of the sentencing proceeding set forth above, Hall's trial counsel presented to the court Hall's pro se affidavit in support of his motion. Hall's counsel offered to "summarize the points for the record" because Hall had brought only one copy of the affidavit. The trial court directed instead that the affidavit be copied and provided to the prosecution. After the prosecutors reviewed the document, they stated, in response to a query from the court, that they opposed the motion. The trial court then denied the motion. The content of the affidavit was not read aloud during the proceeding, although discussion was had concerning defense counsel's request for an adjournment, so that he might have an investigator attempt to interview a witness, referenced in Hall's motion, about whose existence Hall had learned recently. Hall concluded that, because the motion was not read aloud during the proceeding, it was not included in the record on appeal and that he thereby suffered prejudice.

Hall has presented this claim in numerous filings, including on direct appeal and in his multiple replies to the respondents' opposition to the instant application for habeas corpus relief. In his reply papers, for example, Hall asserts that the "direct appeal was knowingly considered on the basis of a 'defective and un-amended record' which was absent the 'existing' underlying C.P.L. § 330.30 motion [and] deliberately de hors the record." In connection with this claim, Hall cites New York Judiciary Law Section 295, which provides, in pertinent part, that "[e]ach

stenographer . . . must take full stenographic notes of the testimony and of all other proceedings in each cause tried or heard. Such stenographer shall take complete stenographic notes of each ruling or decision of the presiding judge . . . together with each and every exception taken to any such ruling, decision, remark or comment by or on behalf of any party to the action." N.Y. Jud. L. § 295.

The respondents contend that Hall's claim is without merit because his C.P.L. § 330.30 motion was included in the judgment roll and became a part of the appellate record by virtue of its filing during the sentencing proceeding. In addition, the respondents contend that much of the "substance [of Hall's § 330.30 motion] was incorporated into his appellate counsel's brief." Additionally, in an affirmation in response to Hall's motion in state court for coram nobis relief, his assigned appellate counsel stated that Hall's "motion appears to be predicated on the notion that appellate counsel is not in possession of C.P.L. § 330.30 motion papers dated October 7, 2005. Appellate counsel was, however, provided with those motion papers as part of the record on appeal."

To the extent that Hall is relying on N.Y. Jud. L. § 295, his argument is not a basis for the remedy he seeks because the violation of a state statute is not a basis for granting federal habeas corpus relief. See Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 480 (1991)(explaining that a violation of state law "is no part of a federal court's habeas review of a state conviction"). Relief on the basis of a petition for habeas corpus is available to a state prisoner only if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," which the petitioner has not demonstrated. 28 U.S.C. § 2254(a).

Moreover, on its face, no merit exists to the petitioner's claim. Hall has made no showing that the absence of a stenographic record of the contents of his C.P.L. § 330.30 motion, as opposed to the proceeding at which it was presented and the rulings of the presiding judge, prejudiced him in his ability to appeal. On the contrary, the claims made in his post-trial motion were known to his appellate counsel and incorporated into the appellate brief. Moreover, those claims were made part of the appellate record and were reviewed by the Appellate Division and denied. Therefore, the petitioner is not entitled to habeas corpus relief on this ground of his Amended Petition.

3. Defective Grand Jury Proceeding

Claims of deficiency in state grand jury proceedings are not cognizable on federal habeas corpus review when, as here, a petit jury subsequently convicts the accused; that conviction renders harmless, beyond a reasonable doubt, any defect in the state grand jury proceedings concerning the charging decision. See Lopez v. Riley, 865 F.2d 30, 32 (2d Cir. 1989). Accordingly, Hall's claim, that the grand jury erred when it indicted him based on incompetent evidence from "insufficient eyewitness corroboration" because the witness who testified was not present at the time of the incident in question, namely, the shooting of Ben-Jochannan, is not cognizable here because the petit jury found Hall guilty of first-degree murder, second-degree murder, attempted first-degree murder, attempted first-degree assault, two counts of first-degree robbery, second-degree robbery, second-degree criminal possession of a weapon, and third-degree criminal possession of a weapon.

4. Ineffective Assistance of Appellate Counsel

Hall contends that "assigned appellate counsel refused to assist and determined to omit the . . . state habeas corpus issues, and C.P.L. § 440.30 claims in favor of filing a sub-par, and

defective, untimely and factually misleading brief for defendant-appellant." As set forth in the Amended Petition, the claims raised in Hall's state habeas corpus petition were: "defective grand jury and indictment based on legally insufficient evidence to indict; prejudicial delay of direct appeal; denial of fundamental right to timely appeal; denial of due process; jurisdictional defect and incomplete record on appeal." The claims raised in Hall's C.P.L. § 440.30 motion, as set forth in his Amended Petition, were: "denial of due process at trial; insufficient evidence of guilt; failure to stenographically record C.P.L. § 330.30 motion for appellate review; prosecution use of known false testimony."

The respondents contend that Hall cannot show that his counsel failed to raise significant and obvious issues on appeal while pursuing issues that were "significantly weaker." See Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994). In addition, construing Hall's claim of ineffective assistance of counsel to allege a failure to present the claims raised in his pro se supplemental brief filed on direct appeal, the respondents maintain that many of these claims "overlapped with those his attorney did include" or were based "solely on Hall's lack of familiarity with the law and with appellate practice."[5] The respondents also deny Hall's allegation of excessive delay on the part of appellate counsel with respect to the filing of Hall's direct appeal.

In Strickland v. Washington, 466 U.S. 668, 669, 104 S. Ct. 2052 (1984), the Supreme Court established a two-part test to determine whether defense counsel's assistance was ineffective. First, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness" according to "prevailing norms." Id. at 688-89, 104 S. Ct. 2064-65.

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[5]The claims raised by Hall in his pro se supplemental brief include those presented in his state habeas corpus petition and in his C.P.L. § 440.30 motion.

Second, the petitioner must "affirmatively prove prejudice" by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 693-94, 104 S. Ct. at 2067-68. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. Although Strickland "was born in the context of ineffective assistance of trial counsel [its] two-prong test applies equally to claims of ineffective assistance of appellate counsel on a defendant's first appeal as of right." Aparicio, 269 F.3d at 95 (citation omitted).

When a claim is made that counsel has rendered ineffective assistance, a strong presumption exists that counsel's performance falls within the "wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065. In a circumstance where appellate counsel is the subject of the ineffective assistance claim, it must be remembered that appellate counsel need not advance every argument, regardless of merit, urged by the appellant. See Evitts v. Lucey, 469 U.S. 387, 394, 105 S. Ct. 830, 835 (1985). When appellate counsel is faulted for failing to raise a particular claim on direct appeal, if that claim is not meritorious, there can be no merit to the claim that appellate counsel should have raised it.

Hall cannot demonstrate that his appellate counsel was constitutionally ineffective. As noted above, Hall raised twenty claims through his pro se supplemental brief on appeal, all of which were found by the Appellate Division to be unavailing. Hall has put forth no evidence to show that the Appellate Division's determination in this respect was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Therefore, since these claims are without bases, there can be no merit to the allegation that appellate counsel should have raised them. In addition, many of the claims raised by Hall in his pro se supplemental appellate brief, state

habeas corpus petition and C.P.L. § 440.30 motion are duplicative of those raised by appellate counsel, thus undermining Hall's contention that appellate counsel omitted them improperly. Furthermore, the Court has reviewed the appellate brief and reply brief prepared by appellate counsel and finds no basis for Hall's claim that appellate counsel's brief was "sub-par." In addition, as discussed earlier, while there was a delay in perfecting the appeal, and while some of this delay may have been attributable to appellate counsel, Hall contributed to the delay by repeatedly seeking to have counsel replaced. In addition, Hall has failed affirmatively to prove prejudice by showing that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Therefore, Hall's claim of ineffective assistance of appellate counsel is without merit; thus, he has not shown that he is entitled to habeas corpus relief on this ground.

RECOMMENDATION

For the reasons set forth above, I recommend that the Amended Petition be denied.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Loretta A. Preska, 500 Pearl Street, Room 2220, New York, New York, 10007, and to the chambers of the undersigned, 40 Centre Street, Room 425, New York, New York, 10007. Any requests for an extension of time for filing objections must be directed to Judge Preska. ***Failure to file objections within fourteen (14) days will result in a waiver of objections and will***

preclude appellate review. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); Cephas v. Nash, 328 F.3d 98, 107 (2d Cir. 2003).

Dated: New York, New York
October 3, 2014

Respectfully submitted,

/Kevin Nathaniel Fox

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

Copy mailed to:

Ralph Hall