D. Vt.
19-cv-228
Crawford, C.J.
Doyle, 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 5th day of April, two thousand twenty-three.

Present:

Debra Ann Livingston,
Chief Judge,
Raymond J. Lohier, Jr.,
Susan L. Carney,
Circuit Judges.

James Thomas Burke,

Petitioner-Appellant,

v.

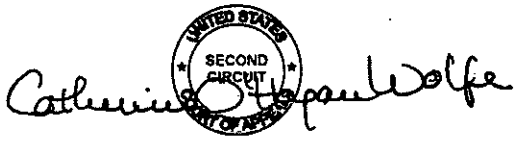
22-896 (L),
22-1028 (Con),
22-2624 (Con)

Mike Touchette, Commish, VT DOC, et al.,

Respondents-Appellees.

Appellant, pro se, moves for a certificate of appealability ("COA"), initial hearing en banc, and sanctions. Upon due consideration, it is hereby ORDERED that the appeal in 22-2624 is DISMISSED for lack of appellate jurisdiction because it challenges the district court's denial of a COA, which is not a final order. *See Lasher v. United States*, 970 F.3d 129, 132 (2d Cir. 2020) (per curiam). It is further ORDERED that the COA motions are DENIED and the appeals in 22-896 and 22-1028 are DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). It is further ORDERED that the remaining motions are DENIED as moot.

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



UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JAMES THOMAS BURKE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 5:19-cv-228
	)	
JIM BAKER, Commissioner, Vermont Department of Corrections, STATE OF VERMONT, and DAVID E. TARTTER, Assistant Attorney General,	)	

Respondents.

ORDER ON REPORT AND RECOMMENDATION AND THE SECOND EMERGENCY MOTION FOR CHIEF JUDGE CRAWFORD TO INTERVENE
(Docs. 20, 23, 29, 31, 34, 35)

Petitioner James Burke objects to the Report and Recommendation issued by United States Magistrate Judge Doyle on November 12, 2021. (Doc. 34.) He also seeks the removal of Judge Doyle from the case and an evidentiary hearing. (Docs. 20, 23, 29, 31, 34, 35.)

The district court rules that Mr. Burke's second-in-time federal habeas petition is a "second or successive" petition for purposes of 28 U.S.C. § 2244. For this reason, the court accepts and concurs in the recommendation of Judge Doyle and orders the petition DISMISSED. The court also DENIES the motions for Judge Crawford to intervene and the motions for an evidentiary hearing.

FACTS

In 2010, Mr. Burke was convicted in Vermont state court of one count of sexual assault in violation of 13 V.S.A. § 3252(a)(1). He was sentenced to a term of 18–20 years. His conviction was affirmed on direct appeal. *State v. Burke*, 2012 VT 50, 192 Vt. 99, 54 A.3d 500,

motion for reargument denied, No. 10-437 (Vt. July 11, 2012), *motion for reconsideration denied*, No. 10-437 (Vt. July 30, 2012), *cert. denied*, 133 S. Ct. 795 (2012).

The U.S. Supreme Court denied certiorari on December 10, 2012. *Burke v. Vermont*, 133 S. Ct. 795 (2012).

Mr. Burke filed a first petition under 28 U.S.C. § 2254 in federal court on September 4, 2012. The petition raised multiple claims, including claims of ineffective assistance of counsel ("IAC"). Because the IAC claims had not been raised before in a state post-conviction relief proceeding, Magistrate Judge Conroy gave Mr. Burke a choice. The court could dismiss the entire petition without prejudice. Alternatively, the court could delete any unexhausted claims and enter a ruling on the merits of the exhausted claims only. *Burke v. Pallito*, No. 2:12-cv-197 (D. Vt. December 4, 2012) (Doc. 12). The latter choice came with a warning from the judge: "If Mr. Burke deletes his ineffective assistance claim from the pending Petition, then that claim would most likely be barred from review in federal court because, even if it is ultimately exhausted in state court, it would constitute a 'second or successive petition' in violation of 28 U.S.C. § 2244(b)." (Doc. 12 at 2.) Mr. Burke chose deletion of the IAC claims. "Petitioner respectfully requests that in the event this Honorable Court determines under Federal law that Petitioners ineffective assistance of counsel claims [are] unexhausted, the Court should delete the unexhausted claim and proceed in a timely manner with the Petitions exhausted claims." *Id.* (Doc. 13.)

On January 18, 2013, the magistrate judge issued a Report and Recommendation recommending dismissal of the IAC claims as unexhausted. *Burke v. Pallito*, No. 2:12-cv-197, 2013 WL 496150, at *5 (D. Vt. Jan. 18, 2013). The district court accepted and adopted this recommendation. *Burke v. Pallito*, No. 2:12 CV 197, 2013 WL 496344, at *1 (D. Vt. Feb. 11,

2013) ("Petitioner's unexhausted ineffective assistance of counsel claim is deleted from the pending petition.").

On November 8, 2013, the magistrate judge issued a second Report and Recommendation recommending that the district court grant summary judgment in favor of the state on the issues previously presented to the Vermont Supreme Court on direct appeal. *Burke v. Pallito*, 2013 WL 6145810, at *1 (D. Vt. Nov. 21, 2013). These issues concerned speedy trial requirements; exclusion of evidence of the complainant's prior convictions; the use of shackles at trial; self-representation; sufficiency of the evidence; jury selection; allegations of prosecutorial misconduct; and jury instructions. The district court accepted the magistrate judge's recommendations in full and denied Mr. Burke's petition for a writ of habeas corpus. *Id.*

Following deletion of the IAC claims from the first federal petition, Mr. Burke filed a motion for post-conviction relief raising these claims in Vermont Superior Court. The motion was filed on February 25, 2013. *James Burke v. State of Vermont*, No. 214-3-13 Cncr (Vt. Sup. Ct., Civil Div.) (Doc. 23-18.)

In March 2015, attorney Paul Volk, retained as an expert for the defense, submitted a report to the Vermont Superior Court stating his opinion that Mr. Burke's trial counsel had not provided effective assistance in certain respects. (Doc. 40-2 at 1–19.) The issues identified by Mr. Volk included a failure to hire a forensic toxicologist, a breakdown in communications between lawyer and client, and the withdrawal of legal representation prior to Mr. Burke's sentencing. (*Id.* at 7–9, 13.) The Superior Court granted summary judgment in favor of the state on all IAC claims. (Doc. 23-23). This decision was affirmed by the Vermont Supreme Court on April 19, 2019. *In re Burke*, 210 Vt. 157 (2019).

Mr. Burke filed this second federal petition on December 3, 2019. The district court transferred the case to the Second Circuit Court of Appeals as a second or successive petition. (Doc. 8.) By order dated March 27, 2020, the Court of Appeals granted leave to file a successive petition, "because Petitioner has made a prima facie showing that the requirements of § 2244(b)(2)(B) are satisfied." (Doc. 10.)

The claims made in the second petition are:

- The exclusion of the complainant's prior convictions;
- The denial of petitioner's motion to amend the state post-conviction relief motion;
- Multiple claims relating to ineffective assistance of counsel and self-representation.

(Doc. 1; Doc. 34 at 12.)

Following the return of the case to the district court, the state moved to dismiss on the grounds that all of Mr. Burke's claims are barred by procedural default, barred by § 2244(b), time barred, or otherwise without merit. (Doc. 23.) Mr. Burke timely responded (Doc. 24) and filed several motions for in-person evidentiary hearings and appointment of counsel. (Docs. 20-1, 29, 31.)

On November 12, 2021, Judge Doyle filed a comprehensive Report and Recommendation in which he recommended dismissal of the second federal habeas petition and other related relief. (Doc. 34.)

Mr. Burke has filed four oppositions to the Report and Recommendation. (Docs. 36, 37, 38, 40.) He argues that the Report and Recommendation misapplies the law regarding attorney-client conflicts (Docs. 36, 37, 38); overlooks a *Brady* claim concerning disclosure of blood test results prior to trial (Doc. 36); misapplies the exhaustion rule (Doc. 37); errs in not recommending relief for the inclusion of jurors who were victims of sexual assault (Doc. 38); errs in not recommending relief due to Mr. Burke's self-representation and the shortcomings of

his stand-by counsel (Doc. 38); overlooks defense counsel's failure to investigate a potential "lesbian-remorse" defense (Doc. 40); overlooks the failure of the trial judge to inquire into possible conflicts of interest of defense counsel (Doc. 40); and was biased against petitioner (Doc. 40).

ANALYSIS

A district judge must make a de novo determination of those portions of a magistrate judge's report and recommendation to which an objection is made. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). The district judge "may accept, reject, or modify, in whole or in part," the magistrate judge's proposed findings and recommendations. 28 U.S.C. § 636(b)(1). Mr. Burke objects to, and requests reconsideration of, "all the legal issues that were clearly 'over-looked' by the Report and Recommendation," and so the court reviews all conclusions contained in the Report and Recommendation de novo. (Doc. 36 at 1.)

Mr. Burke appears before the court as a self-represented litigant. He is "entitled to a liberal construction of [his] pleadings, which should be read to raise the strongest arguments that they suggest." *Diaz v. United States*, 633 F. App'x 551, 555 (2d Cir. 2015) (internal quotation marks omitted).

Federal review of state court convictions for federal constitutional violations has long been available through the federal habeas corpus statute, 28 U.S.C. § 2254. Following enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (1996) ("AEDPA"), three procedural requirements limit the circumstances under which state prisoners can obtain habeas review of their convictions in federal court. These are:

- Exhaustion of state remedies. Subject to exceptions not relevant here, a petitioner can only raise issues in federal court for which he or she has "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A);
- One-year limitations period, subject to tolling. 28 U.S.C. § 2244(d)(1)(A)–(D);
- Second or successive petition limitations. Petitioners raising a second or successive petition are restricted to raising claims relying on new rules of constitutional law made retroactive by the Supreme Court, or based on facts previously unavailable and sufficient to establish by clear and convincing evidence that no reasonable factfinder could have found the petitioner guilty in the absence of the constitutional error. 28 U.S.C. § 2244(b)(2)(B).

The magistrate judge has recommended dismissal of Mr. Burke's claims on the basis of these provisions. The Report and Recommendation takes considerable pains to identify each group of claims and the basis for recommending dismissal. The claims filed by Mr. Burke include claims unreviewable in habeas proceedings, time-barred claims, and IAC claims. The court reviews each in turn.

I. Claims Unreviewable in Habeas Proceedings

Mr. Burke seeks review of the state court judge's exclusion of the complainant's prior convictions. The district court resolved this issue in Mr. Burke's first § 2254 proceeding. In the Report and Recommendation leading to the denial of the first petition, Magistrate Judge Conroy ruled that "[t]he Vermont courts excluded, or found no error in the exclusion of, certain evidence that Mr. Burke sought to have admitted. Those determinations are all well-reasoned, and do not remotely approach a Confrontation Clause violation." *Burke*, 2013 WL 6145810 at *13. 28 U.S.C. § 2244 has long required dismissal of claims presented and resolved in a prior federal

application. 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

Mr. Burke also seeks to present claims in this federal petition that the Vermont courts erred in denying his state post-conviction relief motion. Magistrate Judge Doyle recommends dismissal of these claims because federal habeas relief does not provide a remedy for alleged errors in state post-conviction relief proceedings. *See Word v. Lord*, 648 F.3d 129, 132 (2d Cir. 2011) ("[A]lleged errors in a postconviction proceeding are not grounds for § 2254 review because federal law does not require states to provide a post-conviction mechanism for seeking relief."). The district court agrees with this analysis. Both the evidentiary claims and the claims of error in the state post-conviction relief proceedings are DISMISSED.

II. Time-Barred Claims

The Report and Recommendation recognizes that Mr. Burke's IAC claims are *not* barred by the one-year limitation period due to the tolling rules. Subsection § 2244(d)(2) excludes the time during the pendency of a state post-conviction relief proceeding from the federal one-year time limit.

Mr. Burke's original conviction became final on December 10, 2012 when the U.S. Supreme Court denied his petition for certiorari. The one-year limitation period expired on December 10, 2013. In the meantime, Mr. Burke filed a state post-conviction relief motion on February 25, 2013—77 days after his conviction became final. The state proceeding did not conclude until April 19, 2019 when the Vermont Supreme Court affirmed the denial of the motion. *In re Burke*, 210 Vt. 157 (2019). He filed the present § 2254 proceeding on December 3, 2019—197 days after the denial of the state post-conviction relief motion became final. The total

elapsed time—excluding the tolling period caused by the state post-conviction relief proceeding—is less than a year.

Judge Doyle concluded that these calculations required the tolling of the one-year statute of limitations for all IAC claims since these were presented in the parallel state court post-trial conviction relief proceeding. The district court agrees with this conclusion.

Judge Doyle also concluded that claims not presented in the state post-conviction relief should receive no tolling or relief from the operation of the one-year time bar. The district court disagrees with this conclusion. The filing of a state court post-conviction proceeding tolls the one-year statute for all federal habeas claims, not just those previously presented in the state court post-conviction relief case. This issue was addressed in *Sweger v. Chesney*, 294 F.3d 506 (3d Cir. 2002) in which the court held that 28 U.S.C. § 2242(d)(2) requires tolling for all claims "with respect to the pertinent judgment or claim." *Id.* at 515–16. The judgment means the judgment of conviction, and "[a]ny properly filed collateral challenge to the judgment tolls the time to seek federal collateral review." *Id.* at 517. *See also Tillema v. Long*, 253 F.3d 494, 502 (9th Cir. 2001) ("AEDPA's period of limitation is tolled during the pendency of a state application challenging the pertinent judgment, even if the particular application does not include a claim later asserted in the federal habeas petition"); *Carter v. Litscher*, 275 F.3d 663, 665 (7th Cir. 2001); *Bishop v. Dormire*, 526 F.3d 382, 384 (8th Cir. 2008); *Cowherd v. Million*, 380 F.3d 909, 914 (6th Cir. 2004) (en banc); *Ford v. Moore*, 296 F.3d 1035, 1039-40 (11th Cir. 2002).[1] A

[1] These rulings that permit tolling of all federal habeas claims due to the pendency of a state post-conviction relief proceeding do not apply to the other bases for tolling allowed by 28 U.S.C. § 2244(d)(1). Those include newly recognized constitutional rights and recently discovered evidence. Courts require that each claim asserted in a second petition qualify for these exceptions. Otherwise, a single new development, either through extension of constitutional law or the discovery of new facts, could remove the time-bar for multiple claims not affected by the

leading commentator has reached the same conclusion. *See* Brian R. Means, *Federal Habeas Manual* § 9A:73 (2021) ("The AEDPA's period of limitations is tolled during the pendency of a state application challenging the pertinent judgment, even if the particular application does not include any of the claims later asserted in the federal habeas petition.").

For these reasons, the court excludes the time of the state post-conviction relief proceeding from the calculation of the one-year time bar. The remaining time between the date the conviction became final on December 10, 2012, and the date of filing of the second federal habeas petition is less than one year. The one-year time limit does not apply to any of Mr. Burke's claims asserted in his second petition.

As a practical matter, this ruling makes little difference to the outcome of the case. The first federal habeas ruling disposed of all claims raised on direct appeal. These included claims related to the right to self-representation, the use of restraints and the evidentiary ruling concerning the complainant's prior convictions. These claims may not be raised again in a second federal habeas proceeding. 28 U.S.C. § 2244(b)(1). In any event, two of the current habeas claims—the evidentiary objection and the denial of amendment—are not constitutional claims subject to habeas review. Only the IAC claims are subject to tolling as a result of the pending state post-conviction proceeding.

III. Exhaustion

As Judge Doyle noted, only claims that were presented to the state courts on direct appeal or through a motion for post-conviction relief qualify for consideration in subsequent federal

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change in the law or the new facts. *See Fielder v. Varner*, 379 F.3d 113, 117–18 (3d Cir. 2004); *Mardesich v. Cate*, 668 F.3d 1164 (9th Cir. 2012). The principle of "all for one and one for all" expressed in the *Sweger* ruling is confined to the time when a state court post-conviction relief review is pending.

habeas proceedings. In order to exhaust a claim, the petitioner must present it to the highest state court authorized by law to hear it. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (cleaned up) ("To provide the State with the necessary opportunity [to pass upon and correct alleged violations of federal rights], the prisoner must fairly present his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim.") (cleaned up).

Vermont makes things relatively easy in this respect. There is only one Vermont Supreme Court, and it hears every appeal submitted. The briefs submitted by Mr. Burke in his two Vermont Supreme Court appeals comprise the universe of his exhausted claims. These briefs contain the claims that he presented to the highest state court. Issues that were not presented in either appeal remain unexhausted and therefore cannot form the basis for federal habeas relief.[2]

On direct appeal, Mr. Burke presented the following claims:

- Speedy trial violation;
- Exclusion of impeachment evidence concerning the complaining witness;
- Exclusion of impeachment evidence of prior false allegations of sexual abuse by the complaining witness;
- Violation of defendant's right to represent himself;
- Imposition of a fixed term of imprisonment in violation of state law;
- Denial of motion for new trial.

[2] There is an exception to the exhaustion requirement for claims that were not presented to the highest state court because the state courts would have denied it on procedural grounds. Mr. Burke has made no showing that state procedural requirements prevented him from raising issues on direct appeal or on appeal of the post-conviction relief ruling.

(Doc. 23-11.) Mr. Burke has exhausted state court review of these claims. But he also submitted these claims in his prior federal habeas petition. Their prior denial by this court prevents him from asserting them again in this second petition.

On appeal from the post-conviction relief decision by the Superior Court, Mr. Burke presented the following claims to the Vermont Supreme Court in three separate briefs:

A. Appellant's Brief (Doc. 23-11)

- Personal conflict of interest with defense counsel violated Mr. Burke's right to counsel.

B. Appellant's Pro-Se Supplemental Brief (Doc. 23-25)

- Trial judge in the original criminal case should have granted defense counsel's motion to withdraw and appointed substitute counsel;
- Summary judgment on the post-conviction relief claims was improper due to the existence of genuine disputes of material facts;
- The post-conviction relief court should have permitted Mr. Burke to amend his petition.

C. Pro se Reply Brief (Doc. 23-28)

- State did not oppose defense counsel's motion to withdraw;
- Factual disputes should have prevented summary judgment;
- Trial judge should have allowed motion to amend.

The decision of the Vermont Supreme Court on appeal of the post-conviction ruling addressed the list of claims presented. The court considered multiple claims of ineffective assistance of counsel, ruling that defense counsel met constitutional standards under *Strickland* v. *Washington*, 466 U.S. (1984), with respect to jury selection, issues concerning voluntary intoxication,

diminished capacity and failure to employ a forensic toxicology expert, personal animosity and conflict between attorney and client, and impeachment of the complaining witness. *In re Burke*, 210 Vt. 157 (2019).

The exhaustion requirement leads to dismissal of certain new claims made by Mr. Burke in this petition. These include a claim that the state violated its Brady obligation in not disclosing a blood test result prior to trial and that trial counsel failed to develop a "lesbian-remorse" defense. These are new claims not previously raised before the Vermont Supreme Court.

The court agrees with Judge Doyle that Mr. Burke has exhausted his state court remedies by presenting the IAC claims to the Vermont Supreme Court.

IV. Limits on Second or Successive Petitions

The one-year time limit and exhaustion requirements are not the only restrictions on federal habeas petitions enacted through passage of AEDPA.

Regardless of timeliness, a second or successive petition is barred unless it either "relies on a new rule of constitutional law" made retroactive and previously unavailable to the petitioner, or relies on a "factual predicate for the claim [that] could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2). Here, there is no claim of a new rule of constitutional law. Instead, the applicability of the § 2244(b)(2) exception depends upon whether there are new facts to support Mr. Burke's claim of ineffective assistance of counsel.

The order of the Second Circuit granting leave to file a successive petition singles out "the requirements of § 2244(b)(2)(B)" as the basis for its decision to permit the case to proceed.

The economical nature of the mandate has given rise to a search of the record to determine what new facts the panel may have had in mind.

The most significant development in the case since the district court's dismissal of the first federal petition in 2013 has been the expert witness report by attorney Volk filed in the Vermont Superior Court post-conviction case in 2015. In his report, attorney Volk concludes that acrimony and conflict between Mr. Burke and his attorney gave rise to a "reasonable probability that the result, both as to Mr. Burke's conviction of the charged offense, and, significantly, regarding the sentence imposed upon Mr. Burke, would have been different and more favorable to Petitioner Burke had counsel's representation been effective." (Doc. 40-2 at 14.)

Attorney Volk examined what he identified as important shortcomings in Mr. Burke's defense. These included the decision to forego a forensic toxicologist, to conduct less discovery than would normally be conducted in a major felony case, and to withdraw as counsel before the presentence investigation interview. In attorney Volk's view, animosity between Mr. Burke and his counsel doomed any effort to provide a meaningful defense.

This discussion brings us to the crux of Mr. Burke's claim that he is entitled to pursue a second petition. The district court agrees with the determination in the Report and Recommendation that Mr. Burke's pending federal petition is "second or successive" for purposes of AEDPA.

Representing himself, Mr. Burke filed the first federal petition before filing the state post-conviction relief motion. This decision compromised his ability to present his IAC claims in federal court because the claims were patently unexhausted. They were not—and could not have been—heard on direct appeal to the Vermont Supreme Court. *State v. Gabaree*, 149 Vt. 229,

232–33 (1988) ("[T]he proper avenue of raising the issue of ineffective assistance of counsel is through a motion for post-conviction relief, and not through a direct appeal of a conviction.").

Exhaustion principles required that Mr. Burke first submit his IAC claims to state court through the state post-conviction relief procedure. Confronted with the information that the IAC claims would be denied in the first petition on exhaustion grounds, Mr. Burke requested their deletion from his first federal petition. Before deleting the unexhausted IAC claim, Judge Conroy advised Mr. Burke about the possible consequences. The State of Vermont had proposed dismissal of the entire § 2254 petition without prejudice to allow Mr. Burke to fully exhaust his claims. *Burke v. Pallito*, No. 2:12-cv-197 (Doc. 8 at 1.) Mr. Burke opposed this solution. He stated that he had already presented his IAC claims at trial and on direct appeal. *Id.* (Doc. 9 at 1.) He was mistaken in this belief since the IAC claim could only be presented in a state post-conviction relief proceeding. As an alternative, Mr. Burke proposed that Judge Conroy "amend out of the petition the ineffective assistance of counsel claims if this Court feels it is the most fair way to proceed." (*Id.* at 22.) Judge Conroy requested clarification from Mr. Burke about his choice, warning him that deletion of the IAC claim could bar later review in federal court. *Id.* (Doc. 12).

Had Mr. Burke sought dismissal of his first federal petition in its entirety, he could have presented his IAC claims first in state court and subsequently in federal court in the normal course. The dismissal of the first petition would not have been a denial "on the merits" sufficient to trigger the second or successive petition limitation of AEDPA. *See Graham v. Costello*, 299 F.3d 129, 133 (2d Cir. 2002) ("When a petition is dismissed because it is procedurally defective or because it presents unexhausted claims, we do not consider it to have been denied 'on the merits' because there is a possibility that, once the claims are exhausted in state court or the

procedural defect is cured, the claims will be available for review if properly presented in a federal habeas petition."). Following "deletion" of the unexhausted IAC claims from the first petition, Mr. Burke raised these claims in his state post-conviction relief motion. But since he chose to continue to pursue his other claims in the first federal petition, the court must consider whether the deletion of the IAC claims from the first federal petition renders the second petition "second or successive" for purposes of AEDPA.

Mr. Burke's first petition is described by courts as a "mixed petition" because it contained both exhausted and unexhausted claims. Starting with *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court has developed a body of law governing the availability of federal habeas review for unexhausted claims. In *Rose*, the Court held that "a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Id* at 511. *Rose* predated the passage of AEDPA and had no need to consider the effect of the limits the statute imposed on second or successive claims.

Rose imposed a rule of "total exhaustion" requiring dismissal of a mixed petition in its entirety. The dismissal without prejudice allowed for refiling of a second petition after exhaustion of state remedies. "A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Id.* at 518–19. Because the *Rose* decision preceded passage of AEDPA, there were no fixed time limits on the filing of a second federal petition.

The one-year time limit imposed by AEDPA changed the equation dramatically. In response to the fixed time limit, the Court modified the rule of total exhaustion by approving the

procedure of "stay-and-abeyance" for mixed petitions. "The stay-and-abeyance procedure involves three steps: first, dismissal of any unexhausted claims from the original mixed habeas petition; second, a stay of the remaining claims, pending exhaustion of the dismissed unexhausted claim in state court; and third, amendment of the original petition to add the newly exhausted claims that then relate back to the original petition." *Pliler v. Ford*, 542 U.S. 225, 230–31 (2004). In *Rhines v. Weber*, 544 U.S. 269 (2005), the Court established standards to identify the "limited circumstances" under which the district court could order the stay-and-abeyance remedy. These include "good cause for the petitioner's failure to exhaust his claims first in state court," a review to determine whether the "unexhausted claims are plainly meritless," and time limits on the submission of unexhausted claims to state post-conviction relief review and notice to the federal court that the stay could be lifted. *Id.* at 277.

The *Rhines* decision outlines one procedure, approved by the Supreme Court, for permitting a petitioner to exhaust state remedies without subjecting himself to the defenses triggered by a second or successive filing. But that was not the procedure the court and the parties followed in this case. Instead, the court "deleted" the unexhausted claims, effectively dismissing them without prejudice but also without the special status afforded by a stay. The remaining question is whether the deletion of these claims subjects them to the limitations AEDPA imposes on second or successive claims.

a. Judicial exceptions to the "second or successive" rule do not apply

Despite AEDPA's goal of simplifying the procedures for habeas review of state convictions, the restrictions the statute places on the availability of federal habeas relief has led the Supreme Court to identify conditions when a second federal petition is not considered second or successive for purposes of AEDPA. These exceptions do not assist Mr. Burke.

In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the Court considered whether dismissal of a claim rendered a second petition second or successive. Following dismissal of a claim of incompetency for death penalty purposes as premature, the petitioner filed a second federal petition raising the same claim. The Court ruled that the prior dismissal was not an adjudication on the merits and did not count as a first petition for purposes of finality under AEDPA. *Id.* at 638. *Stewart* considered a narrow circumstance, limited to death penalty cases, in which the defendant's mental status years after the date of conviction may become relevant for the first time as the date of execution approaches. Since the issue was premature when raised in the first petition, the second in time petition cannot fairly be considered second and successive under AEDPA. *See also Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) ("Congress did not intend the provisions of [AEDPA] addressing 'second or successive' habeas petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."). These concerns of prematurity are not relevant to cases like Mr. Burke's in which carrying out the sentence of imprisonment itself raises no new legal questions.

The Court returned to the issue of the effect of an order of dismissal in *Slack v. McDaniel*, 529 U.S. 473 (2000) in which a prisoner filed a mixed petition and requested that the unexhausted claims be held in abeyance until he had presented them to the state courts. Instead, the district court dismissed the entire petition without prejudice with permission to renew his application upon exhaustion of state remedies. The Court rejected the state's effort to characterize the second federal petition as "second or successive," citing Rule 9(b) of the Rules Governing § 2254. "It is instead more appropriate to treat the initial mixed petition as though it had not been filed, subject to whatever conditions the court attaches to the dismissal." *Id.* at 476.

The Court noted that the ruling is consistent with the original procedures for "total exhaustion" under *Rose*. *Id.* at 476 ("[The *Rose* opinion] contemplated that the prisoner could return to federal court after the requisite exhaustion.").

Burton v. Stewart, 549 U.S. 147 (2007) presents a case much closer on its facts to the present case. Burton was convicted after a trial on three counts of rape, robbery, and burglary. He received a 562-month sentence which he appealed. Due to the reversal of an unrelated conviction, he was resentenced to the same term. While these sentencing issues were still pending on direct appeal, he filed his first federal petition. His first federal petition concerned only the constitutionality of his three convictions. The district court denied relief on the merits. After his direct appeal of the sentencing claims was concluded, he filed a second federal petition seeking to raise these issues. He did not obtain permission to file a second petition from the Ninth Circuit, arguing that the petition was not second or successive because the claims concerning sentencing issues were not ripe for federal review when he filed his first petition.

The Supreme Court rejected Burton's argument. A federal petitioner with mixed claims has only two options: dismissal of the entire petition or proceeding with only the exhausted claims. The second course "risks subjecting later petitions that raise new claims to rigorous procedural obstacles." *Id.* at 154. Like Mr. Burke, Burton received a warning about these potential consequences. The Court rejected Burton's contention that AEDPA's restrictions did not apply to a successive petition filed after the constitutional claims concerning sentencing were exhausted in state court. "There is no basis in our cases for supposing . . . that a petitioner with unexhausted claims who . . . elects to proceed to adjudication of his exhausted claims—may later assert that a subsequent petition is not 'second or successive' precisely because his new claims were unexhausted at the time he filed his first petition." *Id.* at 154.

Mr. Burke's position is no stronger than Burton's. He filed a mixed petition before his IAC claims were exhausted through state post-conviction relief proceedings. He was warned about the risk of going forward on the exhausted claims only. Although there are exceptions to the AEDPA second or successive requirements, none apply in his case. Neither the complete dismissal contemplated by *Rose* nor the stay-and-abeyance procedure recognized by *Rhines* were employed. For these reasons, the court agrees with Judge Doyle that the limitations AEDPA imposes on second or successive petitions apply to Mr. Burke's IAC claims.

V. 28 U.S.C. § 2244(b)(2) – New Facts

In the case of second or successive petitions, AEDPA requires that claims based on new evidence must depend on facts that could not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2). The IAC claims are subject to this "new facts" requirement.

The court agrees with Judge Doyle's recommendation that § 2244(b)(2) bars the second petition because the factual predicate for the IAC claim had long been known to Mr. Burke. The personal conflict between Mr. Burke and his counsel and Mr. Burke's intense dissatisfaction with his representation has been the subject of motions and appeals by Mr. Burke at every stage of the case. He raised these issues at trial when he sought to discharge his attorney and represent himself. As he explained to Superior Court Judge Katz at jury draw in May 2010:

> Because [defense counsel] already told me I'm going to be convicted. He already told me – he just told me downstairs I'm going to be convicted and he's trying to talk me out of taking the witness stand so it's not my word against [the complaining witness] anymore . . . He tries to be a nice guy by trying to give me all his professional advice but I know its wrong okay.
> Alleged Defense Attorney Maguire is also in violation of Vermont Professional Conduct Rule. 1.3 diligence. And Rule 1.4 communication. Maguire has never been diligent about communicating with client Burke as there has been no communication at all . . . .

> Maguire has been undermining my defense from day one. Day one everything is my first legal malpractice lawsuit against Maguire which is currently pending in the – in the Orleans Superior Court . . . .
> [W]ould you please allow – allow me to – let the Court understand that my – the only friction that's been between me and this Court is the friction that Mr. Maguire has caused because I've been so frustrated and angry –angry over his legal malpractices . . . I'm asking the Court to grant Maguire's Motion to Withdraw.

(Doc. 23-5 at 6–9.)

Mr. Burke raised similar issues on direct appeal:

> Defendant was denied effective assistance of counsel when Attorney Maguire failed to exercise that degree of care, skill, diligence and knowledge commonly possessed and exercised by reasonable, careful and prudent lawyers in the practice of law in this jurisdiction. Said deprivations specifically occurred when Mr. Maguire violated the Vermont Rules of Professional Conduct Rule 1.1 Competence, Rule 1.2 Scope of Representation, Rule 1.3 Diligence, and Rule 1.4 Communication, Mr. Maguire failed to make timely objections, correct legal arguments, or written motions or call defense witnesses . . . or use any defense evidence obtained by the Pro-se Defendant . . . Mr. Maguire failed to have any kind of legal communications with Defendant Burke after Defendant had acted Pro-se, obtaining defense evidence to be used during trial . . . Mr. Maguire undermined the defense and worked with the State's Attorney to obtain a conviction over Defendant . . . Mr. Maguire failed to request a diminished capacity, intoxication jury instruction . . . Mr. Maguire's overall performance was ineffective . . . Mr. Maguire further confirms the irreconcilable conflict . . . and refused over Defendant's oppositions to call Defendant's investigator. Maguire misstates the facts.

(Doc. 23-11, at 30–31.)

Mr. Burke raised the same issues in his first federal petition and in his state post-conviction relief motion. The same facts appear in attorney Volk's report.

Attorney Volk added a necessary element to the IAC claim by identifying violations of accepted standards of practice—as he understood them—and concluding that these were sufficient to support a fact-finder's conclusion that a different outcome was likely if the violations had not occurred. Attorney Volk relied on the same transcripts and court records that the parties and the various reviewing courts have all considered since Mr. Burke's conviction

and sentencing. As before, these formed the factual predicate for the IAC claims raised in the second federal petition.

28 U.S.C. § 2244(b)(2)(B)(ii) permits a second federal petition if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." An identical "discovery exception" applies to petitions filed after expiration of the one-year limitation period. *See* 28 U.S.C. 2244(d)(1)(D). In defining the term "factual predicate" for purposes of § 2244(d)(1)(D), the Second Circuit has confined the term to the "vital facts" underlying the claim. *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012). These are the facts necessary to escape dismissal under Rule 4 of the Rules Governing § 2254 Cases or Rule 12(b)(6) of the Federal Rules of Civil Procedure. In contrast, "new information . . . that merely supports or strengthens a claim that could have been properly stated with the discovery" is not part of the factual predicate. *Id.*

Expert testimony of the type provided by attorney Volk is generally necessary to prove an IAC claim under *Strickland*. Without it, a claim could be subject to dismissal for lack of evidence that trial counsel's performance fell below a reasonably effective assistance standard. But § 2244(b)(2)(B) is not a pleading standard; it is a discovery rule. The petitioner must show both that he did not know of the factual predicate or "new facts" for his second or successive claim and that he could not have discovered these through the exercise of due diligence. The court agrees with Judge Doyle that Mr. Burke cannot meet the diligence standard. He knew the vital facts concerning the alleged shortcomings in his representation at trial. He knew about these facts as they occurred because he complained about them in the course of trial, on direct appeal, and in his first federal habeas petition.

The court agrees with Judge Doyle that the second petition is not excused from the restriction on second or successive petitions imposed by AEDPA because Mr. Burke obtained the Volk report after filing the second petition. Instead, it is clear from Mr. Burke's filings that he knew of the vital facts relevant to his IAC claims before he filed the first petition. Mr. Volk's opinion strengthened his IAC claims by applying an objective standard of effective assistance to these facts. But the legal opinion does not alter or add to the facts long known to Mr. Burke.

The court DISMISSES the IAC claims because they are "second or successive" within the meaning of AEDPA.

VI. Motions for Judge Crawford to Intervene and for an Evidentiary Hearing

The court DENIES the two motions for Judge Crawford to intervene. (Docs. 20 and 35.) The magistrate judge's ruling is thoughtful and thorough. The district court has sought to review it in detail and has reached the same conclusions for essentially the same reasons. There is no basis for removing Judge Doyle from the case.

The court also DENIES the motions for an evidentiary hearing. (Docs. 20, 29, 31). The record in this case consists of transcripts and pleadings drawn from the various stages of Mr. Burke's trial, direct appeal, and post-conviction relief proceedings in state and federal court. These are all court records. They are sufficient to establish the facts upon which the court has relied in dismissing the second petition. Mr. Burke identifies no factual dispute concerning the sequence of his filings or the issues raised at each stage of the case.

CONCLUSION

For these reasons, the court adopts the Report and Recommendation with minor changes described in this decision. (Doc. 34). The State's motion to dismiss (Doc. 23) is GRANTED. The § 2254 petition is DISMISSED as "second or successive" pursuant to

28 U.S.C. § 2244(b)(2).

Mr. Burke's motions for Judge Crawford to Intervene (Docs. 20 and 35) are DENIED.

Mr. Burke's motions for an evidentiary hearing (Docs. 20, 29, 31) are DENIED.

Dated at Rutland, in the District of Vermont, this 21st day of December, 2021.

Geoffrey W. Crawford, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JAMES THOMAS BURKE, Petitioner, v. MIKE TOUCHETTE, STATE OF VERMONT, DAVID E. TARTTER, Respondents.	)	Case No. 5:19-cv-228

ORDER ON EMERGENCY MOTION FOR AN EVIDENTIARY HEARING, EMERGENCY MOTION TO STAY REVIEW OF WRIT, SECOND EMERGENCY MOTION TO STAY REVIEW OF WRIT, SECOND EMERGENCY MOTION FOR AN EVIDENTIARY HEARING, FOURTH EMERGENCY MOTION FOR AN EVIDENTIARY HEARING, EMERGENCY MOTION TO RECUSE MAGISTRATE DOYLE, and EMERGENCY MOTION FOR AN EVIDENTIARY HEARING
(Docs. 43, 46, 47, 50, 51, 52)

Following the court's decision and judgment order (Docs. 41, 42) that issued on December 21 and December 22, 2021, Petitioner James Burke notified the court that the documents comprising the printed case submitted in connection with his appeal of his state post-conviction relief case before the Vermont Supreme Court were not before the District Court. These documents total approximately 1,600 pages. The District Court forwarded them to the Court of Appeals on March 5, 2020. They were returned to the District Court on March 3, 2022.

Because the printed case was not before the court when it issued its order adopting the Report and Recommendation, the court has now reviewed these materials to determine whether they would support a different result. In particular, the court has examined these materials to determine whether they include new facts in support of Mr. Burke's claim of ineffective assistance of counsel that would allow for a second or successive habeas petition.

Mr. Burke's first habeas petition was denied on November 21, 2013. *Burke v. Pallito*, No. 2:12 CV 197, 2013 WL 6145810 (D. Vt. Nov. 21, 2013), *motion for reconsideration denied*, No. 2:12-cv-197 (D. Vt. Mar. 6, 2014). In reviewing the printed case for new facts, the court will use the November 21, 2013 date.

I. Contents of the Printed Case

The printed case is dated November 29, 2019. It includes case materials drawn from Mr. Burke's original criminal trial and the trial court proceedings, including discovery, in his state post-conviction relief case: *Burke v. State of Vermont*, No. 214-2-13 Cncv ("PCR case"). Mr. Burke submitted these materials to the state PCR court as attachments to a series of affidavits numbered 1–18. Not every affidavit in this sequence is included. And there are some additional materials. All the materials are numbered sequentially. The court has followed Mr. Burke's table of contents and his numbering system in reviewing these additional factual materials.

Mr. Burke filed his PCR case in the Chittenden Superior Court on February 25, 2013. (PC 1.)[1] The petition includes a claim for ineffective assistance of counsel ("IAC") against defense attorney Daniel Maguire. The errors identified in the petition include:

- Failure to obtain an "acute intoxication jury instruction" related to a defense of diminished capacity;
- Failure to call alcohol and drug experts;
- Failure to introduce evidence of victim Emily Linso's past criminal convictions; and
- Irreconcilable conflict between client and defense attorney.

(PC 1–22.) The printed case includes transcripts of the trial and pre-trial hearings from the years 2008–2010. These are obviously not sources of new information. The court considers the affidavits and other materials submitted by Mr. Burke in the printed case in sequence.

[1] All references are to the pagination for the printed case ("PC").

1. Petitioner's Affidavit of James Burke dated February 20, 2013. (PC 24–25.) Mr. Burke argues that the trial court erred in excluding evidence of prior convictions of Ms. Linso as well as his claims that she had previously made false allegations of sexual misconduct. The affidavit establishes that these claims of trial court error were known to Mr. Burke before his first federal habeas petition was dismissed.
2. Affidavit # 4 of James T. Burke dated March 23, 2016. (PC 75–76.) This affidavit concerns Mr. Burke's request that blood previously drawn from Ms. Linso after she reported the sexual assault be tested for evidence of heroin use. In the affidavit, he makes it clear that "it was again and always had been my strategic-defense-decision to have [the victim's] blood drawn at [the hospital] tested for heroin." He supplied citations to hearing transcripts "before and after trial" and complained that attorney Maguire failed to pursue this potential evidence. (*Id.*). The affidavit is evidence that the disagreement between Mr. Burke and his counsel over the blood test issue was known to Mr. Burke at the time of his trial in 2010. His knowledge of the issue is confirmed by the excerpt from his sentencing hearing which he supplied. (PC 77.)
3. Affidavit # 6 of James T. Burke dated April 1, 2016. (PC 82–83.) This affidavit concerns the claim that an irreconcilable conflict of interest made it impossible for Mr. Maguire to provide an effective defense. The affidavit serves to introduce excerpts from transcripts from a status conference and the jury draw in the original criminal case in which Mr. Burke advocated for the dismissal of Mr. Maguire from the case and sought to represent himself. (These transcript pages are located between PC 83 and 84.) They document the animosity between Mr. Burke and his attorney at the time of the trial. They demonstrate that Mr. Burke accused his defense counsel of a conflict of interest as early as 2009.

4. The expert report of attorney Paul Volk. (PC 84–102.) The court has previously discussed how Mr. Volk's opinion that the performance of Mr. Maguire as defense counsel fell short of the professional standard of ineffective assistance is not new information for purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") restrictions. (*See* Doc. 41 at 19–20.) His opinion has three themes: the strong animosity between lawyer and client; the decision not to pursue blood testing of Ms. Linso or a diminished capacity for the defendant, both of whom may have been impaired at the time of the offense; and the lack of representation at the interview conducted by the pre-sentence investigator.

None of these opinions reflect facts not previously known to Mr. Burke. They are all derived from information long known to him. The animosity between Mr. Burke and Mr. Maguire was fully discussed at the time of his trial. The disagreement between the lawyer and the client over whether to seek toxicology testing was also a long-standing grievance in Mr. Burke's mind. Attorney Volk's opinion letter adds no new information on either issue.

The effect of appearing for the pre-sentence interview without counsel raises slightly different issues. Certainly Mr. Burke knew that he went to the interview alone because Mr. Maguire had previously moved to withdraw and did not attend. But he may not have appreciated the value of having an attorney at such an event. Taking the position that he is innocent of the offense despite the conviction may have an emotional appeal for the client, but it is not often persuasive to probation officers.

Mr. Volk's opinion may well have come as a new insight to Mr. Burke. But even if Mr. Burke had not seen the matter in the same light before, he had years following his

sentencing hearing in 2010 to consider and investigate whether the absence of an attorney at the interview demonstrated a lapse in his representation. In his deposition in the state PCR case, he recalled asking the pre-sentence investigator if he could have a different attorney. (PC 489.) He then "decided to go ahead and just get through that procedure myself." (*Id.*) Since the facts were known to him, the exercise of due diligence would have shown him that frequently defense attorneys join their clients at pre-sentence interviews in order to provide guidance, prevent inculpatory statements about other crimes, and make sure all favorable information is provided.

5. In his deposition, taken by Mr. Burke, Mr. Volk adopted his report letter and supplied no new information. (PC 114–229.)

6. The deposition of Mr. Maguire similarly contains no new facts. Mr. Burke's questions demonstrate that he was deeply involved in his defense and fully aware of the various events at trial. He and Mr. Maguire differed over their interpretation of events such as the decision to forego forensic testing of blood samples, but the deposition contains no new information about Mr. Maguire's conduct in representing Mr. Burke. (PC 287–405.)

7. Mr. Burke's deposition demonstrates a comprehensive command of the facts concerning his conviction and representation by Mr. Maguire. It contains no evidence that he learned about new facts following the dismissal of his first federal petition. (PC 406–542.)

8. Attorney Volk returned for a second deposition in January 2016 after he had reviewed the transcript of Mr. Maguire's deposition. He raised concerns about Mr. Maguire's decision not to pursue a competency evaluation, an insanity defense, or a diminished capacity defense. He expressed the same reservations about Mr. Burke's self-representation at the

PSI interview. All of these opinions were consistent with his original opinion letter and arise from facts long known to Mr. Burke. (PC 543–749.)

9. Affidavit #1 of James T. Burke dated March 23, 2016. This affidavit criticizes Mr. Maguire's representation because he failed to develop claims of false allegations of sexual misconduct involving Ms. Linso and her boyfriend. This is not a new development. Mr. Burke had sought to impeach Ms. Linso on these grounds at trial. He raised the issue on direct appeal. *State v. Burke*, 192 Vt. 99, 110 (2012). (PC 750–773.)
10. Affidavit #2 of James T. Burke dated March 23, 2016. This affidavit documents what Mr. Burke described as his "correct and on point strategic decision to obtain a expert-drug & alcohol toxicologist and dermatologist in defense support of the true facts of what truly happened." (PC 773.) He states that Mr. Maguire "came along to 'help' and admittedly failed to pursue the only true and clearly relevant defense evidence...of acute intoxication and drug use diminished capacity defense after Defendant Burke , Pro- se, had pursued this only relevant and on point defense with months/years of defense discovery before Mr. Maguire's mistake . . . ." (PC 773.) The affidavit demonstrates that Mr. Burke was aware at the time of trial that he wished to pursue diminished capacity defenses and, in his view, was frustrated by his attorney's contrary decision. The affidavit demonstrates that there are no new facts concerning this claim of ineffective assistance. (PC 773–774.)
11. Affidavit #3 of James T. Burke dated March 23, 2016. Mr. Burke criticized Mr. Maguire for failing to follow up on his report that Ms. Linso had stolen property from his apartment at the time of the offense. It is supported by a previous written statement by Mr. Burke dated December 12, 2005. This is not new information for purposes of the second federal habeas petition. (PC 783–788.)

12. Affidavit #5 of James T. Burke dated April 1, 2016. Mr. Burke advised the court of a newspaper clipping in an unrelated PCR case. The case, *State v. Casey*, 2013 VT 22, 193 Vt. 429, resulted in the release of the defendant from prison in July 2015. This may be new information but it is irrelevant to Mr. Burke's claim. (PC 793–798.)
13. PCR Affidavit of Pro-se Litigant James Burke dated August 15, 2017. Mr. Burke previously advised the PCR court that at the time of his jury trial, "I witnessed approx. (9) nine jury members who had raised their hands to indicate that they had been involved with being sexually assaulted." He complained that these indications of potential bias were not sufficiently investigated at voir dire. This issue was previously raised and resolved in favor of the prosecution in Mr. Burke's first federal habeas petition. *Burke*, 2013 WL 6145810 at *16. This claim is not new information for purposes of the second federal habeas petition. (PC 799–801.)
14. PCR Affidavit #8 of James T. Burke dated April 1, 2016. Mr. Burke has supplied deposition transcripts from former Burlington police officer Joseph Leahy dated March 21, 2008 (PC 804–921); private investigator Nancy Stevens dated June 26, 2008 (PC 922–984); and defense attorney William Cobb dated July 3, 2008 (PC 985–998). Mr. Burke conducted these depositions himself in preparation for his original criminal trial. He has long maintained that these witnesses were prevented from providing evidence of drug use and motivation to lie that would have weakened the credibility of Ms. Linso. He identifies Seth Randall, Liberty Porta and Roy Porta as witnesses with knowledge of Ms. Linso's heroin use. He also names other potential witnesses drawn from his trial witness list of 75 individuals whom he believes had exculpatory evidence. In his affidavit, he

criticizes Mr. Maguire for failing to investigate and introduce evidence at trial about these individuals.

These issues have long formed part of Mr. Burke's critique of his criminal trial. *See State v. Burke*, 2012 VT 50, 192 Vt. 99, 109–11 (affirming the exclusion of evidence of alleged false accusations of sexual assault and prior convictions of witnesses). Mr. Burke alleged that Ms. Linso was a life-long drug and alcohol user in his original federal habeas petition. "Defense evidence also showed that [the victim] was not only big city street smart in her out and about street ways, but also drug & alcohol savvy because of her past street experiences with drugs & alcohol since she was 11 years old." *Burke v. Pallito*, No. 2:12-cv-197 (D. Vt. Nov. 16, 2012), Doc. 9 ¶ 26. He criticized his defense counsel for failing to introduce evidence that both he and Ms. Linso were intoxicated at the time of the assault. (*Id.* ¶ 17.) In his original state PCR complaint and the first federal habeas petition, Mr. Burke focused on the exclusion of potential impeachment evidence of prior convictions, false accusations, and other bad acts by Ms. Linso and her friends. But the issue of Ms. Linso's history of illegal drug use and his complaint that it had not been introduced at trial were clearly known to Mr. Burke as early as the time of jury selection in 2010 when he complained that Mr. Maguire had failed to develop a defense based on Ms. Linso's prior possession of heroin and hypodermic needles. (Transcript of jury draw at 178–179, filed as an attachment to PC 84.) This is not new information for purposes of the second federal habeas petition. (PC 802–998.)

15. Affidavit of James T. Burke dated September 16, 2015. This affidavit introduces the deposition of Seth Randall, a friend of Ms. Linso's, taken by Mr. Burke on August 28, 2008 in preparing for his criminal trial. At his deposition, Mr. Randall described an

assault by Ms. Linso and others in which he was repeatedly struck with a hammer, rolled in a carpet, and left in the woods to die. (PC 1000–1019.) The testimony concerns an incident in 2005 resulting in Ms. Linso's conviction and prison sentence. It also concerns allegations of drug use by Ms. Linso, including heroin. The deposition documents Mr. Burke's knowledge of Ms. Linso's conduct at least two years prior to his criminal trial.

On August 20, 2009, Mr. Burke conducted a second deposition of Mr. Randall. Mr. Randall testified that Ms. Linso fabricated a sexual assault allegation against him, used heroin, stole money from family members, and joined with others in severely beating him and abandoning him to die by the roadside.

These depositions do not contain new information for purposes of the second federal habeas petition. (PC 999–1019, 1041–1069.)

16. Deposition of Peter Lemieux dated August 28, 2008. Mr. Lemieux, a Vermont state corrections officer, provided testimony concerning Ms. Linso's conduct in prison in or around 2005 while she awaited trial for the assault on Mr. Randall. Mr. Burke conducted the deposition. Mr. Lemieux identified multiple incidents of misconduct and violation of prison regulations. This is not new information for purposes of the second federal habeas petition. (PC 1020–1040.)

17. Affidavit of James T. Burke dated August 19, 2015. This affidavit accompanies the deposition of Nathan Gould taken by Mr. Burke in preparation for his criminal trial. The deposition took place on August 20, 2009.

In 2009, Mr. Gould was a retired Winooski police officer. He took part in the investigation of the assault on Mr. Randall. He testified that Ms. Linso was convicted of crimes against Mr. Randall and that she had also fabricated allegations of sexual assault

against him. The deposition demonstrates that Mr. Burke knew about Ms. Linso's prior conduct and criminal history before his own trial. This is not new information for purposes of the second federal habeas petition. (PC 1068–1090.)

18. Affidavit #9 of James T. Burke dated April 11, 2016. This affidavit provides further information about Mr. Burke's plan to impeach Ms. Linso at trial. The exhibits to the affidavit include an amended notice of intent to offer impeachment on the basis of heroin use and Ms. Linso's criminal conviction for aggravated assault dated November 21, 2006. It includes a probable cause affidavit from a Winooski police detective detailing the assault on Mr. Randall, the state's motion to hold Ms. Linso without bail, a sworn statement from a witness (Nancy Cunha), and Ms. Linso's criminal record. Mr. Burke filed the amended notice of intent in Vermont Superior Court on September 8, 2010. It discloses in detail the basis for his planned impeachment of Ms. Linso. This is not new information for purposes of the second federal habeas petition. (PC 1094–1118.)
19. Affidavit #10 of James T. Burke dated April 11, 2016. This affidavit concerns testimony at Mr. Burke's trial by a police officer about Ms. Linso's statements to him about her abuse of alcohol and heroin use as well as her use of marijuana with Mr. Burke on the day of the offense conduct. This is not new information for purposes of the second federal habeas petition. (PC 1119–1124.)
20. Affidavit # 11 of James T. Burke dated April 11, 2016. This affidavit accompanies the filing of a competency report by William Nash, Ph.D. Dr. Nash examined Mr. Burke on February 1, 2010 at the request of Mr. Maguire. In contrast to the state competency evaluator, Mr. Nash concluded that Mr. Burke was not competent to stand trial due to a "proffered diagnosis" of Schizotypal Personality. In Dr. Nash's view, Mr. Burke's

"complex paranoia, mistrust of his attorney and all of the Court personnel including the Judge are clearly a distorted perception of the process . . . . He is unable to integrate the benevolent counsel of his own attorney or the Judge, and his paranoid distrust of everyone greatly distorts his perception of his place in the world." (PC 1132.)

The trial judge did not find Mr. Burke incompetent and proceeded to trial. In his affidavit, Mr. Burke complains that the judge erred in failing to appoint substitute counsel and provide a so-called *Faretta* warning. *See Faretta v. California*, 422 U.S. 806 (1975); *but see Iowa v. Tovar*, 541 U.S. 77 (2004) (declining to require particular colloquy for knowing waiver of right to counsel).

The competency issue fails to present a basis for habeas relief on grounds of ineffective assistance of counsel because Mr. Burke has identified a supposed error by the trial judge. This error was not raised on direct appeal. It was certainly known to Mr. Burke from the early days of his prosecution when the trial judge declined to adopt Dr. Nash's finding of incompetence.

21. Affidavit # 12 of James T. Burke dated April 11, 2016. This affidavit concerns the written stipulation, signed by Mr. Burke on November 2, 2007, stating that "no date rape drug was detected in the wine or in the [victim's] vomit located on those items." The parties also stipulated that if the state forensic laboratory had tested sheets and a t-shirt taken from Mr. Burke's home, "no regulated drug would have been detected in or on the specimens." (PC 1135.) The stipulation is accompanied by an FBI lab report stating that Diethyltoluamide (DEET) and nicotine were the only substances identified on towels and a pillowcase submitted for testing. Results associated with date rape drugs were not identified. (PC 1136.) Mr. Burke has known about the stipulation since he signed it in

November 2007. It does not represent new information that could justify a second federal habeas petition.

22. Affidavit #12 of James T. Burke dated April 11, 2016. This affidavit concerns statements by Ray Porta (one of Ms. Linso's co-defendants in the Randall assault case) to Mike Dumont concerning an alleged recantation by Ms. Linso. Mr. Burke states that Mr. Dumont has told him that Mr. Porta will now say that Ms. Linso told them that she consented to have sex with Mr. Burke. The statements are described without dates or other details.

In 2019, Mr. Burke relied upon Mr. Porta's statements to file a motion to dismiss the criminal prosecution in Chittenden Superior Court. The record does not reflect how the court resolved the motion except that Mr. Burke remains incarcerated.

In contrast to Mr. Burke's claims of ineffective assistance of counsel, the statements by Mr. Porta to Mr. Dumont support a claim of actual innocence. Mr. Burke recognizes as much in his Affidavit #13 in which he requests that the state PCR court "hold a hearing on my factual innocence." (PC 1138.) The statements are not claims that the performance of defense counsel fell below constitutional limits. There is no claim that Mr. Maguire – or anyone else – knew of the alleged recantation at the time of trial. Rather, Mr. Burke claims that Ms. Linso has now admitted to a third-party that she lied about her lack of consent, thereby putting in doubt proof of an essential element of the offense of conviction.

Identifying this claim as one of actual innocence has several potential consequences. First, it may remove the restriction against second or successive petitions. *McQuiggin v.*

Perkins, 569 U.S. 383, 392 (2013). Second, it requires the court to evaluate the evidence in light of the prima facie standard established by 28 U.S.C. § 2244(b)(2)(B)(ii):

> [whether] the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Finally, it may require a hearing to determine the truth of the claim. But before reaching these issues, the court considers the form in which the evidence reaches the court and the standard imposed by the Second Circuit on the evaluation of newly discovered evidence of recantation.

"It is axiomatic that witness recantations must be looked upon with the utmost suspicion. This is because recantations upset society's interest in the finality of convictions, are very often unreliable and given for suspect motives, and most often serve merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction." *Haouari v. United States*, 510 F.3d 350 (2d Cir. 2007). "[A] specific, sworn recantation is necessary to contradict sworn trial testimony that has been subject to cross examinations." *Id.* at 354.

The Second Circuit has long required the submission of first-hand evidence in the context of habeas petitions. "To warrant plenary presentation of evidence, the application must contain assertions of fact that a petitioner is in a position to establish by competent evidence." *United States v. Aiello*, 814 F.2d 109, 113 (2d Cir. 1987). Hearsay is insufficient. "Airy generalities, conclusory assertions and hearsay statements will not suffice because none of these would be admissible evidence at a hearing." *Id.* at 113-114. The reliability of the statements is further weakened by information supplied by Mr. Burke concerning Mr. Porta's serious mental illness. In a report prepared by the Vermont

Department of Corrections in 2008, he is described as "Seriously Mentally Ill." (PC 1140.)

The alleged statement by Mr. Porta to Mr. Dumont, subsequently passed along to Mr. Burke, about what Ms. Linso said to Mr. Porta regarding the issue of consent is third-hand hearsay. It is supplied with no date, no factual context, and no corroboration. The court cannot consider it for purposes of the prima facie evaluation required by AEDPA because the affidavit is suspect and unreliable for the reasons explained in the *Haouari* decision.

23. Affidavit #14 of James T. Burke dated April 11, 2016. Prior to his criminal trial, Mr. Burke succeeded in obtaining a court order that Ms. Linso be referred to as the "complaining witness" or by name. (PC 1149.) This is hardly new information. (PC 1147–1150.)

24. Affidavit # 15 of James T. Burke dated April 11, 2016. Mr. Burke denies receiving a letter marked "hand delivery" from Mr. Maguire dated May 6, 2010. The letter contains advice related to Mr. Burke's conduct during the upcoming jury trial. In his letter, Mr. Maguire warned Mr. Burke that inappropriate behavior could result in his removal from the courtroom. He provided some information about the schedule of the case and the state's witnesses. He offered his help as counsel.

Jury draw was scheduled for May 10, 2010. Before jury selection commenced, Mr. Burke met with the presiding judge Matthew Katz, the prosecutor and Mr. Maguire. At that time, Mr. Burke acknowledged receipt of Mr. Maguire's letter:

> Mr. Burke: He's trying to talk me out of taking the witness stand.
> The Court: But did you hear what I said?

Mr. Burke: Yes, sir and—but he's never had a conversation with him yet. He wrote me a letter. I'm submitting this.

(Jury Draw Tr. 20–21.)

The Court: Okay. Have – have you gone through your motion [to disqualify attorney Maguire] statement yet?

> Mr. Burke: No, sir, let me – let me finish this sir. Let me finish this please. Okay. Discovery to use defense evidence. Attorney Maguire who has an interest in seeing Defendant Burke convicted informed defendant Burke with a last minute communication through the mail. It was hand delivered. He didn't even come and see me. He dropped it off to somebody else and – and he had no plans. Attorney Maguire has an interest in seeing Defendant Burke convicted. He informed Defendant Burke in a last minute communication that was – that was through the mail that he has no plans to call Seth Randall or any of the other defendant witnesses who impeach Emily – Emily Linso's credibility which is further blatant ineffective assistance of counsel on Maguire's part.

(Jury Draw Tr. 24–25.)

> Mr. Burke: He – he wrote me a letter the other day. This is the only communication I've had with him at all. He wrote me this and hand delivered. He never hand delivered. He never talked to me. He wrote me a letter saying "I do not anticipate any testimony about the Seth Randall case."

(Jury Draw Tr. 35.)

> This – and here is the letter where he says, "I am not going to call – I'm not going to call Seth Randall pursuant to the Vermont Rape Shield Exception I invoked with Judge Keller."

(Jury Draw Tr. 35.)

The hand-delivered letter is consistent with Mr. Burke's description in his statements to Judge Katz. It states in part: "I do not anticipate any testimony about the Seth Randall case for the reasons we have discussed before." (PC 1153.) It is almost certainly the letter Mr. Burke described receiving just before the jury draw.

The May 6, 2010 letter has long been part of the communications between Mr. Burke and Mr. Maguire. Mr. Burke discussed it with the superior court judge prior to the original criminal trial. It is not new information justifying a second federal habeas petition.

25. Affidavit #16 of James T. Burke dated April 11, 2016. This affidavit accompanies a list of 75 witnesses whom Mr. Burke proposed to call at trial. It contains no new information. (PC 1154–1159.)

26. Affidavit #18 of James T. Burke dated April 11, 2016. This affidavit accompanies a list of deposition questions that Mr. Burke supplied to Mr. Maguire in preparation for the deposition of Ms. Linso. The list of 665 questions covers Ms. Linso's use of alcohol and drugs since childhood; her use of heroin; her relations with Mr. Porta, Liberty Porta, and Seth Randall; the events of July 24, 2004 culminating in sexual relations with Mr. Burke; false allegations by Ms. Linso and others that Mr. Randall had committed sexual offenses; prior convictions; and the assault on Mr. Randall. The list of these topics was generated before the criminal trial and contains no new information. (PC 1161–1176.)

27. Affidavit #17 of James T. Burke dated April 11, 2016. This affidavit accompanies payroll records for the dates of July 21, 23, and 26, 2004. Mr. Burke offers them as evidence that he was gainfully employed during the period of the assault. (PC 1177–1181.)

28. PC pages 1182–1523 reproduce pleadings and orders filed in the state PCR case, *Burke v. State of Vermont*, Docket 214-2-13 Cncv, Chittenden Superior Court, and the appeal, *In re Burke*, 2019 VT 28, 210 Vt. 157, 212 A.3d 189.

In conducting this review of the printed case, the court has focused on whether the information supplied by Mr. Burke following the denial of his first federal habeas petition is new information that would justify a second or successive federal petition under 28 U.S.C. § 2244(b)(2)(B)(i). This provision prohibits such petitions unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." As the individual discussion of each group of documents is intended to

illustrate, these documents contain little information that Mr. Burke did not know at the time of his criminal trial.

Mr. Burke was an active participant in every stage of his case. He conducted discovery, including deposing witnesses, himself. He sought to represent himself at every stage of the case. He sought to disqualify his assigned counsel and disparaged his efforts prior to trial. He provided comprehensive summaries of deposition questions and lines of inquiry, frequently directed at impeachment of Ms. Linso on multiple grounds.

A page-by-page review of the printed case reveals that it is comprised almost entirely of factual material predating the trial. There are no recent discoveries. The areas in which Mr. Burke believes his attorney was ineffective are the same areas about which he complained to Judge Katz prior to trial in 2010. These include defense counsel's inability to impeach Ms. Linso with evidence of prior false complaints of sexual assault; her prior history of alcohol and drug use; and her involvement in a serious assault on Mr. Randall for which she served several years in prison. Mr. Burke complained vigorously about these perceived shortcomings in his defense long before he filed his first federal habeas petition. These facts could not only have been discovered through due diligence—they actually formed the basis for his complaints to the trial judge prior to trial.

There is one important exception to this narrative of long-held grievances. That is the opinion letter of attorney Paul Volk concluding that the open conflict between Mr. Burke and his attorney rendered the representation ineffective. Mr. Volk was retained in the course of the state PCR case through the Vermont Office of the Defender General. (PC D (docket sheet entries dated 9/10/13 and 10/9/13).) His report reflects a thorough review of the existing record. Mr. Volk added no new facts of his own. Instead, as is conventional for an expert on

ineffective assistance, he reviewed transcripts, pleadings, and other documents dating from the trial and earlier. This information formed the factual predicate for his opinion. All of this information had long been available to Mr. Burke who had already participated in a trial and a direct appeal of his conviction. Mr. Volk's opinion that Mr. Burke's defense was prejudiced by the acrimony between client and attorney as well as by his appearance without counsel at the pre-sentence investigation interview are conclusions for which the factual predicate has been available at least since the original trial in 2010.

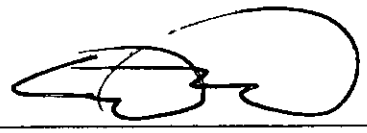
Speaking as plainly as possible, the court notes that the irretrievable error in Mr. Burke's prosecution of his federal IAC claims was his decision to dismiss these claims as unexhausted and proceed with his first federal habeas petition. The magistrate judge warned him that he would jeopardize his opportunity to refile the IAC claims in federal court after presenting them in state court. Had Mr. Burke dismissed his first federal petition in its entirety and proceeded in state court on all claims, he could have presented the ineffective assistance of counsel claims again in federal court, even after losing in state court. Because the facts available to support the IAC claims were known to Mr. Burke when they were first filed in federal court, they do not qualify as new factual claims subject to the exception to the bar against second or successive habeas filings. He chose a different route and as a consequence, he is barred by AEDPA from relitigating the IAC claims in a second federal proceeding.

CONCLUSION

For these reasons, the court DENIES the pending motions filed by Mr. Burke. (Docs. 43, 46, 47, 50, 51, 52.) The filings of these motions had stayed Mr. Burke's time to appeal. Judgment is now final with respect to the denial of this habeas petition as second or successive. The appeal

period is now running. Mr. Burke has 30 days to file a notice of appeal. If he does so, he must also obtain a certificate of appealability from this court or from a judge on the Court of Appeals.

Dated at Burlington, in the District of Vermont, this 25th day of March, 2022.



Geoffrey W. Crawford, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of June, two thousand twenty-three.

James Thomas Burke,

Petitioner - Appellant,

v.

Mike Touchette, Commish, VT DOC, State of Vermont,
David E. Tartter, Esq., Assist. Attorney General,

Respondents - Appellees.

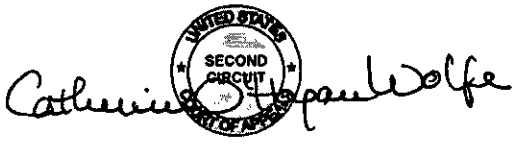
ORDER

Docket Nos: 22-896 (Lead)
22-1028 (Con)
22-2624 (Con)

Appellant, James Thomas Burke, 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



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