JA: 1d

2023 WL 4118631
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United States Court of Appeals, Second Circuit.

Frank R. STEVENSON, Petitioner-Appellant,

v.

Superintendent Michael CAPRA, Respondent-Appellee.

No. 21-2210

June 22, 2023

Appeal from a judgment of the United States District Court for the Eastern District of New York (Brodie, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment appealed from entered on August 23, 2021 is **AFFIRMED**.

Attorneys and Law Firms

FOR APPELLANT: Daniel M. Perez, Law Offices of Daniel M. Perez, Newton, NJ.

FOR APPELLEE: Jordan Cerruti, Assistant District Attorney, Kings County (Eric Gonzalez, District Attorney, Leonard Joblove, Assistant District Attorney, on the brief), Brooklyn, NY.

PRESENT: Rosemary S. Pooler, Susan L. Carney, Beth Robinson, Circuit Judges.

SUMMARY ORDER

***1** Petitioner-Appellant Frank Stevenson appeals from the denial of his petition for a writ of *habeas corpus*, brought under 28 U.S.C. § 2254. Stevenson was convicted in New York state court in 2013 of one count of rape, two counts of sexual abuse, and two counts of endangering a minor. Following the affirmance of his convictions on direct appeal, Stevenson filed a petition with the Eastern District of New York for *habeas* relief, arguing that the trial court, in giving an intoxication instruction to the jury over his objection, violated his asserted Sixth Amendment right to chart his own defense as well as his due process right to a fair trial. The district court denied his petition but granted a certificate of appealability. [1] For the reasons explained below, we agree with the district court that *habeas* relief is unwarranted. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

In 2011, the ten-year-old daughter of Stevenson's girlfriend (the "complainant") told her teacher Stevenson had sexually assaulted her on two occasions. Stevenson was arrested and charged with rape, sexual abuse, and endangering a minor. During Stevenson's trial, the complainant, her mother, her teacher, a doctor at the practice where the complainant had been examined following the alleged assault, and a child psychologist all testified on behalf of the prosecution. Over Stevenson's objection, the court also admitted into evidence a recording in which Stevenson made a phone call to his sister while he was held in pre-trial detention. In the recording, Stevenson stated he was "about to admit the truth to my family," and then said to his sister, "I was smoking some shit ... I think it made me do some stuff ... that wasn't right." App'x 89, 95, 126.

Stevenson's sole defense at trial was that he had not committed the alleged acts. But during the charge conference, the prosecutor moved for an intoxication instruction on the basis of Stevenson's statements during the phone call. Stevenson objected, arguing there was no evidence that he was intoxicated at the time of the alleged offenses, and that the recorded statement was not on its face tied to the complainant's allegations. The trial court disagreed, stating a "reasonable inference can be made" that the statement "related to the allegations." App'x 79.

The intoxication instruction was ultimately read to the jury four times: twice when the instructions were initially read (once each for the sexual abuse and endangering child welfare counts), and twice when the jury, during deliberations, asked to hear the specifics of the charges again. [2] The jury found Stevenson guilty of all counts. He was sentenced to an aggregate term of twenty-five years in prison followed by twenty-five years of post-release supervision.

***2** On direct appeal, Stevenson argued that the trial court's intoxication instruction, based solely on the recorded phone call, deprived him of his constitutional rights to chart his own defense and to a fair trial. He argued that the instruction "suggest[ed] that [he] was offering an intoxication defense" rather than arguing for his complete innocence, and therefore "significantly compounded the prejudice caused by admitting

the tape." App'x 147-48. He argued this was not harmless error because evidence of his guilt was not "overwhelming," reasoning that the prosecutors' case had rested on the complainant's testimony and credibility alone, given the complainant's "unremarkable" medical examination. App'x 148.

The Appellate Division concluded that the trial court erred in giving the intoxication instruction because, in its view, there was insufficient evidence of intoxication related to the crimes charged. But it nonetheless affirmed the conviction, concluding that the error was harmless based on "overwhelming evidence of the defendant's guilt" and "no significant probability that the error contributed to his convictions." *People v. Stevenson*, 11 N.Y.S.3d 646, 647 (2d Dep't 2015). Stevenson's application for leave to appeal to the New York Court of Appeals was denied. *People v. Stevenson*, 26 N.Y.3d 1092 (2015).

In 2017, Stevenson filed a pro se petition for writ of *habeas corpus* in federal court. His initial petition was stayed for a period, and in 2019, Stevenson filed the amended *habeas* petition at issue here. As relevant to this appeal, he argued that the intoxication instruction undermined his constitutional right to chart his own defense, and because this violation was structural error, it was unreasonable for the Appellate Division to apply a harmless error analysis. He further argued the Appellate Division failed to give sufficient weight to the injurious effects the intoxication charge had at his trial.

The district court denied Stevenson's petition, concluding that the Appellate Division reasonably ruled that the trial court's instruction was harmless error. The district court nonetheless granted a certificate of appealability as to the jury instruction claim, among others, viewing the claims as "debatable." *See* Sp. App'x 67.

On appeal, represented by counsel, Stevenson argues that the Appellate Division's holding that the intoxication instruction was harmless error was contrary to, or involved an unreasonable application of, clearly established federal law. He argues that the Supreme Court has recognized the Sixth Amendment protects a criminal defendant's right to make fundamental choices about their own defense, and the Fourteenth Amendment protects the right to a fair trial. Stevenson argues that the intoxication instruction rendered his trial fundamentally unfair and was therefore structural error. Alternatively, he contends that even under the harmless error framework, the Appellate Division's assessment was objectively unreasonable because the instruction denied Stevenson a protected autonomy right to make fundamental choices about his own defense. For the reasons stated below, we disagree.

We review a district court's denial of a petition for *habeas corpus* without deference. *Cornell v. Kirkpatrick*, 665 F.3d 369, 374 (2d Cir. 2011). [3]

> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter "adjudicated on the merits in State court" to show that the relevant state-court "decision" (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

***3** *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018) (quoting 28 U.S.C. § 2254(d)). This analysis "requires the federal habeas court to train its attention on the particular reasons —both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision." *Id.* at 1191-92. [4]

For law to be "clearly established" for purposes of *habeas* relief under AEDPA, it must have been "determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), rather than by the lower federal courts, *Williams v. Taylor*, 529 U.S. 362, 381 (2000). If a rule is "dictated by precedent existing at the time the defendant's conviction became final," it may provide a basis for *habeas* relief; however, if it "breaks new ground or imposes a new obligation on the States or the Federal Government," it falls outside the universe of clearly established federal law. *Id.*

Additionally, in evaluating whether a decision is contrary to or an unreasonable application of federal law, a state court must be granted "deference and latitude" inapplicable when a case is before a federal court on direct review. *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Accordingly, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. As long as "fairminded jurists could disagree" with the conclusion that the State court's decision conflicts with Supreme Court precedent, *habeas* relief is unavailable. *Id.*

Stevenson relies on the Supreme Court's recent decision in *McCoy v. Louisiana* to argue that the trial court's decision to give the intoxication instruction over his objection violated his Sixth Amendment right to autonomy. 138 S. Ct. 1500

(2018). In *McCoy*, the defendant was charged with three counts of first-degree murder. *Id.* at 1506. McCoy's lawyer, against McCoy's wishes, admitted to the jury that McCoy had committed the crimes, hoping this admission would allow McCoy to avoid a death sentence. *Id.* at 1506-07. The Court held this violated McCoy's Sixth Amendment autonomy right to decide the objective of his own defense, explaining:

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category.

Id. at 1508.

Assuming without deciding that *McCoy*, which post-dated the Appellate Division's decision on review, did not break new ground in holding the Sixth Amendment reserves to a criminal defendant an autonomy right to decide the objective of the defense,[5] we cannot conclude that the trial court's decision to give the challenged jury instruction violates the clearly established federal law *McCoy* embodies. Stevenson does not argue that he was not able to make his chosen argument to the jury, or that he and his lawyer parted ways on a key objective of the defense. Indeed, Stevenson's attorney repeatedly emphasized in his closing argument Stevenson's complete innocence defense.

*4 Stevenson argues instead that his defense's objective was undermined when *the trial judge*, over his objection, approved the intoxication instruction and read it to the jury four times in the course of reading (and later repeating) the complete jury instructions. We need not decide whether, in a context in which the AEDPA limitations did not apply, we would conclude that the Sixth Amendment right that was decisive in *McCoy* extends to a case like this. For purposes of this appeal, what matters is that we cannot conclude that the Sixth Amendment right, understood as clearly established, applies here.

The state court decisions Stevenson relies on in arguing otherwise hinge on violations of state law; they do not support his argument that the court's instruction in this case violates a clearly established federal, Sixth Amendment autonomy right. *See People v. DeGina*, 72 N.Y.2d 768, 776-78 (1988) (New York law); *State v. R.T.*, 205 N.J. 493, 511-12 (2011) (Long, *J.*, concurring) (New Jersey law). Accordingly, the Sixth Amendment autonomy right which Stevenson articulates is not a basis for *habeas* relief.

As to Stevenson's Fourteenth Amendment due process argument, we assume without deciding that the challenged jury instruction violated Stevenson's clearly established federal due process right at the time his state court conviction became final. We reject Stevenson's argument that the Appellate Division unreasonably applied clearly established law in concluding that the trial court's error was harmless. In particular, we conclude that the Appellate Division did not unreasonably apply clearly established law by applying a "harmless error" rather than a "structural error" analysis, and did not unreasonably determine the facts in light of the evidence presented in the State court proceeding in concluding the error was harmless.

The "defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017). The Supreme Court has recognized structural error where a defendant is denied the right to conduct his own defense without an attorney, the right to select his or her own attorney, or a judge fails to give a reasonable doubt instruction. *Id.* at 295-96. These errors are considered structural because their effect on the trial's fairness is hard to measure; they result in fundamental unfairness; or their violation endangers a right beyond simple error. *Id.*

While *McCoy* establishes that the violation of a defendant's Sixth Amendment autonomy right constitutes structural error, Stevenson identifies no caselaw supporting the proposition that in the Fourteenth Amendment context, giving an instruction that is accurate as to the law but unwarranted by the evidence can constitute structural error. *Cf. DeGina*, 72 N.Y.2d at 778 (applying harmless error analysis in holding trial court erred in giving jury instruction). Accordingly, the Appellate Division's use of the harmless error framework is not a basis for *habeas* relief.

And the Appellate Division's conclusion that the intoxication instruction was harmless error was not unreasonable. Given the testimony from the complainant, corroborating testimony from her mother and teacher, and Stevenson's own statements suggesting consciousness of guilt, we cannot conclude that no "fairminded jurist[ ]," *Harrington*, 562 U.S. at 101, could agree with the Appellate Division's determination that the evidence against Stevenson was "overwhelming," *Stevenson*, 11 N.Y.S.3d at 647. Moreover, we agree with the district court that Stevenson's possible intoxication at the time he committed the crimes was not a significant element of the State's case. *See* Sp. App'x 51. The evidence of Stevenson's potentially inculpatory statement that he "was smoking some shit" that "made [him] do some stuff ... that wasn't right" would have been before the jury with or without the instruction to which Stevenson objected. *See* App'x 68 (tape admitted over Stevenson's objection). In the face of this evidence, the marginal impact of the unwarranted instruction is minimal. For these reasons, and with deference to the Appellate Division's similar conclusion, *see Stevenson*, 11 N.Y.S.3d at 647, we conclude that any error was "harmless beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24 (1967). Therefore, the Fourteenth Amendment also provides no basis to grant Stevenson's *habeas* petition.

*5

* * *

Accordingly, the district court's judgment dismissing Stevenson's petition is **AFFIRMED**.

All Citations

Not Reported in Fed. Rptr., 2023 WL 4118631

Footnotes

1 The district court's certificate of appealability also extended to other issues, but on appeal, Stevenson advances only his challenge to the jury instruction.

2 With respect to the sexual abuse charge, for example, the instruction read:

> Under our law, intoxication is not, as such, a defense to a criminal charge but evidence of the defendant's intoxication may be considered whenever it is relevant to negative an element [of the crime charged]. Thus, in determining whether the defendant had the purpose of gratifying the sexual desire of either party, you may consider whether the defendant's mind was affected by intoxicants to such a degree that he was incapable of forming the purpose necessary for the commission of the crime of sexual abuse in the first degree.

E.g., App'x 100.

3 In quotations from caselaw, this summary order omits all internal quotation marks, alterations, footnotes, and citations, unless otherwise noted.

4 *Wilson* further provides that where, as here, the final State court decision on a defendant's case consists of a one-word order, we "look through" this unexplained decision "to the last related state-court decision that does provide a relevant rationale"—here, the New York Appellate Division decision. *See* 138 S. Ct. at 1192.

5 "Prior to *McCoy*, the Supreme Court had never explicitly used the term 'right to autonomy' in the criminal context. The Supreme Court has long recognized, however, that an accused has the right to make certain decisions, particularly with respect to self-representation." *United States v. Rosemond*, 958 F.3d 111, 120 n.3 (2d Cir. 2020).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK R. STEVENSON,

Petitioner,

v.

SUPERINTENDANT MICHAEL CAPRA,

Respondent.

MEMORANDUM & ORDER
17-CV-5251 (MKB)

MARGO K. BRODIE, United States District Judge:

Petitioner Frank R. Stevenson, proceeding *pro se* and currently incarcerated at Sing Sing Correctional Facility, brings the above-captioned habeas corpus petition pursuant to 28 U.S.C. § 2254, in which he alleges that he is being held in state custody in violation of his federal constitutional rights. (Am. Pet., Docket Entry No. 31.) Petitioner's claims arise from a judgment of conviction in New York State Supreme Court, Kings County (the "Trial Court"), for rape in the first degree, sexual abuse in the first degree, and endangering the welfare of a child. (*Id.* at 2.) Petitioner seeks a writ of habeas corpus on the following grounds: (1) the Trial Court erroneously admitted into evidence recorded telephone calls between Petitioner and his sister; (2) the Trial Court's intoxication charge was improper and was not harmless error; (3) the Trial Court improperly admitted an "inflammatory" and "prejudicial" graduation photograph of the victim; (4) ineffective assistance of counsel at trial for failure to (a) object to admission of the graduation photograph of the victim, (b) object to the prosecutor's summation remarks when the prosecutor allegedly mischaracterized evidence and vouched for the credibility of the victim, (c) consult or retain a medical expert, (d) convey that the prosecutor's plea offer was "still available" to Petitioner or to "advise Petitioner of the pro's and con's" of the offer, (e) pursue a

discovery/*Brady* violation when the State of New York (the "State") failed to disclose three of the nine pages of medical records of the victim (the "Medical Records"), (f) make a pretrial motion for discovery, and (g) impeach a witness; (5) prosecutorial misconduct for (a) "mischaracterizing evidence and vouching for the credibility of the complainant," (b) suppression of "discoverable material," and (c) allowing the victim's mother to testify to an "allegedly false date" regarding the voicemail Petitioner left for her following his arrest; and (6) actual innocence. (*Id.* 5–33.)

Petitioner moves to hold the petition in abeyance while he pursues a motion for a writ of error *coram nobis* in state court on the grounds that he was deprived of his rights under the Confrontation Clause and the right to effective assistance of counsel at both the trial and appellate levels. (Pet'r's Third Mot. to Stay ¶ 9 ("Third Stay Mot."), Docket Entry No. 38; Am. Pet.)

For the reasons set forth below, the Court denies Petitioner's motion to hold his petition in abeyance and denies the petition for a writ of habeas corpus.

I. Background

Petitioner's claims for relief arise from his conviction in the Trial Court on charges of rape, sexual abuse, and endangering the welfare of a child. (Am. Pet. 2.) After Petitioner's sentencing, Petitioner filed a direct appeal (the "Direct Appeal") and two motions to vacate his judgment of conviction pursuant to New York Criminal Procedure Law ("C.P.L.") § 440.10, (respectively, the "First 440 Motion" and the "Second 440 Motion"), asserting claims for, *inter alia*, erroneous admission of evidence such as phone calls and messages left by Petitioner and photographs of the victim, erroneous instructions provided to the jury, prosecutorial misconduct,

and ineffective assistance of counsel.[1] All of Petitioner's post-conviction relief efforts were denied, and Petitioner sought habeas review in this Court. (*See* First 440 Mot.; Second 440 Mot.) Prior to the instant motion to stay, Petitioner twice sought to hold his petition in abeyance to exhaust additional claims in state court and the Court denied both motions. (Mot. to Stay Pet. ("First Stay Mot."), Docket Entry No. 14; Mot. to Stay Pet. ("Second Stay Mot."), Docket Entry No. 22.) The Court provides a summary of pertinent facts below.[2]

a. Charges and trial

i. Charges and plea deal offer

Prosecutors allege that on a date between September 1, 2010, and October 10, 2010, and on January 27, 2011, Petitioner raped and sexually abused his live-in girlfriend's ten-year-old daughter. (Tr. of Trial Proceedings before the Hon. William M. Harrington ("Tr.") 142:14–15, annexed to Resp't's Resp. as Exs. 1–4, Docket Entry Nos. 13-1–13-4; Direct Appeal 11; Second Resp. ¶ 4, Docket Entry No. 33.)[3] Prosecutors charged Petitioner with one count of rape in the first degree, two counts of sexual abuse in the first degree, and two counts of endangering the welfare of a child. (Tr. 20:10–13.)

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[1] (*See* State Ct. Direct Appeal Docs. ("Direct Appeal"), annexed to Resp't's Resp. to Order to Show Cause ("Resp't's Resp.") as Ex. 6, Docket Entry No. 13-6; Pet'r's State Ct. Mot. to Vacate J. ("First 440 Mot."), annexed to Resp't's Resp. as Ex. 7, Docket Entry No. 13-7; Pet'r's Second 440 Mot. ("Second 440 Mot."), annexed to Resp't's Second Resp. to Order to Show Cause ("Second Resp.") as Ex. 1, Docket Entry No. 33-1.) Because the state court documents annexed to Respondent's submissions are not consecutively paginated, the Court refers to the page numbers assigned by the electronic filing system.

[2] Because several of Petitioner's claims are procedurally barred, adjudication of these claims does not depend on the facts adduced at trial. The Court therefore only provides a summary of pertinent facts related to Petitioner's claims that are not procedurally barred.

[3] Solely with respect to the trial transcript, which spans several docket entries, the Court refers to the original page numbers, not the electronic filing system numbers.

Before trial, Petitioner was offered a plea deal of a term of imprisonment of five years in full satisfaction of the indictment. (First 440 Mot. 78 (affirmation of trial counsel David Stephen Jacobs, Esq.).) Petitioner had received assurances from his prior retained counsel, who later withdrew from the case, that he would be "acquitted of the charges" because "there was no medical evidence of rape." (*Id.*) Petitioner's trial counsel David Stephen Jacobs ("Trial Counsel") stated that he "advised [Petitioner] that it was a beneficial offer and that he should accept it" because he would face a "far longer term of imprisonment" at trial. (*Id.*) Trial Counsel stated that Petitioner rejected the plea deal because he believed he would be acquitted at trial because there was no medical evidence of rape. (*Id.*)

ii. Trial testimony and admitted evidence

At trial before the Trial Court, the victim testified about the sexual abuse and rape, and Trial Counsel did not impeach her testimony. (Tr. 52:15–77:25.) The victim's mother testified against Petitioner, (Tr. 137:7–178:4), as well as the victim's schoolteacher, who testified that the victim told her that she was raped, (Tr. 132:1–137:5).

1. Medical records and expert testimony

At trial, the State admitted the Medical Records into evidence, which were records from examination of the victim at Brooklyn Hospital and the Brooklyn Child Advocacy Center where she was referred for a child sexual abuse evaluation following "a disclosure that she was sexually abused by her mother's boyfriend." (Tr. 244:22–246:6; Medical Records, annexed to Pet. as Ex. 1, at 17, Docket Entry No. 1.) On examination, the victim did not show any bruising or lacerations and the examining doctor stated that the "rest of the exam is unremarkable." (Medical Records 17.) The assessment portion of the Medical Records stated that "[a] normal

exam does not preclude sexual abuse" and that the "medical diagnosis is Child Sexual Abuse." (*Id.*) Petitioner did not object to admission of the Medical Records. (Tr. 245:2–6.)

The doctor who examined the victim and prepared the Medical Records was not available to testify on the day she was supposed to testify due to a family emergency. (Tr. 193:14–23.) A medical doctor and board-certified expert in "[g]eneral pediatrics in child abuse medicine" who worked at the same facility (the "Medical Expert") — the Brooklyn Child Advocacy Center — testified in place of the other doctor. (Tr. 193:20–23; 238:17–241:1, 244:6–244:18.) The Medical Expert did not personally examine the victim but reviewed the victim's Medical Records prior to testifying and testified that the child's medical examination was "normal." (Tr. 245:15–246:15, 248:4–255:13.) The Medical Expert explained that while there was no evidence of trauma, ninety-five percent of child sexual abuse cases involving girls have a "normal" examination. (Tr. 248:4–255:13, 266:6–267:9.) The Medical Expert explained why there may be a normal exam but a diagnosis of sexual abuse, (Tr. 250:20– 251:21), and stated that there were "no abnormalities documented" with respect to the victim, (Tr. 262:7).

2. Recorded call and voicemail messages

At trial, the State admitted two recordings. First, the State admitted a recording of a telephone call made by Petitioner to his sister three days after Petitioner's arrest (the "Recorded Call") in which he said he had smoked some "white stuff" that "made him do something that's not right." (Direct Appeal 11.) In the Recorded Call, Petitioner also stated that he would tell his lawyer, which the State argued connected the conversation to the charges. (*Id.*) Trial Counsel objected to the admission of the Recorded Call on the grounds that it was not relevant because the conversation "lacked reference to sexual acts, or to a time or place" and contained evidence of bad character. (*Id.* at 12.)

The Trial Court stated that while the Recorded Call was "not the most probative," it was "probative to some degree of consciousness of guilt." (*Id.*) The Trial Court decided to admit a portion of the recording, including the part before Petitioner's sister came to the phone, beginning when Petitioner said that he would tell his lawyer later and ending after the reference to the "white shit." (*Id.*) The Trial Court "also stated that it would instruct the jury that it should not draw a negative inference from the possible reference to use of a controlled substance."[4] (*Id.*) Trial Counsel objected again to admission of both the entire recording and the part before Petitioner's sister picked up the phone. (*Id.*)

Second, the State admitted portions of voicemail messages left by Petitioner for the victim's mother (the "Voicemail Messages") in which Petitioner was sobbing and apologetic, stating that the victim had taken things the "wrong way," "none of this is true," and "nothing ever happened." (Direct Appeal 15, 76; *see also* Tr. 155:14–158:16, 176:21–177:16.)

3. Victim's photograph

The State also admitted a photograph of the victim at ten years old — her age when the alleged rape occurred, (Tr. 158:20–160:01), depicting the victim graduating from the fifth grade, (Tr. 160:15–17). The photograph was admitted through the victim's mother's testimony "for identification," (Tr. 159:1–160:01), and later displayed on two PowerPoint slides during the prosecutor's summation remarks, (Tr. 198:4–7; Direct Appeal 17, 39, 111). Trial Counsel did not object to admission of the photograph. (Tr. 159:11–12.)

[4] Although the Trial Court instructed the jury that they could not draw an adverse inference of Petitioner's guilt because the call was made from jail, (*see* Tr. 340:5–15, 391:23–392:7), this instruction prohibiting an adverse inference on the basis of possible reference to use of a controlled substance was never given to the jury, (*see* Tr. 343:3–370:12).

4. Summation remarks

During summation, the prosecutor used the PowerPoint presentation and, both in the slides and verbally, argued that Petitioner had "corroborated" the victim's testimony in the Recorded Call by saying he had done something that "wasn't right." (Direct Appeal 10.) The prosecutor also stated that the medical examination along with other evidence corroborated the victim's story. (*Id.*) The prosecutor stated several times that "there is no reason to doubt [the victim]," questioned "why would she make this up," and stated that she had "no reason to lie." (*Id.*; Tr. 318–34.) The prosecutor also noted on several occasions that the victim's testimony was "corroborated" by the evidence. (*See, e.g.*, Tr. 318:14–18, 341:13–14.) On one such instance, the prosecutor stated:

> And you will see that because [the victim's] testimony is corroborated. It is corroborated. It is corroborated by the details that she was able to give you. It is corroborated by the fact that she has no reason to lie.
>
> Ladies and gentlemen, the truth is small and happens, it is what it is, but nobody lies unless they have a reason, and she has none.
>
> Her testimony is corroborated by her demeanor on the stand and her testimony is corroborated by that of her mother, the testimony of her teacher, . . . and her medical exam. Yes, her medical exam corroborates her testimony. And, ladies and gentlemen, most importantly, defense counsel called it exactly, I'm going to say it, it's corroborated by this defendant's own words, what he said.
>
> So let's look at that. Let's look at how the testimony is corroborated.

(Tr. 318:14–319:6.) The words "no reason to lie" also surrounded the victim's photograph displayed on the PowerPoint. (Direct Appeal 44.)

iii. Jury instructions and sentencing

Prior to both parties' summations, the State requested an intoxication instruction due to Petitioner's statement that he was "smoking some shit." (Tr. 274:21–23.) Trial Counsel objected, stating that he did not believe an intoxication instruction was relevant because "[t]here is no other indication of intoxication at the time alleged in any of the counts in the indictment." (Tr. 275:2–7.) The Trial Court stated that the intoxication charge was appropriate because "a reasonable inference can be made from not only the contents of the statement but the circumstances in which it was made[] that it [was] related to the allegations in this case." (Tr. 275:8–15.) After reviewing the verdict sheet, the State clarified with the Trial Court whether the intoxication charge would be given, to which the Trial Court stated that the charge "would only apply to endangering the welfare of a child because . . . there is no intent element." (Tr. 291:1–10.) The State and the Trial Court debated to which charges the intoxication instruction would apply. (Tr. 291:10–294:8.) The Trial Court ultimately decided that intoxication would not apply to the rape charge because it is a strict liability offense and decided to inform the jury that intoxication is not a defense to a criminal charge but "may be considered whenever it is relevant to negat[e] an element of the crime charged." (Tr. 294:12–21.) With respect to the crime of endangering the welfare of a child, the Trial Court decided to instruct the jury that "in determining whether the defendant had the knowledge necessary to commit the crime," the jury "may consider whether the defendant's mind was affected by intoxicants to such a degree that he was incapable of forming the knowledge necessary for the commission of that crime." (Tr. 294:17–295:2.) With respect to sexual abuse, the Trial Court instructed the jury that "[i]n determining whether the defendant had the purpose to gratify the sexual desire of himself or the other party," the jury may "consider whether the defendant's mind was affected by intoxicants to

such a degree that he was incapable of forming the purpose necessary for the commission of that crime." (Tr. 295:3–10.)

With respect to the count of sexual abuse in the first degree, the Trial Court charged the jury that:

> Under our law, intoxication is not, as such, a defense to a criminal charge but evidence of the defendant's intoxication may be considered whenever it is relevant to negat[e] an element of the crime charged.
>
> Thus, in determining whether the defendant had the purpose of gratifying the sexual desire of either party, you may consider whether the defendant's mind was affected by intoxicants to such a degree that he was incapable of forming the purpose necessary for the commission of that crime.

(Tr. 359:1–11.) With respect to the count of endangering the welfare of a child, the Trial Court charged the jury that:

> A person knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child when that person is aware that he or she is acting in such a manner.
>
> . . . [E]vidence of the defendant's intoxication may be considered whenever it is relevant to negat[e] an element of the crime charged.
>
> Thus, in determining whether the defendant had the knowledge necessary to commit the crime of endangering the welfare of a child, you may consider whether the defendant's mind was affected by intoxicants to such a degree that he was incapable of forming the knowledge necessary for the commission of that crime.
>
> Actual harm to the child need not result.

(Tr. 360:15–361:4.)

On May 8, 2013, a jury convicted Petitioner of rape in the first degree, two counts of sexual abuse in the first degree, and two counts of endangering the welfare of a child. (Tr. 402:10–406:16.) On May 28, 2013, the Trial Court sentenced Petitioner to a term of twenty

years' imprisonment on the rape conviction, a concurrent sentence of five years on one count of sexual abuse, a consecutive sentence of five years on the other count of sexual abuse, and concurrent jail terms of one year for both counts of endangering the welfare of a child, all to be followed by a total of twenty-five years of post-release supervision. (Tr. of Sentencing Hr'g before the Hon. Martin Murphy ("S.") 10:4–11:6, annexed to Resp't's Resp. as Ex. 5, Docket Entry No. 13-5.)

b. Direct Appeal

Petitioner appealed his convictions to the Supreme Court of New York State, Appellate Division (the "Appellate Division"). (Direct Appeal 6.) On appeal, he argued that (1) various evidentiary errors including admission of the Recorded Call and the Voicemail Messages as well as the Trial Court's instruction to the jury on intoxication over his objection deprived him of a fair trial; (2) the prosecutor's conduct deprived him of a fair trial because the prosecutor showed a photograph of the victim at the age she was raped, and because the prosecutor made improper summation marks that vouched for the credibility of the victim and mischaracterized the medical testimony; (3) ineffective assistance of Trial Counsel because counsel did not object to the prosecutor's remarks that Petitioner contested on appeal; and (4) that the sentence imposed was excessive because it was substantially greater than the one offered in a plea negotiation before trial and because Petitioner did not have any prior criminal convictions in the past fifteen years since his prior youthful offender adjudication for a gang rape. (*Id.* at 25–53.)

On June 15, 2015, the Appellate Division affirmed Petitioner's conviction. *People v. Stevenson*, 11 N.Y.S.3d 646, 647 (App. Div. 2015). The Appellate Division held that the Trial Court properly admitted into evidence the Recorded Call "as evidence of consciousness of guilt[] and [that] its probative value outweighed any potential for prejudice." *Id.* The Appellate

Division found that while the Trial Court erred in "charg[ing] the jury, over the [Petitioner's] objection, regarding intoxication" because there was "insufficient evidence of intoxication in the record," this error was "harmless, as there was overwhelming evidence of the [Petitioner's] guilt and . . . no significant probability that the error contributed to his convictions." *Id.* With respect to Petitioner's arguments that the Trial Court erred by allowing a photograph of the victim to be admitted into evidence, that the prosecutor improperly displayed slides including the photograph of the victim during summation, and that the prosecutor made improper remarks during summation, the Appellate Division found that the contentions were "unpreserved for appellate review." *Id.* at 648. The Appellate Division held that Trial Counsel's failure to object to the challenged summation remarks did not constitute ineffective assistance of counsel because "[t]he record reveals that defense counsel provided meaningful representation." *Id.* Lastly, the Appellate Division held that Petitioner's claim of an excessive sentence was meritless because "the fact that the sentence imposed after trial was greater than the sentence offered during plea negotiations does not, standing alone, establish that he was punished for asserting his right to proceed to trial," and moreover, Petitioner's sentence was not excessive. *Id.*

Petitioner sought leave to appeal to the New York Court of Appeals, which was denied on December 28, 2015. *See People v. Stevenson*, 26 N.Y.3d 1092 (2015).

c. First 440 Motion

On September 30, 2016, Petitioner filed a state motion to vacate his judgment of conviction, pursuant to C.P.L. § 440.10. (First 440 Mot. 3.) Petitioner claimed that he was denied effective assistance of counsel at trial because Trial Counsel failed to consult with a medical expert before trial and call a medical expert to testify at trial. (*Id.* at 5.)

The prosecution opposed Petitioner's motion and provided an affidavit from Trial Counsel, who stated that he made a strategic decision not to consult a medical expert before trial or call a medical expert to testify because the facts of the case did not warrant consulting with an expert. (*Id.* at 78–79.) Trial Counsel stated that he was "familiar with the medical opinions about the different possible interpretations of the significance of normal medical findings in a child who has claimed she was raped" and did not believe there was "anything to be gained by consulting with a medical expert who would only repeat what is a well-established fact." (*Id.*.)

On April 7, 2017, the court denied Petitioner's First 440 Motion, finding that Petitioner was not deprived of effective assistance of counsel at trial because counsel had "reasonable strategic reasons for not consulting with, hiring, or calling a medical expert." (*Id.* at 116–26.) The court stated that "the jury was well aware that [the medical expert's] diagnosis of sexual assault was exclusively based upon the victim's statement and the assumption that it was true, and not based upon any physical evidence." (*Id.* at 123.) The court also found that unlike the Second Circuit cases cited by Petitioner to support his argument that Trial Counsel should have called a medical expert, "there were no abnormal findings or medical findings of physical injury to challenge and no need [to] investigate alternative explanations for any physical injuries." (*Id.* at 124.) Further, the court found that "[t]o the extent [Petitioner's] reply papers can be interpreted as raising an ineffective assistance claim" based on Trial Counsel's failure to advise Petitioner on the consequences of accepting the plea deal, that claim is similarly meritless because Petitioner's "motion papers do not contain any sworn allegation of fact on this issue." (*Id.* at 125.) To the contrary, Petitioner's counsel stated in a sworn statement that he advised Petitioner of the beneficial offer before him. (*Id.*)

On May 5, 2017, Petitioner sought to reargue the First 440 Motion, (*see id.* at 128), but the court denied Petitioner's request, (*id.* at 156). Petitioner sought leave to appeal the denial of the First 440 Motion, but on August 10, 2017, the Appellate Division denied his application. (Aff. in Opp'n to Pet. ("Pet. Opp'n") ¶ 21, Docket Entry No. 11.)

d. Second 440 Motion

On December 14, 2017, Petitioner moved, for a second time, to vacate his judgment of conviction pursuant to C.P.L. § 440. (Second 440 Mot. 2.) Petitioner claimed that (1) Trial Counsel was ineffective for failing to (a) make a pre-trial discovery motion or raise a *Brady* challenge concerning three undisclosed pages of the victim's Medical Records, (b) impeach the victim's mother when she gave an allegedly incorrect date for the voicemail Petitioner left her, and (c) object to an alleged falsehood in the prosecutor's sentencing letter; (2) the prosecutor committed misconduct by (a) committing *Brady* and discovery violations by not turning over three pages of the victim's Medical Records, (b) allowing the victim's mother to falsely testify to an incorrect date for the voicemail Petitioner left her, and (c) providing false evidence at sentencing; (4) post-conviction counsel was ineffective for not obtaining the undisclosed pages of victim's Medical Records and for failing to raise a claim relating to their absence in the First 440 Motion; and (5) Petitioner was actually innocent. (*Id.* at 8–30, 91–92.)

On January 2, 2019, the court denied the motion both on procedural grounds and on the merits. (*Id.* at 102–09.) The court found that "all of [Petitioner's] claims based on the [M]edical [R]ecords and the voicemail" were procedurally barred because Petitioner failed to raise those on-the-record claims on direct appeal, and that Petitioner's ineffective assistance of counsel and actual innocence claims were procedurally barred pursuant to section 440's mandatory procedural bar because Petitioner failed to raise those claims in his Direct Appeal and pursuant

to section 440's permissive procedural bar because Petitioner failed to raise the claims in the First 440 Motion. (*Id.* at 104.) The court found that Petitioner's motion also failed on the merits because the "alleged missing [M]edical [R]ecords and incorrect date of the voicemail do not constitute *Brady* material" and because "[c]ounsel provided effective assistance." (*Id.* at 105–06.) With respect to Petitioner's claim of actual innocence, the court found that this claim was procedurally barred because Petitioner failed to bring the claim in the First 440 Motion and failed on the merits because Petitioner did not meet his burden to show actual innocence and did not "reference any additional material evidence in his papers, let alone attach sworn affidavits claiming new evidence." (*Id.* at 106–07.) Lastly, although Petitioner moved to withdraw the claim in his reply papers, the court found that "[t]he allegation that the prosecutor provided false information in a sentencing letter does not require vacating the conviction or sentence" because the information did not affect the trial verdict and nevertheless, the State "did not allege that [Petitioner] was ever convicted or charged with harassment" with respect to his youthful offender adjudication. (*Id.* at 107.)

Petitioner sought leave to appeal the denial of his Second 440 Motion, (*id.* at 111), which the Appellate Division denied on April 8, 2019, (*id.* at 154).

e. Writ of error *coram nobis*

On October 14, 2021, Petitioner filed a writ of error *coram nobis* petition in the Appellate Division, arguing that (1) he was deprived of his Sixth Amendment right to confrontation because the Medical Records were introduced into evidence by the testimony of the Medical Expert, instead of the doctor who examined the victim, and (2) he was deprived of effective assistance of trial and appellate counsel for their failure to raise this alleged Confrontation Clause

violation at trial and on appeal.[5] (Third Stay Mot. 15–16 (*coram nobis* petition).) On February 17, 2021, the Appellate Division denied Petitioner's application, stating that he "failed to establish that he was denied the effective assistance of appellate counsel," and on May 16, 2021, the Court of Appeals denied leave to appeal. *See People v. Stevenson*, 138 N.Y.S.3d 395 (App. Div. 2021), *leave to appeal denied*, 37 N.Y.3d 960 (2021).

f. Federal habeas petition

On September 18, 2017, after Petitioner filed his First 440 Motion, Petitioner filed a timely habeas petition with the Court, which included five claims that were exhausted in state court and three claims that Petitioner conceded were unexhausted. (Pet., Docket Entry No. 1.) With respect to his exhausted claims, Petitioner argued that (1) the Trial Court erred in admitting the Recorded Call and the Voicemail Messages, (2) the Trial Court's intoxication charge was improper, (3) the Trial Court improperly admitted the photograph of the victim and the prosecutor improperly used that photograph during a PowerPoint presentation during summation, (4) the prosecutor committed misconduct in summation by mischaracterizing evidence and vouching for the victim's credibility, and (5) Petitioner received ineffective assistance of counsel

[5] Petitioner states that he sought a writ of error *coram nobis* to exhaust his Confrontation Clause claims and his ineffective assistance of trial and appellate counsel claims. (Third Stay Mot. 3.) The Court notes that a writ of error *coram nobis* "serve[s] to exhaust only [an] ineffective assistance of appellate counsel claim." *Jamison v. Auburn Corr. Facility*, No. 10-CV-3440, 2015 WL 8770079, at *18 (E.D.N.Y. Dec. 14, 2015) (finding the petitioner's *Batson* claim procedurally barred even though the petitioner "argued in his *coram nobis* papers that his appellate counsel was ineffective for failing to raise the *Batson* claim"); *see also Turner v. Artuz*, 262 F.3d 118, 123 (2d Cir. 2001) (per curiam) (finding claims of error at the trial level unexhausted when presented in a writ of error *coram nobis* because "the writ of error *coram nobis* lies in [the state appellate court] only to vacate an order determining an appeal on the ground that the defendant was deprived of the effective assistance of appellate counsel" (alteration in original) (quoting *People v. Gordon*, 584 N.Y.S.2d 318, 318 (App. Div. 1992))); *Daye v. Att'y Gen. of N.Y.*, 696 F.2d 186, 191 (2d Cir. 1982) ("The chief purposes of the exhaustion doctrine would be frustrated if the federal habeas court were to rule on a claim whose fundamental legal basis was substantially different from that asserted in state court.").

because Trial Counsel failed to (a) object to the photo of the victim or to the prosecutor's alleged improper summation remarks, (b) retain or consult with a medical expert, and (c) convey the prosecutor's plea offer to him. (*Id.* ¶¶ 12–18.) With respect to his unexhausted claims, Petitioner argued that the prosecution's failure to turn over the three purportedly withheld pages of Medical Records in advance of his trial gives rise to (1) a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), (2) a Sixth Amendment claim for ineffective assistance of trial counsel for failure to raise this issue, and (3) a Sixth Amendment claim for ineffective assistance of appellate counsel due to his post-conviction counsel's failure to raise the first and second claims during his post-conviction proceedings in state court. (Pet. ¶¶ 19–21.)

On December 18, 2017, Petitioner filed a motion to stay his petition to allow him to exhaust his unexhausted claims through the Second 440 Motion. (First Stay Mot.) By Memorandum and Order dated January 26, 2018 (the "January 2018 Decision"), the Court denied Petitioner's motion to hold his habeas petition in abeyance without prejudice and allowed Petitioner to amend the petition by removing the unexhausted claims. (Jan. 2018 Decision, Docket Entry No. 17.) By Order dated February 8, 2018, the Court granted Petitioner's request, (*see* Pet'r's Letter dated Feb. 1, 2018, Docket Entry No. 18), to amend his petition to remove the following claims: (1) *Brady* claim, (2) ineffective assistance of trial counsel claim, and (3) ineffective assistance of post-conviction counsel claim, (Order dated Feb. 8, 2018).

In April and June of 2018, Petitioner filed three motions: a motion for discovery, a motion to amend his petition to add back the claims removed in February of 2018, and a motion to stay his case. (Mot. for Discovery, Docket Entry No. 20; Mot. to Amend Pet., Docket Entry No. 21; Second Stay Mot.) On November 28, 2018, the Court referred the motions to Magistrate Judge Lois Bloom. (Order Referring Mots. dated Nov. 28, 2018.) By Order dated November 30,

2018, Judge Bloom denied Petitioner's motions for a stay and to amend for the same reasons set forth in the January 2018 Decision. (Order dated Nov. 30, 2018, Docket Entry No. 23.) Judge Bloom granted Petitioner's motion for discovery, which sought "missing pages of the child complainant disclosures that were made to the examining physician," stating that Petitioner is "entitled to the three missing pages" because "only six of the nine pages of the Brooklyn Hospital records were produced to him before trial." (*Id.* at 3.) Judge Bloom also ordered that Respondent produce a sworn declaration regarding the documents' authenticity.[6] (*Id.*)

On May 6, 2019, Petitioner again moved to amend the petition to add claims exhausted in state court, (Second Mot. to Amend Pet., Docket Entry No. 29), and the Court granted his request, (Order dated Oct. 25, 2019). On November 14, 2020, Petitioner filed an amended petition for a writ of habeas corpus, adding the following claims: (1) ineffective assistance of counsel because Trial Counsel failed to (a) convey that a plea offer was "still available" or to advise Petitioner of how to proceed with the plea, (b) pursue a discovery or *Brady* violation when prosecutors failed to disclose three of the nine pages of Medical Records of the victim, (c) make a pre-trial motion for discovery, and (d) impeach a witness; (2) deprivation of due process because the prosecution (a) suppressed discoverable material, and (b) solicited and allowed false testimony by a witness; and (3) actual innocence. (Am. Pet. 18–33.)

On October 22, 2020, Petitioner moved to have the Court hold his petition in abeyance while he pursued a motion for a writ of error *coram nobis* in state court on the grounds that he was deprived of his rights under the Confrontation Clause and the right to effective assistance of

[6] In January of 2019, Petitioner again moved for discovery, requesting that Respondent "include the statements made by complainant to the examining physician." (Mot. to Appoint Counsel and for Discovery, Docket Entry No. 27.) The Court denied Petitioner's request. (Order dated Mar. 4, 2019, Docket Entry No 28.)

counsel at both the trial and appellate levels. (Third Stay Mot.) Respondent opposed Petitioner's Third Stay Motion because Petitioner had "not shown 'good cause' for failing to exhaust his new claims in time for him to include them in his amended petition" and because, even if a stay were granted, "[P]etitioner would be unable to amend his federal petition to obtain review of his unexhausted claims . . . due to the expiration of the federal *habeas* limitations period." (Resp't's Opp'n to Third Stay Mot. ("Third Stay Mot. Opp'n") 3–4, Docket Entry No. 39.)

On June 8, 2021, after the Court of Appeals denied Petitioner leave to appeal the Appellate Division's denial of his *coram nobis* petition and while Petitioner's Third Stay Motion was pending before the Court, Petitioner filed a third motion to amend his habeas petition, seeking to amend his petition to "include claims now exhausted through the [s]tate courts." (Third Mot. to Amend 1, Docket Entry No. 42.) Petitioner seeks to add claims that he was deprived of his rights under the Confrontation Clause because the Medical Records were admitted and the Medical Expert who testified was not the doctor who prepared the Medical Records or examined the victim. (*Id.* at 1.) Petitioner also seeks to add ineffective assistance of counsel claims at both the trial and appellate levels because his attorneys failed to object to admission of the Medical Records or raise that issue on appeal. (*Id.* at 1–2.) Respondent opposes Petitioner's motion, arguing that (1) only Petitioner's ineffective assistance of appellate counsel claim is now exhausted by his *coram nobis* petition, and (2) Petitioner's new claims are time-barred and do not related back to the original petition. (Resp't's Opp'n to Third Mot. to Amend ("Third Mot. to Amend Opp'n"), Docket Entry No. 43.)

II. Discussion

a. Standards of review

i. Motion to amend

A motion to amend a habeas petition is analyzed under the standards set forth in Rule 15(a) of the Federal Rules of Civil Procedure. *See Ching v. United States*, 298 F.3d 174, 180 (2d Cir. 2002); *Jackson v. Capra*, No. 19-CV-1542, 2020 WL 3790342, at *2 (N.D.N.Y. July 7, 2020) ("Motions to amend habeas petitions are governed by Rule 15 of the Federal Rules of Civil Procedure."). "Rule 15 provides that 'leave shall be freely given when justice so requires.'" *Ching*, 298 F.3d at 180 (quoting Fed. R. Civ. P. 15(a)). A court, however, may deny leave "where necessary to thwart tactics that are dilatory, unfairly prejudicial or otherwise abusive." *Id.* A district court may also deny leave when "amendment would be futile." *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (per curiam); *Tineo-Santos v. Piccolo*, No. 19-CV-5038, 2021 WL 266561, at *2 (S.D.N.Y. Jan. 27, 2021) (denying leave to amend a habeas petition and stating that "leave to amend may be denied 'where the amendment would be futile'" (quoting *Cuevas v. United States*, No. 10-CV-5959, 2013 WL 655082 (S.D.N.Y. Feb. 22, 2013))); *Rodriguez v. United States*, No. 14-CV-6134, 2020 WL 7861383, at *8 (E.D.N.Y. Dec. 31, 2020) ("While 'leave to amend generally should be freely granted, it may be denied where there is good reason to do so, such as undue delay, bad faith, dilatory tactics, undue prejudice to the party to be served with the proposed pleading, or futility.'" (quoting *Edwards v. Fischer*, No. 01-CV-9397, 2002 WL 31833237, at *1 (S.D.N.Y. Dec. 16, 2002))).

ii. Habeas petition

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for a writ of habeas corpus by a person in custody pursuant to a state court judgment may only be brought on the grounds that his or her custody is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A petitioner is required to show that the state court decision, having been adjudicated on the merits, is either "contrary to, or involved an unreasonable application of, clearly established Federal law" or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(1)–(2); *see also Shoop v. Hill*, 586 U.S. ---, ---, 139 S. Ct. 504, 506 (Jan. 7, 2019) (per curiam) ("[H]abeas relief may be granted only if the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' Supreme Court precedent that was 'clearly established' at the time of the adjudication." (quoting *White v. Woodall*, 572 U.S. 415, 419–20 (2014))); *Kernan v. Hinojosa*, 578 U.S. 941, 941, (2016) (per curiam); *Woods v. Donald*, 575 U.S. 312, 313 (2015) (per curiam); *Johnson v. Williams*, 568 U.S. 289, 292 (2013). "An 'adjudication on the merits' is one that '(1) disposes of the claim on the merits, and (2) reduces its disposition to judgment.'" *Bell v. Miller*, 500 F.3d 149, 155 (2d Cir. 2007) (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001)); *see also Harrington v. Richter*, 562 U.S. 86, 98 (2011). Under the section 2254(d) standards, a state court's decision must stand as long as "'fairminded jurists could disagree' on the correctness of the . . . decision." *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

For the purposes of federal habeas review, "clearly established law" is defined as "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the

relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Glebe v. Frost*, 574 U.S. 21, 24 (2014) (per curiam) ("As we have repeatedly emphasized, however, circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" (quoting 28 U.S.C. § 2254(d)(1))); *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (per curiam) ("The Sixth Circuit also erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the [state] [c]ourt's decision."). A state court decision is "contrary to" or an "unreasonable application of" clearly established law if the decision (1) is contrary to Supreme Court precedent on a question of law, (2) arrives at a conclusion different than that reached by the Supreme Court on "materially indistinguishable" facts, or (3) identifies the correct governing legal rule but unreasonably applies it to the facts of the petitioner's case. *See Williams*, 529 U.S. at 412–13. In order to establish that a state court decision is an unreasonable application of federal law, the state court decision must be "more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). The decision must be "objectively unreasonable." *Id.*

A court may also grant habeas relief if the state court adjudication "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)(2). "[S]tate-court factual determination[s] [are not] unreasonable 'merely because [a federal post-conviction court] would have reached a different conclusion in the first instance.'" *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Rather, factual determinations made by the state court are "presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Even if "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on

habeas review that does not suffice to'" overturn a state court factual determination. *Wood*, 558 U.S. at 301 (alteration in original) (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)). A court may overturn a state court's factual determination only if the record cannot "plausibly be viewed" as consistent with the state court's fact-finding or if "a reasonable factfinder must conclude" that the state court's decision was inconsistent with the record evidence. *Rice*, 546 U.S. at 340–41.

b. Leave to amend

Respondent argues that the Court should deny Petitioner's application to amend his federal habeas petition because Petitioner's one-year period for filing a timely habeas petition commenced on March 27, 2016, was tolled pursuant to 28 U.S.C. 2244(d)(1)(a) while Petitioner pursued his collateral motion in state court from September 30, 2016, until August 10, 2017, and expired six months later. (Third Stay Mot. Opp'n 4.) Because Petitioner filed the petition on September 18, 2017, Respondent contends that the statute of limitations period "ended less than three months" later and argues that Petitioner may "only amend his petition to add additional claims if the new claims relate-back to the claims that [P]etitioner already raised in the *habeas* petition." (*Id.*) In addition, Respondent asserts that the claims do not relate back because the new claims "rest on different facts from the claims that he has already raised in his petition." (*Id.* at 5; Third Mot. to Amend Opp'n 5.)

In support of the argument that Petitioner's claims do not relate back, Respondent argues that Petitioner's three new claims "differ in time" because the Confrontation Clause-related claims "concern the admission of evidence at trial" whereas the *Brady* claims concern "the prosecutor's conduct prior to trial," (Third Mot. to Amend Opp'n 6), and differ in type because the new claims "concern whether the testimony of the [state's] expert witness regarding the

[M]edical [R]ecords of the child victim's examination violated [P]etitioner's right to confrontation" and the other claims concern whether discovery was properly withheld, (Third Stay Mot. Opp'n 5; Third Mot. to Amend Opp'n 6). In addition, Respondent argues that Petitioner's ineffective assistance of trial counsel claim based on Trial Counsel's failure to raise the Confrontation Clause issue does not relate back to the previous ineffective assistance of counsel claims which concerned whether his attorney should have consulted a medical expert, cross-examined the State's Medical Expert, raised the alleged *Brady* violation, and impeached the victim's mother regarding the Voicemail Messages, not whether his right to confrontation was violated by "admission of testimony from the [State's] medical expert about the child's [M]edical [R]ecords even though the expert had not examined the child." (Third Stay Mot. Opp'n 5; Third Mot. to Amend Opp'n 6–7.) Respondent also argues that the new ineffective assistance of appellate counsel claim does not relate back to the petition because "none of those claims concerned appellate counsel's performance." (Third Mot. to Amend Opp'n 7.)

Petitioner argues that his claims relate back to the original timely filed petition because the Confrontation Clause claim "revolves around the medical report" which is a "feature" of Petitioner's ineffective assistance of trial counsel claims, (Third Stay Mot. 3–4), and because the State's Medical Expert's testimony was part of the same transaction and occurrence involving the "admission of the medical report, the surrogate testimony of the [p]eople's substitute [M]edical [E]xpert, and his claims of prosecutorial misconduct," (Third Stay Mot. Reply 1–2; *see also* Third Mot. to Amend 2).[7] In addition, Petitioner contends that not including his

[7] Petitioner argues that he raised the Confrontation Clause claim in his amended petition and that the relation-back doctrine is therefore inapplicable. (Pet'r's Reply in Supp. of Third Stay Mot. ("Third Stay Mot. Reply") 1, Docket Entry No. 41 (citing Am. Pet. 21); Third Mot. to Amend 1–2.) Respondent argues that Petitioner failed to raise the Confrontation Clause claim

ineffective assistance of trial counsel claim would be "unjust" as ineffective assistance of counsel claims must be considered in the aggregate. (Third Stay Mot. 4.)

The Court first addresses the timeliness of the new claims, next addresses whether the new claims relate back to Petitioner's timely filed original petition, and then addresses whether amendment of the petition to include the claims would be futile.

i. Petitioner's additional claims are untimely

With the passage of AEDPA, Congress set a one-year statute of limitations within which a person in custody pursuant to a state court conviction may file a petition for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The one-year period runs from the date on which the latest of four events occurs:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable

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within his amended petition because Petitioner only raised the Medical Records to argue a *Brady* violation for the State's "fail[ure] to disclose three of the nine pages." (Third Mot. to Amend Opp'n 5–6.) While the Court recognizes that it must liberally construe Petitioner's filings to "raise the strongest arguments that they suggest," *see Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 472 (2d Cir. 2006) (per curiam) (quoting *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir. 2006)), to the extent Petitioner did raise the Confrontation Clause claim in his amended petition, Petitioner was not permitted to do so because he was only granted leave to amend his petition to include the claims exhausted in the Second 440 Motion, (*see* Order dated Oct. 25, 2019; Second Mot. to Amend Pet. (requesting leave to amend the petition to include claims exhausted in the Second 440 Motion)), and the Confrontation Clause claim was not raised in the Second 440 Motion, (*see* Second 440 Mot. 8–30, 91–92). Accordingly, the Court does not construe the amended petition to include the Confrontation Clause claim and analyzes its timeliness with the other claims Petitioner seeks to add.

> to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)–(D); *see also Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (interpreting section 2244 to apply "to the general run of habeas cases . . . when those cases had been filed after the date of the Act"); *Francis v. Comm'r of Corr.*, 827 F. App'x 129, 130 (2d Cir. 2020) ("[T]he statute of limitations applicable to habeas petitions is one year from 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.'" (quoting 28 U.S.C. § 2254(d)(1)(A))); *Favourite v. Colvin*, 758 F. App'x 68, 69 (2d Cir. 2018) ("The [AEDPA] imposes a one-year statute of limitations for filing a habeas corpus petition, which begins to run following . . . 'the date on which the judgment became final.'" (quoting 28 U.S.C. § 2244(d)(1)(A))). A judgment of conviction is "final" under 28 U.S.C. § 2244(d)(1)(A) when a defendant's direct appeal in the respective state's highest court is complete and either proceedings before the United States Supreme Court are complete, if the petitioner chooses to file for a writ of certiorari, or the time expires to seek certiorari before the United States Supreme Court. *McKinney v. Artuz*, 326 F.3d 87, 96 (2d Cir. 2003); *see also Williams v. Artuz*, 237 F.3d 147, 150–51 (2d Cir. 2001) (holding that a petitioner's judgment of conviction becomes final ninety days from the date the New York Court of Appeals denies leave to appeal); *Smith v. McIntosh*, No. 20-CV-4535, 2021 WL 123360, at *2 (E.D.N.Y. Jan. 13, 2021) (same).

In calculating the one-year limitations period, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted." 28 U.S.C. § 2244(d)(2). However, filing a post-conviction motion does not re-start the one-year statute of limitations period anew. Rather,

the tolling provision under section 2244(d)(2) merely excludes the amount of time a post-conviction motion is under submission from the calculation of the one-year statute of limitations. *Saunders v. Senkowski*, 587 F.3d 543, 548 (2d Cir. 2009) (per curiam) (noting that a section 440.10 motion is "pending" beginning on the day it is filed and ending when it is disposed of); *Doe v. Menefee*, 391 F.3d 147, 154 (2d Cir. 2004) (noting that a state collateral proceeding commenced after the limitations period has run does not restart the limitations period); *Smith v. McGinnis*, 208 F.3d 13, 16 (2d Cir. 2000).

Although Petitioner's original petition is timely, his proposed Confrontation Clause and related ineffective assistance of trial and appellate counsel claims appear to be untimely under subsection (A).[8] Petitioner's application for leave to appeal his Direct Appeal to the New York Court of Appeals was denied on December 28, 2015. *Stevenson*, 26 N.Y.3d at 1092. Therefore, Petitioner's conviction became final on March 28, 2016, upon expiration of the time during which Petitioner could have sought certiorari in the United States Supreme Court.[9] *See Green v. James*, No. 15-CV-2825, 2021 WL 623746, at *9 (S.D.N.Y. Jan. 12, 2021) ("A petitioner's conviction usually becomes final 90 days later, when the time for petitioning the U.S. Supreme Court for a writ of certiorari expires." (citing *McKinney*, 326 F.3d at 96)); *Vertil v. United States*, No. 10-CR-22, 2019 WL 1492903, at *3 (E.D.N.Y. Mar. 31, 2019) ("A conviction becomes final when the 90[-]day period for seeking a writ of certiorari expires." (citing *McKinney*, 326 F.3d at

[8] Petitioner does not indicate that subsections (B) through (D) are applicable.

[9] Respondent argues that the time to seek certiorari in the United States Supreme Court expired on March 27, 2016. (Third Stay Mot. Opp'n 4.) However, because March 27, 2016, fell on a Sunday, Petitioner had until Monday, March 28, 2016, to seek certiorari. *See Wesley-Rosa v. Kaplan*, 274 F. Supp. 3d 126, 130 (E.D.N.Y. 2017) (finding that a habeas petitioner had until the following Monday to seek certiorari when the deadline to file the certiorari petition fell on the weekend).

96)). Petitioner moved to vacate his conviction pursuant to C.P.L. § 440.10 on September 30, 2016, (*see* First 440 Mot. 3), 186 days after his conviction became final, tolling the limitations period during the pendency of that motion. *See Gabbidon v. Lee*, No. 18-CV-2248, 2020 WL 2129391, at *5 (S.D.N.Y. May 5, 2020) (tolling the AEDPA limitations period while the petitioner's motion to vacate his conviction pursuant to C.P.L. § 440.10 was pending). The tolling ceased on August 10, 2017, the date on which the Appellate Division denied Petitioner leave to appeal. (*See* First 440 Mot. 156); *see also Jones v. Superintendent of Wende Corr. Facility*, No. 16-CV-7109, 2020 WL 9048784, at *4 (S.D.N.Y. Oct. 6, 2020) ("The statute of limitations was tolled through [the date] when the Appellate Division denied [p]etitioner's leave to appeal."), *report and recommendation adopted*, 2021 WL 1198933 (S.D.N.Y. Mar. 30, 2021); *Gabbidon*, 2020 WL 2129391, at *5 (ending the tolling period when the Appellate Division denied the petitioner's leave to appeal application); *Criss v. Superintendent, Elmira Corr. Facility*, No. 19-CV-1513, 2020 WL 7053563, at *3 (N.D.N.Y. Dec. 2, 2020) (same). The limitations period accrued for another 126 days, and was tolled again on December 14, 2017, when Petitioner filed his Second 440 Motion.[10] (*See* Second 440 Mot. 2); *see also Coleman v. Melecio*, No. 20-CV-105, 2021 WL 638272, at *2 (N.D.N.Y. Feb. 18, 2021) (tolling the AEDPA statute of limitations because the petitioner filed a second 440 motion). The tolling ceased on April 8, 2019, when the Appellate Division denied leave to appeal denial of his Second 440

[10] Petitioner timely filed his original petition within the statute of limitations period. (*See* Pet.) The Court received the petition on January 28, 2017. (*Id.*) The effective filing date may be even earlier because the "prison mailbox rule" obligates the Court to consider an incarcerated litigant's papers to be deemed filed at the moment the prisoner hands the papers to prison officials for mailing. *See, e.g.*, *Opperisano v. P.O. Jones*, 286 F. Supp. 3d 450, 452 n.2 (E.D.N.Y. 2018) (citing *Houston v. Lack*, 487 U.S. 266, 276 (1988)). To receive the benefit of the prison mailbox rule, a prisoner must comply with certain procedural requirements. *See* Rule 3(d) Gov'g § 2254 in U.S. Dist. Cts. The Court need not determine whether the prison mailbox rule applies because the petition is timely even if Petitioner is not entitled to the rule's protection.

Motion. (*See* Second 440 Mot. 154.) Thus, Petitioner had fifty-three days left to file under the AEDPA statute of limitations. Accordingly, the AEDPA statute of limitations expired on May 31, 2019, and the claims Petitioner moved to add over a year later, on October 22, 2020, are untimely.

ii. Petitioner's additional claims do not relate back

"After the federal limitations period has run, a habeas petitioner may only amend his petition to add additional claims if the amended petition would 'relate back to the filing date of the original [petition].'" *Jeffrey v. Capra*, No. 20-CV-232, 2020 WL 4719629, at *3 (E.D.N.Y. Aug. 12, 2020) (alteration in original) (quoting *Mayle v. Felix*, 545 U.S. 644, 648 (2005)). Claims filed past the statute of limitations relate back to the date of filing of the original petition if they share "a common core of operative facts" with the original petition. *Mayle*, 545 U.S. at 646; *Gibson v. Artus*, 407 F. App'x 517, 519 (2d Cir. 2010) ("An amendment to a pleading has a clear connection to the original pleading when 'the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading.'" (quoting Fed. R. Civ. P. 15(c)(1)(B))); *Sanchez v. United States*, No. 16-CV-9418, 2021 WL 1164538, at *5 (S.D.N.Y. Mar. 25, 2021) ("In the *habeas* context, a later claim will relate back only if it is 'tied to a common core of operative facts' as the original claim." (quoting *Mayle*, 545 U.S. at 664)); *Tineo-Santos*, 2021 WL 266561, at *3 ("For new claims to relate back, they must share 'a common core of operative facts' with the original petition." (quoting *Mayle*, 545 U.S. at 664)); *see also* Fed. R. Civ. P. 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading . . . ."). "An amended habeas petition . . . does not relate back (and thereby escape

AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650; *Celaj v. United States*, --- F. Supp. 3d ---, ---, 2021 WL 323303, at *4 (S.D.N.Y. Feb. 1, 2021) ("In the habeas context, '[a]n amended habeas petition . . . does not relate back when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading sets forth.'" (alteration in original) (quoting *Ozsusamlar v. United States*, No. 02-CR-763, 2013 WL 4623648, at *3 (S.D.N.Y. Aug. 29, 2013))).

Petitioner's claims do not relate back to the claims presented in his original petition.[11] In his original timely filed petition, Petitioner's only claims regarding the Medical Records concerned allegations that the prosecution failed to disclose three pages of the Medical Records prior to trial, and that both trial counsel and appellate counsel were ineffective for failing to raise a *Brady* violation on this issue. (*See* Pet. 19–21.) The facts underlying these three claims concern an alleged failure to disclose pages of the Medical Records *before* trial, unlike the claims Petitioner now seeks to add, which concern admission of the Medical Records *at trial* because the prosecution's Medical Expert who testified at trial was not the same doctor who examined the victim and prepared the Medical Records. (*See* Third Stay Mot. 3–4.) Because the proposed amendments concern facts that differ in time and type from those set forth in the original timely

[11] In the amended petition, Petitioner mentioned that the person who prepared the Medical Records was not the same person who testified at trial and suggested that his right to confront witnesses against him was violated. (*See* Am. Pet. 28 ("[T]he prosecutor's expert medical witness was allowed to dress up the medical report without the basis of the diagnosis being subject to an analysis, essentially depriving petitioner the right to confrontation and discredit the diagnosis, the author or the People's medical expert witness . . . .").) However, to the extent Petitioner asserted a Confrontation Clause claim in the amended petition, this claim was untimely as the statute of limitations expired on May 31, 2019, and Petitioner filed his amended petition several months later on November 18, 2019. (*See* Aff. of Service, annexed to Am. Pet. as Ex. 1, Docket Entry No. 31-1 (stating that Petitioner placed his amended petition in the prison mailbox on November 18, 2019).)

filed petition, *see Mayle*, 545 U.S. at 650, these claims do not relate back to the claims presented in the petition. *See Fernandez v. Ercole*, No. 14-CV-2974, 2017 WL 2364371, at *6 (S.D.N.Y. May 31, 2017) (finding no relation back when the "proposed amendments . . . assert *Brady* violations on the basis of the prosecution's failure to disclose evidence of an eyewitness's statement and [the victim's] prior arrests, as well as a Confrontation Clause claim based on the trial court's failure to permit cross-examination of the eyewitness," and the original petition asserted due process claims regarding the admission of evidence of the victim's injuries and the plaintiff's history of dealing marijuana); *Veal v. United States*, No. 01-CV-8033, 2007 WL 3146925, at *6 (S.D.N.Y. Oct. 9, 2007) (holding that claim of ineffective assistance of counsel did not relate back because the petitioner's "original petition focused on decisions made by [trial counsel] as part of his strategy *during the trial*, whereas his new claim would delve into the realm of *pre-trial* negotiations and discussions between [the] [p]etitioner and his attorney" (emphases added)), *aff'd*, 334 F. App'x 402 (2d Cir. 2009); *see also Jeffrey*, 2020 WL 4719629, at *4 (finding no relation back when the "[p]etitioner's habeas petition focuses entirely on *Batson* and jury selection, while his ineffective assistance of counsel and conflict of interest arguments stem from distinct allegations about plea offers, a prior representation of petitioner's brother, and potential trial witnesses"); *Boytion v. Phillips*, No. 03-CV-1466, 2006 WL 941793, at *6 (E.D.N.Y. Apr. 12, 2006) (finding that claims arose out of "facts that differ in time and type" when "[t]he facts relating to the alleged prosecutorial violation occurred at trial during opening and closing remarks" and the alleged Sixth Amendment violation occurred "during a separate sentencing hearing"); *cf. Pierre v. Ercole*, 607 F. Supp. 2d 605, 608 (S.D.N.Y. 2009) (finding that amendment related back where new ineffective assistance of counsel claim arose "out of the same set of operative facts as the due process claim in the original petition" because

"[b]oth are based on the exclusion of statements by the same two unavailable witnesses who, petitioner alleges, would have supported the defense theory that the victim was murdered when petitioner was out of state").

In addition, Petitioner's argument that the ineffective assistance of trial and appellate counsel claims relate back because the original petition also asserted ineffective assistance of counsel claims, is unpersuasive. Merely asserting the same type of claim without a common core of operative facts is insufficient to satisfy the relation back standard. *See Celaj*, --- F. Supp. 3d at ---, 2021 WL 323303, at *6 (finding that three new ineffective assistance of counsel claims did not relate back to two ineffective assistance of counsel claims set forth in the original petition and stating that "[i]t is not enough that both sets of claims allege ineffective assistance of trial counsel, as [the petitioner's] 'additional claims must have a clear temporal and factual connection those raised in his original petition'" (quoting *Ozsusamlar*, 2013 WL 4623648, at *4)); *Ozsusamlar*, 2013 WL 4623648, at *4 ("Although both sets of claims assert that counsel provided ineffective assistance, 'it is not sufficient for an untimely amendment merely to assert the same general type of legal claim as in the original [section] 2255 motion.'" (quoting *Veal*, 2007 WL 3146925, at *1)).

Accordingly, because the proposed claims do not relate back, Petitioner's claims are time-barred, and allowing an amendment to add these claims would be futile.[12] *See Gabbidon*,

[12] The Court declines to equitably toll the AEDPA's one-year statute of limitations because Petitioner has failed to allege any extraordinary circumstances that prevented him from amending his petition before the statute of limitations had run. *See Fennell v. McCarthy*, No. 20-CV-3764, 2021 WL 981547, at *4 (S.D.N.Y. Mar. 16, 2021) ("Tolling of the limitations period is applied only in 'rare and exceptional' circumstances. A litigant seeking equitable tolling must show both that he 'diligently' pursued his rights and that 'some extraordinary circumstance . . . prevented timely filing.'" (citation omitted) (first quoting *McGinnis*, 208 F.3d at 17; and then quoting *Holland v. Florida*, 560 U.S. 631, 647–48 (2010))); *Herb v. Smith*, No. 14-CV-4405,

2020 WL 2129391, at *5 ("Petitioner's proposed claims are, therefore, futile unless they 'relate back' to the claims asserted in his original [p]etition."); *Tineo-Santos*, 2021 WL 266561, at *2 ("Courts have found it futile to grant leave to amend a habeas petition where the claims that a petitioner is seeking to add would be time-barred under the [AEDPA] statute of limitations . . . ." (citing *Sookoo v. Heath*, No. 09-CV-9820, 2011 WL 6188729, at *3 (S.D.N.Y. Dec. 12, 2011))).

iii. Petitioner's additional claims are meritless

Even if Petitioner could establish that his claims relate back, for the reasons stated below, amendment is not warranted because Petitioner's claims based on an underlying Confrontation Clause violation are meritless.

2017 WL 1497936, at *5 (E.D.N.Y. Apr. 25, 2017) ("Petitioner has failed to allege any extraordinary circumstance that prevented him from timely amending his Petition. Courts will not equitably toll 'when a litigant is responsible for its *own* delay.'" (quoting *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 256–57 (2016))).

Moreover, the Court notes that Petitioner's Confrontation Clause claim is procedurally defaulted because New York State courts could not hear the merits of this claim pursuant to section 440's mandatory procedural bar as it was based on the trial record. *See* C.P.L. § 440.10(2)(a); *Inoa v. Smith*, No. 16-CV-2708, 2018 WL 4110908, at *20 (S.D.N.Y. Aug. 29, 2018) (finding that because the petitioner's Confrontation Clause challenge to the admission of expert testimony was "'based on facts that appear on the record' but not raised on direct appeal, it is procedurally barred from being reasserted in state court"), *report and recommendation adopted*, 2019 WL 549019 (S.D.N.Y. Feb. 9, 2019). While New York State law provides for collateral review of a conviction under C.P.L. section 440.10, such review is not available if the claim could have been raised on direct review. *See* C.P.L. § 440.10(2)(a); *Jackson v. Conway*, 763 F.3d 115, 143–44 (2d Cir. 2014) (holding that a petitioner's claim was unexhausted and procedurally defaulted because the claim could have been raised on direct appeal (citing § 440.10(2))). Petitioner failed to raise these claims in his Direct Appeal and has failed to allege any facts to show cause for the default. (*See* Direct Appeal 25–53); *Bogan v. Bradt*, No. 11-CV-1550, 2017 WL 2913465, at *7 (E.D.N.Y. July 6, 2017) ("The Confrontation Clause claim is also procedurally defaulted because the New York State courts would decline to hear the merits of the claim."); *Pearson v. Rock*, No. 12-CV-3505, 2015 WL 4509610, at *16 n.17 (E.D.N.Y. July 24, 2015) ("The motion [to amend] is also denied as futile because [the petitioner's] jurisdictional claim appears to be procedurally barred for failure to have been raised upon direct appeal.").

On federal habeas review, a violation of a petitioner's federal rights during his or her state criminal proceedings is harmless — and therefore does not warrant habeas relief — unless the "error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Unlike on direct review,[13] a showing of harmlessness on collateral review requires "more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 576 U.S. 257, 268 (2015) (quoting *Brecht*, 507 U.S. at 637). However, if a "conscientious judge [remains] in grave doubt about the likely effect of an error on the jury's verdict" — that is, "in the judge's mind, the matter is so evenly balanced that [the judge] feels . . . in virtual equipoise as to the harmlessness of the error" — then "the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (quoting *Brecht*, 507 U.S. at 623). "[I]n [section] 2254 proceedings[,] a [federal] court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* . . . , whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard" generally applicable on direct review. *Fry v. Pliler*, 551 U.S. 112, 121–22 (2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). To determine whether a Confrontation Clause violation amounts to harmless error, courts consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the

[13] "On direct review, . . . the standard for determining whether a federal constitutional error is harmless . . . requires the government 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Spencer v. Capra*, 788 F. App'x 21, 22 (2d Cir. 2019) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." *Garlick v. Lee*, 1 F.4th 122, 128 (2d Cir. 2021) (quoting *Cotto v. Herbert*, 331 F.3d 217, 254 (2d Cir. 2003)).

If the state courts do not conduct their own harmless error analysis, the preceding discussion represents the extent of the federal court's harmlessness analysis on federal habeas review because there is no state ruling which commands AEDPA deference. *See Orlando v. Nassau Cnty. Dist. Att'y's Off.*, 915 F.3d 113, 127 (2d Cir. 2019) (stating that the Appellate Division did not find that the trial court erred in admitting the disputed testimony and therefore "did not determine that the admission of [the witness's] testimony as to [declarant's] statements was harmless, we owe no deference to the Appellate Division on that issue"); *Young v. Conway*, 698 F.3d 69, 87 (2d Cir. 2012) (providing no deference to a state court where there was no harmless error analysis).

Assuming without deciding that admission of the Medical Records raises a Confrontation Clause issue, the Trial Court's error was harmless.

As an initial matter, the Confrontation Clause claim is subject to harmless error analysis because Confrontation Clause claims generally do not fit within the small category of errors requiring automatic reversal. *See Silva v. New York*, No. 19-CV-6799, 2021 WL 535260, at *3 (E.D.N.Y. Feb. 12, 2021) ("[P]etitioner's claim would fail because, on habeas review, Confrontation Clause violations are subject to harmless error analysis set out in *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993)."); *Gilocompo v. LaClair*, No. 16-CV-4963, 2021 WL 355148, at *14 (E.D.N.Y. Feb. 2, 2021) ("Violations of the Confrontation Clause are subject to harmless error analysis." (citing *United States v. Acosta*, 833 F. App'x 856, 867 (2d Cir. 2020)));

Arroyo v. Lee, 831 F. Supp. 2d 750, 762 (S.D.N.Y. 2011) ("Confrontation Clause violations are subject to the same 'harmless error' analysis as evidentiary errors." (quoting *United States v. Dhinsa*, 243 F.3d 635, 649, 656 (2d Cir. 2001))).

Consideration of the relevant factors demonstrates that any confrontation-related errors in this case are harmless. The voluminous and weighty evidence against Petitioner supports a harmlessness determination. The State's case did not solely rest on the challenged Medical Records; the victim, her mother, and her teacher all testified at trial that Petitioner sexually abused the victim, (*see* Tr. 2:14–22, 41:6–17, 45:24–76:2, 133:4–137:20), and the State also presented evidence of Petitioner's consciousness of guilt in the Voicemail Messages, (Direct Appeal 15, 76; *see also* Tr. 155:14–158:16, 176:21–177:16), and in the victim's mother's testimony, (Tr. 155:1–158:17, 176:24–177:13). While the Medical Records were the only source of medical evidence offered at trial to establish that Petitioner sexually abused the victim, the Medical Records did not describe any physical manifestations of abuse, and the diagnosis of sexual abuse based on the victim's statements were cumulative of other inculpatory evidence connecting Petitioner to the victim's abuse. *See Perkins v. Herbert*, 596 F.3d 161, 177–78 (2d Cir. 2010) (finding that any Confrontation Clause errors were harmless when the "erroneously admitted evidence was cumulative of the properly admitted evidence, and that the remaining evidence of guilt, including [the petitioner's] oral confession, was strong"); *Silva*, 2021 WL 535260, at *3 (finding that any Confrontation Clause error in admitting testimony from "the only witness capable of identifying [the] petitioner" was harmless because "multiple eyewitnesses testified to the same version of events," parts of the attack were captured on surveillance video, and the petitioner made multiple phone calls "in which he conspired to intimidate [the witness]" which were introduced into evidence); *cf. Garlick*, 1 F.4th at 136 (finding that the petitioner's

right to confrontation was violated and the error was not harmless when admission of an autopsy report at trial was used to eliminate another suspect as the cause of the victim's death, no other medical evidence was offered at trial to establish the cause and manner of the victim's death, and the "autopsy report was the strongest evidence in the State's case and was not cumulative of other inculpatory evidence connecting [the petitioner] to the victim's death").

In addition, Petitioner's ineffective assistance of trial and appellate counsel claims based on their failure to raise the Confrontation Clause issue are similarly meritless. *See Aparicio v. Artuz*, 269 F.3d 78, 99 n.10 (2d Cir. 2001) ("Because the double jeopardy claim was meritless, [the] [p]etitioner's trial counsel was not ineffective for failing to raise it. And thus, [the] [p]etitioner's appellate counsel was not ineffective for failing to raise the ineffectiveness of trial counsel."); *Rivera v. Kaplan*, No. 17-CV-2257, 2020 WL 5550047, at *22 (S.D.N.Y. July 20, 2020) ("To the extent these underlying complaints are themselves meritless . . . , counsel cannot be faulted for choosing not to object on those grounds." (citing *Aparicio*, 269 F.3d at 99 n.10)).

Accordingly, because the three claims Petitioner seeks to add to his petition are meritless, Petitioner's motion to amend is denied as futile.[14] *See Garcia*, 841 F.3d at 583 (stating that leave to amend may be denied when "amendment would be futile" (citing *Cuoco*, 222 F.3d at 112));

[14] Because Petitioner's *coram nobis* petitioner served only to exhaust Petitioner's ineffective assistance of appellate counsel claim, the Court construes Petitioner's still-pending motion to stay the case to apply to Petitioner's Confrontation Clause and ineffective assistance of trial counsel claims. (*See* Third Stay Mot.); *Triestman*, 470 F.3d at 474 ("It is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they *suggest*.'" (quoting *Pabon*, 459 F.3d at 248)). In view of the Court's denial of leave to amend, the Court also denies Petitioner's motion to stay his case. *See Mullins v. Graham*, No. 17-CV-2958, 2018 WL 1187401, at *5 (E.D.N.Y. Mar. 6, 2018) (stating that "the stay analysis is inapposite" when the petitioner's petition was not a "mixed" petition because it only contained exhausted claims (citing *Spells v. Lee*, No. 11-CV-1680, 2011 WL 2532907, at *1 (E.D.N.Y. June 23, 2011))); *Davis v. Graham*, No. 16-CV-275, 2018 WL 3996424, at *3 (W.D.N.Y. Aug. 21, 2018) (stating that a stay and abeyance is "inapplicable" when a petition is not mixed).

Serrano v. Royce, No. 20-CV-6660, 2021 WL 1564759, at *2 (S.D.N.Y. Apr. 21, 2021) ("[L]eave to amend should be denied where the proposed new claim would be futile, either because it fails to comply with the aforementioned procedural requirements or it lacks merit.").

c. Merits of the habeas petition

The Court next addresses the Petitioner's remaining merits-based claims that (1) the Trial Court erroneously admitted into evidence recorded telephone calls between Petitioner and his sister; (2) the Trial Court's intoxication charge was improper and was not harmless error; (3) the Trial Court improperly admitted an "inflammatory" and "prejudicial" graduation photograph of the victim; (4) ineffective assistance of counsel at trial for failure to (a) object to admission of the graduation photograph of the victim, (b) object to the prosecutor's summation remarks when the prosecutor allegedly mischaracterized evidence and vouched for the credibility of the victim, (c) consult or retain a medical expert, (d) convey that the prosecutor's plea offer was "still available" to Petitioner or to "advise Petitioner of the pro's and con's" of the offer, (e) pursue a discovery/*Brady* violation when the State failed to disclose three of the nine pages of the Medical Records, (f) make a pretrial motion for discovery, and (g) impeach a witness; (5) prosecutorial misconduct for (a) "mischaracterizing evidence and vouching for the credibility of the complainant," (b) suppression of "discoverable material," and (c) allowing the victim's mother to testify to an "allegedly false date" regarding the voicemail Petitioner left for her following his arrest; and (6) actual innocence. (Am. Pet. 5–33.)

The Court first discusses the procedurally barred claims and then the merits of the remaining claims.

i. Procedurally barred claims

Petitioner claims (1) that he was deprived of a fair trial because the Trial Court improperly admitted an "inflammatory" and "prejudicial" graduation photograph of the victim; (2) that he was deprived of the effective assistance of counsel because Trial Counsel failed to (a) pursue a discovery/*Brady* violation when the State failed to disclose three of the nine pages of Medical Records of the victim, (b) make a pretrial motion for discovery for the Medical Records, and (c) impeach the victim's mother regarding the date of one of the Voicemail Messages; and (3) prosecutorial misconduct for (a) "mischaracterizing evidence and vouching for the credibility of the complainant" during summation (b) suppressing "discoverable material" relating to the victim's Medical Records and (c) allowing the victim's mother to testify to an "allegedly false date" regarding one of the Voicemail Messages. (*Id.* at 7–9, 11, 21–32.) Because Petitioner's claims were either unpreserved for appellate review on direct appeal, *see Stevenson*, 11 N.Y.S.3d at 648, or procedurally defaulted in his Second 440 Motion, (*see* Second 440 Mot. 104), these claims are procedurally barred on habeas review.

"[A] federal court may not review federal claims that were procedurally defaulted in state court — that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila v. Davis*, 582 U.S. ---, ---, 137 S. Ct. 2058, 2064 (June 26, 2017) (citing *Beard v. Kindler*, 558 U.S. 53, 55 (2009)). "But, for this procedural default rule to apply, the state court must have '*clearly and expressly state[d]* that its judgment rest[ed] on a state procedural bar.'" *Garner v. Lee*, 908 F.3d 845, 859 (2d Cir. 2018) (alterations in original) (quoting *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 118 (2d Cir. 2015)). "'To qualify as an adequate procedural ground,' capable of barring federal habeas review, 'a state rule must be firmly established and regularly followed.'" *Johnson v. Lee*, 578 U.S. 1147, ---, 136 S. Ct. 1802,

1803 (May 31, 2016) (per curiam) (quoting *Walker v. Martin*, 562 U.S. 307, 316 (2011)). The Second Circuit has held that C.P.L. § 440.10(3)(c) — which allows a state court to deny a claim in a post-conviction motion if the movant could have, but failed to, raise the same claim *in an earlier Article 440 motion* — "constitutes an adequate state procedural bar to federal habeas review." *Murden v. Artuz*, 497 F.3d 178, 192 (2d Cir. 2007); *see also Gousse v. Superintendent, Wende Corr. Facility*, No. 19-CV-1607, 2020 WL 4369643, at *15 (E.D.N.Y. July 29, 2020) (rejecting a claim as procedurally defaulted where the state court denied the claim on account of C.P.L. section 440.10(3)(c)). The Second Circuit has likewise held that C.P.L. § 440.10(2)(c) — which requires a state court to deny a claim in a post-conviction motion if the movant should have raised, but unjustifiably failed to raise, that claim *on direct appeal* — also constitutes a state procedural bar sufficiently independent and adequate to bar federal habeas review. *See Jackson v. Conway*, 763 F.3d 115, 143–44 (2d Cir. 2014) (rejecting a claim as procedurally defaulted where the state court denied the claim on account of C.P.L. section 440.10(2)(c)); *Clark v. Perez*, 510 F.3d 382, 393 (2d Cir. 2008) ("We conclude that the district court erred in holding that the state court's application of section 440.10(2)(c) did not constitute an adequate state procedural bar to [petitioner's] federal habeas petition.").

1. Graduation photo of victim and summation remarks

Petitioner's claims alleging that the Trial Court improperly admitted the graduation photo of the victim and that the prosecutor made improper remarks on summation are procedurally barred.

In its decision on Petitioner's Direct Appeal, the Appellate Division held that Petitioner's claims regarding the admission of the graduation photo and the prosecutor's "remarks during summation" were "unpreserved for appellate review" pursuant to C.P.L. section 470.05(2)

because Petitioner did not object at trial. *See Stevenson*, 11 N.Y.S.3d at 648. "[I]t is well established that the application of [s]ection 470.05(2) is an independent and adequate state procedural ground that prohibits federal habeas review." *Rios v. Bradt*, No. 13-CV-4442, 2020 WL 5709158, at *5 (E.D.N.Y. Sept. 24, 2020) (second alteration in original); *see also Liggan v. Senkowski*, 652 F. App'x 41, 43 (2d Cir. 2016) (concluding that the petitioner's "claim is procedurally barred because his state court appeal was decided based on the application of New York's contemporaneous objection rule"); *Gutierrez v. Smith*, 702 F.3d 103, 111 (2d Cir. 2012) ("Where a party fails to lodge such a contemporaneous objection [pursuant to C.P.L. section 470.05(2)], the issue is unpreserved for appeal because of the party's procedural default."); *Khan v. Capra*, No. 19-CV-533, 2020 WL 6581855, at *8 (E.D.N.Y. Nov. 10, 2020) (finding that C.P.L. section 470.05(2) constitutes an "independent and adequate state ground"); *Hoke v. Artus*, No. 15-CV-4828, 2019 WL 181300, at *5 (E.D.N.Y. Jan. 9, 2019) (concluding that petitioner's claim was procedurally barred from federal habeas review where the Appellate Division rejected petitioner's claim as unpreserved for review under C.P.L. section 470.05(2)). Because independent and adequate state procedural rules barred Petitioner's claims alleging that the Trial Court improperly admitted the graduation photo of the victim and that the prosecutor made improper remarks on summation, this Court may not grant federal habeas relief.

2. Ineffective assistance of counsel and prosecutorial misconduct

Petitioner's claims of (1) ineffective assistance of counsel because Trial Counsel failed to (a) pursue a discovery/*Brady* violation when the state failed to disclose three of the nine pages of Medical Records of the victim, and (b) make a pretrial motion for discovery for the Medical Records, and (c) impeach the victim's mother regarding the date of one of the Voicemail Messages, and (2) prosecutorial misconduct for (a) suppression of "discoverable material"

relating to the victim's Medical Records and (b) allowing the victim's mother to testify to an allegedly false date regarding the Voicemail Messages, (Am. Pet. 22), are also procedurally barred.

In its decision on Petitioner's Second 440 Motion, the court held that Petitioner's "claims relating to the complainant's [M]edical [R]ecords and [Petitioner's] calls to the complainant's mother while incarcerated on Rikers Island" were procedurally barred pursuant to C.P.L. section 440.10(2) because Petitioner failed to raise those on-the-record claims on direct appeal. (Second 440 Mot. 104.) In the alternative, the court held that even construing Petitioner's claims as "off-the-record allegations involving [T]rial [C]ounsel's ineffectiveness," these claims are also procedurally barred pursuant to section 440.10(3)(c) because "these claims could have been raised" in Petitioner's First 440 Motion or his motion to re-argue "based on information that was within the [Petitioner's] possession." (*Id.*) Because independent and adequate state procedural rules barred Petitioner's request for relief in the state courts, *see Murden*, 497 F.3d at 192; *Jackson*, 763 F.3d at 143–44, this Court may not grant federal habeas relief.[15]

ii. Petitioner fails to allege a fundamental miscarriage of justice

Petitioner argues that he is "actually innocent" and that "[t]he cumulative effect of all errors presented overwhelmed [his] right to a fair trial." (Am. Pet. 31.) In support, Petitioner contends that "[h]ad it not been for the [T]rial [C]ourt's, the defense counsel's[,] and the

[15] As an alternative holding, the state court also denied Petitioner's claims on the merits. (Second 440 Mot. 106.) Because a state court's application of a state procedural bar prohibits federal habeas review of a claim even if the state court also denied the claim on its merits, the court's alternative holding does not negate the procedural bar. *See Galdamez v. Keane*, 394 F.3d 68, 77 (2d Cir. 2005) ("[W]here a state court explicitly says that a particular claim fails for a procedural reason, but still reaches the merits, that claim remains procedurally barred." (first citing *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); and then citing *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 810 n.4 (2d Cir. 2000))).

prosecution's misdeeds, the jury would have found reason to doubt" his guilt. (*Id.*) Petitioner argues that because "the merits of this claim heavily relies on the validity of" his other claims, "[t]he cumulative effect of all these errors should be considered and addressed by this Court." (*Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 315 (1995)).)

Respondent argues that Petitioner's claim should be rejected because "[a]n actual innocence claim does not present a freestanding basis for habeas relief." (Second Resp. 12 n.9.) In addition, Respondent argues that the state court properly "found that [Petitioner] did not make out a prima facie showing of actual innocence, as [Petitioner] did not refer to any additional material evidence or provide any sworn affidavits claiming new evidence." (*Id.*)

A showing of actual innocence is not itself cognizable as a free-standing basis for relief. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."); *Rivas v. Fischer*, 687 F.3d 514, 540 (2d Cir. 2012) ("[A] petitioner seeking access to a federal habeas court in the face of a procedural obstacle must advance both a legitimate constitutional claim and a credible and compelling claim of actual innocence.") However, a showing of actual innocence can serve as an exception to allow a habeas court to review procedurally defaulted claims. *See Herrera*, 506 U.S. at 400 (stating that a showing of actual innocence "serves merely as a gateway to the airing of a petitioner's procedurally defaulted claims").

The actual innocence exception is also known as the fundamental miscarriage of justice exception. *See Cotto*, 331 F.3d at 239 n.10 (holding that a fundamental miscarriage of justice arises when a petitioner "is actually innocent of the crime for which he has been convicted." (quoting *Dunham v. Travis*, 313 F.3d 724, 729 (2d Cir. 2002))); *see also Dretke v. Haley*, 541

U.S. 386, 393 (2004) (explaining that *Murray v. Carrier*, 477 U.S. 478 (1986), "recognized a narrow exception to the cause requirement where a constitutional violation has 'probably resulted' in the conviction of [a petitioner] who is 'actually innocent'"). The actual innocence exception "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (quoting *Herrera*, 506 U.S. at 404); *see also Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (noting that a habeas court is concerned "not [with] the petitioners' innocence or guilt but solely [with] the question [of] whether their constitutional rights have been preserved").

"Where a petitioner has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the petitioner can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *DiSimone v. Phillips*, 461 F.3d 181, 190–91 (2d Cir. 2006) (quoting *Bousley v. United States*, 523 U.S. 614, 622 (1998)) (alterations omitted). "To establish actual innocence, petitioner must demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623 (quoting *Schlup*, 513 U.S. at 298). "The Supreme Court has explained that the fundamental miscarriage of justice exception is 'extremely rare' and should be applied only in 'the extraordinary cases.'" *Sweet v. Bennett*, 353 F.3d 135, 142 (2d Cir. 2003) (quoting *Schlup*, 513 U.S. at 321–22; *Murray*, 477 U.S. at 496 ("In an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

Although Petitioner maintains his innocence and claims that "[h]ad it not been for the [T]rial [C]ourt's, the defense counsel's[,] and the prosecution's misdeeds, the jury would have found reason to doubt" Petitioner's guilt, (Am. Pet. 31), he has not overcome the high burden imposed by the miscarriage of justice standard. Petitioner does not rely on or present any "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," that was not presented at trial. *Schlup*, 513 U.S. at 324; *see also Rivas*, 687 F.3d at 546–47 (finding that the petitioner had "a close case" that only passed the *Schlup* standard because the petitioner was able to present reliable scientific expert testimony not presented to the jury and the Second Circuit "would not expect a lesser showing of actual innocence to satisfy the *Schlup* standard"); *Doe*, 391 F.3d at 161 (finding that there is a "limited . . . type of evidence on which an actual innocence claim may be based . . . in order to take advantage of the gateway," which includes "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial" (quoting *Schlup*, 513 U.S. at 324)); *Djenasevic v. New York*, No. 17-CV-6366, 2019 WL 653153, at *6 (E.D.N.Y. Feb. 15, 2019) (finding *Schlup* standard not satisfied when the petitioner alleged in support of actual innocence claim that guilty pleas were coerced, that prosecutors committed misconduct by using falsified evidence, and that defense attorneys were ineffective because petitioner "fail[ed] to present an new credible or compelling evidence"). Accordingly, Petitioner has failed to demonstrate a fundamental miscarriage of justice.

iii. Evidentiary ruling claim

Petitioner argues that he was deprived of his right to a fair trial because the Trial Court admitted "an ambiguous, irrelevant[,] and prejudicial phone recorded conversation Petitioner had with his sister, over defense counsel['s] objection." (Am. Pet. 4–5.) In support, Petitioner

asserts that the Trial Court admitted the Recorded Call "without considering its prejudicial impact on the Petitioner," and argues that the Recorded Call was "highly prejudicial" because it "allowed the jury to speculate [about] the [Petitioner's] guilt, despite there being no relevance . . . stated in the contents." (*Id.* at 5.) Petitioner contends that the Appellate Division's determination that the Trial Court properly admitted the phone conversation was "unreasonable in light of the evidence presented and was contrary to clearly established federal law." (*Id.*)

Respondent argues that Petitioner's claim, based on an evidentiary ruling by the Trial Court, is "a matter of state law" and does not raise federal constitutional issues. (Resp't's Mem. in Opp'n to Am. Pet. ("Resp't's Mem.") 9, annexed to Pet. Opp'n, Docket Entry No. 11.) In the alternative, Respondent argues that both the Trial Court's ruling and the Appellate Division's decision affirming that ruling were "correct interpretations of state law" and "any error in the admission of the recordings was harmless." (*Id.* at 9–11.)

The Supreme Court has made clear that "habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)); *see also Bowman v. Racette*, 661 F. App'x 56, 58 (2d Cir. 2016) ("[F]ederal habeas courts generally will not "reexamine state-court determinations on state-law questions." (quoting *Estelle*, 502 U.S. at 67–68)). Thus, a petitioner seeking habeas relief based upon an error of state evidentiary law must show that: (1) the state court's evidentiary ruling was an error of "constitutional magnitude," that is, it was both (a) an error under New York state law and (b) an error that denied him the "constitutional right to a fundamentally fair trial" and (2) "the constitutional error was not harmless." *Perez v. Phillips*, 210 F. App'x 55, 57 (2d Cir. 2006) (first quoting *Perez v. Phillips*, No. 04-CV-3859, 2005 WL 517336, at *4 (S.D.N.Y. Mar. 4, 2005); and then quoting *Dey v. Scully*, 952 F. Supp. 957, 969 (E.D.N.Y. 1997)); *see Freeman v.*

Kadien, 684 F.3d 30, 35 (2d Cir. 2012) (noting that federal habeas corpus relief does not lie for errors of state law, but "[a] federal habeas court may, of course, review an error of state evidentiary law to assess whether the error deprived the petitioner of his due process right to a 'fundamentally fair trial'" (quoting *Zarvela v. Artuz*, 364 F.3d 415, 418 (2d Cir. 2004))); *Bowers v. Noeth*, No. 17-CV-1967, 2020 WL 6746829, at *4 (E.D.N.Y. Nov. 17, 2020) (reciting the two-prong test set forth in *Perez*).

In order to satisfy the fundamental unfairness prong, the erroneously admitted evidence must have been "sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it." *McKinnon v. Superintendent, Great Meadow Corr. Facility*, 422 F. App'x 69, 73 (2d Cir. 2011) (quoting *Collins v. Scully*, 755 F.2d 16, 19 (2d Cir. 1985)); *Pinckney v. Lee*, No. 10-CV-1312, 2020 WL 6136302, at *22 (E.D.N.Y. Oct. 19, 2020) (noting that the error "must have been crucial, critical, highly significant" (quoting *Collins*, 755 F.2d at 19)); *Lyons v. Girdich*, No. 02-CV-3117, 2003 WL 22956991, at *10 (E.D.N.Y. Oct. 15, 2003) ("Errors of state law that rise to the level of a constitutional violation may be corrected by a habeas court, but even an error of constitutional dimensions will merit habeas corpus relief only if it had a 'substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *Brecht*, 507 U.S. at 623)).

Petitioner's evidentiary claim does not satisfy the fundamental fairness prong because, assuming there was an error of state law, Petitioner fails to demonstrate that the Recorded Call was sufficiently material to provide the basis for conviction or that without the Recorded Call, there could not have been reasonable doubt. The State's case did not solely rest on the challenged Recorded Call; the victim testified at trial and identified Petitioner as the assailant, (Tr. 45:5–81:15), and the State also presented evidence of Petitioner's consciousness of guilt in

the Voicemail Messages, (Direct Appeal 15, 76; *see also* Tr. 155:14–158:16, 176:21–177:16), and in the victim's mother's testimony, (Tr. 155:1–158:17, 176:24–177:13). *See Perez*, 210 F. App'x at 58 ("[E]xcluded evidence is not sufficiently 'material' in this context unless its inclusion creates a previously non-existent reasonable doubt."); *Loucks v. Capra*, No. 16-CV-4227, 2019 WL 2330295, at *13 (S.D.N.Y. Apr. 22, 2019) ("While the letters may have supported [the] [p]etitioner's consciousness of guilt, their admission did not affect the fundamental fairness of the trial because the remainder of the record firmly supported [the] [p]etitioner's conviction."), *report and recommendation adopted*, 2019 WL 2326225 (S.D.N.Y. May 30, 2019); *Edwards v. Capra*, No. 12-CV-4654, 2016 WL 5818543, at *6 (E.D.N.Y. Oct. 5, 2016) (holding that admission of testimony did not "'affect the fundamental fairness of the proceedings' under *McKinnon*" because "the [s]tate's case did not rest solely on the challenged statements" and because the defense "had the opportunity to cross-examine the [testifying witness]" (quoting *McKinnon*, 422 F. App'x at 73)). Although the Recorded Call was arguably an important piece of evidence, (*see* Tr. 373:1–12 (describing the jury's question about the Recorded Call during deliberations)), the jury did not need to rely on the Recorded Call to reach the conclusion that Petitioner was guilty, (*see* Tr. 391:15–392:10 (describing the jury's question about the Voicemail Messages during deliberations)). *See McKinnon*, 422 F. App'x at 73 (finding that petitioner failed to establish that admission of testimony deprived him of a fundamentally fair trial when the jury did not need to rely on the challenged testimony to conclude that petitioner was guilty and "other evidence not challenged by [the petitioner] proved that [the petitioner] was the attacker, and [the petitioner] cannot demonstrate that the [challenged] testimony had a substantial and injurious effect on the verdict"); *Costello v. Griffin*, No. 16-CV-4189, 2018 WL 6250992, at *7 (E.D.N.Y. Nov. 28, 2018) (finding that fairness of

the proceedings was not affected when other evidence in the record such as "unequivocal and unimpeachable DNA evidence placing [the] [p]etitioner in [the victim's] apartment" strengthened the prosecution's case); *Inoa v. Smith*, No. 16-CV-2708, 2018 WL 4110908, at *16 (S.D.N.Y. Aug. 29, 2018) (finding that the jury did not need to rely on the challenged uncorroborated accomplice testimony because at trial "a rational jury could have relied on 'the manifest content' of the recorded telephone calls to conclude that an agreement existed" for the petitioner to kill the victim in exchange for money), *report and recommendation adopted*, 2019 WL 549019 (S.D.N.Y. Feb. 9, 2019).

Accordingly, any errors of state law in the Trial Court's evidentiary ruling do not rise to a level of constitutional magnitude sufficient to be cognizable on habeas review.

iv. Jury instruction claim

Petitioner claims that he was deprived of his due process right to a fair trial because the Trial Court's intoxication jury instruction was improper and not harmless error. (*See* Am. Pet. 6.) In support, Petitioner argues that while the Appellate Division agreed that the intoxication instruction was an error, the Appellate Division "failed to consider the injurious effects the charge had on the Petitioner" in deciding that the error was harmless. (*Id.* at 7.)

Respondent asserts that the error was harmless because it was "not a significant element of the [S]tate's case" and "practically the only mention of it was in the charge to the jury." (Resp't's Mem. 12.) In addition, Respondent argues that "an intoxication charge is usually requested by a defendant as a means to negate the element of intent." (*Id.*) Given the "overwhelming evidence" of Petitioner's guilt, Respondent asserts that the "Appellate Division was entirely reasonable in its determination." (*Id.* at 13–14.)

Because the Appellate Division reasonably concluded that the intoxication instruction was harmless error, this Court cannot grant habeas relief on this claim.

The Court applies the harmlessness standard discussed above with reference to Petitioner's Confrontation Clause claims. *See supra* section II.b.iii. The analysis becomes more complicated, however, when the state courts on direct appeal *do* hold that errors of federal law infected a defendant's state criminal proceedings *but* find those errors to be harmless after conducting *their own* harmlessness analysis.[16] This complication arises from AEDPA's deferential review standards. When a state court holds that a federal constitutional violation tainted a defendant's trial but that the violation was harmless, the state court has "adjudicated" a constitutional "claim . . . on the merits." 28 U.S.C. § 2254(d). As a consequence, AEDPA prohibits habeas relief on the adjudicated claim unless the state court's adjudication unreasonably applied clearly established Supreme Court precedent or unreasonably determined the facts in light of the evidence in the state court record. *See* § 2254(d)(1), (2).

AEDPA's deferential review standards apply both to the analysis of the underlying federal constitutional violation as well as to the state court's analysis of the harmlessness of that violation; that is to say, "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry*, 551 U.S. at 119. "And a state-court decision [finding a federal

[16] In its decision on Petitioner's Direct Appeal, the Appellate Division found that the Trial Court "erred in granting the [state's] request to charge the jury, over [Petitioner's] objection, regarding intoxication, as there was insufficient evidence of intoxication in the record." *Stevenson*, 11 N.Y.S.3d at 647. The Appellate Division did not state whether this was an error of federal or state law, *see id.*, but Respondent argues that the jury instruction error is an error of state law, not federal law, and this Court therefore cannot grant relief on these claims, (*see* Resp't's Mem. 9–14). The Court need not decide this issue because the Court finds any error in this case to be harmless as a matter of law and does not decide whether the jury instruction claim rises to the level of a federal constitutional violation.

constitutional violation harmless] is not unreasonable if "'fairminded jurists could disagree" on [its] correctness.'" *Ayala*, 576 U.S. at 269 (quoting *Harrington*, 562 U.S. at 101). A federal court "may not grant [a petitioner's] habeas petition, however, if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (per curiam) (quoting *Lockyer*, 538 U.S. at 75–77).

Nevertheless, the AEDPA deferential standard of review does not displace the *Brecht* analysis. *See Fry*, 551 U.S. at 119–20. Rather, "the *Brecht* standard 'subsumes' the requirements that § 2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman* [*v. California*, 386 U.S. 18 (2015)]." *Ayala*, 576 U.S. at 268. "While a federal habeas court need not 'formal[ly]' apply both *Brecht* and 'AEDPA/*Chapman*,' AEDPA nevertheless 'sets forth a precondition to the grant of habeas relief.'" *Id.* (quoting *Fry*, 551 U.S. at 119–20). "In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Id.* at 270.

Assuming without deciding that the jury instructional error raises federal constitutional issues, the Trial Court's jury instruction on intoxication was harmless.

As an initial matter, the jury instruction is subject to harmless error analysis. Jury instruction errors generally do not fit within the small category of errors requiring automatic reversal. *See Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (per curiam) ("[H]armless-error analysis applies to [jury] instructional errors so long as the error at issue does not categorically 'vitiat[e] *all* the jury's findings.'" (third alteration in original) (quoting *Neder v. United States*, 527 U.S. 1, 11 (1999))). The jury instruction concerning Petitioner's intoxication does not vitiate

all of the jury's findings in the way that, for example, a failure to properly define the reasonable doubt standard would. *See Gaines v. Kelly*, 202 F.3d 598, 604 (2d Cir. 2000). Accordingly, the Trial Court's instruction regarding Petitioner's intoxication is susceptible to harmless error analysis.

Not only is this instructional error subject to harmless error analysis, but that analysis demonstrates that both errors in this case are, in fact, harmless. Among other things, courts analyzing the harmlessness of an instructional error consider the degree to which the trial court repeated the instructional error before the jury as well as any counter-balancing instructions that would mitigate the effect of the improper instruction or improperly withheld instruction. *See Smalls v. Batista*, 191 F.3d 272, 282 (2d Cir. 1999).

The first factor — repetition of the error before the jury — weighs in favor of harmlessness. Petitioner's possible intoxication at the time he committed the crimes was not a significant element of the State's case. Although intoxication was mentioned on four separate occasions to the jury during the jury charge, (*see* Tr. 359:1–4, 360:19–22; 377:22–25, 379:18–380:3), intoxication was not frequently mentioned by the State throughout the trial as a whole and Petitioner's comment during the Recorded Call about "smoking" was only briefly mentioned during the State's opening and summation remarks (*see* Tr. 39:1–2, 341:15–17). In addition, to the extent that intoxication was repeated before the jury, the Trial Court's instruction on intoxication itself functioned to potentially help Petitioner by demonstrating that he did not form the necessary purpose or knowledge, (*see* Tr. 377:22–378:6, 379:19–380:3), to commit the crimes with which he was charged. As the Trial Court instructed, "evidence of the [Petitioner's] intoxication may be considered whenever it is relevant to negative an element of the crime charged." (Tr. 377:22–378:6.)

In addition, the voluminous and weighty evidence against Petitioner further supports a harmlessness determination. In its decision finding the Trial Court's intoxication instruction harmless error, the Appellate Division found that while there was "insufficient evidence of intoxication in the record," the instruction was harmless because "there was overwhelming evidence of the defendant's guilt and . . . no significant probability that the error contributed to his convictions." *Stevenson*, 11 N.Y.S.3d at 647. Petitioner has not demonstrated that the intoxication instruction "so infected the entire trial that the resulting conviction violates due process." *Blazic v. Henderson*, 900 F.2d 534, 541 (2d Cir. 1990). As the Appellate Division explained, there was overwhelming evidence of Petitioner's guilt in the form of testimony from the victim, testimony from her mother, testimony of the victim's teacher, and statements by Petitioner indicating consciousness of guilt, such as the Recorded Call and the Voicemail Messages. (*See* Tr. 2:14–22, 41:6–17, 45:24–76:2, 133:4–137:20, 148:15–158:16, 176:21–177:16.) Accordingly, the intoxication instruction was harmless. *See Forino v. Lee*, No. 10-CV-5980, 2016 WL 7350583, at *8 (E.D.N.Y. Dec. 19, 2016) (finding that omission of a jury instruction was harmless because "the evidence of Petitioner's guilt was overwhelming").

Given this analysis, the Court cannot find that the Appellate Division unreasonably concluded that the instructional error was harmless. At the very least, fair-minded jurists could disagree about the harmlessness of this error; as such, this Court must uphold the Appellate Division's judgment.

v. Ineffective assistance of Trial Counsel

Petitioner argues that he was denied the effective assistance of Trial Counsel based on Trial Counsel's failure to (a) object to admission of the graduation photograph of the victim, (b) object to the prosecutor's summation remarks when the prosecutor allegedly

mischaracterized evidence and vouched for the credibility of the victim, (c) consult or retain a medical expert, and (d) convey that the prosecutor's plea offer was "still available" to Petitioner or to "advise Petitioner of the pro's and con's" of the offer. (Am. Pet. 7–18.)

"The Sixth Amendment right to counsel 'is the right to the effective assistance of counsel.'" *Buck v. Davis*, 580 U.S. ---, ---, 137 S. Ct. 759, 775 (Feb. 22, 2017) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)); *see also Premo v. Moore*, 562 U.S. 115, 121 (2011). "A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice." *Buck*, 580 U.S. at ---, 137 S. Ct. at 775 (citing *Strickland*, 466 U.S. at 687); *see also Sexton v. Beaudreaux*, 585 U.S. ---, ---, 138 S. Ct. 2555, 2558 (June 28, 2018) (per curiam) ("To prove ineffective assistance of counsel, a petitioner must demonstrate both deficient performance and prejudice." (citing *Strickland*, 466 U.S. at 687)). "Recognizing the 'tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence,' . . . counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (alteration in original) (quoting *Strickland*, 466 U.S. at 690); *see also Bierenbaum v. Graham*, 607 F.3d 36, 50 (2d Cir. 2010) (stating that the *Strickland* standard is "highly deferential" to eliminate the "distorting effects of hindsight" (quoting *Strickland*, 466 U.S. at 689)). While it is possible that, in certain instances, even "an isolated error" can support an ineffective assistance claim, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington*, 562 U.S. at 111.

The "highly deferential" *Strickland* standard is made "doubly so" on habeas review, as AEDPA requires deference to the state court's ruling. *Premo*, 562 U.S. at 122; *accord Santone v.*

Fischer, 689 F.3d 138, 154 (2d Cir. 2012); *see also Dunn v. Reeves*, 594 U.S. ---, ---, 141 S. Ct. 2405, 2410 (July 2, 2021) ("This analysis is 'doubly deferential' when, as here, a state court has decided that counsel performed adequately." (quoting *Burt v. Titlow*, 571 U.S. 12, 23 (2013))). Thus, on habeas review, "the question is not whether counsel's actions were reasonable . . . [but] whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105. "Surmounting *Strickland*'s high bar is never an easy task." *Id.* (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

For the reasons stated below, the Court cannot find that the Appellate Division unreasonably applied clearly established Supreme Court precedent or unreasonably determined the facts when it decided that Petitioner did not suffer ineffective assistance of counsel.

1. Failure to object to photograph of victim and summation statements by prosecutor

Petitioner argues that "[t]here are single errors that can render a defense [counselor's] entire representation deficient," and Trial Counsel's failure to "launch a single objection to admission of the graduation photo of the child-complainant or the prosecutor's misuse of it" was one of those errors. (Am. Pet. 9 (citing *People v. Hobot*, 84 N.Y.2d 1021, 1022 (1995)).) In support, Petitioner claims that the photograph, which was included on a PowerPoint slide during summation, was prejudicial because it shows a ten-and-a-half-year-old child, "smiling while holding a diploma, dressed in a graduation gown," and "the effects it would have on the jury's determination process cannot be ignored." (*Id.* at 10.) Petitioner relies on the dissent in *People v. Santiago*, 22 N.Y.3d 740 (2014), in which the dissenting judge stated that defense counsel's failure to object to the prosecutor's use of a photograph during summation "was designed to inflame the passion of the jury in order to engender prejudice against the defendant [and] constitutes an error . . . as to deny defendant a fair trial." *Santiago*, 22 N.Y.3d at 751 (Rivera J.,

dissenting); (*see* Am. Pet. 10). In addition, Petitioner argues that Trial Counsel "failed to lodge a single objection to the prosecutor's comments [during summation], [in which] she mischaracterized evidence and vouched for the credibility of the child complainant." (*Id.* at 13.) Petitioner asserts that because the case turned on "the uncorroborated testimony of the child-complainant," there is "underwhelming evidence" and the summation remarks served to prejudice him. (*Id.* at 14–15.)

In his Direct Appeal, Petitioner argued that he was deprived of effective assistance of counsel because of Trial Counsel's "inexplicable failure to object to admission of the graduation photograph or a single one of these numerous, improper, and highly prejudicial comments" by the prosecutor.[17] (Direct Appeal 52 (citing *People v. Fisher*, 18 N.Y.3d 864 (2012)).) In its decision, the Appellate Division decided the claim on the merits, holding that Trial Counsel's "failure to object to the challenged summation remarks did not constitute ineffective assistance of counsel"[18] and also stating that "[t]he record reveals that defense counsel provided meaningful representation." *Stevenson*, 11 N.Y.S.3d at 648.

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[17] In his Direct Appeal, Petitioner challenged the prosecutor's summation remarks because (1) the prosecutor "mischaracterized the testimony" regarding the victim's medical examination and stated that the examination "corroborated" the victim's testimony when "[a] medical exam that revealed no physical signs of abuse could not legitimately be deemed to have 'corroborated' any testimony," (2) "improper[ly] vouch[ed] for the complainant's credibility," and (3) improperly shifted the burden to Petitioner by stating that the victim had "no reason to lie." (Direct Appeal 46–50.)

[18] In his Direct Appeal briefing, Petitioner based his ineffective assistance of counsel claim on the display of the photograph, which was admitted and displayed during the testimony of the victim's mother and again during the prosecutor's summation remarks. (Tr. 158:1–159:25, 198:4–7; Direct Appeal 17, 39, 111.) Accordingly, the Court construes the Appellate Division's reference to "the challenged summation remarks" to include reference to Petitioner's arguments regarding the display of the photograph during the summation remarks.

The Court cannot conclude that the First 440 Motion court unreasonably denied Petitioner's ineffective assistance claim because, even assuming without deciding that counsel's performance was deficient,[19] Petitioner has not demonstrated that such performance prejudiced him. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). As discussed *supra*, there was ample evidence of Petitioner's guilt before the jury without the photograph and the summation comments, *see Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010) (stating that in determining prejudice, a habeas court "must consider the totality of the evidence before the judge or jury" (quoting *Strickland*, 466 U.S. at 695)), including testimony from the victim identifying Petitioner as the assailant, (Tr. 45:5–81:15), and evidence of Petitioner's consciousness of guilt in both the Voicemail Messages, (Direct Appeal 15, 76; *see also* Tr. 155:14–158:16, 176:21–177:16), and in the victim's mother's testimony, (Tr. 155:1–158:17, 176:24–177:13). The Court is therefore not persuaded that, had Trial Counsel objected to the graduation photograph and the prosecutor's summation comments, the verdict at trial would have been different. *See Ainsley v. La Manna*, No. 18-CV-3738, 2019 WL 1407325, at *13 (E.D.N.Y. Mar. 28, 2019) (holding that any deficient performance by trial counsel in failing to object to the prosecutor's summation at trial did not satisfy *Strickland*'s prejudice prong because "substantial evidence of [the] [p]etitioner's guilt was introduced at trial, including unimpeachable evidence in the form of video and DNA"); *Brown v. Lee*, No. 14-CV-9718, 2019

[19] Although the Appellate Division held that Trial Counsel's performance was not deficient, *see Stevenson*, 11 N.Y.S.3d at 648, the Court assumes without deciding that Trial Counsel's failure to object was deficient because the record does not provide any indication of the reasons why Trial Counsel chose not to object to the admission of the photograph or the prosecutor's remarks during summation, and the Court declines to speculate as to the reasons why Trial Counsel might not have objected.

WL 5078360, at *10 n.8 (S.D.N.Y. Oct. 10, 2019) (finding no prejudice from alleged trial counsel error in failing to object to admission of recorded telephone conversations between petitioner and the victim when "[t]he evidence against [the] [p]etitioner beyond the recording included his own confession to the police, extensive testimony from the victim, and testimony from another witness"); *see also Festus v. Noeth*, No. 17-CV-3941, 2020 WL 7042666, at *23 (E.D.N.Y. Nov. 30, 2020) (finding that the prosecutor's summation remarks, which the petitioner contended improperly vouched for and bolstered a witness' testimony, "do not amount to egregious misconduct," and, thus, did not result in actual prejudice). In addition, the Trial Court limited any prejudice by instructing the jury that "summations are not evidence," and that "[i]t is the function of the jury to draw its own inferences and conclusions from the evidence as [it] recollect[s] the evidence and . . . find[s] the evidence to be credible and believable." (Tr. 343:13–22); *see Ward v. Griffin*, No. 15-CV-2579, 2018 WL 4688937, at *15 (E.D.N.Y. Sept. 28, 2018) ("[T]he trial court mitigated any potential prejudice from the prosecutor's remarks when he told the jury that the 'summations of counsel are [] not evidence in the case' and that it was free to reject any arguments made in summation." (second alteration in original)).

Accordingly, because Petitioner did not demonstrate that he suffered any prejudice as a result of the alleged errors by Trial Counsel, the Court cannot grant habeas relief on this claim.

2. Failure to consult with or call a medical expert

Petitioner argues that Trial Counsel was ineffective for failure to "retain, or at a minimum, consult a medical expert." (Am. Pet. 15.) In support, Petitioner argues that Trial Counsel should have subpoenaed the nurse who examined the victim "the minute the prosecutor abruptly announced her sudden availability" and "knew he had to at least retain a medical expert

or at minimum consult one . . . so that he could conduct a more effective cross examination." (*Id.* at 16.)

In his First 440 Motion, Petitioner argued that when "a defendant is accused of sexually abusing a child and the evidence is such that the case turns on accepting one party's word over another's, defense counsel, *at a minimum*, should be required to consult with an expert." (First 440 Mot. 5.) In support, Petitioner cites three recent cases in which the Second Circuit "considered whether to grant *habeas corpus* relief to New York State prisoners on the ground that their counsel was ineffective for failing to consult with medical experts familiar with issues concerning child sexual abuse." (*Id.* at 6.) Petitioner also provided an affidavit from Dr. Mark Taff, an expert in the field of sexual abuse, who suggested "specific evidence of items which could be challenged had he (or any other expert) been consulted," (*id.*), such as "'positive' findings of anatomical/tissue injuries during a physical examination of a patient," "[t]he complete lack of scientific evidence . . . such as stains, hairs, [and] foreign objects" at the scene, and "[t]he absence of physical injury involving the genitals and rectum." (*Id.* at 8–10.)

In its decision on the First 440 Motion, the state court provided several reasons for why Petitioner's ineffective assistance of counsel claim failed: (1) statements from Trial Counsel in his affidavit "set[] forth reasonable strategic reasons for not consulting with, hiring, or calling a medical expert to testify," (2) statements from Dr. Taff, Petitioner's expert who submitted an affidavit in support of Petitioner's 440 Motion, did not "call into question [T]rial [C]ounsel's decisions" and instead suggested courses of action that "do not seem to be pertinent to the evidence in the case at hand," and (3) differences between the cases cited by Petitioner and the facts at hand. (*Id.* at 123–24.) The court found that Trial Counsel's failure to confer with an expert was "strategic and reasonable" considering the facts of the case, and explained that expert

testimony "is not needed to explain to a jury that a victim's normal physical examination conducted four days after she claimed to have been sexually assaulted . . . could mean that the victim was not raped." (*Id.* at 123.)

The Court cannot conclude that the First 440 Motion court unreasonably denied Petitioner's ineffective assistance claim. As discussed *supra*, a lawyer's tactical decisions are afforded great deference in the face of an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 690 ("Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement."). The decision of whether to employ a medical expert is a question of strategy. *See Harrington*, 562 U.S. at 111 (rejecting the proposition that a defense expert must testify whenever the state utilizes an expert, as "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense," and noting that "[i]n many instances cross-examination will be sufficient to expose defects in an expert's presentation").

In his affidavit submitted to the First 440 Motion court, Trial Counsel provided clear reasons for why he did not use a medical expert. He was aware of the proposition that a normal exam may indicate that a claim of rape was false. (First 440 Mot. 79.) Trial Counsel also averred that he was well aware that a normal medical examination "can mean that a victim was not raped but it does *not rule out the possibility* that she was raped" and that he "did not then, and do[es] not now[] believe there was anything to be gained by consulting with a medical expert who would only repeat what is a well-established fact." (*Id.*) At trial, Trial Counsel focused his cross-examination of the State's medical expert on this point and eventually got the State's

Medical Expert to admit that there was nothing in the victim's physical exam that corroborated her allegations. (Tr. 269:8–12.)

In addition, the cases cited by Petitioner in his briefing on the First 440 Motion are unpersuasive. As the state court correctly noted, those cases are inapposite because "[i]n all of these cases, it was claimed that the victims exhibited physical evidence of sexual abuse that could have been challenged or explained by a defense expert." (*Id.* at 124.) For example, in *Gersten v. Senkowski*, the Second Circuit found trial counsel's failure to call a medical expert to challenge the medical evidence deficient because the medical evidence indicated penetration had occurred and counsel "essentially conceded that the physical evidence was indicative of sexual penetration without conducting any investigation." 426 F.3d 588, 607–08 (2d Cir. 2005). Similarly, in *Lindstadt v. Keane*, the Second Circuit held that counsel was deficient for failing to call an expert witness when the prosecution's expert's findings were indicative of sexual abuse and counsel did not consult an expert to call these findings into doubt. 239 F.3d 191, 193–201 (2d Cir. 2001).

Because Trial Counsel's failure to call an expert witness was a strategic decision, the court's decision in the First 440 Motion that Trial Counsel provided effective assistance of counsel was reasonable. *See Swaby v. New York*, 613 F. App'x 48, 50 (2d Cir. 2015) ("[F]ailure to seek an expert does not satisfy the performance prong of *Strickland* where counsel chooses a strategy that does not require an expert. . . . '[E]ven if it had been apparent that expert . . . testimony could support [a certain] defense, it would be reasonable to conclude that a competent attorney might elect not to use it.'" (third alteration in original) (quoting *Harrington*, 562 U.S. at 106)); *Morency v. Annucci*, No. 14-CV-672, 2017 WL 4417718, at *15 (E.D.N.Y. Mar. 20, 2017) ("While trial counsel's decision not to call . . . a defense expert was premised on a

misunderstanding of the law, his decision to forego a different defense expert and instead rely on his cross-examination of [a witness] . . . is, as the 440 court found, an objectively reasonable strategic decision."), *report and recommendation adopted*, 2017 WL 4417647 (E.D.N.Y. Sept. 30, 2017).

Accordingly, the Court cannot grant habeas relief on this ground.

3. Failure to convey availability of plea offer

Petitioner argues that Trial Counsel was ineffective for counsel's "failure to convey that a plea offer was still available, or to, at minimum, advise Petitioner of the pro's and con's, the strength of the prosecution's case[,] and the amount of time he faced." (Am. Pet. 18.) Petitioner contends that Trial Counsel "displayed complete frustration towards him throughout the duration of his entire trial and it seems to have had a lot to do with the nature of his charges." (*Id.* at 18–19.)

Petitioner presented this ineffective assistance of counsel claim based on the plea deal to the First 440 Motion court twice — the first time in the First 440 Motion and the second time on a motion to reargue the First 440 Motion. (*See* First 440 Mot. 3–32, 128–34.) In his original First 440 Motion, Petitioner did not provide a sworn affidavit that Trial Counsel failed to properly advise him of his plea deal. (*See id.* 3–32.) In his unsworn allegations, Petitioner asserted that Trial Counsel "never educated [him] on the strength of the People's case and the risks [he] was taking in going to trial." (*Id.* at 86.) Petitioner was "still questioning the details of the latest plea offer" but asserted that "[a]s long as [he] maintained his innocence, counsel felt there had to be a trial and he did not want to discuss the details of any plea offer." (*Id.*) In its

decision, the First 440 Motion court denied Petitioner's claim pursuant to C.P.L. § 440.30(2)(b)[20] because the allegation that Trial Counsel did not properly discuss his plea offer with him is "not supported by sworn factual allegations." (*Id.* at 125.) In the alternative, the court noted that "notwithstanding the fact that [Petitioner] has not provided a sworn affidavit of fact . . . he has also not provided any objective evidence that he would have pled guilty." (*Id.*) In his motion to reargue the First 440 Motion, Petitioner included a sworn statement, stating that Trial Counsel failed to convey "the details of [the plea deal,] such as[] the time of incarceration and or post-release supervision time it entail[ed]," and the "strength of the government's case or the weaknesses in the defense, as well as the chances of being convicted." (*Id.* at 133.) The First 440 Motion court denied the motion to reargue, holding that Petitioner "failed to provide a reasonable justification for his failure to submit his affirmation in support of his prior motion," and holding that the motion was procedurally barred pursuant to C.P.L. § 440.10(3)(c) because Petitioner "was in a position to adequately raise the ground on his previous motion and failed to do so." (*Id.* at 157.) In the alternative, the First 440 Motion court denied the motion on the merits, stating that "[t]here is no objective credible evidence that the [Petitioner] was not informed of the offer or the strength of the People's case, or that he would have accepted the plea offer." (*Id.* at 158.)

[20] It is not apparent from the First 440 Motion decision which provision of the C.P.L. the First 440 Motion court intended to cite to because the version of this provision in effect in 2017 when the First 440 Motion was decided does not contain a section 440.30(2)(b). *See* C.P.L. § 440.30(2)(b) (amended 2019). Because the Second Circuit has not yet addressed whether section 440.30(2)(b) constitutes an independent and adequate state ground, the Court assumes without deciding that this claim is not barred but nevertheless determines that the claim fails on the merits. Accordingly, the Court declines to second guess whether the First 440 Motion court erred in citing to this provision.

The Second Circuit has not yet addressed whether section 440.30(2)(b) of the C.P.L. constitutes an independent and adequate state ground upon which Petitioner's claim can be precluded from habeas review, and only one court within this District has addressed this issue. *See Wells v. Miller*, No. 02-CV-5778, 2003 WL 23185759, at *17 (E.D.N.Y. Oct. 23, 2003) ("A state court decision that rejects claims pursuant to sections 440.10(2) and 440.30(2) of the New York Criminal Procedural Law is based upon an adequate and independent state ground."). Assuming without deciding that the claim is not procedurally barred pursuant to C.P.L. § 440.30(2), the Court finds that Petitioner's ineffective assistance of counsel claim nevertheless fails on the merits.

The Court cannot conclude that the First 440 Motion court unreasonably denied Petitioner's ineffective assistance claim because, even assuming without deciding that counsel's performance was deficient, Petitioner has not demonstrated that such performance prejudiced him. *See Strickland*, 466 U.S. at 694. Petitioner's own statements belie any claim that he might have pled guilty had Trial Counsel advised him in more detail regarding the plea offer and risks of going to trial. As the First 440 Motion court noted in its decision, Trial Counsel's sworn affidavit states that he advised Petitioner of the "generous" plea deal offer, that he advised Petitioner "that it was a beneficial offer and that he should accept it because a jury might credit the complainant's accusations and he would then . . . face[] a far longer term of imprisonment," and that Petitioner "rejected the People's plea offer because . . . he was certain that he would be acquitted, due to the lack of medical evidence."[21] (First 440 Mot. 78.) At Petitioner's

[21] Petitioner's only support for his argument that Trial Counsel did not adequately advise him of his plea offer in his original First 440 Motion was his own unsworn statement, which the Second Circuit has held in a non-habeas context to be insufficient to establish ineffective assistance of counsel. *See United States v. Mejia*, 18 F. App'x 20, 23 (2d Cir. 2001)

sentencing hearing, Trial Counsel stated that Petitioner was offered a plea deal of five years imprisonment, which Petitioner rejected. (S. 5:15–21.) Petitioner made the following remarks right after Trial Counsel spoke:

> I fought for my freedom because I know I did not do this and I still, if I could come back to court every day and fight for my innocence, your Honor, I am innocent. . . . I am sorry to the people who feel I have done this, but I have not. That is why I have been here. I never ran away and I still won't.

(S. 7:5–13.) In addition, as the First 440 Motion court noted, Petitioner did not assert that he would have accepted the plea deal had he been properly advised by Trial Counsel. (*See* First 440 Mot. 125 (stating that Petitioner has "always maintained his innocence and never demonstrated a willingness to accept any plea offer" and stating that Petitioner was required to provide "objective credible evidence, beyond his own word, that he would have pled guilty had he been adequately advised by his attorney that he should do so").) In view of Petitioner's own statements that he "fought for [his] freedom" because he was innocent and the lack of evidence that Petitioner would have pled guilty if properly advised, there is no reasonable likelihood that the outcome would have been different had Trial Counsel conveyed that the plea offer was still available. *See Lafler v. Cooper*, 566 U.S. 156, 164 (2012) ("[A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances) . . . ."); *Cochran v. Griffin*, No. 18-CV-175, 2021 WL 1223848, at *6–7 (N.D.N.Y. Mar. 31, 2021) (stating that the "[p]etitioner's claim that had counsel advised him of his sentence exposure, he would not

("[Defendant] offers nothing more than his own assertion in his appellate brief that his lawyer would not permit him to testify. Such an unsworn, self-serving assertion is insufficient, on its own, to establish ineffective assistance of counsel." (citing *Underwood v. Clark*, 939 F.2d 473, 475–76 (7th Cir. 1991))).

have rejected the plea is belied by the record" when, despite the disparity between the plea deal and the sentence received, the petitioner "expressed no interest in accepting a plea").

To the extent Petitioner's claim relies upon the state court's failure to consider his sworn affidavit in assessing his motion to reargue, his claim was procedurally barred in the state court because the court relied upon independent and adequate state procedural grounds to deny the motion to reargue. (*See* First 440 Mot. 157); *Murden*, 497 F.3d at 192 (holding that C.P.L. § 440.10(3)(c) "constitutes an adequate state procedural bar to federal habeas review"). Accordingly, Petitioner's claim is procedurally barred from habeas review. *See Murden*, 497 F.3d at 197 ("[W]e are procedurally barred from considering [the petitioner's] 1972 psychiatric records, which were not presented with his first Section 440 motion, but we are not barred from considering . . . [evidence], which was presented on that first motion."); *Kennaugh v. Miller*, 289 F.3d 36, 49 (2d Cir. 2002) (assessing the merits of the petitioner's *Brady* claim on the basis of evidence presented to the state court in the post-trial motion to vacate and applying procedural bar to a second set of police reports presented on a motion to renew the section 440 motion because to the extent the petitioner's *Brady* claim "relie[d] upon the state court's failure (in assessing his motion to renew) to consider the second set of police reports," that claim was procedurally barred from habeas review because the state court "relied upon independent and adequate state procedural grounds to deny the motion to renew").

Accordingly, because the First 440 Motion court's decision that Trial Counsel provided effective assistance of counsel was reasonable, the Court cannot grant habeas relief on this ground.

III. Certificate of appealability

Having denied the petition for a writ of habeas corpus, the Court grants a certificate of appealability as to Petitioner's motion to amend, evidentiary ruling, jury instruction, and ineffective assistance of counsel claims. The Court denies a certificate of appealability for Petitioner's procedurally barred claims regarding the admission of the victim's graduation photo, the victim's Medical Records, the prosecutor's summation remarks, and the Voicemail Messages.

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) Gov'g § 2254 Cases in the U.S. Dist. Cts. A court must issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means that a habeas petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 580 U.S. at ---, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). "Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed,' and '[courts] should not decline the application . . . merely because [they] believe[] the applicant will not demonstrate an entitlement to relief.'" *Welch v. United States*, 578 U.S. ---, ---, 136 S. Ct. 1257, 1263–64 (Apr. 18, 2016) (quoting *Miller-El*, 537 U.S. at 337). In fact, a certificate of appealability may issue even if "every jurist of reason might agree, after

the [certificate of appealability] has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 337–38.

The Court grants a certificate of appealability as to Petitioner's motion to amend, evidentiary ruling, and jury instruction claims. As to Petitioner's motion to amend, although the claims Petitioner seeks to add rely on facts not set forth in the original petition, including the testimony of the State's Medical Expert, reasonable jurors could debate whether Petitioner's claims relate back to the original petition as these claims concerned the Medical Records. As to Petitioner's evidentiary ruling and jury instruction claims, although the Supreme Court has clearly mandated that "habeas corpus relief does not lie for errors of state law," *see Estelle*, 502 U.S. at 67, reasonable jurors could debate whether these errors rise to the level of constitutional magnitude to warrant federal habeas relief. While the Court expects that all reasonable jurists would eventually reach the same conclusion as the Court, especially with respect to Petitioner's jury instruction claim that requires double deference to the state court's analysis of the underlying alleged federal constitutional violation as well as to the state court's analysis of the harmlessness of that violation, because the claims are "debatable," the Court must issue a certificate of appealability. *See Buck*, 580 U.S. at ---, 137 S. Ct. at 774; *Waiters v. Lee*, No. 13-CV-3636, 2020 WL 3432638, at *14 (E.D.N.Y. June 23, 2020).

The Court also grants a certificate of appealability for Petitioner's ineffective assistance of counsel claims. Adjudicating a claim of ineffective assistance necessarily requires complex judgments about the reasonableness of counsel's actions in light of all the facts. These claims are not amenable to hard-and-fast conclusions but instead require a searching inquiry into the circumstances. Given the fungible and imprecise "reasonableness" standard of *Strickland*'s first prong, the Court believes that reasonable jurists could at least debate Petitioner's claims

concerning Trial Counsel's failure to object to the photograph of the victim, consult with a medical expert, and convey availability of the plea offer. Given the high bar for success on *Strickland* claims, compounded by the high bar for a federal habeas court to overturn a state court's adjudication of a *Strickland* claim on its merits, the Court expects that all reasonable jurists would eventually reach the same conclusion as the Court, but because the claim is "debatable," the Court must issue a certificate of appealability. *See Buck*, 580 U.S. at ---, 137 S. Ct. at 774; *Waiters*, 2020 WL 3432638, at *14.

However, the Court denies a certificate of appealability for Petitioner's claims regarding the admission of the victim's graduation photo, victim's Medical Records, the prosecutor's summation remarks, and the Voicemail Messages. The Appellate Division held that Petitioner's claims alleging that the Trial Court improperly admitted the graduation photo of the victim and that the prosecutor made improper remarks on summation were "unpreserved for appellate review" pursuant to C.P.L. § 470.05(2) because Petitioner did not object at trial. *See Stevenson*, 11 N.Y.S.3d at 648. Second Circuit precedent clearly establishes that New York's contemporaneous objection rule is an independent and adequate state ground upon which a claim may be procedurally barred. *See Liggan*, 652 F. App'x at 43 (concluding that the petitioner's "claim is procedurally barred because his state court appeal was decided based on the application of New York's contemporaneous objection rule"). Similarly, the Second 440 Motion court held that Petitioner's "claims relating to the complainant's [M]edical [R]ecords and [Petitioner's] calls to the complainant's mother while incarcerated on Rikers Island" were procedurally barred pursuant to both C.P.L. § 440.10(2) because Petitioner failed to raise those on-the-record claims on direct appeal and, in the alternative, C.P.L. § 440.10(3)(c) if the court construed the claims as off-the-record allegations because "these claims could have been raised" in Petitioner's First 440

Motion or his motion to re-argue "based on information that was within the [Petitioner's] possession." (Second 440 Mot. 104.) Second Circuit precedent clearly establishes that both C.P.L. §§ 440.10(3)(c) and 440.10(2)(c) are independent and adequate state rules to bar federal habeas review. *See Murden*, 497 F.3d at 192; *Jackson*, 763 F.3d at 143–44. No reasonable jurist would debate whether this Court may grant federal habeas relief on the basis of these claims, making a certificate of appealability inappropriate.

IV. Conclusion

For the foregoing reasons, the Court denies Petitioner's motion to amend his petition and denies the petition for a writ of habeas corpus. The Court issues a certificate of appealability as to Petitioner's motion to amend, evidentiary ruling, jury instruction, and ineffective assistance of counsel claims. The Court denies a certificate of appealability for Petitioner's procedurally barred claims regarding the admission of the victim's graduation photo, the victim's Medical Records, the prosecutor's summation remarks, and the Voicemail Messages. The Clerk of Court is directed to enter judgment and close this case.

Dated: August 16, 2021
Brooklyn, New York

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge

JA: 1e

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 12th day of October, two thousand twenty-three.

Frank R. Stevenson,

Petitioner - Appellant,

v.

Superintendent Michael Capra,

Respondent - Appellee.

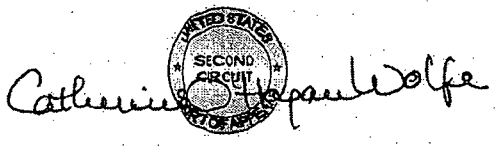
ORDER

Docket No: 21-2210

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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