No. 23-

IN THE

Supreme Court of the United States

ERIK JOHNSON,

Petitioner,

v.

PATRICK GRIFFIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the admission into evidence, through the testimony of decedent's 10-year-old daughter, of hearsay statements allegedly made by the decedent to the father of her children during a phone call to which the daughter was not privy, violated petitioner's Confrontation Clause rights where the statements were introduced for their truth and the jury was not given an adverse missing witness instruction as to the father, who was present at the courthouse and could have testified.

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LIST OF RELATED CASES:

Johnson v. Griffin, 22-2007, United States Court of Appeals for the Second Circuit, Judgment entered January 26, 2024

Johnson v. Griffin, 13-cv-4337 (MKB) (SMG), United States District Court for the Eastern District of New York, Judgment entered August 16, 2022

People v. Johnson, Court of Appeals of the State of New York, Leave to appeal denied August 9, 2012

People v. Johnson, 2010-3508, New York Supreme Court, Appellate Division, Second Department, Judgment affirmed May 23, 2012

People v. Johnson, 3299/06, New York Supreme Court, Criminal Term, Queens County, judgment rendered March 25, 2010

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The Court of Appeals decision affirming the District Court's denial of a writ of habeas corpus is reported at *Johnson v. Griffin*, 22-2007-pr, 2024 WL 302387 (2d Cir. Jan. 26, 2024) (summary order) (Appendix A, 1a -9a). The District Court decision is reported only at *Johnson v. Griffin*, 13-CV-4337 (MKB), 2022 WL 334771 (E.D.N.Y. Aug 12, 2022) (MKB) (Appendix B, 10a - 53a). The Magistrate Judge's Report and Recommendation is unreported (Appendix C, 54a - 93a). The decision by the highest state court to consider petitioner's claim is reported at *People v. Johnson*, 95 A.D.3d 1237, 943 N.Y.S.2d 910 (2d Dept. 2012) (Appendix D, 94a).

JURISDICTION

This Court has jurisdiction to review the Order of the United States Court of Appeals pursuant to 28 U.S.C. §§ 1253, 1257a on the question whether the state trial court deprived petitioner of his Sixth Amendment right to confront witnesses against him by admitting hearsay statements made by decedent to a witness not called to testify without granting the defense a missing witness instruction.

The Court of Appeals affirmed the District Court's denial of Mr. Johnson's petition for a writ of habeas corpus on January 26, 2024, and denied rehearing on April 12, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., Amend. VI.

2. ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." U.S. Const., Amend. XIV.

3. "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE

Petitioner-Appellant Erik Johnson was arrested in connection with the stabbing death of his ex-girlfriend Asma Johnson on November 8, 2006. He was tried before a jury and, on February 11, 2010, was convicted of murder in the second degree and criminal possession of a weapon in the fourth degree. The trial court imposed concurrent sentences of 25 years to life, and one year, respectively.

Mr. Johnson timely perfected his appeal in the Appellate Division, Second Department arguing, *inter alia*, that his Fourteenth Amendment right to a fair trial was violated by the trial court's refusal to give a missing witness charge and that her received ineffective assistance of counsel who did not adequately argue that issue. The Appellate Division affirmed Mr. Johnson's conviction on March 23, 2012, holding that any error with respect to the missing witness or other appellate claims was harmless and that the ineffective assistance of counsel claim was without merit. He sought leave to appeal to the Court of Appeals on the same claims, but leave to appeal was denied on August 9, 2012.

Mr. Johnson timely filed his petition for a writ of habeas corpus on July 25, 2013, arguing, *inter alia*, that the state trial court had violated both his Sixth and Fourteenth Amendment rights

when it refused to give a missing witness instruction, and that trial counsel was ineffective for failing to argue the constitutional dimensions of the missing witness application or that Livingston's testimony would not have been cumulative. United States District Judge Margo K. Brodie found that the state court's refusal to give a missing witness instruction violated his rights under both the Sixth and Fourteenth Amendments (implicitly finding that ineffective assistance of counsel excused the defense failure to make the Sixth Amendment argument to the state court). Judge Brodie nevertheless denied the petition on August 16, 2022, on the basis of harmless error, but issued a Certificate of Appealability.

On appeal to the Court of Appeals, Mr. Johnson argued that habeas corpus relief should be granted because the state courts unreasonably applied federal law concerning Mr. Johnson's entitlement to a missing witness charge. Specifically, as is relevant to this petition, he alleged that the prosecution refused to call Livingston to the stand, and instead presented his double-hearsay testimony though the testimony of his daughter who was not a party to the call, thereby insulating him from cross-examination about a phone call that placed Mr. Johnson in Asma's apartment at the time of the crime. Mr. Johnson argued that he was entitled to a missing witness charge as to Livingston because Livingston's testimony about what Asma told him on the phone was of critical importance to the case, he was available, and he would be expected to favor the prosecution. These tactics by the prosecution were fundamentally unfair and violated Mr. Johnson's rights under the Sixth and Fourteenth Amendments. Mr. Johnson also argued that the error was not harmless.

In a memorandum decision dated January 26, 2024, the Court of Appeals held that, with respect to Mr. Johnson’s Sixth Amendment missing witness claim, since the statements Asma allegedly made to Mr. Johnson, as elicited at trial through Asma’s daughter, were not testimonial,

there could be no Confrontation Clause violation. The Court also determined that the missing witness instruction aspect of Mr. Johnson's claim had "no connection to the Confrontation Clause."

Mr. Johnson moved for rehearing on the ground that the Court had misapprehended his argument. Specifically, he argued that the Panel's determination that there could have been no Confrontation Clause violation caused by the introduction of hearsay statements made by Livingston because, when he made them, they were not testimonial, was incorrect because those statements were admitted into evidence for their truth through his daughter, and therefore it was her testimonial statements during trial that were at issue. The jury was not given a missing-witness adverse inference instruction about Livingston's absence, which would have allowed it to discount his daughter's testimony at trial. Instead, the jury was instructed that it could not "speculate about" or, therefore, question, the truth of those statements. The Court of Appeals denied rehearing on April 12, 2024.

STATEMENT OF FACTS

Trial Testimony Related to Confrontation Clause Claim

Asma Johnson lived in a second floor Queens apartment with her daughter and her nine year old son. Asma's daughter testified that around 5:45 pm on November 8, 2006, Thomas Livinston, the children's father, came to take them to back to school to play math games. Asma told the children to go downstairs to meet him, but when her daughter opened the door, Mr. Johnson (no relation to Asma) was waiting outside the door and pushed into the apartment saying he was there to apologize to the family.

According to Asma's daughter, when Mr. Johnson was her mother's boyfriend, there had been times when he would come to the apartment and the two would argue, but the police never came during those arguments. Mr. Johnson had twice before pushed his way into their apartment in this fashion. During cross-examination, the court sustained defense counsel's questions about whether Livingston had ever struck Asma and whether she ever had an order of protection against him.

On this occasion, Asma told the children she would be fine and sent them downstairs to meet Livinston. Her daughter testified that although she was upset by Mr. Johnson's arrival, she said nothing to Livingston about it. They went to math games with Livingston and he stayed to take them home later. Over defense counsel's objection, Asma's daughter was permitted to testify that, on the way home, Livingston called Asma who told him not to bring the children there. Her daughter was not on the phone at the time, but Livingston told her it was her mother he was speaking with. Over objection, Asma's daughter also testified that Livingston asked her who was at the apartment when he picked them up and she told him Mr. Johnson had been there.

Livingston then took the children to Mr. Johnson's aunt's house, which was a few buildings away. SHAUNA TIPPINS, Mr. Johnson's aunt, GLORIA TIPPINS, his cousin, and Shauna's sister and son were home when they arrived. Asma's daughter testified that Livingston told Mr. Johnson's aunt that Mr. Johnson was "causing all types of problems and that she should make him leave." Over objection, Shauna similarly testified that Livingston told them that Mr. Johnson and Asma were arguing and that they should go over there.

They did so and, as they approached, Shauna looked through a window and saw what she took to be Mr. Johnson's shadow a few feet outside Ama's door on the second-floor. Shauna and

Gloria met Mr. Johnson coming down to the first floor landing as they were going up. Shauna and Gloria testified that, on his way past them, Mr. Johnson said he did something "wrong" or "bad" or "stupid." They both testified that Mr. Johnson had no blood on his jacket, boots, or pants, and that he had nothing in his hands).

Defense Counsel's Application for a Missing Witness Charge

Toward the close of the Prosecution's case, defense counsel requested that the jury be given a missing witness instruction with respect to Thomas Livingston, who was "supposed to have made the telephone calls to the victim and spoken to the victim" between 5:00 and 8:p.m. the night she was killed (99a). Counsel argued that Livingston was under prosecution control and pointed out that Livingston was available to testify since he was outside the courtroom during his daughter's testimony (101a). The prosecutor opposed the application on the grounds that Livingston was not a witness to the crime and his testimony would be duplicative of his daughter's testimony (100a). The prosecutor did not contest that Livingston was in prosecution control or that he was available. The court denied the application without explanation (102a). Counsel renewed his missing witness charge application at the end of the court's final charge, which the court again denied (96a).

REASONS FOR GRANTING THE WRIT

The question for this Court's review is whether the Confrontation Clause of the Sixth Amendment can be violated by the admission of hearsay statements through trial testimony elicited under circumstances that prevents the defense from confronting the available witness to whom the statements were allegedly made without benefit of a missing witness instruction.

Contrary to the Court of Appeals's characterization, Mr. Johnson's claim is not that the admission of Livingston's hearsay statements violated the Confrontation Clause. His claim is more nuanced than that: the admission of Livingston's daughter's obviously testimonial statements at trial about what he said, violated the Confrontation Clause because the trial court's refusal to grant an adverse inference missing witness instruction permitted the prosecution to prevent cross-examination as to them by keeping Livingston, the available principal witness to those statements, off the stand. Mr. Johnson could not challenge Livingston's reports about Asma's conversation with him through his daughter, who was not privy to Asma's side of the conversation. This prosecution strategy was as unconstitutional as it was clever.

Thomas Livingston, who was present in the courthouse during his daughter's testimony at Mr. Johnson's trial, was plainly the witness best positioned to testify about the *alleged* statements Asma made to him during a phone conversation Asma *allegedly* had with Livingston as he was driving the children home the night Asma was killed. But rather than call Livingston to testify about the conversation he had, the prosecution put Asma's alleged hearsay statements, which her daughter could not hear, into evidence through her daughter in the form of Livingston's statements about them. There was no instruction prohibiting the jury from using Livingston's statements for

their truth but the jury was told that it should not speculate about anything outside of the evidence including, implicitly, that the statements might not be true.

Because Livingston had direct knowledge of the alleged phone call with Asma, defense counsel asked for a missing witness instruction allowing the jury to draw an adverse inference about the phone call because of his absence, but that application was denied without explanation. Thus, by keeping Livingston off the stand, the prosecutor succeeded in insulating his hearsay statements about Asma's hearsay statements from challenge through cross-examination. It is the combination of the court's refusal to give a missing witness charge, the court's direction that the jury not speculate about matters off the record, and the admission of Livingston's statements about what Asma allegedly told him for their truth through a different witness, that resulted in a violation of the Confrontation Clause.

The Court of Appeals nevertheless determined that the admission of Livingston's statements about his conversation with Asma could not violate the confrontation clause because at the time he made them to his daughter and his Aunt, they were not made as a substitute for in-court testimony (7a). Mr. Johnson does not dispute this. Rather, his claim is based on the in-court testimonial statements his daughter made about Asma's alleged telephone statements to Livingston. *See Crawford v. Washington*, 541 U.S. 36, 50 (2004). The Confrontation Clause problem arises not just from the admission of her hearsay report about Asma's statements to Livingston, which he relayed to others, but from the court's instructions that the jury could not speculate about what Asma might or might not have said, together with its failure to instruct that it could draw an adverse inference about them from Livingston's absence. The prosecution thus introduced hearsay statements made by Livingston about what Asma allegedly told him, through

a witness at trial, for their truth, while shielding Livingston from cross-examination. This end run around this Court's "testimonial statements" jurisprudence exploited a gap between the nature of the statements to be confronted, and the nature of confrontation itself. Because the prosecution's novel strategy for insulating an available witness from cross-examination, and therefore about his statements, does not fit neatly into the Court's current testimonial statements analyses, this case presents a novel Confrontation Clause claim.

There is no ancillary barrier to this Court's review of that question. First, the Court of Appeal's conclusion that a missing witness instruction would likely not be appropriate because the "the defense could have easily called Livingston, who was present at the trial" is simply incorrect as a matter of law. It is well-established in both New York and Second Circuit precedent that a witness who has a substantial connection to one of the parties cannot be considered "available" to the opposite party. *People v. Gonzalez*, 68 N.Y.2d 424, 429, 509 N.Y.S.2d 796, 800 (1986); *People v. Rodriguez*, 38 N.Y.2d 95, 98, 378 N.Y.S.2d 665, 668 (1975); *United States v. Nichols*, 912 F.2d 598, 602 (2d Cir. 1990) (missing witness charge 'is appropriate if production of the witness is 'peculiarly within [the] power' of the other party"). Here, Livingston was the father of Asma's daughter and her brother and naturally "would have favored the prosecution in the murder of his children's mother, even if he did not have the additional motivation of avoiding being implicated in the murder himself. *See United States v. Torres*, 845 F.2d 1165, 1170 (2d Cir. 1988) (the circumstances of the witness's relation to the parties, not just physical presence, controls whether missing witness charge is appropriate).

Second, the Court of Appeals's focus on the missing witness instruction being permissive only, and not requiring the jury to draw an adverse inference, ignores that the real harm was that

the jury also was told not to speculate about off-the-record information, which *prevented* them from drawing such an inference. Without the missing witness instruction, the jury was essentially told it had no choice but to accept as true Asma's daughter's report of what Livingston claimed Asma had told him.

Third, that defense counsel at Mr. Johnson's trial did not couch his missing witness argument in Sixth Amendment terms does not bar review because the District Court necessarily found that failure to have been excused by ineffective assistance of counsel when it reached Mr. Johnson's Sixth Amendment claim on the merits and ruled, in his favor, that the trial court had erred. *See Shinn v. Ramirez*, 142 S.Ct. 1718, 1728 (2022); *Coleman v. Thompson*, 501 U.S. 722, 754 (1991).

Finally, that the courts below found any error to be harmless does not prevent this Court from reviewing both the merits and the harmlessness determination. The District Court found its conclusion to that effect to be one with which another court might reasonably disagree, and the Court of Appeals did not take up the question other than to agree with the Appellate Division's initial conclusion to that any error was harmless.

There was substantial testimony presented at trial that Mr. Johnson frequently attempted to enter Asma's apartment but was often unable to do so. On only on a few occasions was able to push his way in by lying in wait for the opportunity. That testimony demonstrates how crucial Livingston's testimony was, and why the prosecution went to such lengths to keep him off the stand. If the substance of the phone call Asma's daughter testified about was not as she said, and did not prove Mr. Johnson's presence inside Asma's apartment just before she was found, then Mr. Johnson's presence *outside* it when the Tippins arrived proved nothing. After all, it was consistent

with all those occasions when Mr. Johnson was outside the apartment unable to get in. That the door was open when the Tippins arrived as Mr. Johnson was leaving, together with there being an exit path from the building by way of the roof, left the critical question of whether Mr. Johnson was ever inside the apartment unanswered. And that Mr. Johnson said he had done something "wrong" or "stupid" could refer to any kind of conduct short of stabbing Asma.

On the other hand, the evidence indicated that Asma was stabbed multiple times, and so severely that she would have bled profusely. Therefore, the complete absence of blood on Mr. Johnson as he passed the Tippins on the way out of the building and the absence of a DNA profile matching his on the knife found in the apartment, lead away from a conclusion that the evidence was overwhelming. And that Mr. Johnson was found hiding out at his mother's home in Pennsylvania is of very little probative value since an innocent person afraid of wrongful arrest and conviction has as much motivation to leave the area as a guilty person would.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

/s/ Paul Skip Laisure

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Date: April 25, 2024

APPENDIX

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22-2007-pr
Johnson v. Griffin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of January, two thousand twenty-four.

Present:

AMALYA L. KEARSE,
GERARD E. LYNCH,
WILLIAM J. NARDINI,
Circuit Judges.

ERIK JOHNSON,

Petitioner-Appellant,

v. 22-2007-pr

PATRICK GRIFFIN,

Respondent-Appellee.

For Petitioner-Appellant: PAUL SKIP LAISURE, Garden City, NY

For Respondent-Appellee: DANIELLE M. O'BOYLE (John M. Castellano, *on the brief*), Assistant District Attorneys, *for* Melinda Katz, District Attorney for Queens County, Kew Gardens, NY

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

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

Petitioner-Appellant Erik Johnson ("Johnson") appeals from a judgment of the United States District Court for the Eastern District of New York (Margo K. Brodie, *Chief Judge*), entered on August 16, 2022, denying his *pro se* petition for a writ of habeas corpus challenging his 2010 second-degree murder conviction in New York state court. Following a jury trial, Johnson was convicted of the 2006 murder of his then-ex-girlfriend, Asma Johnson ("Asma"), for which he was sentenced to 25 years to life in prison. On direct appeal, Johnson argued that (1) the trial court's refusal to give a missing witness jury instruction based on the prosecution's decision not to call Asma's ex-boyfriend and the father of two of her children, Thomas Livingston, as a witness at trial violated his Fourteenth Amendment right to a fair trial; (2) the trial court's admission of hearsay testimony that Johnson had previously abused and threatened Asma's life violated his Sixth and Fourteenth Amendment rights; and (3) his trial counsel rendered ineffective assistance in violation of the Sixth and Fourteenth Amendments. The Appellate Division upheld Johnson's conviction, reasoning that any error was harmless due to the overwhelming evidence of his guilt. *See People v. Johnson*, 943 N.Y.S.2d 910, 911 (2d Dep't 2012).

In 2013, Johnson filed this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the same claims and additionally arguing that the court's failure to give a missing witness instruction denied his Sixth Amendment Confrontation Clause rights. The district court denied the petition and issued a certificate of appealability. *Johnson v. Griffin*, No. 13CV4337MKBSMG, 2022 WL 3347771, at *18–19 (E.D.N.Y. Aug. 12, 2022). Johnson, now represented by counsel, appeals, pressing only the first two claims, while arguing that his trial

counsel rendered ineffective assistance only to excuse procedural default rather than as a stand-alone claim. We assume the parties' familiarity with the case.

Section 2254(a) provides that a federal court may grant a writ of habeas corpus to a state criminal defendant "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." A habeas petitioner must show that the challenged state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d). A constitutional error is considered harmless in the habeas context unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).[1] "We review *de novo* a district court's decision to deny a defendant's petition for a writ of habeas corpus under 28 U.S.C. § 2254." *Murray v. Noeth*, 32 F.4th 154, 157 (2d Cir.), *cert. denied,* 143 S. Ct. 270 (2022).

Here, Johnson not only has to show that the Appellate Division was incorrect in concluding that any error was harmless, but also that such a determination was unreasonable. Cognizant of that highly deferential standard of review, for the reasons explained below, we conclude that the Appellate Division's harmlessness determination was not unreasonable. We also explain why Johnson's claims are meritless in any event.

I. Missing Witness Instruction

At trial, Asma's and Livingston's then-10-year-old daughter, Najiyah Livingston ("Najiyah"), testified as follows. On the day of Asma's murder, Livingston picked Najiyah and

[1] Unless otherwise indicated, in quoting cases, all internal quotation marks, alteration marks, emphases, footnotes, and citations are omitted.

her brother up from Asma's building around 5:45 p.m. and drove them to school to play math games. As the children were leaving the apartment, Johnson pushed his way inside. While later driving the children back to the apartment, Livingston received a call from Asma; Livingston told Najiyah that Asma told him not to bring the children back to the apartment. Livingston asked Najiyah who was at the apartment with Asma, and Najiyah responded that Johnson was there. Livingston then took the children to the apartment of Gloria Tippins ("Gloria"), Johnson's aunt, where they arrived around 8:10 p.m. Shauna Tippins ("Shauna"), Gloria's daughter who was present at the time, testified at trial that Livingston asked her and Gloria to check on Asma and Johnson because they were fighting; they left to check on Asma at 8:16 p.m. When the Tippinses arrived at Asma's apartment building, which was two buildings away from Gloria's, they saw Johnson walking down from the second floor, where Asma's apartment was. Johnson told them that he did something "wrong" or "stupid" and pointed up to Asma's apartment unit; he then left the building. App'x at 270. The Tippinses found the door of Asma's apartment ajar and discovered Asma's body lying in a pool of blood. They ran out of the apartment building to get help, at which point Shauna approached Johnson and asked, "What did you do?" *Id.* Johnson did not respond; he merely "looked back." *Id.* Defense counsel objected to Najiyah's and Shauna's testimony about Livingston's statements on hearsay grounds. Although Livingston was present in the courtroom throughout the trial, neither party called him, and the trial court denied Johnson's request to give a missing witness jury instruction.

Johnson argues that the denial of his request for a missing witness jury instruction, and the admission of Livingston's hearsay testimony, violated his Sixth and Fourteenth Amendment rights. For the reasons set forth below, we find neither argument persuasive.

A. Fourteenth Amendment

The failure to give an appropriate jury instruction can rise to the level of a Fourteenth Amendment violation if it "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *accord Blazic v. Henderson*, 900 F.2d 534, 540 (2d Cir. 1990) ("In order to obtain a writ of habeas corpus in federal court on the ground of error in a state court's instructions to the jury on matters of state law, the petitioner must show not only that the instruction misstated state law but also that the error violated a right guaranteed to him by federal law."). In other words, the failure to give an instruction may be constitutional error if "there is a substantial likelihood that a properly instructed jury would have [acquitted the defendant]." *Davis v. Strack*, 270 F.3d 111, 131 (2d Cir. 2001); *see also Blazic*, 900 F.2d at 542 (finding no constitutional error where giving the omitted instruction "would not have altered the result of the trial").

Johnson cites no state or federal law or constitutional principle requiring a missing witness instruction in these circumstances. Indeed, it is doubtful that such an instruction would have been appropriate here since the defense could have easily called Livingston, who was present at trial. *See United States v. Caccia*, 122 F.3d 136, 139 (2d Cir. 1997) ("[W]here a witness is equally available to both sides, a missing witness charge is inappropriate."). But even if failing to give the instruction was error, it would not have likely altered the outcome of the trial and thus either does not implicate the Fourteenth Amendment, and is thus not cognizable, if a state law error, or was harmless if a federal constitutional error. Giving the instruction would have permitted (but not required) the jury to draw an adverse inference that had Livingston testified, his testimony would

have contradicted the hearsay testimony of his statements elicited through Najiyah and Shauna.[2] The two hearsay statements at issue were relatively innocuous[3] and likely had little bearing on the verdict given the other voluminous and strong evidence of Johnson's guilt: he had physically abused Asma and had been stalking and harassing her outside of her apartment shortly before her murder; he aggressively entered Asma's apartment a couple of hours before her murder when she was home alone; Asma's neighbor heard a woman scream, "help me, help me, this man is killing me" mere minutes before the Tippinses encountered him leaving Asma's building, App'x at 270; on his way out of the building, he said he did something "wrong" or "stupid" while pointing up to Asma's unit, where her body was lying in a pool of blood, *id.*; DNA from an anal swab taken from Asma matched his male line; and he fled the state after the incident, lied about his whereabouts, and was hiding under a sofa when the police found him. It was thus reasonable for the Appellate Division to conclude that any error was harmless.

[2] To the extent Johnson argues that the failure to give the missing witness instruction prejudiced him because he was unable to cross-examine Livingston about Livingston's alleged prior abuse of Asma and her order of protection against Livingston, which would have allowed the jury to draw an inference that Livingston was the perpetrator, that theory of harm is unrelated to the complained-of error: the failure to give the requested instruction. The instruction would not have cured that harm, as it would not have allowed the jury to hear about Livingston's prior abuse or draw any adverse inference therefrom. The only remedy that would have cured this purported prejudice would have been defense counsel calling Livingston as a witness, which it could have but did not do. And if the complained-of error is instead the admission of the challenged hearsay statements, that claim is distinct from one focused on the failure to give the requested instruction. To the extent Johnson challenges the admission of the hearsay statements, such a claim is properly considered under a Sixth Amendment Confrontation Clause rubric, which is discussed below.

[3] Although Johnson repeatedly states in his brief that Najiyah's testimony describing the phone call in the car contained double hearsay because she "testi[fied] that Asma told Mr. Livingston on the phone that Mr. Johnson was there," Appellant's Br. at 31; *see also id.* at 25, 37—which would be important testimony because it would "plac[e] Mr. Johnson in Asma's apartment just before her body was found," *id.* at 55—he seriously misdescribes the record. Najiyah testified that she was not party to the phone call with Asma, and she did not testify that Livingston told her that Asma said Johnson was at the apartment. Further, Asma's reported statement—not to bring the children back—was a command, not a declarative statement that could have been offered for its truth, and therefore cannot be viewed as embedded hearsay. *See United States v. Dawkins*, 999 F.3d 767, 789 (2d Cir. 2021) ("[A]n order, *i.e.*, an imperative rather than a declarative statement, . . . [is] offered not for its truth, but for the fact that it was said. It [i]s therefore not hearsay.").

B. Sixth Amendment

Johnson also argues that the admission of Livingston's hearsay statements "brings a Sixth Amendment dimension to [his] claim of error concerning the refusal to give a missing witness instruction." Appellant's Br. at 36–37. The government argues that Johnson procedurally defaulted this claim by failing to raise it on direct appeal. But even if we assume there was no default, we find the argument unpersuasive on the merits.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S Const. amend. VI. "The Sixth Amendment . . . prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Ohio v. Clark*, 576 U.S. 237, 243 (2015). Thus, "the Confrontation Clause's reach" is limited to "testimonial statements." *Michigan v. Bryant*, 562 U.S. 344, 354 (2011). Statements are testimonial when, "in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony." *Clark*, 576 U.S. at 245. "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text . . . reflects an especially acute concern with a specific type of out-of-court statement." *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

As an initial matter, Johnson frames his claim as being anchored to the failure to give a missing witness instruction, but that failure has no connection to the Confrontation Clause. Even construing his claim as instead challenging the admission of the hearsay statements, rather than the failure to give the instruction, it still fails because Livingston's statements elicited at trial are not testimonial. His statement to Najiyah that Asma said that she did not want him to bring Najiyah

and her brother to the apartment was not testimonial because it was nothing more than a logistical comment to his then-seven-year-old daughter; when "viewed objectively," its "primary purpose" was not "to create an out-of-court substitute for trial testimony." *Clark*, 576 U.S. at 245. His statement to Shauna that Asma and Johnson were arguing was similarly non-testimonial but rather was intended to explain why he was asking Shauna and Gloria to check on them. Neither statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *United States v. Feliz*, 467 F.3d 227, 233 (2d Cir. 2006), especially considering that at that point, Asma's body had not yet been discovered and thus Livingston was not aware of the crime, let alone the possibility of future legal proceedings.

Livingston's statements were accordingly not subject to the Confrontation Clause's strictures, and even if they were, the overwhelming evidence against Johnson renders any error harmless, as the Appellate Division reasonably concluded.

II. Hearsay Testimony Regarding Prior Abuse

At trial, the prosecution called Yahaira Cabrera, Asma's neighbor, and Angela Willis, Asma's close friend, who testified (over defense counsel's objections) to statements Asma made indicating that Johnson had abused her and threatened her life. Specifically, Cabrera testified that the week before Asma's murder, Asma told her that Johnson had beaten her up, that she did not want to have him arrested because he was on parole, and she was scared to report him to the police. Cabrera also testified that the day before Asma's murder, Asma said that she wanted to leave Johnson, but he told her that if she stopped seeing him, he would "hurt her son" and "would come back and kill her," making her fearful to leave him. Dist. Ct. R. 917–19. Willis testified that Asma told her that Johnson beat her and was "becoming possessive," *id.* at 941, but that she did not want

to report him to the police because Johnson was on parole. Johnson argues that the admission of this hearsay testimony violated his Fourteenth Amendment rights.

Even if the admission of these statements was erroneous under New York law, *see People v. Maher*, 89 N.Y.2d 456, 460–62 (1997), the statements likely were not dispositive of the conviction and thus do not carry the requisite constitutional dimension for a federal habeas claim,[4] *Blazic*, 900 F.2d at 542. As the district court noted,

> the jury heard other evidence, besides [Asma's] statements, that suggested [Johnson] and [Asma] had an abusive relationship, including Najiyah's testimony that [Johnson] had pushed his way into the apartment on numerous occasions, pushing [Asma] on one occasion and arguing with her on another, and Cabrera's testimony that she had seen bruises on [Asma's] face and seen [Johnson] banging on [Asma's] door and yelling "open the f**cking door."

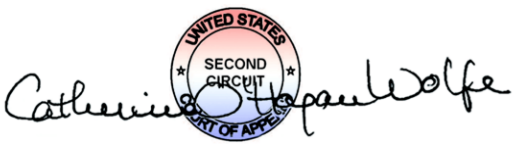
Johnson, 2022 WL 3347771, at *16. Cabrera and another neighbor also testified that Johnson had loitered outside Asma's apartment unit and banged on her door while calling her name several times in the weeks leading up to her murder. This was all properly admissible evidence of Johnson's prior abuse and stalking—and, as detailed above, there was also ample other evidence of Johnson's guilt. Johnson has therefore failed to show any prejudice from the alleged error.

* * *

Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



[4] Although the district court liberally construed Johnson's *pro se* petition as also raising a Sixth Amendment Confrontation Clause claim based on these evidentiary rulings, *see Johnson*, 2022 WL 3347771, at *6, Johnson did not raise this claim in his counseled brief before this Court, so we do not address it.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ERIK JOHNSON,

Petitioner,

MEMORANDUM & ORDER
13-CV-4337 (MKB) (SMG)

v.

PATRICK GRIFFIN,

Respondent.

MARGO K. BRODIE, United States District Judge:

Petitioner Erik Johnson, proceeding pro se and currently incarcerated at Sullivan Correctional Facility in Fallsburg, New York, filed the above-captioned petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2554 on July 25, 2013, alleging that he is being held in state custody in violation of his federal constitutional rights. (Pet. for Writ of Habeas Corpus ("Pet.") 1, Docket Entry No. 1.)[1] Petitioner's claims arise from a judgment of conviction following a jury trial in the Supreme Court of New York State, Queens County (the "Trial Court"), on charges of murder in the second degree and criminal possession of a weapon in the fourth degree. (*Id.* at 1; Tr. of Sentencing Proceedings before the Hon. Gregory Lasak dated Mar. 25, 2010 ("Sentencing Tr.") 20:12–20, annexed to State Ct. R. as Ex. 8, Docket Entry No. 10-8, at 106–26.) Petitioner challenges his conviction on the grounds that: (1) he was denied the right to a fair trial because the prosecution did not call Thomas Livingston as a witness and the Trial Court did not give a missing witness charge; (2) he was denied the right to confront witnesses for the same reason; (3) he was denied the right to a fair trial because the Trial Court

[1] Because the petition is not consecutively paginated, the Court refers to the page numbers assigned by the electronic case filing system.

admitted hearsay testimony recounting statements describing his prior bad acts; and (4) he was denied the right to the effective assistance of trial counsel. (Pet. 20–21, 23, 26, 31.) In his reply, he also argues that (5) the evidence presented at trial was insufficient to support his conviction. (Pet'r's Traverse & Mem. of Law ("Pet'r's Reply") 12, 14–15, Docket Entry No. 12.)

On April 30, 2020, the Court referred the petition to Magistrate Judge Steven M. Gold for a report and recommendation, (Order dated Apr. 30, 2020), and, on November 25, 2020, Judge Gold recommended that the Court deny the petition in its entirety (the "R&R"), (R&R 40, Docket Entry No. 14). On April 22, 2021, Petitioner timely filed objections to the R&R.[2] (Pet'r's Objs. ("Objs."), Docket Entry No. 16.) For the reasons set forth below, the Court adopts the R&R in its entirety and denies the petition for a writ of habeas corpus.

[2] Because it appeared from the docket that Petitioner had never been mailed a copy of the R&R, the Court mailed the R&R to Petitioner and extended the deadline to file objections until February 18, 2021. (Order dated Jan. 19, 2021.) Petitioner then requested an extension until April because he did not have access to the law library due to COVID-19. (Pl.'s Letter dated Feb. 25, 2021, Docket Entry No. 15.) The Court granted Petitioner's request and directed him to file his objections by April 30, 2021. (Scheduling Order dated Feb. 25, 2021.) Petitioner gave his objections to prison officials for forwarding to the Court on April 22, 2021, making them timely. (Objs. 9); *see, e.g.*, *Silver v. Dalessandro*, No. 15-CV-3462, 2019 WL 5902645, at *4 n.4 (E.D.N.Y. Oct. 28, 2019) ("Court papers from incarcerated, *pro se* litigants are deemed to have been filed when those documents are placed in the possession of prison officials for forwarding to the court." (first citing *Houston v. Lack*, 487 U.S. 266, 275–76 (1988); and then citing *Harrison v. Harlem Hosp.*, 364 F. App'x 686, 687 (2d Cir. 2010))), *report and recommendation adopted sub nom. Silver v. Salessandro*, 2019 WL 5895469 (E.D.N.Y. Nov. 12, 2019).

I. Background

a. Factual background

Petitioner's ex-girlfriend, Asma Johnson (the "Victim"),[3] was found stabbed to death in her apartment on November 8, 2006. (Aff. of Ellen Abbot ("Abbot Aff.") ¶ 4, Docket Entry No. 8.) Police arrested Petitioner at his mother's home in Pennsylvania two weeks later. (*Id.*) Petitioner was charged with murder in the second degree, N.Y. Penal Law § 125.25(1), and criminal possession of a weapon in the fourth degree, *id.* § 265.01(2). (*Id.* ¶ 5.)

i. The trial

Petitioner's jury trial commenced on January 27, 2010, in the Trial Court before Judge Gregory Lasak. (State Trial Tr. ("Tr.") 1, Docket Entry Nos. 10-2 to 10-8.)

1. Evidence at trial

A. Petitioner's relationship with the Victim

Petitioner began dating the Victim in the late summer or early fall of 2006. (Tr. 502:4–7, 539:11–540:4, 645:17–21, 676:23–677:6.) By late October, their relationship had deteriorated, and the Victim had instructed her daughter, Najiyah Livingston, who was seven years old at the time, not to let Petitioner into her apartment. (*See* Tr. 497:6–7, 502:8–505:15.) Najiyah testified that Petitioner waited outside of the apartment and pushed his way in once she opened the door on two occasions in late October. (Tr. 502:11–506:1.) On one of those occasions, Petitioner pushed the Victim, causing her to fall and bruise her legs, thigh, and head, and on the other occasion, Najiyah heard Petitioner and the Victim arguing. (Tr. 502:18–504:15, 505:22–507:4,

[3] Though the Victim, Asma Johnson, shares the same last name as Petitioner, Erik Johnson, they are not related. (*See* Tr. 348:19–21.) To avoid confusion, and for consistency with the R&R, the Court refers to Ms. Johnson as the "Victim" and to Mr. Johnson as "Petitioner." (R&R 2 n.3.)

514:3–9.) The Victim's friend, Angela Willis, testified that the Victim told her in late October that Petitioner had "hit her, beat her," but that the Victim did not want to report this to the police "because he was on parole." (Tr. 677:7–678:8.) The Victim's friend and neighbor who lived across the hall, Yahaira Cabrera, testified that she saw the Victim throwing out the trash a week before her murder and noticed bruises on her face, which the Victim told her had come from Petitioner hitting her. (Tr. 657:14–658:10.) That same week, Cabrera saw Petitioner "banging" on the Victim's door, which she had seen him do "several times" before. (Tr. 658:16–659:2.) On two of these previous occasions, she had "called the cops," who went to the Victim's door, but the Victim "wouldn't open the door." (Tr. 659:2–659:15.) Another neighbor, Brenda Jordan, testified that she saw Petitioner "either . . . sitting on the stairs or standing next to [the Victim's] door, or knocking on the door, calling her" and the Victim "not answering" approximately twenty times in the weeks leading up to the Victim's murder. (Tr. 764:1–24.)

B. Day of the murder

On the day of the murder, Cabrera saw Petitioner banging on the Victim's door between 2:00 PM and 3:00 PM and heard him yell "open the f***ing door." (Tr. 647:16–648:24.) Jordan saw Petitioner standing at the Victim's door between 2:45 PM and 3:45 PM. (Tr. 762:20–763:7.) After Petitioner went down the stairs, Cabrera and the Victim spoke. (Tr. 648:25–649:17.) The Victim told Cabrera "that she was scared and that she was trying to leave [Petitioner], but he threatened her," telling her that "if she calls the cops on him or decides to do anything against him, that he would not only hurt her son" but also "come back and kill her." (Tr. 656:3–24.)

At about 5:45 PM, the Victim told Najiyah and her brother, Khalil, to go downstairs, where their father, Thomas Livingston, was waiting to drive them to Najiyah's school to play math games. (Tr. 347:12–16, 497:8–9; 497:24–499:5.) When Najiyah opened the apartment

door, she heard footsteps and saw Petitioner, who pushed her and ran into the apartment. (Tr. 499:13–500:13.) Najiyah asked the Victim if she was going to be okay and the Victim said yes and told the children to go downstairs. (Tr. 501:13–19.) The children left with Livingston for Najiyah's school, leaving the Victim alone in the apartment with Petitioner. (Tr. 501:21–502:3.)

Later, while Livingston was driving the children back to the Victim's apartment, he spoke on the phone to the Victim, who told him not to bring the children home. (Tr. 508:3–17, 526:16–18.) Livingston asked Najiyah who was at the apartment with the Victim when they left earlier, and Najiyah responded that Petitioner was at the apartment. (Tr. 508:3–17.) Livingston then brought the children to the house of Petitioner's aunt, Gloria Tippins ("Gloria Tippins"). (Tr. 352:12–15, 508:15–22.)

Livingston and the children arrived at Gloria Tippins's house at around 8:10 PM. (Tr. 540:24–541:10.) Livingston told Gloria Tippins and her daughter, Petitioner's cousin Shauna Tippins ("Shauna Tippins"), that Petitioner and the Victim were arguing and Petitioner was "causing all types of problems, and that [they] should make him leave." (Tr. 509:4–8, 541:14–541:22.) Shauna Tippins and Gloria Tippins testified that they walked to the Victim's apartment building, which was two buildings from their own. (Tr. 542:9–25, 573:12–574:13.) Shauna Tippins and Gloria Tippins entered the Victim's building and walked through a foyer to the stairs to go to the Victim's apartment on the second floor. (Tr. 574:14–575:4.) As they ascended the stairs, they saw Petitioner coming down from the second floor. (Tr. 543:5–544:3, 575:5–10.) As Petitioner passed them on the stairs, he told them he had done something "wrong" or "stupid" and pointed up, then left the building. (Tr. 544:24–545:7, 575:23–576:7.) Shauna Tippins and Gloria Tippins proceeded up the stairs to the Victim's apartment, where they found the door ajar and discovered the Victim's body lying in a pool of blood. (Tr. 545:8–21, 576:12–577:7.)

Shauna Tippins and Gloria Tippins ran back downstairs to get help. (Tr. 545:25–546:2, 577:3–11.) Gloria Tippins was saying "Oh, my God," "oh, my God," and her friend, Glenn Burgess, who lived on the first floor of the Victim's apartment building, heard her and came out into the hall to ask what the problem was. (Tr. 577:17–578:6, 605:21–608:13.) Gloria Tippins told Burgess what had happened and Burgess went upstairs with her to the Victim's apartment, then ran back downstairs to get his phone and call 911. (Tr. 577:17–578:1, 608:8–610:9.) Meanwhile, Shauna Tippins ran outside, saw Petitioner walking away from the building, and asked, "[W]hat did you do?" (Tr. 546:5–15, 577:14–15.) Petitioner "didn't say anything, he just looked back." (Tr. 546:17.) Surveillance cameras captured video recordings of Livingston going to Gloria Tippins's apartment with the children, Gloria Tippins and Shauna Tippins' encounter with Petitioner on the stairs, and Burgess coming out of his apartment, checking the Victim's apartment, and running back downstairs to get his phone. (*See* Tr. 549:13–553:8, 579:11–586:4, 611:20–613:10.)

Burgess testified that he heard Gloria Tippins's voice in the hall and called the police at around 8:21 PM. (Tr. 577:17–21, 606:12–607:24, 610:4–9, 614:3–6.) Burgess's sister, Luxzoria Hope, lived with Burgess and testified that she had heard a female voice coming through the pipes above her kitchen saying "[h]elp me, help me, this man is killing me" a couple minutes after 8:00 PM. (Tr. 620:18–622:12, 630:11–631:20, 633:7–11.)

Police arrived at the Victim's apartment at approximately 8:30 PM. (Tr. 391:19–393:6.) Several minutes later, a paramedic arrived, however the Victim "was in cardiac arrest" and "there was no hope of resuscitation." (Tr. 372:14–373:9, 375:3–19.) The Victim had been stabbed twice in her neck, with one stab cutting her carotid artery "completely" in half and chipping her second vertebra and the other penetrating her jugular vein, and twice in her

abdomen, with one stab penetrating her liver and the other perforating her small intestine. (Tr. 375:20–375:24, 866:11–13, 867:23–873:6; 879:21–24.) In addition, she had a number of injuries to the front and sides of her face that suggested she had been subjected to blunt force traumas, including a scrape and a bruise on her upper lip, a three-quarter-inch "laceration or tearing of the upper lip where it connects to the teeth," a "large bruise" with a scrape over it and swelling on the right side of her face, and a bruised left ear that was lacerated where it attaches to the side of the face. (Tr. 874:8–876:22.) There was also "a series of bruises" on her arms and legs and a bruise on her left wrist, which were "consistent with being grabbed with a great degree of force." (Tr. 876:23–878:19.) Detectives recovered a knife with a broken tip from inside the Victim's garbage pail and later matched the DNA on the knife to the Victim's DNA, though Petitioner's DNA was not found on the knife's handle. (Tr. 425:22–23, 463:1–20, 829:18–830:17, 843:25–844:6.) Medical examiner Susan Horan testified that she matched traces of semen on an anal swab taken from the Victim to Petitioner's paternal line. (Tr. 832:3–11, 845:3–14.)

C. Petitioner's arrest

Petitioner was arrested at his mother's home in Pennsylvania on November 20, 2006, about two weeks after the murder. (Tr. 690:23–693:25.) When the police arrived, they found Petitioner hiding under a sofa bed. (Tr. 739:10–741:3.) After the police took him to the police station, Petitioner waived his *Miranda* rights. (Tr. 694:6–698:16.) Petitioner told the police that he had been in Pennsylvania since before October 31, 2006, and that he had "paid a crack head $40 to bring him." (Tr. 701:19–702:9.) When the police asked him why he did not see his parole officer, Roger Chung ("PO Chung"), on November 15, 2006, Petitioner "had no answer." (Tr. 702:24–703:2, 770:9–10.) The police asked Petitioner if he sees PO Chung every two weeks and if he had seen PO Chung prior to November 15, 2006, and Petitioner responded "yes" to

both questions. (Tr. 703:8–15.) When asked how he could have seen PO Chung two weeks prior to November 15, 2006, which would have been on November 1, 2006, when he said that he was not in New York in November, Petitioner stated "I told you a crack head drove me to Pennsylvania before Halloween." (Tr. 704:7–13.) Petitioner then claimed that he had gone back to New York on November 1, 2006, "and then the crack head drove me back [to Pennsylvania] for $40." (Tr. 704:15–22.) PO Chung testified that he had seen Petitioner in New York on November 1, 2006, but that Petitioner did not attend parole meetings on November 9 and 15, 2006. (Tr. 774:12–776:11.)

D. Defense counsel's summation

Defense counsel did not call any witnesses. He elicited several facts on cross-examination of the prosecution's witnesses and emphasized them in his summation. First, he highlighted the fact that Petitioner's alleged abuse had never been reported to the police or PO Chung. Najiyah testified that the police never came to the Victim's apartment when she and Petitioner were arguing, that she did not know whether the Victim ever reported their arguments to the police, and that she never told anyone about the time Petitioner had pushed the Victim, giving her bruises. (Tr. 520:25–522:1.) Cabrera testified that although she had called the police when Petitioner was banging on the Victim's door late at night and told the Victim "if he's doing this to you [then] you need to call the police," she personally had never spoken to any police officers about allegations of abuse, and the Victim "never opened the door when the police would knock." (Tr. 669:4–671:12.)

Second, he elicited that neither Shauna Tippins nor Gloria Tippins had noticed blood on Petitioner when they encountered him at the Victim's apartment, even though the wounds to her carotid artery and jugular vein would have caused her to "bleed profusely" and blood could have

"spew[ed] out from the neck." (Tr. 564:1–565:10, 598:1–599:1, 893:8–894:12.) He also elicited that the police did not observe blood on the stairs of the Victim's apartment building or any trail of blood in her apartment. (Tr. 712:11–25.)

In addition to emphasizing these points in his summation, (Tr. 924:22–925:5, 935:13–936:6 (no reported abuse); Tr. 910:19–22, 928:10–929:7 (blood)), he argued that the evidence was insufficient to convict Petitioner because it was circumstantial and "[t]here were no eyewitnesses who saw [him] kill [the Victim]." (Tr. 908:7–12, 916:19–22, 943:3–5.) He also emphasized that neither Petitioner's fingerprints nor his DNA were found on the knife and that the medical examiners failed to analyze the DNA under the Victim's fingernails. (Tr. 804:22–805:2, 843:22–844:6, 892:3–24, 916:23–917:16.)

Finally, he attempted to place Livingston "under suspicion by revealing that the [V]ictim had acquired a protective order against Livingston in 2002 and suggesting that Livingston was conspiring with his daughter, Najiyah, to blame [P]etitioner for the [V]ictim's death, which Livingston may have in fact committed; the [Trial] Court, however, precluded much of this line of inquiry." (R&R 7; *see also* Tr. 362:11–363:16, 518:7–25, 528:22– 529:24, 719:9–722:8, 923:1–9.)

2. Verdict and sentencing

On February 11, 2010, the jury returned a verdict of guilty on both counts. (Tr. 981, 1023:7–19.) On March 25, 2010, the Trial Court sentenced Petitioner to twenty-five years to life for murder in the second degree and one year for criminal possession of a weapon in the fourth degree. (Sentencing Tr. 1, 16:19–20:20.)

ii. Direct appeal

Petitioner timely appealed his conviction to the Appellate Division, Second Department, arguing that (1) his Fourteenth Amendment right to a fair trial was denied when the court refused to give a missing witness charge concerning Livingston and (2) his rights to cross-examination and a fair trial under the Sixth and Fourteenth Amendments and the New York State Constitution were denied when the court improperly allowed the prosecution to introduce hearsay testimony that he abused and threatened to kill the Victim and that he was in the Victim's apartment shortly before her body was discovered. (Appellate Br. 16, 26, Docket Entry 10-1, at 1–41.) Petitioner also suggested in footnotes that his trial counsel was ineffective under state and federal standards. (*Id.* at 25 n.6, 37 n.9.)

On May 23, 2012, the Appellate Division affirmed Petitioner's conviction, concluding that "[e]ven if the Supreme Court erred in denying [his] request for a missing witness charge" or in "admitting certain hearsay testimony of third parties," any error was harmless, "as there was overwhelming evidence of [his] guilt and no significant probability that the error contributed to his conviction." *People v. Johnson*, 943 N.Y.S.2d 910, 911 (App. Div. 2012) (quoting *People v. Smalls*, 916 N.Y.S.2d 795, 795 (App. Div. 2011)). The court also found that Petitioner's "remaining contention [was] without merit," apparently referring to his ineffective assistance of counsel claims. *Id.*

On August 9, 2012, the Court of Appeals denied Petitioner leave to appeal. *See People v. Johnson*, 19 N.Y.3d 997, 997 (2012); (Denial of Leave to Appeal, annexed to State Ct. R. as Ex. 1, Docket Entry No. 10-1, at 125).

b. Report and recommendation

i. Claims based on refusal to give a missing witness charge

Because "Petitioner's argument concerning the trial court's failure to give a missing witness charge implicates the Fourteenth Amendment right to a fair trial and the Sixth Amendment right of confrontation," Judge Gold considered these as separate claims. (R&R 23.)

1. Denial of Fourteenth Amendment right to fair trial

Judge Gold found that Petitioner exhausted his claim "that he was denied a fair trial due to the trial court's refusal to give a missing witness charge," (*id.* at 18), and that "[b]ecause the Appellate Division's dismissal of this claim as 'harmless' was based on the merits," it is entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), (*id.* at 24). Judge Gold found that the Trial Court's discretionary decision not to give a missing witness charge did not deny Petitioner the right to a fair trial. (*Id.* at 24.) Judge Gold noted that there is no clearly established Supreme Court precedent requiring a trial court to instruct the jury with respect to a missing witness, and that the propriety of a state court's jury instruction is a matter of state law that does not raise a federal question. (*Id.*) He therefore found that Petitioner's claim only warrants habeas relief if the Trial Court's decision so infected the entire trial that the resulting conviction violates due process. (*Id.* at 25.) Judge Gold concluded that the Trial Court's decision "was not error under state or federal law, much less error that infected the fairness of the trial," because "Livingston was available to be called by either the prosecution or [the] defense, and it was only for tactical reasons that defense counsel declined to call him." (*Id.*) Judge Gold further found that even if the Trial Court erred, this error did not deprive Petitioner of due process because the Appellate Division reasonably concluded that "there was overwhelming evidence of [Petitioner's] guilt and no significant probability that the error contributed to his conviction." (*Id.* at 26 (quoting *Johnson*, 943 N.Y.S.2d at 911).) Finally,

Judge Gold noted that "even if there had been prejudice, it would have been mitigated by defense counsel's arguments in summation." (*Id.*)

2. Denial of Sixth Amendment right to confront witness

Judge Gold found that Petitioner failed to exhaust his claim that the Trial Court's refusal to give a missing witness charge violated the Sixth Amendment's Confrontation Clause because he did not raise it before the Appellate Division. (R&R 20, 22, 27.) While Petitioner's appellate brief "arguably hint[ed] at the Confrontation Clause issue" by characterizing Livingston's statements to Najiyah in the car about Petitioner's presence in the Victim's apartment on the day of the murder as "an accusation by [Livingston] a non-testifying witness" and citing to *People v. Barboza*, 805 N.Y.S.2d 657 (App. Div. 2005), Judge Gold concluded that "this fleeting reference did not provide the state court with a 'fair and meaningful' opportunity to consider any federal Confrontation Clause claim." (*Id.* at 20–21 (second alteration in original) (quoting Pet'r's App. Br. 33–34, Docket Entry No. 10-1, at 42).) In addition, Judge Gold found that Petitioner "offer[ed] no grounds that might excuse his procedural default," for although Petitioner "raises an ineffective assistance of counsel claim, which may excuse procedural default if it 'causes' the default, [he] does not present his ineffective counsel claim as the cause of his procedural default," and "[e]ven if he had, it would not change the outcome," as he "was not denied effective assistance of counsel" and because he "claims that only his trial counsel provided ineffective assistance, though his appellate counsel is at least in part responsible for the decision not to raise the Confrontation Clause issue in the appellate brief." (*Id.* at 22 & n.9.)

Although Judge Gold found that Petitioner failed to exhaust this claim, he nevertheless considered it on its merits and concluded that "[t]he statements that were introduced at trial . . . were *not* testimonial and their admission therefore did not violate [P]etitioner's Confrontation

Clause rights."[4] (*Id.* at 28.) He noted that "Livingston's statement to his daughter as he drove her home was initially nothing more than a logistical conversation concerning where to bring her and her brother," and that "[t]he sequence of events further demonstrates that [his] statements that . . . [P]etitioner was causing 'problems' and was arguing with the [V]ictim were made to elicit the Tippinses' help and to explain why [they] should check on the [V]ictim and [P]etitioner." (*Id.* at 28–29.) Further, Judge Gold found it "likely that Livingston felt there was an ongoing emergency after speaking to the [V]ictim, and that his statements at the Tippinses' apartment were made for the 'primary purpose' of addressing that emergency as it was happening." (*Id.* at 29.) Even if Petitioner's right of confrontation was violated, Judge Gold concluded that such a violation would be harmless error, as Livingston's statements are unlikely to have influenced the jury's verdict given "the overwhelming evidence" against Petitioner, which "established not only that [he] and the [V]ictim had an abusive relationship but also that [he] admitted doing something 'wrong' or 'stupid' as he was seen leaving the [V]ictim's apartment just before her body was discovered, in an exchange captured by video surveillance footage." (*Id.*) Therefore, he concluded that "the Appellate Division's rejection of [P]etitioner's missing witness charge claim was neither contrary to, nor based on an unreasonable application of, clearly established federal law." (*Id.* at 30.)

[4] Judge Gold also found that Petitioner's "attempt to supplement the record by attaching exhibits to his habeas petition," including grand jury minutes, a copy of the statement Livingston made at the police station, and pretrial hearing minutes, "is prohibited under *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)" because these exhibits were not included in the state record. (R&R 22; *see* Attachments to Pet., Docket Entry No. 1, at 36–188.) Although statements Livingston made to the grand jury "are clearly testimonial," Judge Gold concluded that because they "were not introduced at trial" they "are not the basis of [P]etitioner's claim." (R&R 28.)

ii. Claims based on improper admission of hearsay

In view of Petitioner's pro se status and because he brings his claim that the Trial Court improperly admitted hearsay concerning the Victim's statements to others about his prior bad acts under both the Sixth and Fourteenth Amendments, Judge Gold interpreted Petitioner's hearsay argument as encompassing both a claim that he was denied his Fourteenth Amendment right to a fair trial and "a separate claim that the state court's evidentiary rulings violated his rights under the Confrontation Clause." (*Id.*)

1. Denial of Fourteenth Amendment right to fair trial

Judge Gold found that Petitioner exhausted his claim that he was denied a fair trial based on the Trial Court's "decision to admit hearsay testimony regarding [his] prior misconduct." (*Id.* at 18.) "[B]ecause the Appellate Division deemed the [T]rial [C]ourt's admission of 'certain hearsay testimony of third parties' harmless," Judge Gold found that "the state court's ruling is entitled to AEDPA deference." (*Id.* at 30.) Judge Gold also found that "the testimony concerning [Petitioner's] prior misconduct, including that he had aggressively pushed his way into the [V]ictim's apartment, pushed her so hard she bruised her leg, and hit her, was properly admitted under [*People v. Molineux*, 168 N.Y. 264, 293 (1901)] to show 'that this defendant was motivated and had an intent to harm *this* victim,' and not merely that [P]etitioner had a general propensity for violence."[5] (*Id.* at 32 (citations omitted) (quoting *People v. Bierenbaum*, 748 N.Y.S.2d 563, 587 (App. Div. 2002)).) However, he concluded that the Trial Court "may have erred in . . . admitting the [V]ictim's statements through Cabrera's and Willis's hearsay testimony" under the prosecution's purported "background exception" to the hearsay rule, which

[5] Judge Gold noted that "[t]he trial judge instructed the jury accordingly, explaining that the prior offenses 'must not be considered for the purpose of proving that the defendant had a propensity or predisposition to commit the crime' but only considered 'on the question of intent, motive or identity of the perpetrator.'" (R&R 32 n.12.)

some New York courts have rejected. (*Id.* at 32–33.) Nevertheless, Judge Gold found that federal habeas corpus relief does not lie for errors of state law, and this error did not deprive Petitioner of due process because the Victim's statements "did not provide the 'basis for conviction or . . . remove a reasonable doubt that would have existed on the record without' them." (*Id.* at 33 (first quoting *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); and then quoting *Cox v. Bradt*, No. 10-CV-9175, 2012 WL 2282508, at *15 (S.D.N.Y. June 15, 2012)).) Because "the jury heard other evidence, besides the [V]ictim's statements, which suggested [Petitioner] and the [V]ictim had an abusive relationship," Judge Gold concluded that "the Appellate Division's determination that any error [was] harmless was not unreasonable." (*Id.* at 33–34.)

2. Denial of Sixth Amendment right to confront witness

Judge Gold found that because "[s]tatements to friends and family are generally non-testimonial," "the testimony of Cabrera and Willis relating the [V]ictim's statements to them about [P]etitioner's abuse were not admitted in violation of the Confrontation Clause, even if they may have been admitted in violation of New York's evidence rules." (*Id.* at 34–35 (citing *Giles v. California*, 554 U.S. 353, 376 (2008)).)

iii. Ineffective assistance of trial counsel claim

Judge Gold found that Petitioner exhausted his claim "that he was denied the effective assistance of trial counsel."[6] (*Id.* at 18.) Judge Gold found that "the state court's finding is

[6] Petitioner raises several ineffective assistance of counsel arguments in his petition that he did not raise in his appellate brief — namely, that trial counsel stumbled over words, failed to object to the testimony of PO Chung and Willis, and failed to preserve for appellate review the arguments that Livingston would have given non-cumulative testimony, that the evidence was insufficient to support a second degree murder conviction, and that the Victim's statements, as recounted through the testimony of Willis and Cabrera, did not fit within a recognized exception to the hearsay rule. (Pet. 32–34.) Although Petitioner did not raise these arguments in his appellate brief, Judge Gold found that they supplement but do not fundamentally alter the ineffective assistance of counsel claim Petitioner presented to the Appellate Division, and thus these arguments "are properly exhausted and reviewable." (R&R 19.)

entitled to AEDPA deference" because the Appellate Division rejected Petitioner's claim. (*Id.* at 35.) Judge Gold concluded that "it is clear that counsel's errors, if any, did not affect the outcome of [P]etitioner's trial," as trial counsel "did seek a missing witness charge, but it was denied," and although trial counsel "may have failed to preserve certain arguments concerning the admission of hearsay . . . these errors did not prejudice [P]etitioner," as the jury still would have heard "about the Tippinses' encounter with [P]etitioner on the stairwell [and] the testimony from others suggesting that [his] and the [V]ictim's relationship was becoming increasingly violent." (*Id.* at 36–37 (citation omitted).) In addition, Judge Gold noted that "[r]egarding the testimony of Willis and the parole officer, [P]etitioner's trial counsel did in fact raise these issues at trial, but [P]etitioner was nevertheless found guilty." (*Id.* at 37.)

iv. Sufficiency and weight of evidence claims

Judge Gold noted that Petitioner "challenges both the legal sufficiency of the evidence used to convict him [and] the weight given to the evidence," which are distinct claims. (*Id.* at 38.) Judge Gold found that Petitioner failed to exhaust these claims, which he first raised in his reply, (Pet'r's Reply 12–15), because he did not raise them before the Appellate Division, (R&R 38). Judge Gold nevertheless considered these claims on the merits and concluded that Petitioner's weight of the evidence claim is a state claim that is not reviewable in a federal habeas proceeding, (R&R 38 (citing *Blake v. Martuscello*, No. 10-CV-2570, 2013 WL 3456958, at *9 (E.D.N.Y. July 8, 2013) (collecting cases))), and that Petitioner's sufficiency claim is meritless because "the evidence introduced at trial . . . was plainly sufficient to sustain [his] conviction," (*id.* at 39).

c. Petitioner's objections to the R&R

i. Claims based on failure to give a missing witness charge

Petitioner objects to Judge Gold's finding that he failed to exhaust his claim that the Trial Court's refusal to give a missing witness charge violated the Sixth Amendment's Confrontation Clause by failing to raise it in his appellate brief except through a fleeting reference to *People v. Barboza*. (Objs. 4–5.) In support, Petitioner argues that the default should be excused because Judge Gold recognized that Petitioner's trial counsel was ineffective when he noted that "[P]etitioner claims that only his trial counsel provided ineffective assistance, though his appellate counsel is at least in part responsible for the decision not to raise the [C]onfrontation [C]lause issue in the appellate brief." (*Id.* at 6 (quoting R&R 22 n.9); *see also id.* at 4–5 (arguing that even if his appellate brief referenced *People v. Barboza* "without mentioning any United States Supreme Court precedents," it "clearly supports [his] ineffective assistance [of counsel] claim," which is "corroborate[d]" by Judge Gold's footnote).)[7]

Petitioner also objects to Judge Gold's recitation of the fact that, in opposing defense counsel's request for a missing witness charge, the prosecution "argued that all references to facts involving . . . Livingston in its opening statement were covered by his daughter Najiyah Livingston" and that "any piece of circumstantial evidence that [Livingston] may have was already testified to by [Najiyah] who . . . is a better witness.'" (Objs. 3; *see* R&R 13.) In support, Petitioner argues that New York Criminal Procedure Law section 60.20 prohibits the

[7] Judge Gold's footnote stated: "[h]ere, as explained below, [P]etitioner was not denied effective assistance of counsel under federal standards. In addition, [P]etitioner claims that only his trial counsel provided ineffective assistance, though his appellate counsel is at least in part responsible for the decision not to raise the Confrontation Clause issue in the appellate brief." (R&R 22 n.9.)

testimony of children under age twelve from being admitted.[8] (Objs. 3.) The Court liberally construes this argument as an objection to Judge Gold's finding that the Trial Court's refusal to give a missing witness charge did not violate Petitioner's constitutional rights.

ii. Claims based on improper admission of hearsay

Petitioner requests that the Court treat his Memorandum of Law and Traverse "as an objection to [the R&R] regarding the hearsay testimon[y] from Ms. Cabrera and Ms. Willis." (*Id.* at 6.)

iii. Ineffective assistance of trial counsel and sufficiency of the evidence claims

As noted above, Petitioner argues that the default of his Confrontation Clause claim based on the Trial Court's refusal to give a missing witness charge should be excused because the failure of his appellate brief to mention the Confrontation Clause was caused by the ineffective assistance of his trial and appellate counsel. (Objs. 4–5.) The Court liberally construes this as an objection to Judge Gold's finding that trial counsel did not provide ineffective assistance.[9]

II. Discussion

a. Standards of review

i. Report and recommendation

A district court reviewing a magistrate judge's recommended ruling "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."

[8] Najiyah was ten years old when she testified. (Tr. 496:10–11.) New York Criminal Procedure Law section 60.20 provides that "[e]very witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath." N.Y. C.P.L. § 60.20(2).

[9] Respondent has not filed a response to Petitioner's objections and the time for doing so has passed.

28 U.S.C. § 636(b)(1)(C). When a party submits a timely objection to a report and recommendation, the district court reviews *de novo* the parts of the report and recommendation to which the party objected. *Id.*; *see also United States v. Romano*, No. 15-992-CR, 2022 WL 402394, at *3 (2d Cir. Feb. 10. 2022) (quoting *United States v. Romano*, 794 F.3d 317, 340 (2d Cir. 2015)). The district court may adopt those portions of the recommended ruling to which no timely objections have been made, provided no clear error is apparent from the face of the record. *See S.J. v. N.Y.C. Dep't of Educ.*, No. 21-240-CV, 2022 WL 1409578, at *1 n.1 (2d Cir. May 4, 2022) (noting that district court applied correct legal standard in conducting *de novo* review of portions of magistrate's report to which specific objections were made and reviewing portions not objected to for clear error). The clear error standard also applies when a party makes only conclusory or general objections. Fed. R. Civ. P. 72(b)(2) ("[A] party may serve and file specific written objections to the [magistrate judge's] proposed findings and recommendations."); *see also Wu v. Good Samaritan Hosp. Med. Ctr.*, 815 F. App'x 575, 579 (2d Cir. 2020) ("Merely referring the court to previously filed papers or arguments does not constitute an adequate objection under . . . Fed. R. Civ. P. 72(b)." (quoting *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002))); *Benitez v. Parmer*, 654 F. App'x 502, 504 (2d Cir. 2016) (holding that "general objection[s] [are] insufficient to obtain *de novo* review by [a] district court").

Whether clear error review or *de novo* review applies when an objecting party reiterates the arguments made to the magistrate judge is unclear. While the Second Circuit has suggested that clear error review is appropriate if a party's objection to a magistrate judge's report and recommendation repeats arguments already presented to and considered by the magistrate judge, *see Mario*, 313 F.3d at 766 ("Merely referring the court to previously filed papers or arguments

does not constitute an adequate objection under . . . Fed. R. Civ. P. 72(b) . . . ."), the Second Circuit has more recently stated that it is "skeptical" that the clear error standard would be appropriate when the objection is based on a previously asserted argument, *see Moss v. Colvin*, 845 F.3d 516, 520 n.2 (2d Cir. 2017) ("[W]e are skeptical that clear error review would be appropriate in this instance, where arguably 'the only way for [the plaintiff] to raise . . . arguments [on that point] [was] to reiterate them.'" (third and fourth alterations in original) (first quoting *Watson v. Geithner*, No. 11-CV-9527, 2013 WL 5441748, at *2 (S.D.N.Y. Sept. 27, 2013); and then citing 28 U.S.C. § 636(b)(1))). *See also Joseph v. Korn*, No. 19-CV-7147, 2021 WL 912163, at *1 (E.D.N.Y. Mar. 9, 2021) ("Although '[o]bjections that reiterate arguments considered and rejected by the magistrate are reviewed for clear error,' in an abundance of caution, this [c]ourt reviews [the] [p]laintiff's arguments *de novo*." (citation omitted) (first quoting *Cruz v. Colvin*, No. 13-CV-1267, 2014 WL 5089580, at *1 (S.D.N.Y. Sept. 25, 2014); and then citing *Parker v. Comm'r of Soc. Sec'y Admin.*, No. 18-CV-3814, 2019 WL 4386050, at *6 (Sept. 13, 2019))); *Harewood v. N.Y.C. Dep't of Educ.*, No. 18-CV-5487, 2021 WL 673476, at *6 (S.D.N.Y. Feb. 22, 2021) ("[W]hen the objections simply reiterate previous arguments or make only conclusory statements, the court should review such portions of the report only for clear error." (first citing *Dickerson v. Conway*, No. 08-CV-8024, 2013 WL 3199094, at *1 (S.D.N.Y. June 25, 2013); and then citing *Kirk v. Burge*, 646 F. Supp. 2d 534, 538 (S.D.N.Y. 2009))), *aff'd*, No. 21-CV-584, 2022 WL 760739 (2d Cir. Mar. 14, 2022); *Castorina v. Saul*, No. 19-CV-991, 2020 WL 6781078, at *1 (S.D.N.Y. Nov. 18, 2020) ("While courts in this [d]istrict sometimes state that objections that 'simply reiterate [the] original arguments' merit only clear error review, this rule lacks support in either 28 U.S.C. § 636(b)(1)(C) or Rule 72(b)(2) of the

Federal Rules of Civil Procedure. The Second Circuit has expressed similar skepticism." (second alteration in original) (citation omitted)).

ii. Habeas petition

Under 28 U.S.C. § 2254, as amended by 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 Edwards v. Vannoy*, 593 U.S. ---, ---, 141 S. Ct. 1547, 1564–65 (May 17, 2021) (Thomas, J., concurring); *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 28 U.S.C. §2254(d)(1))); *Sexton v. Beaudreaux*, 585 U.S. ---, ---, 138 S. Ct. 2555, 2558 (June 28, 2018) (per curiam); *Kernan v. Hinojosa*, 578 U.S. 412, 413 (2016) (per curiam); *Woods v. Donald*, 575 U.S. 312, 313 (2015) (per curiam). An adjudication on the merits is one that "(1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment." *Fischer v. Smith*, 780 F.3d 556, 560 (2d Cir. 2015) (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001)); *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 state court's decision." *Woods v. Etherton*, 578 U.S. 113, 116–17 (2016) (per curiam) (quoting *Harrington*, 562 U.S. at 101).

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." *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)); *see also Kernan v. Cuero*, 583 U.S. ---, ---, 138 S. Ct. 4, 9 (Nov. 6, 2017) (per curiam) ("[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" (quoting *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (per curiam))); *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 determinations [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 evidence, 'on habeas review that does not suffice to'" overturn a state court factual determination. *Tharpe v. Sellers*, 583 U.S. ---, ---, 138 S. Ct. 545, 553 (Jan. 8, 2018) (Thomas, J., dissenting) (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. Unopposed portions of the R&R

No party has objected to Judge Gold's recommendation that the Court reject Petitioner's claims that the evidence at trial was insufficient to support his conviction as both procedurally barred and without merit. The Court has reviewed the unopposed portions of the R&R and, finding no clear error, adopts these recommendations pursuant to 28 U.S.C. § 636(b)(1).[10]

[10] Petitioner objects to Judge Gold's recitation of the fact that Cabrera saw Petitioner "banging on the victim[']s door between 2:00pm & 3:00pm" because "there is no evidence . . . that [he] was banging on the door at this time." (Objs. 3.) In addition, Petitioner objects to Judge Gold's statement that "the defense attempted to place . . . Livingston under suspicion by revealing that the [V]ictim had acquired a protective order against Livingston in 2002 and suggesting that Livingston was conspiring with . . . Najiyah[] to blame [P]etitioner for the [V]ictim's death, which Livingston may have in fact committed," (R&R 7), arguing that his trial lawyers' tactics "were not to use Mr. Livingston and his daughter as a scape-goat" but "to prove that the [Assistant District Attorney] lacked the physical evidence to prove that [Petitioner] was the one who committed murder." (Objs. 4.) Because the Court finds no clear error in Judge Gold's finding that Petitioner failed to exhaust his sufficiency and weight of the evidence claims, the Court does not separately address the merits of these claims. However, the Court notes that even liberally construing these arguments as objections to Judge Gold's determination on the merits, they nevertheless fail. As discussed below in connection with Petitioner's other claims,

c. Claims based on failure to give a missing witness charge

Petitioner claims that the Trial Court's refusal to give a missing witness charge instructing the jury to draw an adverse inference from the prosecution's decision not to call Livingston violated his Sixth Amendment right to confront witnesses and Fourteenth Amendment right to a fair trial. (Pet. 20–25.) In his Petition, he argues that the Trial Court erroneously denied his request for a missing witness charge because Livingston was a material witness in the prosecution's control, as he was "the last person to have spoken on the telephone" with the Victim and also appeared on the prosecution's witness list. (*Id.*) Although Livingston testified to the Grand Jury that the Victim told him that Petitioner was "in the house with [her], do not bring the [kids] home yet," Petitioner argues that the prosecution did not call him as a witness and instead introduced his testimonial statements through Najiyah's testimony because it knew the defense would have elicited "the abusive past relationship [Livingston] had" with the Victim if Livingston took the stand, which would have harmed the prosecution's case. (*Id.* at 20–23.) Petitioner objects to Judge Gold's recitation of the fact that the prosecution argued a missing witness charge was inappropriate because Livingston's testimony would have been cumulative, as "any piece of circumstantial evidence that [Livingston] may have [had] was already testified to by [Najiyah] who . . . is a better witness," (Tr. 856:21–858:11), arguing that

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the evidence was sufficient to support his conviction. In addition, contrary to Petitioner's assertions, although surveillance footage of Petitioner banging on the Victim's door between 2:00 PM and 3:00 PM was not introduced at trial, Cabrera testified that she saw Petitioner banging on the Victim's door between 2:00 PM and 3:00 PM. (Tr. 647:16–648:24.) Further, Petitioner's trial counsel specifically stated that his intention in asking Najiyah questions "relating to her relationship with her father" and the "order of protection" was "to bring out that [Najiyah] favors her father over [Petitioner]" and "has been influenced by her father to testify the way she does," (Tr. 528:20–529:24), and that his intention in revealing that the Victim had acquired a protective order against Livingston in 2002 was to make the jury "aware that somebody other than [Petitioner] could have harmed [the Victim]," (Tr. 719:9–722:23).

New York Criminal Procedure Law section 60.20 prohibits the testimony of children Najiyah's age from being admitted, (Objs. 3).

The Court of Appeals found that "[e]ven if the Supreme Court erred in denying the defendant's request for a missing witness charge," any error was harmless, "as there was overwhelming evidence of [his] guilt and no significant probability that the error contributed to his conviction." *Johnson*, 943 N.Y.S.2d at 911 (quoting *Smalls*, 916 N.Y.S.2d at 795). Assuming without deciding that the failure to give a missing witness charge was an error that raises federal constitutional issues, any error was harmless.

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,[11] 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)

[11] "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)).

(quoting *Brecht*, 507 U.S. at 623). "[I]n § 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)).

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 because 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).

Because the Appellate Division reasonably concluded that the failure to give a missing witness charge was harmless error, this Court cannot grant habeas relief on this claim.

i. This error is subject to a harmless error analysis

As an initial matter, the failure to give a missing witness charge 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 failure to give a missing witness charge for Livingston 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 Wilson v. Capra*, No. 15-CV-6495, 2020 WL 10506052, at *22 (E.D.N.Y. Oct. 12, 2020) (noting same); *see also Campbell v. Fischer*, 103 F. App'x 683, 683 (2d Cir. 2004) (reviewing state court's refusal to give missing witness charge for harmless error); *cf. Gaines v. Kelly*, 202 F.3d 598, 604 (2d Cir. 2000) (noting that "a constitutional defect in a jury instruction defining reasonable doubt can never constitute harmless error" because "the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings" (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993))). Accordingly, the Trial Court's refusal to grant a missing witness instruction is susceptible to harmless error analysis.

ii. The error was harmless

The error in this case is harmless. "Instructional error is harmless only if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *United States v. Demott*, 906 F.3d 231, 246 (2d Cir. 2018) (quoting *United States v. Moran-Toala*, 726 F.3d 334, 344 (2d Cir. 2013)). Courts analyzing the harmlessness of an instructional error consider, among other things, 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 Hill v. Quigley*, 784 F. App'x 16, 19 (2d Cir. 2019); *Smalls v. Batista*, 191 F.3d 272, 282 (2d Cir. 1999).

The Trial Court did not give any instruction concerning the missing witness and therefore the first factor — repetition of the error before the jury — weighs in favor of harmlessness.

The second factor — counter-balancing instructions — also weighs in favor of harmlessness. The Trial Court gave multiple instructions that mitigated against the absence of the missing witness instruction, including its charges that jurors must decide the case on the evidence alone without speculating concerning matters not presented. (Tr. 983:21–984:23, 989, 995:23–996:2.) This instruction specifically precluded jurors from speculating about what Livingston would have said had he testified. In addition, the Trial Court instructed the jurors that they could also consider the lack of evidence in evaluating Petitioner's guilt. (Tr. 995:23–997:5.)

The Trial Court also permitted defense counsel to comment in summation about Livingston's failure to testify, which comments mitigate the impact of a failure to give a missing witness charge. (Tr. 925:15–25); *see, e.g.*, *Bisnauth v. Morton*, No. 18-CV-4899, 2021 WL 3492746, at *15 (E.D.N.Y. Aug. 9, 2021) ("It is entirely speculative to suggest that the failure by the court to give a missing witness charge had any impact on the trial. Indeed, . . . defense counsel repeatedly argued to the jury the absence of McKenzie from the State's case-in-chief. Moreover, . . . there was overwhelming evidence of [the] petitioner's guilt." (citation omitted)); *Wilson*, 2020 WL 10506052, at *22 ("The [t]rial [c]ourt also permitted defense counsel to comment in summation about those witnesses' failure to testify, a ruling that mitigates the impact of a failure to issue a missing witness charge."); *Montanez v. Tynon*, No. 18-CV-1766, 2018 WL 6268221, at *14 (S.D.N.Y. Nov. 30, 2018) ("Furthermore, given that Montanez's trial counsel argued about the significance of Washington's absence at length in his summation, any prejudice from the denial of the charge was substantially abated." (citation omitted)); *Adamson v. Griffin*, No. 16-CV-511, 2016 WL 6780011, at *6 (S.D.N.Y. Nov. 16, 2016) ("Reversal is

particularly inappropriate where, as here, defense counsel urged an adverse inference in his summation.").

Moreover, the voluminous and weighty evidence against Petitioner further supports a harmlessness determination. As Judge Gold found, the Appellate Division reasonably concluded that "there was overwhelming evidence of [petitioner's] guilt and no significant probability that the error contributed to his conviction." (R&R 15, 26 (quoting *Johnson*, 943 N.Y.S.2d at 911).) Najiyah testified that Petitioner forced his way into the apartment on numerous occasions, including the night of the murder, and pushed the Victim into an air conditioner, bruising her badly eight days prior to the murder. (Tr. 497:6–7, 502:11–507:4, 514:3–9.) Cabrera and Willis testified that the Victim told them Petitioner had beaten her, and Cabrera testified that she observed bruises on the Victim's face. (Tr. 657:14–658:10, 677:7–678:8.) Cabrera and Jordan testified that they had observed Petitioner banging on the Victim's door on several occasions and that the Victim would not let him in. (Tr. 658:16–659:15, 764:1–24.) Cabrera also testified that, on the day of the murder, she saw Petitioner banging on the Victim's door and cursing. (Tr. 647:16–648:24.) The Victim's downstairs neighbor heard a women yell "this man is killing me," (Tr. 620:22–621:10), and Shauna Tippins and Gloria Tippins testified that, moments before discovering the Victim's body, they encountered Petitioner and he told them he had done something "wrong" or "stupid" and pointed up in the direction of the apartment, a gesture captured by the surveillance video, (Tr. 544:24–545:7, 575:23–576:7).

In addition, Petitioner's own actions demonstrate his consciousness of guilt. Following the murder, Petitioner fled to his mother's house in Pennsylvania in violation of his parole, was found hiding under a bed by police, and lied to the police by stating that he had not been in New York on the night of the murder. (Tr. 701:19–25, 702:23–704:10, 739:10–741:3.) Based on all

of the evidence in the case, any error in the refusal to give a missing witness charge was harmless. *See, e.g.*, *Gomez v. Griffin*, No. 17-CV-7249, 2021 WL 1224885, at *12 (E.D.N.Y. Mar. 31, 2021) ("[T]he trial court's refusal to give [a missing witness] instruction did not violate due process. Given the overwhelming evidence at trial against [the] [p]etitioner, the absence of a missing witness charge here could not have possibly prejudiced [the] [p]etitioner."); *Nicholas v. Miller*, No. 14-CV-5595, 2019 U.S. Dist. LEXIS 174538, at *28 (E.D.N.Y. Sept. 30, 2019) ("In light of the ample evidence of [the petitioner's] guilt, there is no reason to believe that an adverse inference charge would have affected the jury's verdict.").

d. Hearsay claims

Petitioner claims that the Trial Court violated his Sixth Amendment right to confront witnesses and Fourteenth Amendment right to a fair trial by improperly admitting hearsay testimony from the Victim's friends about statements the Victim made describing Petitioner's prior bad acts, as this testimony was intended to show his propensity for violence and may have induced the jury to convict him "because of his past." (Pet. 26–31.) Petitioner requests that the Court treat his Memorandum of Law and Traverse "as an objection to [the R&R] regarding the hearsay testimon[y] from Ms. Cabrera and Ms. Willis."[12] (Objs. 6.)

i. Sixth Amendment Confrontation Clause claim

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend VI. This constitutional provision, known as the Confrontation Clause, generally "prohibits the introduction of testimonial statements by a

[12] In view of the Second Circuit's statement that it is "skeptical" that the clear error standard would be appropriate when an objection is based on a previously asserted argument, *see Moss v. Colvin*, 845 F.3d 516, 520 n.2 (2d Cir. 2017), the Court reviews Petitioner's claims *de novo*.

nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Ohio v. Clark*, 576 U.S. 237, 243 (2015) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)); *Whorton v. Bockting*, 549 U.S. 406, 413 (2007) ("[O]ur opinion in *Crawford* . . . held that '[t]estimonial statements of witnesses absent from trial' are admissible 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness].'" (quoting *Crawford*, 541 U.S. at 59)). Statements are "testimonial" when "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Clark*, 576 U.S. at 245 (alteration in original) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). "[W]hen a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the [statement]' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the [statement] occurs." *Bryant*, 562 U.S. at 370.

An out-of-court statement does not acquire a testimonial character merely because the statement will be useful in a later criminal prosecution. *See Clark*, 576 U.S. at 245 ("[U]nder our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. 'Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence.'" (quoting *Bryant*, 562 U.S. at 359)); *Davis v. Washington*, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency."). For example, a domestic violence victim reporting an ongoing assault to a 911 dispatcher most likely makes her statements for the purpose of ensuring her personal safety, even if her statements could later be

useful to prosecute the abuser. *See Davis*, 547 U.S. at 827–28. Likewise, a gunshot-wound victim who — immediately before being transported by ambulance to a hospital for medical treatment — tells police about the circumstances of his shooting (including the identity of the shooter and the location of the shooting) most likely does so to assist police in apprehending a gunman on the loose, even if his statements could assist a subsequent prosecution of the assailant. *See Bryant*, 562 U.S. at 371–78. In addition, "statements to persons other than law enforcement officers . . . are much less likely to be testimonial than statements to law enforcement officers." *Clark*, 576 U.S. at 246–49 (finding discussion between a three-year-old child and her preschool teachers about potential child abuse at the child's home most likely has the primary purpose of safeguarding the child from further abuse, even if those statements could support later criminal charges against the abuser). As relevant here, the Supreme Court has noted, in a case arising in the domestic violence context, that "[s]tatements to friends and neighbors about abuse and intimidation" are not testimonial and "would be excluded, if at all, only by hearsay rules." *Giles*, 554 U.S. at 376.

As Judge Gold correctly concluded, the Victim's out-of-court statements to her friends and neighbors about Petitioner's prior abuse were nontestimonial under *Giles*, and, as such, any testimony about these statements was "not admitted in violation of the Confrontation Clause, even if [it] may have been admitted in violation of New York's evidence rules." (R&R 35 (citing *Giles*, 554 U.S. at 376).) Indeed, even outside the domestic violence context discussed in *Giles*, courts have routinely distinguished between casual statements to acquaintances and "knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings," finding the former to be nontestimonial. *United States v. Saget*, 377 F.3d 223, 228

(2d Cir. 2004); *see, e.g.*, *United States v. Gedinez*, 280 F. App'x 47, 49–50 (2d Cir. 2008) (finding statement of "non-testifying co-defendant made to an acquaintance" nontestimonial); *Saget*, 377 F.3d at 229 (finding statements nontestimonial where declarant "believed that he was having a casual conversation with a friend and potential co-conspirator"); *Burkett v. Artus*, No. 14-CV-110, 2016 WL 6659492, at *13 n.16 (N.D.N.Y. Nov. 10, 2016) (finding statements non-testimonial because "there [wa]s no indication that the declarant (i.e., the victim) had any reasonable expectation that her statements, made to friends and family outside the context of any proceeding, investigation, or formal complaint, would be used in future judicial proceedings"); *Augugliaro v. Bradt*, No. 08-CV-1548, 2014 WL 5093849, at *8 (E.D.N.Y. Oct. 6, 2014) (finding statements nontestimonial where made on declarant's "own initiative, in an off-hand and casual manner, and to a friend and co-conspirator"); *Ko v. Burge*, No. 06-CV-6826, 2008 WL 552629, at *10 (S.D.N.Y. Feb. 26, 2008) (finding statement "plainly nontestimonial" where it was "made to a friend over the phone with no intervention of any government authorities," "was "neither solicited by any law enforcement officers nor made in the context of any government investigation," and thus did "not bear any of the hallmarks of testimonial statements identified by the Supreme Court in *Crawford*"). Viewed objectively in light of all the circumstances, the primary purpose of the Victim's statements was likely to communicate an ongoing emergency to her friends and neighbors, rather than to "creat[e] an out-of-court substitute for trial testimony." *Clark*, 576 U.S. at 245 (alteration in original) (quoting *Bryant*, 562 U.S. at 358). Accordingly, the Victim's statements were nontestimonial and Petitioner's Confrontation Clause claim fails.

ii. Fourteenth Amendment right to fair trial claim

"Merely showing that the state court admitted evidence in violation of state rules of evidence is not enough" to warrant federal post-conviction relief, "for such a state court decision

on state law, even if erroneous, is not an independent ground for the writ of habeas corpus to issue under AEDPA." *Griggs v. Lempke*, 797 F. App'x 612, 615 (2d Cir. 2020); *see also Estelle*, 502 U.S. at 67–68 (stating that inquiry into whether evidence was incorrectly admitted under state law "is no part of a federal court's habeas review of a state conviction" because "federal habeas corpus relief does not lie for errors of state law" (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990))). However, a court may "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." *Newkirk v. Capra*, 615 F. App'x 712, 713 n.2 (2d Cir. 2015) (quoting *Freeman v. Kadien*, 684 F.3d 30, 34–35 (2d Cir. 2012)); *see also Vincent v. Bennett*, 54 F. App'x 714, 717 (2d Cir. 2003). A state law evidence violation becomes a federal constitutional violation if the evidence "is so extremely unfair that its admission violates fundamental conceptions of justice." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)); *Vega v. Walsh*, 669 F.3d 123, 126 (2d Cir. 2012); *see also Freeman*, 684 F.3d at 35; *McKinnon v. Superintendent*, 422 F. App'x 69, 73 (2d Cir. 2011) ("Such unfairness will only result where: '[t]he erroneously admitted evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. In short it must have been crucial, critical, [and] highly significant.'" (second alteration in original) (quoting *Collins v. Scully*, 755 F.2d 16, 19 (2d Cir. 1985))); *Johnson v. Ross*, 955 F.2d 178, 181 (2d Cir. 1992). Only a narrow set of evidentiary violations fits within this category. *See Evans v. Fischer*, 712 F.3d 125, 133–34 (2d Cir. 2013).

Assuming without deciding that the Trial Court admitted Cabrera's and Willis's testimony about the Victim's statements to them in violation of state rules of evidence, this

testimony was not "sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it," *McKinnon*, 422 F. App'x at 73 (quoting *Collins*, 755 F.2d at 19), and thus was not "so extremely unfair that its admission violate[d] 'fundamental conceptions of justice'" in violation of Petitioner's Fourteenth Amendment right to a fair trial, *Vega*, 669 F.3d at 126 (alteration in original) (quoting *Dowling*, 493 U.S. at 352). As Judge Gold noted, "the jury heard other evidence, besides the [V]ictim's statements," that suggested Petitioner and the Victim "had an abusive relationship," including Najiyah's testimony that Petitioner had pushed his way into the apartment on numerous occasions, pushing the Victim on one occasion and arguing with her on another, and Cabrera's testimony that she had seen bruises on the Victim's face and seen Petitioner banging on the Victim's door and yelling "open the f**cking door." (*See* R&R 33–34.) Therefore, the Appellate Division's determination that any error was harmless was not unreasonable, and the Court denies Petitioner's claim that the Trial Court's erroneous admission of hearsay evidence of his prior bad acts violated his Fourteenth Amendment right to a fair trial.

e. Ineffective assistance of counsel claim

Petitioner asserts that the procedural default of his Confrontation Clause claim should be excused due to the ineffective assistance of trial and appellate counsel. (Objs. 5–6.) Although Petitioner does not object to Judge Gold's analysis of his ineffective assistance of trial counsel claim, the Court liberally construes Petitioner's objection to the procedural default of his Confrontation Clause claim as an objection to this analysis and as raising a new claim of ineffective assistance of appellate counsel.

i. Ineffective assistance of trial counsel

Petitioner argues that trial counsel provided ineffective assistance by "stumbling with words to the jury" and failing to object to the testimony of PO Chung and Willis, who had not seen the Victim in two years. (Pet. 32.) In addition, Petitioner argues that his attorney failed to preserve for appellate review the arguments that "the missing witness would have given . . . non-cumulative testimony," that "the evidence was legally insufficient to support the conviction for murder in the [second] degree," and that the Victim's statements, as recounted through the testimony of "two witnesses" — presumably Cabrera and Willis — "did not fit within a recognized exception to the hearsay rule." (*Id.* at 33–34.) Because the Appellate Division rejected Petitioner's ineffective assistance of counsel claim on the merits, the state court's finding is entitled to AEDPA deference.

"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, 121–22 (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*, 585 U.S. at ---, 138 S. Ct. at 2558 ("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 Bell v. Cone*, 535 U.S. 685, 698 (2002) (stating that "[j]udicial scrutiny of a counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time" (alterations in original) (quoting *Strickland*, 466 U.S. at 689)); *United States v. Rosemond*, 958 F.3d 111, 121 (2d Cir. 2020) (same) (citing *Jackson v. Conway*, 763 F.3d 115, 153 (2d Cir. 2014)), *cert. denied*, 141 S. Ct. 1057 (Jan. 11, 2021). 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. *Id.* at 105; *Premo*, 562 U.S. at 122; *see 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, 15 (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." *Wilson v. Sellers*, 584 U.S. ---, ---, 138 S. Ct. 1188, 1199 n.1 (Apr. 17, 2018) (Gorsuch, J., dissenting) (quoting *Premo*, 562 U.S. at 123). "Surmounting *Strickland*'s high bar is never an easy task." *Lee v. United States*, 582 U.S. ---, ---, 137 S. Ct. 1958, 1967 (June 23, 2017) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

As Judge Gold found, "counsel's errors, if any, did not affect the outcome of [P]etitioner's trial." (R&R 36.) Although Petitioner argues that his attorney failed to object to

the testimony of PO Chung and of Willis, (Pet. 32), Petitioner's trial counsel raised these issues at trial. (*See* Tr. 603:5–13, 919:22–920:1.) Further, "defense counsel's attempt 'to minimize damaging testimony by offering to stipulate to testimony about [Petitioner's] parole' is just one example of what was an overall effective performance."[13] (R&R 37 n.15 (quoting Resp't's Opp'n 36–38).) In addition, counsel sought a missing witness charge, which was denied. (Tr. 856:2–20, 858:12–20.) Indeed, the Trial Court told defense counsel that he was "free to call Mr. Livingston if [he] want[ed] to get [Livingston's prior assault of the Victim] out," (Tr. 720:16–17, 722:3–4), and defense counsel made a tactical decision not to do so, stating "[w]hat am I going to do[,] ask him about his record and sit down? I would be in a very bad position to do that and not ask him anything else," (Tr. 722:5–10). Such decisions are afforded great deference in the face of an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

Finally, even assuming that counsel's performance was deficient because he stumbled over words or failed to raise the objections and arguments Petitioner highlights, Petitioner has not demonstrated that such performance prejudiced him. *See id.* at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result

[13] As Respondent outlines in its opposition to the petition, trial counsel also "made appropriate motions" that "were partially successful"; "vigorously opposed the prosecutor's [*People v. Molineux*, 168 N.Y. 264 (1901)] application"; requested certain material prior to trial "so he could thoroughly prepare" and "tried to discover other information throughout trial"; "thoroughly questioned the jurors" during *voir dire*; "gave a persuasive opening" and "proposed deficiencies in the prosecution's proof"; objected to the prosecution's questions and "successfully argued for the redaction of prosecution photographs" he believed were prejudicial; "thoroughly cross-examined the prosecution's witnesses" using their previous reports and prior testimony; and "elicit[ed] evidence favorable to the defense," including "that no one saw blood on [P]etitioner's clothes," even though blood would have "spew[ed]" from the Victim's injuries and she would have bled "profusely." (Resp't's Opp'n 35–38 (footnote omitted).)

of the proceeding would have been different."). As discussed above, there was ample evidence of Petitioner's guilt before the jury. *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)). In view of all of the evidence in the case, the Court is not persuaded that absent the alleged deficiencies in trial counsel's performance, 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 did not satisfy *Strickland*'s prejudice prong because "substantial evidence of [the] [p]etitioner's guilt was introduced at trial"); *Brown v. Lee*, No. 14-CV-9718, 2019 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 the 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").

Accordingly, Petitioner is not entitled to habeas relief based on his ineffective assistance of trial counsel claim.

ii. Ineffective assistance of appellate counsel

Petitioner asserts in his objections to the R&R that his failure to exhaust his Confrontation Clause claim based on the lack of a missing witness charge should be excused because the failure to raise this claim in his appellate brief was, at least in part, his appellate counsel's decision. (Objs. 4–6.)

To the extent Petitioner seeks to raise an ineffective assistance of appellate counsel claim, Petitioner did not raise this claim in his Petition and may not do so for the first time in his

objections to the R&R. *Tashbook v. Petrucci*, No. 20-CV-5318, 2022 WL 884974, at *4 n.3 (S.D.N.Y. Mar. 25, 2022) ("To the extent [the pro se petitioner] attempts to bring [new] claims . . . , the [c]ourt declines to consider them, since they were not . . . raised in the [p]etition."); *Holguin v. Lee*, No. 13-CV-1492, 2016 WL 1030129, at *7 (S.D.N.Y. Mar. 10, 2016) (finding that the pro se petitioner was "not entitled to habeas relief based on these new claims because, in the context of federal habeas review, 'a petitioner is not permitted to raise an objection to a magistrate judge's report that was not raised in his original petition'" (quoting *Chisolm v. Headley*, 58 F. Supp. 2d 281, 284 n.2 (S.D.N.Y. 1999))); *Umoja v. Griffin*, No. 11-CV-736, 2014 U.S. Dist. LEXIS 73964, at *14–15 (E.D.N.Y. May 29, 2014) (rejecting pro se petitioner's objection to report and recommendation because it "has no impact on the [report and recommendation] before the [c]ourt," as it "is based on an entirely new claim, which is unexhausted," it is "doubtful that this new claim has any merit," and the petitioner did not provide "any explanation for his [new] claim"); *Ramirez v. United States*, No. 05-CV-2692, 2007 WL 2729019, at *3 (S.D.N.Y. Sept. 14, 2007) (noting that claim not raised in original habeas petition could not be raised for the first time in objections to a magistrate judge's report and that "[e]ven if [the] [p]etitioner raised this claim in his [p]etition, 'conclusory allegations' are 'insufficient to establish ineffective assistance of counsel'" (quoting *Jones v. Greene*, No. 05-CV-8997, 2007 WL 2089291, at *7 (S.D.N.Y. July 20, 2007))).

Accordingly, Petitioner is not entitled to habeas relief based on his ineffective assistance of appellate counsel claim.

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 claims based on the Trial Court's refusal to give a missing witness

charge, claims based on the improper admission of hearsay, and ineffective assistance of counsel claims. The Court denies a certificate of appealability for Petitioner's sufficiency and weight of the evidence claims.

"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 . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Hernandez v. Peery*, --- U.S. ---, ---, 141 S. Ct. 2231, 2234 (June 28, 2021) (Sotomayor, J., dissenting) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "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, 336 (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. 120, 127 (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." *Buck*, 580 U.S. at ---, 137 S. Ct. at 774 (quoting *Miller-El*, 537 U.S. at 338).

The Court grants a certificate of appealability as to Petitioner's claims based on the Trial Court's refusal to give a missing witness charge, claims based on the improper admission of

hearsay, and ineffective assistance of trial counsel claim. As to Petitioner's claims based on the Trial Court's refusal to give a missing witness charge and claims based on the improper admission of hearsay, 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 because these claims require double deference to the state court's analysis of the harmlessness of these violations, in view of the fact that the claims are "debatable," the Court must issue a certificate of appealability. *See Buck*, 580 U.S. at ---, 137 S. Ct. at 774; *Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007) ("The standard for issuing the certificate of appealability is whether 'jurists of reason would find it debatable whether the petition states a valid claim.'" (quoting *Slack*, 529 U.S. at 478)); *Waiters v. Lee*, No. 13-CV-3636, 2020 WL 3432638, at *14 (E.D.N.Y. June 23, 2020), *aff'd*, No. 20-2190, 2021 WL 5183539 (2d Cir. Nov. 9, 2021).

The Court also grants a certificate of appealability for Petitioner's ineffective assistance of counsel claims, and, relatedly, for the procedural default of Petitioner's Confrontation Clause claim based on the Trial Court's refusal to give a missing witness charge, which Petitioner argues was caused by ineffective assistance of counsel. 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, and that a determination of whether counsel's alleged errors prejudiced Petitioner requires a consideration of all the evidence, the

Court believes that reasonable jurists could at least debate Petitioner's ineffective assistance of counsel claims. In view of 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 on these claims as well, but because they are "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.

Finally, the Court denies a certificate of appealability for Petitioner's sufficiency and weight of the evidence claims. No reasonable jurist would debate whether a procedural bar applies to these claims. In addition, reasonable jurists would not debate these claims because Petitioner raised them for the first time in his reply brief. The principle that courts will not consider arguments first raised in a reply brief is a well-settled prudential doctrine familiar to litigators and judges throughout the nation. *Evangelista v. Ashcroft*, 359 F.3d 145, 155 n.4 (2d Cir. 2004). The Second Circuit has followed that practice for nearly a century and continues to do so today. *See Diaz v. United States*, 633 F. App'x 551, 556 (2d Cir. 2015); *Dixon v. Miller*, 293 F.3d 74, 80 (2d Cir. 2002); *Smith v. U.S. Shipping Bd. Emergency Fleet Corp.*, 26 F.2d 337, 339 (2d Cir. 1928).

IV. Conclusion

The Court has reviewed the R&R and, finding no error, clear or otherwise, adopts the R&R pursuant to 28 U.S.C. § 636(b)(1). Accordingly, the Court denies the petition for a writ of habeas corpus. The Court issues a certificate of appealability as to Petitioner's claims based on the Trial Court's refusal to give a missing witness charge, claims based on the improper admission of hearsay, and ineffective assistance of trial counsel claim. The Court denies a

certificate of appealability as to Petitioner's sufficiency and weight of the evidence claims. The Clerk of Court is directed to enter judgment and close this case.

Dated: August 12, 2022
Brooklyn, New York

SO ORDERED:

s/ MKB

MARGO K. BRODIE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ERIK JOHNSON,	:	
	:	
Petitioner,	:	
	:	REPORT &
-against-	:	RECOMMENDATION
	:	13-CV-4337 (MKB) (SMG)
PATRICK GRIFFIN,	:	
	:	
Respondent.	:	

GOLD, STEVEN M., U.S. Magistrate Judge:

INTRODUCTION

Erik Johnson, moving *pro se*, brings this petition for a writ of habeas corpus pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. In March 2010, following a jury trial in Queens County, petitioner was convicted of second-degree murder and fourth-degree criminal possession of a weapon and sentenced to twenty-five years to life for the murder conviction to be served concurrently with one year for the weapon conviction. Pet. for Writ of Habeas Corpus ("Habeas Pet.")[1] at 1, Dkt. 1; Aff. in Opp. to the Pet. for Writ of Habeas Corpus by Ellen C. Abbot ("Abbot Aff.") ¶ 26, Dkt. 8 at ECF pages 3–16. Petitioner's conviction was affirmed by the Appellate Division, *People v. Johnson*, 95 A.D.3d 1237 (2d Dep't 2012), and his application for leave to appeal to the Court of Appeals was denied, *People v. Johnson*, 19 N.Y.3d 997 (2012).

In his habeas petition, petitioner challenges his conviction on the grounds that: 1) he was denied a fair trial and the right to confront witnesses under the People's control because the prosecution did not call Thomas Livingston as a witness and the trial court did not give a missing

[1] The page numbers used when citing to the Habeas Petition refer to the page numbers of the PDF document filed at Dkt. 1. Within the 186-page filing, petitioner's memorandum of law is at pages 17–35 and his exhibits are at pages 36–71. The appellate briefs and state appellate decisions are at pages 72–186.

witness charge regarding Livingston; 2) he was denied a fair trial because the trial court admitted hearsay testimony recounting statements made by the victim describing petitioner's prior uncharged misconduct and bad acts; and 3) he was denied the right to the effective assistance of trial counsel. Habeas Pet. at 20–21, 26, 31.[2] Petitioner raises a fourth claim in his reply: 4) the evidence presented at trial, particularly the scientific evidence, circumstantial evidence, and testimony, was insufficient to support his conviction. Pet.'s Traverse & Mem. of Law ("Pet.'s Reply") at 12, 14–15, Dkt. 12.

By Order dated April 30, 2020, United States District Judge Margot K. Brodie referred the petition to me for report and recommendation. For the reasons stated below, I respectfully recommend that Johnson's petition be denied in its entirety.

BACKGROUND

Petitioner's ex-girlfriend, Asma Johnson,[3] was found stabbed to death in her apartment in Queens, New York, on the night of November 8, 2006. Abbot Aff. ¶ 4. Police arrested petitioner at his mother's home in Pennsylvania two weeks later. *Id.* Petitioner was charged with murder in the second degree, N.Y. Penal Law § 125.25(1), and criminal possession of a weapon in the fourth degree, N.Y. Penal Law § 265.01(2). *Id.* ¶ 5.

I. The Trial

The petitioner's jury trial commenced on January 27, 2010, in Queens County Supreme Court before Judge Gregory Lasak. State Trial Tr.[4] ("Tr.") at 1, Dkt. 10-2 at ECF page 63, 10-3,

[2] The number assigned to each of petitioner's arguments corresponds with "Point One," "Point Two," and "Point Three" in the Habeas Petition.

[3] Though the victim, Asma Johnson, shares the same last name as petitioner, Erik Johnson, they are not related. *See* Tr. at 348:19-21. To avoid confusion, I refer to the Ms. Johnson as the "victim" and Mr. Johnson as "petitioner."

[4] "Tr." refers to the state court trial record, which is spread over seven attachments at Dkts. 10-2, 10-3, 10-4, 10-5, 10-6, 10-7, and 10-8 on ECF. Dkt. 10-2 contains pages 1–134 of the transcript, beginning at page 63 of the ECF document; Dkt. 10-3 contains pages 135–325; Dkt. 10-4 contains pages 326–526; Dkt. 10-5 contains pages 527–

10-4, 10-5, 10-6, 10-7, 10-8. As summarized below, the People presented substantial evidence connecting petitioner to the victim's murder.

A. The Evidence at Trial

The People presented nineteen witnesses, including the police officers who arrived at the scene of the crime and arrested the petitioner, the victim's daughter and two friends, several of the victim's neighbors, the petitioner's aunt and cousin, the petitioner's parole officer, the medical examiner who conducted the autopsy, and the medical examiners who analyzed DNA recovered from the murder weapon and the victim.

The testimony of the victim's daughter and friends established that the petitioner and victim began dating in early fall of 2006. Tr. at 502:4-7, 645:17-21, 676:23–677:6. By late October, however, the relationship deteriorated and the petitioner became increasingly aggressive. *See* Tr. 502:8–505:15. The victim's daughter, Najiyah Livingston, who was seven-years-old at the time of the incident, testified that the petitioner waited outside of the apartment and pushed his way in once she opened the door on two occasions in late October. Tr. at 497:6-7, 502:11-17. On one of those occasions, the petitioner pushed the victim, causing her to badly bruise her thigh, and on another Najiyah heard the petitioner and victim arguing. Tr. at 502:18–504:15, 505:22–507:4. The victim's friend and neighbor who lived across the hall, Yahaira Cabrera, saw the victim throwing out the trash a week before her murder, around November 1, 2006, and noticed bruises on her face. Tr. at 657:14–658:4. That same week, Cabrera saw the petitioner banging on the victim's door "several times." Tr. at 658:16–659:7. Another neighbor in the victim's apartment building, Brenda Jordan, testified that she saw the petitioner "either sitting on the stairs or standing next to the [victim's] door, or knocking on the door, calling her

530; Dkt. 10-6 contains pages 531–742; Dkt. 10-7 contains pages 743–933; Dkt. 10-8 contains pages 934–1026, ending at page 93 of the ECF document.

name" about twenty times in the weeks leading up to the murder on November 8, 2006. Tr. at 764:6-24.

On November 8, 2006, the day of the murder, the petitioner was again seen aggressively attempting to gain entry to the victim's apartment. Cabrera saw the petitioner banging on the victim's door between 2:00 p.m. and 3:00 p.m. and heard him yell "open the f***ing door." Tr. at 647:16–648:24. Jordan saw the petitioner standing at the victim's door between 2:45 p.m. and 3:45 p.m. Tr. at 762:20–763:7. When Najiyah and her brother left their mother's apartment on that day at about 5:45 p.m. because her father, Thomas Livingston, was outside waiting to drive them to play games at Najiyah's school, petitioner was waiting in the hallway and pushed his way into the apartment. Tr. at 498:6–501:2. Najiyah asked her mother if she was going to be okay and her mother said yes and told the children to go downstairs. Tr. at 501:13-19. Both children then left, leaving the victim alone in the apartment with the petitioner. Tr. at 501:21–502:3.

Najiyah testified that her father, Livingston, received a call from the victim later that night while driving the children back to the victim's apartment. Tr. at 508:3-17. The victim apparently told Livingston not to bring the children home, which led Livingston to ask Najiyah who was at the apartment with her mother. Tr. at 508:3-17. Najiyah responded that the petitioner was at the apartment; Livingston then took the children to petitioner's aunt's house instead of to their home. Tr. at 508:15-22. Livingston and the children arrived at that apartment at around 8:10 p.m. and asked petitioner's aunt, Gloria Tippins, and her daughter, Shauna, to go to the victim's apartment to check on the victim and the petitioner. Tr. at 540:24–541:22.

According to both Shauna and Gloria, they went straight to the victim's apartment building, which was two buildings down from their own. Tr. at 542:9-25, 573:12–574:13. The

two women entered the lobby of the victim's apartment building, which was unlocked, and then walked through a foyer to the stairs to go to the victim's apartment on the second floor. Tr. at 574:17–575:4. They were ascending the stairs when they saw the petitioner on the first-floor landing, coming from the second floor. Tr. at 543:5–544:3, 575:5-10. As he came down the stairs, he told his cousin and aunt he did something "wrong" or "stupid" and he pointed up; he then left the building. Tr. at 544:24–545:7, 575:23–576:7. Shauna and Gloria proceeded to the victim's apartment, where they found the door ajar and discovered the victim's body lying in a pool of blood. Tr. at 545:8-21, 576:12–577:7. The two ran back downstairs to get help. Tr. at 577:8-23. Shauna also ran after the petitioner who was walking away from the building and asked, "what did you do?"; the petitioner "didn't say anything, he just looked back." Tr. at 545:25–546:17. Video recordings reflecting these events, including Livingston going to Gloria's apartment and the Tippinses' encounter with the petitioner, were captured by surveillance cameras in the apartment buildings. *See* Tr. at 549:13–553:8.

Gloria's friend, Glenn Burgess, who lived on the first floor of the victim's apartment building and testified at trial, heard Gloria's voice and called the police at around 8:21 p.m. Tr. at 577:17-21, 606:12–607:24, 610:4-9, 614:3-6. Burgess lived with his sister, Luxzoria Hope, who also testified and apparently heard a female voice coming through the pipes above her saying "help me, help me, this man is killing me" a couple minutes after 8:00 p.m., though she did not share this information with her brother or the police until December of 2006. Tr. at 620:18–622:12, 630:11–631:20, 633:7-11.

By the time the police and the paramedic arrived at 8:30 p.m., the victim was dead. Tr. at 372:14-15, 375:3-19. She had been stabbed four times, twice in her neck and twice in her abdomen; the wound to the carotid artery in her neck was likely the cause of death. Tr. at

374:21–375:24, 405:4-6, 866:3-13, 867:23–869:13. In addition to the stab wounds, the victim's face was swollen and lacerated, suggesting she had been subject to blunt force trauma; bruises on her arms and legs also suggested she had been forcefully grabbed. Tr. at 874:8–878:19. Detectives recovered a knife from inside the victim's garbage pail and later matched the DNA on the knife to the victim's DNA, though the petitioner's DNA was not found on the knife's handle. Tr. at 463:1-20, 829:18–830:17, 832:3-11; 843:25–844:6. One medical examiner, Susan Horan, did however testify that she matched traces of semen on an anal swab taken from the victim to the petitioner's paternal line. Tr. at 832:3-10, 845:11-14.

Police arrested the petitioner at his mother's house in Philadelphia on November 20, 2006. Tr. at 690:23–693:25. When they arrived, petitioner was hiding under a sofa bed. Tr. at 739:10-741:3. Detectives questioned petitioner at the police station after he verbally waived his Miranda rights. Tr. at 694:6–698:16. Petitioner maintained that he had been in Pennsylvania since before October 31, 2006, but police were aware that he had seen his parole officer on November 1, 2006. Tr. at 701:19-25, 702:23–704:10. When pressed about this inconsistency, petitioner claimed that he had gone back to New York on November 1, 2006, and then returned to Pennsylvania. Tr. at 704:7-22. Petitioner's parole officer, Robert Chung, testified that he had seen the petitioner on November 1, 2006, but that petitioner did not attend his parole meetings on November 9 and 15. Tr. at 774:12–776:11.

Defense counsel did not call any witnesses but did press several points when cross-examining the prosecution witnesses and in his summation. First, he highlighted the fact that the victim never reported the petitioner's supposed prior acts of abuse to the police. *See* Tr. at 521:1–522:1 (Najiyah), 670:12–671:12 (Cabrera), 924:22–925:5, 935:13–936:6 (summation). Next, he argued that the evidence was insufficient to convict the petitioner because there was

only circumstantial evidence tying petitioner to the victim's death and "[t]here were no eyewitnesses who saw Mr. Johnson kill Asma Johnson." Tr. at 916:19-22; *see also* Tr. at 908:7-12, 943:3-5.

Defense counsel also questioned the sufficiency of the People's scientific evidence, emphasizing that neither petitioner's fingerprints nor his DNA were found on the murder weapon and that the medical examiners failed to analyze the DNA under the victim's fingernails. Tr. at 804:22–805:2 (fingerprints), 843:22–844:6 (DNA), 892:3–24 (fingernails); *see also* Tr. at 916:23–917:16 (defendant's summation). He further revealed through the cross-examination of Shauna and Gloria Tippins that neither of them noticed blood on the petitioner's clothing as he descended the stairs from the victim's apartment even though the victim would have "bl[ed] profusely" when her carotid artery was severed. Tr. at 564:1–565:10, 598:1–599:1, 910:19-22 (blood on clothes), 893:8–894:12 (victim's bleeding), 928:10–929:7 (summation). Petitioner was wearing "[a] dark blue sweatshirt, jeans, dark, black boots, and a New York Yankee hat" when Shauna and Gloria saw him. Tr. at 578:25–579:3.

Finally, as described in more detail below, the defense attempted to place Thomas Livingston under suspicion by revealing that the victim had acquired a protective order against Livingston in 2002 and suggesting that Livingston was conspiring with his daughter, Najiyah, to blame petitioner for the victim's death, which Livingston may have in fact committed; the Court, however, precluded much of this line of inquiry. Tr. at 362:11–363:16, 518:7-25, 528:22–529:24, 719:9–722:8, 923:1-9.

B. The Verdict and Sentencing

The jury returned a verdict of guilty on both counts on February 11, 2010. Tr. at 981, 1023:7-19. On March 25, 2010, Judge Lasak sentenced the petitioner to 25 years to life for murder in the second degree and one year for criminal possession of a weapon in the fourth degree. Sentencing Tr. at 1, 16:19–20:20, Dkt. 10-8 at ECF pages 106–26.

C. Testimony about Prior Uncharged Misconduct

In addition to the evidence summarized above, Judge Lasak allowed three witnesses—Najiyah, Cabrera, and Angela Willis—to testify about the petitioner's aggression towards the victim on occasions prior to the day the victim was murdered. In a *Molineux* application at the start of trial, the People argued the petitioner's prior bad acts were "highly probative on issues of intent, motive and identity," Tr. at 173:4-5, and in support of its application relied heavily on *People v. Bierenbaum*, 301 A.D.2d 119 (1st Dep't 2002), Tr. at 173:6–175:10. Defendant in *Bierenbaum* challenged his conviction for murdering his wife on several grounds, including that the trial court allowed the prosecution to introduce evidence of statements made by the victim "describing defendant's threatening remarks and otherwise negative behavior." 301 A.D.2d at 122. The court rejected defendant's argument, reasoning that the husband-defendant's prior aggression towards the victim-wife "evince[d] defendant's intent to focus his aggression on one person, namely, his wife—his victim." 301 A.D.2d at 150. The court further observed:

> [t]hat key factor in the context of marital and other intimate relationships frequently differentiates domestic violence assaults and homicides…from other cases wherein evidence of past assaultive behavior against people other than the victim has most properly been precluded. In the former, the previous aggression principally indicates intent or motive or identity whereas in the latter it can predominantly give rise to inference of propensity…Finally, this evidence shows that this defendant was motivated and had an intent to harm this victim. There is little or nothing by way of circumstantial evidence that is more relevant or probative in a

> circumstantial murder case—especially one involving domestic violence—than [this] type of evidence.

Bierenbaum, 301 A.D.2d at 150 (as quoted at Tr. at 174:16–175:10). The People also invoked *Bierenbaum* to argue that a victim's hearsay concerning prior domestic violence may be admissible so long as there are certain indicia of reliability, such as whether statements were made to confidants and friends rather than to police officers or "in an effort to curry favor or get the defendant in trouble." Tr. at 178:7–179:14 (discussing *Bierenbaum*, 301 at A.D.2d at 144–45, and that court's reliance on *Nucci ex rel. Nucci v. Proper*, 95 N.Y.2d 597 (2001)).

Defense counsel argued in response that allowing such testimony would be so prejudicial as to undermine the presumption of innocence. Tr. at 181:2-16. He also attempted to challenge the reliability of the proposed *Molineux* testimony by stressing that it was unbelievable no one had gone to the police to report the alleged abuse. Tr. at 181:17–183:2. Judge Lasak responded by noting that defense counsel's arguments went to weight rather than admissibility. Tr. at 183:3-6. The court then ruled in favor of the People, but reserved its decision concerning Willis's testimony. Tr. at 195:22–197:16.

Najiyah proceeded to testify that the petitioner had pushed his way into the apartment on two occasions in the weeks leading up to the murder without much dispute. However, the admissibility of the victim's hearsay resurfaced at the beginning of Cabrera's testimony when she began to describe a conversation she had with the victim after she heard the petitioner banging on the door of the victim's apartment on November 8, 2006. Tr. 649:5-22. After defense counsel successfully objected to this testimony, the parties met at sidebar to clarify the court's ruling. Tr. at 649:20–650:5. At that point, the prosecution argued that Cabrera's retelling of her conversation with the victim was proper and within the scope of the court's pre-trial *Molineux* ruling. The prosecution again referenced *Bierenbaum* and described that case as

one "where basic hearsay statements by the witness regarding motive and intent w[ere] admitted as an exception to hearsay and on the issue of motive and intent in a domestic situation." Tr. 651:1-5. The court accepted the People's argument, but also held that the witness could not testify that the petitioner had threatened the victim by saying he would hurt her oldest son currently at Rikers. Tr. at 168:13-18, 651:13-21, 652:11-18.

Following the sidebar, the jury heard Cabrera testify to the following events:

- On November 8, 2006—the day the victim was murdered—Cabrera spoke to the victim over the phone after she saw petitioner banging on the door and yelling "open the f***ing door." Tr. 648:2–649:17. The victim asked Cabrera whether petitioner had left, which he had. Cabrera and the victim then met in the hall and had a conversation, during which the victim revealed that she had been hiding in the closet with her children. Tr. at 653:12-25, 654:17–655:3.

- On November 7, 2006, Cabrera saw the victim in the hallway and the victim told her that "she was scared and the she was trying to leave [petitioner], but he threatened her." Cabrera then testified to the "nature of the threats," which were that "if [the victim] calls the cops on him or decides to do anything against him…that he would not only hurt her son…he would come back and kill her." Tr. at 655:17–657:13.

- At some point during the week prior to November 8, 2006, when Cabrera saw the victim throwing out the garbage and noticed her face was bruised, the victim told Cabrera that "Erik hit her." When Cabrera told her to call the police, the victim said she "couldn't" and that she was "scared." Tr. at 657:14–658:15.

During cross-examination, the defense attempted to elicit testimony concerning the victim and Livingston's prior relationship by questioning Cabrera about her and the victim's friendship. Tr. at. 662:22–664:6. The prosecution objected to this line of questioning and the court sustained its objection, rejecting defense counsel's argument that the victim may have confided in Cabrera about the prior relationship with Livingston because they were "close." Tr. at 664:8–665:11. The court reasoned that the basis of Cabrera's knowledge was not her "close" relationship with the victim but rather her own observations:

> [Cabrera] observed the defendant do certain things in the hallway, okay. And based on that, they had a conversation. There was no

> confiding, okay. It was based on the actions that were *observed* by the witness that *caused* the witness to speak to the deceased about what was *happening*. It wasn't as if they were having a conversation devoid of any observation made by the witness about the actions of the defendant. There was a reason for that and there was nothing about a close relationship.

Tr. 664:24–665:11 (emphasis added).

Also over defense counsel's objection, the court permitted Willis to recount phone conversations she had with the victim concerning the petitioner's prior conduct toward her. *See* Tr. at 640:9–641:6. Willis described the victim as "like a sister," and someone she had spent Christmas and holidays with and known for twenty-six years. Tr. at 675:4-676:3. Willis moved from the victim's neighborhood in 2004, but the two remained in touch by speaking by telephone once a week for an hour or two. Tr. at 676:4-15, 677:14-16. Willis described the following conversations to the jury:

- In late October, 2006, the victim called Willis at work and told her that "Erik had hit her, beat her." Willis told the victim to go to the police, but she "said she didn't want to do it because he was on parole." Tr. at 677:21–678:8.

- Willis testified that, prior to the late October conversation, the victim had "said that [the petitioner] wanted her to change her phone number," that "he ripped her phone out," and that "he was very aggressive and she was afraid of him." The court sustained defense counsel's objection to these statements and told the jurors to "disregard the testimony"; the court had explicitly prohibited reference to the petitioner ripping the victim's phone out of the wall in its *Molineux* ruling. Tr. at 640:18-21, 678:9–679:4.

- The prosecution asked if the victim told Willis that petitioner "was becoming possessive," to which Willis responded "yes." Defense counsel objected to the leading question but the objection was overruled. Tr. at 679:5-19.

D. Witness Thomas Livingston and the Missing Person Charge

Throughout the trial, the issue of Livingston's testimony was raised repeatedly by defense counsel. At first, because Livingston was on the People's witness list at the beginning of trial, defense counsel expressed frustration at the People's failure to turn over records relating to

Livingston's prior convictions. Tr. at 335:12-22, 432:14–434:23, 720:11. Defense counsel argued that he needed these records to effectively cross-examine the witness. Tr. at 344:7-13, 432:23–433:5. Following Najiyah's testimony, defense counsel was still unable to acquire certain records involving Livingston's "criminal court arrests and convictions which…[were] essential to cross examination." Tr. at 532:8–534:1. As a result, the defense asked that "Mr. Livingston be precluded from testifying because [of] the Sixth Amendment right to confrontation" and the "fundamental right to cross examine all witnesses presented at trial." Tr. at 534:6-19. The court denied the application to preclude Livingston from testifying. Tr. at 535:9-12. The prosecution, though, never called him as a witness.

The People's decision to not call Livingston to testify came out during the defense's cross-examination of Detective Robert Edwin, when defense counsel attempted to elicit testimony concerning a prior assault conviction Livingston received for striking the victim. Tr. at 719:9–721:19. The court told defense counsel that he could not bring out this history through the detective and said that he was "free to call Mr. Livingston if [he] want[ed] to get [the prior assault] out." Tr. at 720:16-17, 722:3-5. Defense counsel dismissed that solution, asking "[w]hat am I going to do ask him about his record and sit down? I would be in a very bad position to do that and not ask him about anything else"; the court responded by precluding the inquiry. Tr. at 722:5-10.

Following this ruling, and before the People called its final witness, defense counsel requested a missing witness charge due to the prosecution's "failure to call a necessary and material witness." Tr. at 856:2-20. The defense argued that Livingston was a material witness because he made a "series of phone calls and conferred with Asma Johnson up until 8:00 P.M." and because the People told the jury they would hear from Livingston at the start of trial. Tr. at

856:2-20, 858:12-20. The People argued that all references to facts involving Livingston in its opening statement "w[ere] covered by Najiyah Livingston" and that "any piece of circumstantial evidence that [Livingston] may have was already testified to by his daughter who…is a better witness." Tr. at 856:21–858:11. The court denied the application for a missing witness charge. Tr. at 912:2-4.

Ultimately, the jury did not hear from Livingston, but they did hear his statements through the testimony of other witnesses:

- Najiyah testified that her dad—Livingston—asked her while they were in the car driving back to the victim's apartment "who was there when [they] left" and told her "that [her] mom said…to not bring [them] home." When they arrived at the Tippinses' apartment, Najiyah testified that her dad told petitioner's aunt that "[petitioner] is causing all types of problems, and that she should make him leave." The court allowed the statement made in the car to be received in evidence over defense counsel's objection; defense counsel did not object to the second statement. Tr. at 508:3–509:8.

- Shauna testified that Livingston "said that [petitioner] Erik Johnson and [the victim] Miss Johnson [were] arguing, and [asked] for [her and her mother] to go over there." The court allowed this testimony over defense counsel's hearsay objection. Tr. at 541:10-22.

- Gloria testified that when they left to go to the victim's apartment, Livingston and his kids "stayed behind because he said he was parked…on 21 street." Defense counsel successfully objected to this conversation. Tr. at 574:7-11.

Defense counsel addressed the prosecution's decision not to call Livingston in his summation. He posed the following questions to the jury: "Did Mr. Livingston tell you that he stayed with his daughter throughout the time when the math games were going on? Why didn't Mr. [Livingston][5] not testify? Was he concerned about his relationship with his ex-girlfriend that may have come out during this trial?" The court sustained the People's objection to this portion of the summation. Tr. at 923:1-9.

[5] The transcript says "Mr. Johnson" but the context makes clear that defense counsel meant to refer to Mr. Livingston's failure to testify.

II. Direct Appeal

Petitioner timely appealed his conviction to the Appellate Division, Second Department. Abbot Aff. ¶ 27. On appeal, he made the following arguments: 1) his right to a fair trial was denied when the court refused to give a missing witness charge concerning Livingston; and 2) his rights to cross-examination and to a fair trial were denied when the court improperly allowed the People to introduce hearsay testimony that the petitioner abused and threatened to kill the victim and that he was in the victim's apartment shortly before her body was discovered. Pet.'s Appellate Br. at 16, 26, Dkt. 10-1 at ECF pages 1–41. Petitioner's first claim referenced the Fourteenth Amendment to the U.S. Constitution, while his second claim referenced the Fourteenth and Sixth Amendments to the U.S. Constitution as well as New York State constitutional provisions. *Id.* In two footnotes, petitioner also raised the possibility that his trial counsel provided him with ineffective assistance of counsel under state and federal standards. Specifically, with respect to the missing witness charge, petitioner wrote, "[s]hould this Court find that counsel's request [for a missing witness charge] was not sufficiently argued, it should find that this deficiency constituted ineffective assistance of counsel." *Id.* at 25 n. 6. Similarly, at the conclusion of the arguments concerning the admission of hearsay, petitioner asked the court to,

> [a]lternatively…reverse and grant a new trial based on defense counsel's ineffectiveness for not arguing that the hearsay from Cabrera and Willis did not fit within a recognized exception to the hearsay rule, and for failing to specifically argue that Najiyah's and Shauna's testimony concerning appellant's presence in Johnson['s] apartment was hearsay.

Id. at 37 n. 9.[6]

[6] Petitioner was represented by new counsel on appeal.

The Appellate Division affirmed the petitioner's conviction in a short opinion on May 23, 2012. *Johnson,* 95 A.D.3d 1237. The Appellate Division concluded that any error by the trial court "in denying the defendant's request for a missing witness charge" or "admitting certain hearsay testimony of third parties" was harmless, "as there was overwhelming evidence of the defendant's guilt and no significant probability that the error contributed to his conviction." *Id.* The court also noted that the petitioner's "remaining contention [was] without merit," presumably referring to the ineffective assistance counsel claims. *Id.*

In two letters, petitioner sought review in the New York Court of Appeals. The first requested that the court "consider and review all issues raised" in the petitioner's appellate brief. Pet.'s Ltr. dated May 31, 2012, Dkt. 10-1 at ECF pages 115–16. In the second, petitioner's appellate counsel wrote to supplement the appellate briefs and "to explain why this case is particularly appropriate for review by the Court." Pet.'s Ltr. dated Aug. 6, 2012, at 1, Dkt. 10-1 at ECF pages 117–19. Counsel argued that the Court of Appeals had never before addressed "whether hearsay that appellant abused and threatened to kill the deceased, who wanted to end their relationship, is admissible as background evidence." *Id.* The letter acknowledged that a defendant's prior bad acts against the victim may be probative of motive and intent in domestic violence cases, and therefore admissible, but emphasized that hearsay is still "not admissible simply because it may be shown to be 'reliable' without regard to whether it fits into a recognized exception." *Id.* at 1–2.

On August 9, 2012, petitioner was denied leave to appeal by the Court of Appeals. *People v. Johnson*, 19 N.Y.3d 997 (2012).[7]

[7] This Order may also be found at ECF page 125 of Dkt. 10-1.

DISCUSSION

I. AEDPA's Procedural Requirements

Federal court review of petitioner's challenges to his state court conviction is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Before reaching the merits of the petition, I review AEDPA's procedural requirements.

A. Statute of Limitations

AEDPA requires that a state prisoner file a petition for a writ of habeas corpus within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The judgment in petitioner's case became final ninety days after the New York Court of Appeals denied leave to appeal because he did not petition for a writ of certiorari to the United States Supreme Court. *McKinney v. Artuz*, 326 F.3d 87, 96 (2d Cir. 2003). Thus, petitioner's conviction became final on November 7, 2012, or ninety days after the Court of Appeals issued its order denying leave to appeal on August 9, 2012. Because the petitioner filed his petition on July 25, 2013, his petition was timely filed. Dkt. 1.

B. Exhaustion

Under AEDPA, petitioners who are serving state sentences must exhaust all available state court remedies before a federal habeas court may review the merits of their claims. *See* 28 U.S.C. § 2254(b); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). To exhaust state remedies, a petitioner must "(i) present[] the federal constitutional claim asserted in the [habeas] petition to the highest state court (after preserving it as required by state law in lower courts) and (ii) inform[] that court (and lower courts) about both the factual and legal bases for the federal claim." *Ramirez v. Att'y Gen. of St. of N.Y.*, 280 F.3d 87, 94 (2d Cir. 2001).

"Exhaustion does not require citation of 'book and verse of the federal constitution.'" *Jackson v. Edwards*, 404 F.3d 612, 619 (2d Cir. 2005) (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971)). For example, "even 'a minimal reference to the Fourteenth Amendment'" or claim that a petitioner was "deprived of a fair trial" is sufficient to alert a state court to a petitioner's claim that he was denied his federal right to a fair trial. *Adamson v. Griffin*, 2016 WL 6780011, at *6 (S.D.N.Y. Nov. 16, 2016) (quoting *Reid v. Senkowski*, 961 F.2d 374, 376 (2d Cir. 1992)). A petitioner may also exhaust federal constitutional claims in state proceedings by:

> "(a) rel[ying] on pertinent federal cases employing [federal] constitutional analysis; (b) rel[ying] on state cases employing [federal] constitutional analysis in like fact situations; (c) asserti[ng] [] the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) alleg[ing] [] a pattern of facts that is well within the mainstream of constitutional litigation."

Adamson, 2016 WL 6780011, at *4 (quoting *Smith v. Duncan*, 411 F.3d 340, 348 (2d Cir. 2005)). The flexibility underlying the exhaustion requirement reflects the idea that "exhaustion is not intended to exhaust the petitioner or his or her lawyers," but rather to ensure that "the state court has a fair and meaningful chance to grant relief on what is substantially the same claim raised in [the] federal [habeas proceeding]." *Jones v. Keane*, 329 F.3d 290, 295 (2d Cir. 2003).

In New York, a defendant seeking review of a decision of the Appellate Division must do so by applying for leave to appeal by letter application to the Court of Appeals. *Harris v. Fischer*, 438 F. App'x 11, 13 (2d Cir. 2011). A petitioner who presents his federal claims to the Appellate Division and is denied leave to appeal to the state's highest court meets the exhaustion requirement if his "leave application 'clearly state[s] that he [is] pressing all of the claims raised in [an] attached [Appellate Division] brief.'" *Id.* (quoting *Jordan v. Lefevre*, 206 F.3d 196, 199 (2d. Cir. 2000)).

Here, in seeking leave to appeal the Appellate Division's ruling, petitioner asked the Court of Appeals to review each of the claims raised in his appellate brief. *See* Pet.'s Ltr. dated May 31, 2012; Abbot Aff. ¶ 34. Petitioner has therefore satisfied AEDPA's exhaustion requirement with respect to the claims he raised before the Appellate Division, including that he was denied a fair trial due to the trial court's refusal to give a missing witness charge and its decision to admit hearsay testimony regarding petitioner's prior misconduct, and that he was denied the effective assistance of trial counsel. *See* Pet.'s Appellate Brief.

C. Procedural Bar—Independent and Adequate State Grounds

Respondent nevertheless contends that several of the arguments raised in the habeas petition—including petitioner's ineffective counsel and Confrontation Clause claims—were left out of petitioner's appellate brief and are, as a result, procedurally barred from collateral review. Opp. to Pet. for a Writ of Habeas Corpus ("Opp.") at 18, 21, 42–45, Dkt. 8.

It is well established that, except in limited circumstances, federal habeas relief is foreclosed where a state prisoner's federal claim was defaulted in state court pursuant to an independent and adequate state law procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "Under such circumstances, a federal court will deem the claim exhausted, but treat review of the merits as procedurally barred." *Hernandez v. Senkowski*, 1999 WL 1495443, at *9 (E.D.N.Y. Dec. 29, 1999). Thus, "[f]or exhaustion purposes, 'a federal habeas court need not require that a[n unexhausted] federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred.'" *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991) (citing *Harris v. Reed*, 489 U.S. 255, 263 n. 9 (1989)).

A petitioner may procedurally default a claim by failing to raise it on direct appeal. *Pearson v. Rock*, 2015 WL 4509610, at *8 (E.D.N.Y. July 24, 2015). The Second Circuit has

held that "New York law prohibit[ing] review of a claim on collateral review when the defendant unjustifiably fails to raise the claim on direct appeal" is an adequate and independent state procedural bar. *Aparicio v. Artuz*, 269 F.3d 78, 93 (2d Cir. 2001). "'Once a claim is found to be procedurally defaulted, a federal court may grant habeas relief on such claim only if the petitioner has demonstrate[d] cause for the default and prejudice from the asserted error,' or a 'fundamental miscarriage of justice.'" *DeVaughn v. Graham*, 2017 WL 244837, at *6 (E.D.N.Y. Jan. 19, 2017) (citation omitted).

Here, as noted above, petitioner raised two ineffective counsel claims in the footnotes of his appellate brief. Respondent acknowledges that those claims have been exhausted, *see* Opp. at 29–30, 40, but argues that "some of petitioner's [habeas] arguments regarding the effectiveness of his counsel cannot be considered here because he never raised them in state court." Abbot Aff. ¶ 38. Specifically, respondent contends that the following arguments are unexhausted: that petitioner's trial attorney

> failed to preserve a claim that the evidence was legally insufficient; failed to substantiate his objections; stumbled with words to the jury and at sidebars; failed to argue constitutional standards or make a followup argument for the missing witness application; failed to supplement his arguments or objections with case law; and that a review of the entire record demonstrates his ineffectiveness.

Opp. at 20; *see also* Habeas Pet. at 32–33. Indeed, the two footnotes raising an ineffective counsel claim in petitioner's appellate brief are not as extensive as the claim in his habeas petition. *See* Pet.'s Appellate Br. at 25 n. 6 (regarding request for missing witness instruction), 37 n. 9 (regarding hearsay objections).

However, because petitioner's habeas claims concerning trial counsel's ineffective performance "supplement[], but do[] not fundamentally alter" the "[ineffective counsel claim] presented to state courts," those claims are properly exhausted and reviewable on the merits.

Caballero v. Keane, 42 F.3d 738, 741 (2d Cir. 1994); *Hemphill v. Senkowski*, 2004 WL 943567, at *12–*13 (S.D.N.Y. May 3, 2004) (applying *Caballero* to find that the "numerous" ineffective counsel claims raised in the habeas proceeding merely supplemented the singular ineffective counsel claim made in state court because the new claims related to the same underlying argument). Most of petitioner's ineffective counsel claims are so broad that they do not concretely, or "fundamentally," alter his original ineffective assistance claims. For example, petitioner's argument that his attorney failed to substantiate or supplement his arguments with case law is simply an example of why petitioner claimed before the Appellate Division that the missing witness charge request "was not sufficiently argued" or that trial counsel should have more aggressively opposed the hearsay testimony offered by the prosecution. *See* Pet.'s Appellate Br. at 25 n. 6, 37 n. 9.

Respondent next argues that petitioner procedurally defaulted his claim that the People's failure to call Livingston as a witness violated his right under the Confrontation Clause of the Sixth Amendment.[8] *See* Opp. at 42–45. Related to this claim, respondent insists that the Court should not consider the exhibits attached to the habeas petition, which include grand jury minutes, a copy of the statement Livingston made at the police station, and pretrial hearing minutes, because these exhibits were not included in the state record. *Id.* at 46; *see* Habeas Exs., Dkt. 1 at ECF pages 36–71.

The Court agrees. Not once did petitioner mention the Confrontation Clause of the Sixth Amendment in his appellate brief. Petitioner's argument with respect to the missing witness charge was instead made entirely in the context of his Fourteenth Amendment right to a fair trial. *See* Pet.'s Appellate Br. at 16. Petitioner's appellate brief does in one instance arguably hint at

[8] Petitioner's Confrontation Clause argument is found in the "missing witness charge" section, or under the "Point One" heading, of the habeas petition. *See* Habeas Pet. at 20–25.

the Confrontation Clause issue by characterizing Livingston's statements concerning petitioner's presence in the victim's apartment as "an accusation by [Livingston] a non-testifying witness" and citing to *People v. Barboza*, 24 A.D.3d 460 (2d Dep't 2005), a case holding that a Confrontation Clause argument was without merit. Pet.'s Appellate Br. at 33–34. However, this fleeting reference did not provide the state court with a "fair and meaningful" opportunity to consider any federal Confrontation Clause claim.

For one, the reference to Livingston as a "non-testifying witness" was made in the context of the argument that Livingston's hearsay statements were improperly admitted under state evidence law. *See* Pet.'s Appellate Br. at 31–35. Thus, it cannot be said that the reference was "so particular as to call to mind" the right of confrontation. *See Corchado v. Rabideau*, 576 F. Supp. 2d 433, 453–54 (W.D.N.Y. 2008) (collecting cases suggesting that "a hearsay objection or claim does not automatically 'call to mind' the Sixth Amendment's Confrontation Clause."). In addition, the brief's citation to *Barboza* may not have alerted the Appellate Division to petitioner's federal right. Though the defendant in *Barboza* claimed that he was denied the right of confrontation by the testimony of a police detective, the brief opinion relies on state and not federal cases. As a result, this citation may have flagged only petitioner's state right of confrontation—if it flagged any confrontation issue at all. *See* N.Y. Const. art. I, § 6; *see also Ildefonso v. Wendland*, 2019 WL 7484053, at *8 (N.D.N.Y. Oct. 31, 2019), *report and recommendation adopted*, 2020 WL 58674 (N.D.N.Y. Jan. 6, 2020) (concluding that federal claim had not been exhausted even though the petitioner had cited some New York cases which did in fact "primarily rel[y]" on the federal standard because "petitioner did not cite these cases to invoke any federal analysis of his own claims, nor do the cases themselves invoke a constitutional analysis of factually similar claims").

Thus, because petitioner failed to exhaust his Confrontation Clause claim in state proceedings and offers no grounds that might excuse his procedural default,[9] his Confrontation Clause claim is procedurally barred from habeas review. In addition, petitioner's attempt to supplement the record by attaching exhibits to his habeas petition is prohibited under *Cullen v. Pinholster*, 563 U.S. 170, 181, (2011) (limiting the record before a federal habeas court "to the record that was before the state court that adjudicated the claim on the merits").

I nevertheless review each of the petitioner's claims on the merits. *See* 28 U.S.C. § 2254(b)(2); *Aparicio*, 269 F.3d at 90 n. 5 ("AEDPA permits a habeas court to reject a claim on the merits notwithstanding the fact that it is unexhausted."). For the reasons set out below, I respectfully recommend denying the habeas petition in its entirety.

III. Petitioner's Claims for Habeas Relief

A. Legal Standards

Pursuant to AEDPA's deferential standard, a federal court may not grant a writ of habeas corpus to a state prisoner on a claim that was adjudicated on the merits in state court,

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

28 U.S.C. § 2254(d); *see also Price v. Vincent*, 538 U.S. 634, 639–40 (2003).

[9] Though petitioner raises an ineffective assistance of counsel claim, which may excuse procedural default if it "causes" the default, *Mizell v. United States*, 2020 WL 2216561, at *3 (S.D.N.Y. May 6, 2020), petitioner does not present his ineffective counsel claim as the cause of his procedural default. Even if he had, it would not change the outcome. "A defense counsel's ineffectiveness in failing to properly preserve a claim for review in state court can suffice to establish cause for a procedural default only when the counsel's ineptitude rises to the level of a violation of a defendant's Sixth Amendment right to counsel." *Aparicio v. Artuz*, 269 F.3d 78, 91 (2d Cir. 2001). Here, as explained below, petitioner was not denied effective assistance of counsel under federal standards. In addition, petitioner claims that only his trial counsel provided ineffective assistance, though his appellate counsel is at least in part responsible for the decision not to raise the Confrontation Clause issue in the appellate brief.

Thus, under AEDPA's first prong, a federal habeas court may not issue a writ simply because it decides that the state court applied Supreme Court precedent incorrectly. *Price*, 538 U.S. at 641. Rather,

> [u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). An incorrect application of federal law will not necessarily be an unreasonable one. *See Grayton v. Ercole*, 691 F.3d 165, 174 (2d Cir. 2012) ("[T]he writ may only issue where the state court's application of the law was not only wrong, but unreasonable.").

The second prong of AEDPA presumes a state court's factual findings to be correct. Factual determinations by a state court may be held to be "unreasonable" only where the petitioner rebuts the presumption of correctness "by clear and convincing evidence." *See* 28 U.S.C. § 2254(e)(1); *Cummings v. Lee*, 2013 WL 5744465, at *21 (E.D.N.Y. Oct. 23, 2013).

B. Missing Witness Charge

Petitioner's argument concerning the trial court's failure to give a missing witness charge implicates the Fourteenth Amendment right to a fair trial and the Sixth Amendment right of confrontation. These arguments are made under the "Point One" heading of petitioner's habeas memorandum. *See* Habeas Pet. at 20–25.

1. Denial of Fair Trial

Petitioner argues that the trial court's refusal to give a missing witness charge instructing the jury to draw an adverse inference from the People's decision not to call Livingston to testify denied him a fair trial. *See* Habeas Pet. at 23–24. He claims that the trial court's ruling was incorrect because Livingston, as the last person to speak to the victim, was a material witness of "prime importance" who was present in the courtroom and available to testify.[10] *Id.* at 21, 24.

Because the Appellate Division's dismissal of this claim as "harmless" was based on the merits, it is entitled to AEDPA deference. *See Davis v. Ayala*, 576 U.S. 257, 269 (2015) (noting that the state court's finding that any federal error was harmless "undoubtedly constitutes an adjudication of [petitioner's] constitutional claim 'on the merits'"). Moreover, "[w]hen a federal court reviews a state court finding of harmless error beyond a reasonable doubt under AEDPA, 'a federal court may not award habeas relief under § 2254 unless the harmlessness determination itself was unreasonable.'" *Troche v. LaManna*, 2019 WL 2619339, at *3 (E.D.N.Y. June 26, 2019) (quoting *Fry v. Pliler*, 551 U.S. 112, 119 (2007)).

This claim is without merit. As an initial matter, "[t]here is 'no clearly established Supreme Court precedent requiring a trial court to instruct the jury with respect to a missing witness.'" *Adamson*, 2016 WL 6780011, at *6 (quoting *Morales v. Strack*, 2003 WL 21816963 at *4 (E.D.N.Y. July 3, 2003), *aff'd*, 116 F. App'x 293 (2d Cir. 2004)). Rather, "[t]he propriety of a state court's jury instruction is ordinarily a state law matter that does not raise a federal question." *Gonzales v. People*, 2006 WL 2506472, at *2 (S.D.N.Y. Aug. 30, 2006). Petitioner's

[10] To obtain a missing witness charge under New York law, a party must demonstrate that 1) the witness has material knowledge, 2) the witness would be expected to give noncumulative testimony favorable to the party who declined to call the witness, and 3) the witness is available to the party declining to call the witness. *Garcia-Lopez v. Fischer*, 2007 WL 1459253, at *9 (S.D.N.Y. May 17, 2007), *as amended* (May 18, 2007) (quoting *People v. Sauvignon*, 100 N.Y.2d 192, 197 (2003)).

claim is therefore "cognizable on federal habeas review only if [he] can show 'not merely that the instruction [was] undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.'" *Quinones v. Artus*, 2013 WL 5502870, at *7 (E.D.N.Y. Sept. 30, 2013) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)). A trial court's "discretionary decision not to give the instruction" will warrant habeas relief only if the decision "by itself so infect[s] the entire trial that the resulting conviction violates due process." *Dell v. Ercole*, 2009 WL 605188, at *6 (E.D.N.Y. Mar. 6, 2009).

Here, the trial court's refusal to give a missing witness charge was not error under state or federal law, much less error that infected the fairness of the trial. "[W]here a witness is equally available to both sides, a missing witness charge is 'inappropriate.'" *United States v. Caccia*, 122 F.3d 136, 139 (2d Cir. 1997); *see also United States v. Pierce*, 785 F.3d 832, 843–44 (2d Cir. 2015) (holding it was not error to refuse a missing witness instruction when defense acknowledged at trial that it had "an equal opportunity" to call the witness at issue); *Dell*, 2009 WL 605188, at *6 (failure to call witness "not a 'missing-witness' trigger" where witness was not "'missing,' but present and available to testify"); *People v. Costa*, 183 A.D.2d 722, 723 (2d Dep't 1992) (missing witness charge properly denied where witness was equally available to defendant). Livingston was available to be called by either the prosecution or defense, and it was only for tactical reasons that defense counsel declined to call him. *See* Tr. at 722:3-10 ("What am I going to do ask him about his record and sit down? I would be in a very bad position to do that and not ask him about anything else."). The trial court's decision not to provide a missing witness instruction was therefore appropriate.

Even assuming that the trial's court's decision was made in error, it did not "so infect" the trial as to deprive petitioner of due process. As the Appellate Division reasonably concluded, "there was overwhelming evidence of the defendant's guilt and no significant probability that the error contributed to his conviction." *Johnson,* 95 A.D.3d at 1237. Petitioner told his cousin and aunt that he did something "wrong" or "stupid" as he descended the stairs from the victim's apartment immediately prior to the discovery of the victim's body. *See* Tr. at 542–45, 573–77. A missing witness charge—either given or withheld—would have not changed the outcome of petitioner's trial. *See Cupp*, 414 U.S. at 146–47 (noting that courts "determining effect of [an] instruction on the validity of respondent's conviction" should be mindful that "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge").

Finally, even if there had been prejudice, it would have been mitigated by defense counsel's arguments in summation. *See Guerrero v. Payant*, 2010 WL 2545818, at *26 (E.D.N.Y. June 21, 2010) (holding that defense counsel's argument about the prosecution's failure to call a witness in summation "alleviated any potential error in the court's failure to issue a missing witness charge"); *Brown v. Spitzer*, 2007 WL 2406870, at *3 (E.D.N.Y. Aug. 21, 2007) ("[C]ounsel's closing argument as to an allegedly missing witness cures the failure to charge, if one would be required.").

2. Confrontation Clause

Petitioner argues that the trial court's refusal to either require Livingston to testify or give a missing witness charge violated his Sixth Amendment right of confrontation as well. Habeas Pet. at 21. Specifically, petitioner contends that the trial court's admission of Livingston's statements that the victim said not to bring the children home, that petitioner was "causing all

types of problems," and that the victim and petitioner were arguing, violated his right of confrontation. Habeas Pet. at 22; *see* Tr. at 508:3–509:8, 541:10-25. Petitioner submits exhibits in support of this argument, including the People's witness list, a copy of the statement Livingston made at the police station, grand jury minutes, and pre-trial minutes. *See* Habeas Exs. The exhibits show that Livingston told the police that the victim was having a "bad relationship" with petitioner and that when Livingston called the victim on his way to the apartment she told him not to bring the kids home and that "he" was there, *id.* at 37, that Livingston identified the petitioner "after viewing a photo array," *id.* at 60–61, and finally that Livingston implicated petitioner before a grand jury, *id.* at 38–55.

Petitioner's Confrontation Clause claim is, as discussed above, procedurally barred. I nevertheless reach the claim and, for the reasons stated below, conclude that it lacks merit.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. CONST. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004), the Supreme Court held that the Confrontation Clause applies not only to in-court testimony, but also to out-of-court statements introduced at trial. Still, "not all hearsay implicates the Sixth Amendment's core concerns," *id.* at 51; rather, "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006). "[T]he inquiry under the Confrontation Clause is [therefore] whether the statement at issue is testimonial…If so, the Confrontation Clause requirements of unavailability and prior cross-examination apply. If not, the Confrontation Clause poses no bar to the statement's admission." *United States v. Feliz*, 467 F.3d 227, 232 (2d Cir. 2006).

"An out-of-court statement is testimonial if the 'primary purpose' underlying it was to establish an evidentiary record in a manner that might reasonably be expected to be used in a later legal proceeding." *United States v. Ramos*, 622 F. App'x 29, 30 (2d Cir. 2015) (quoting *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2720 (2011) (Sotomayor, J., concurring)); *see also Davis*, 547 U.S. at 828 (characterizing testimonial out-of-court statements as "a weaker substitute for live testimony at trial" (internal quotation marks and citation omitted)). In contrast, non-testimonial statements are "neither solicited by any law enforcement officers nor made in the context of any government investigation." *Ko v. Burge*, 2008 WL 552629, at *10 (S.D.N.Y. Feb. 26, 2008). Most statements made in the ordinary course of life, such as a "happenstance" remark to a "friend and confidant" or a comment made during a phone call with a family member, are non-testimonial. *United States v. Brow*n, 441 F.3d 1330, 1360 (11th Cir. 2006); *United States v. Franklin*, 415 F.3d 537, 545–46 (6th Cir. 2005); *see also United States v. Manfre,* 368 F.3d 832, 838 n. 1 (8th Cir. 2004) ("[Declarant]'s comments were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.").

Here, the statements Livingston made to police and before the grand jury are clearly testimonial. These statements, though, were not introduced at trial and accordingly are not the basis of petitioner's claim. The statements that were introduced at trial, in contrast, were *not* testimonial and their admission therefore did not violate petitioner's Confrontation Clause rights. Livingston's statement to his daughter as he drove her home was initially nothing more than a logistical conversation concerning where to bring her and her brother. The sequence of events further demonstrates that Livingston's statements that the petitioner was causing "problems" and was arguing with the victim were made to elicit the Tippinses' help and to explain why Shauna

and Gloria should check on the victim and petitioner. It also seems likely that Livingston felt there was an ongoing emergency after speaking to the victim, and that his statements at the Tippinses' apartment were made for the "primary purpose" of addressing that emergency as it was happening. *See Davis*, 547 U.S. at 827 (finding the declarant's statements made in the course of an ongoing emergency to be non-testimonial because the witness "was speaking about events *as they were actually happening*," and "the nature of what was asked and answered…was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past").

Finally, "even assuming arguendo that petitioner's Confrontation Clause rights were violated…such a violation is subject to harmless error review." *Sims v. Artus*, 2019 WL 3718024, at *8 (E.D.N.Y. Aug. 7, 2019); *see also United States v. Caraballo*, 658 F. App'x 595, 598–99 (2d Cir. 2016). "[O]n habeas review of a state conviction, a constitutional error will be considered harmless unless it 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Black v. Griffin*, 2019 WL 2551685, at *28 (S.D.N.Y. Jan. 14, 2019), *report and recommendation adopted*, 2019 WL 2548132 (S.D.N.Y. June 20, 2019) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993)). Here, the overwhelming evidence, presented through the testimony of witnesses who testified at the trial and were subject to cross-examination, established not only that the petitioner and the victim had an abusive relationship but also that the petitioner admitted doing something "wrong" or "stupid" as he was seen leaving the victim's apartment just before her body was discovered, in an exchange captured by video surveillance footage. *See* Tr. at 542–45, 549–53, 573–77. Livingston's three statements in the face of such incriminatory evidence were unlikely to have had a "substantial…influence in determining the jury's verdict."

For all these reasons, the Appellate Division's rejection of petitioner's missing witness charge claim was neither contrary to, nor based on an unreasonable application of, clearly established federal law. Petitioner's arguments under the "Point One" heading should therefore be denied.

C. Admission of Hearsay as to Prior Uncharged Misconduct

Petitioner's second claim, found under the "Point Two" heading of his memorandum, challenges the trial court's admission of testimony concerning the victim's statements to others about his prior bad acts, which he refers to as uncharged crimes. Habeas Pet. at 26–31. In addition, mindful of the Court's "duty to construe liberally papers filed by *pro se* litigants," *see Jennis v. Rood*, 310 F. App'x 439, 441 n. 1 (2d Cir. 2009), and because petitioner brings his second claim under both the Sixth and the Fourteenth Amendment, I interpret petitioner's hearsay argument as encompassing a separate claim that the state court's evidentiary rulings violated his rights under the Confrontation Clause.

1. Evidentiary Rulings

Petitioner argues that he was denied a right to a fair trial due to the court's evidentiary rulings, which admitted 1) hearsay testimony about statements made by the victim 2) describing petitioner's prior bad acts, or attributing uncharged offenses to him. Habeas Pet. at 26. Specifically, petitioner argues that the victim's friends' testimony about his prior uncharged bad acts was intended to show his propensity for violence, and that this evidence may have induced the jury to convict him "because of his past." *Id.* at 26–29. Again, because the Appellate Division deemed the trial court's admission of "certain hearsay testimony of third parties" harmless, the state court's ruling is entitled to AEDPA deference.

Petitioner's claim that he is entitled to habeas relief because the trial court made erroneous evidentiary rulings should be denied. "[S]tate evidentiary determinations are generally a matter of state law and not subject to habeas review." *Basagoitia v. Smith*, 2012 WL 4511358, at *5 (E.D.N.Y. Sept. 30, 2012). "Challenges to the admissibility of evidence are cognizable on federal habeas review only if the petitioner can establish that the decision to admit the evidence rendered the trial so fundamentally unfair as to deny him or her due process of law." *Riedel v. Perez*, 2012 WL 3598829, at *14 (E.D.N.Y. Aug. 15, 2012) (citing *Freeman v. Kadien*, 684 F.3d 30, 35 (2d Cir. 2012)). Thus, "[t]he erroneous admission of evidence rises to a deprivation of due process under the Fourteenth Amendment only if the evidence in question 'was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it.'" *Cox v. Bradt*, 2012 WL 2282508, at *15 (S.D.N.Y. June 15, 2012) (quoting *Johnson v. Ross*, 955 F.2d 178, 181 (2d Cir. 1992)).

The evidence of prior misconduct challenged by petitioner was properly admitted at his trial. Under New York law, "a trial justice…[may] allow[] a jury to hear about a defendant's prior bad acts—be they violent or otherwise—if they shed light on the issues of intent, identity, motive, absence of accident or mistake, or common plan and scheme." *People v. Bierenbaum*, 301 A.D.2d 119, 149 (1st Dep't 2002) (citing *People v. Molineux*, 168 N.Y. 264, 293 (1901)).[11] In domestic violence cases, proof of prior assaults and threats is particularly relevant "not only to issues of identity and intent, but also 'to provide background information concerning the context and history of [the] defendant's relationship with the victim.'" *Burkett v. Artus*, 2016 WL 6659492, at *12 (N.D.N.Y. Nov. 10, 2016) (quoting *People v. Wertman*, 114 A.D.3d 1279, 1280 (4th Dep't 2014)).

[11] Federal law governing the admissibility of crimes, wrongs, and other bad acts is similar. *See* Fed. R. Evid. 404(b).

Here, the testimony concerning the petitioner's prior misconduct, including that he had aggressively pushed his way into the victim's apartment, pushed her so hard she bruised her leg, and hit her, *see* Tr. at 502–07, 653–58, 677–79, was properly admitted under *Molineux* to show "that this defendant was motivated and had an intent to harm *this* victim," and not merely that petitioner had a general propensity for violence.[12] *Bierenbaum*, 301 A.D.2d at 150 (emphasis added). Moreover, courts have found in domestic violence cases that the probative value of such evidence exceeds its potential for prejudice. *See, e.g., People v. Flowers*, 245 A.D.2d 1088, 1088 (4th Dep't 1997). It seems, then, that the admission of petitioner's prior misconduct was permissible under state law.

New York law concerning the admission of *statements* made to third parties by a victim of domestic violence was, however, less clear at the time of petitioner's trial in 2010. The People relied on *Bierenbaum* at trial to argue that the victim's statements to Cabrera and Willis that petitioner had hit and threatened her, *see* Tr. at 653–58, 677–79, were admissible under a "background exception" to the hearsay rule, which allows "basic hearsay statements…on the issue of motive and intent in a domestic situation." Tr. 650:6–651:7; *see also Bierenbaum*, 301 A.D.2d at 144–47.[13] The People argued further that a victim's hearsay should be admitted under the "background exception" when it carries certain indicia of reliability. *See* Tr. at 178–79; *see also* Opp. at 66–67. The trial court accepted both arguments without much discussion. *See* Tr. at 652–53.

[12] The trial judge instructed the jury accordingly, explaining that the prior offenses "must not be considered for the purpose of proving that the defendant had a propensity or predisposition to commit the crime" but only considered "on the question of intent, motive or identity of the perpetrator." Tr. at 991:17–992:2.

[13] The victim's statements do not appear to have been excited utterances or to fall within any other well-established exception to the hearsay rule.

However, other New York courts have rejected the notion of a "background exception" that allows hearsay testimony relating statements made by a victim of domestic violence to be admitted. *See People v. Harvey,* 270 A.D.2d 959, 960 (4th Dep't 2000). Indeed, in *People v. Maher*, 89 N.Y.2d 456, 460–61 (1997), the Court of Appeals held that the lower court was wrong to admit a victim's hearsay statements concerning the defendant's abuse. In so holding, the court rejected the lower court's "unwarranted expansion" of a narrow hearsay exception, intended only to prevent witness tampering, into "a categorical authority for the admissibility of victims' statements in all homicide cases." *Id.* at 461. It therefore seems that the trial court may have erred in accepting the People's purported "background exception" and in admitting the victim's statements through Cabrera's and Willis's hearsay testimony.[14]

Even so, "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Here, the victim's statements were surely significant, but they did not provide the "basis for conviction or [] remove a reasonable doubt that would have existed on the record without" them. *Cox*, 2012 WL 2282508, at *15. Absent the victim's statements, the jury would have heard the Tippinses testify that they saw petitioner descending from the victim's apartment and heard him say he had done something "stupid" or "wrong" immediately before discovering her body. In addition, the jury heard other evidence, besides the victim's statements, which suggested the petitioner and the victim had an abusive relationship. Najiyah testified that petitioner pushed his way into the victim's—her mother's—apartment on at least two occasions prior to the day of the murder. On one of those occasions, Najiyah saw petitioner

[14] Recently, in *People v. Brooks*, 31 N.Y.3d 939, 942 (2018), the Court of Appeals rejected the reasoning employed in *Bierenbaum* in more direct terms by clarifying that even if "evidence that defendant...threatened to kill the victim is admissible under a *Molineux* theory, [it] must still be in admissible form." The court added, "[n]or is there any blanket hearsay exception providing for use of such statements as 'background' in domestic violence prosecutions." *Id.* However, mindful that this case had not yet been decided at the time of petitioner's trial in 2010, I limit my analysis to case law that was available then.

push her mother into a radiator so hard that she screamed in pain, and on another she was able to hear the petitioner and her mother arguing. *See* Tr. at 502–07. Cabrera also testified that she had seen bruises on the victim's face and that she saw petitioner banging on the victim's door and heard him yelling "open the f***ng door" outside of the victim's apartment on the day of the murder, suggesting that petitioner was angry at the victim just hours before the crime was committed. *See* Tr. at 647–49, 653–58. Accordingly, the Appellate Division's determination that any error harmless was not unreasonable, and petitioner's claim based on the admission of hearsay evidence of his prior bad acts should be denied.

2. Confrontation Clause

Petitioner's hearsay claim raises a second issue: whether the trial court's admission through third-party testimony of the victim's statements deprived petitioner of his Sixth Amendment Confrontation Clause right. As discussed above, whether admitting hearsay evidence of the victim's statements violated the petitioner's right of confrontation turns on whether the statements introduced at trial were testimonial. Statements to friends and family are generally non-testimonial. *See Burkett*, 2016 WL 6659492, at *13 n. 16 (concluding that statements were non-testimonial because "there [wa]s no indication that the declarant (i.e., the victim) had any reasonable expectation that her statements, made to friends and family outside the context of any proceeding, investigation, or formal complaint, would be used in future judicial proceedings"). Indeed, in a case arising in the domestic violence context, the Supreme Court has observed that "[s]tatements to friends and neighbors about abuse and intimidation…would be excluded, if at all, only by hearsay rules," and not the Sixth Amendment. *Giles v. California*, 554 U.S. 353, 376 (2008).

It is clear, then, that the testimony of Cabrera and Willis relating the victim's statements to them about petitioner's abuse were not admitted in violation of the Confrontation Clause, even if they may have been admitted in violation of New York's evidence rules. Petitioner's claims under the "Point Two" heading should therefore be denied in their entirety.

D. Ineffective Assistance of Trial Counsel

Under "Point Three," *see* Habeas Pet. at 31–35, petitioner argues that trial counsel provided him ineffective assistance by stumbling over words and failing to object to the testimony of petitioner's parole officer and of Willis, who had not seen the victim in two years. *Id.* at 32. Petitioner further argues that his attorney failed to preserve the following arguments for appellate review: that the missing witness would have given non-cumulative testimony, that the evidence was legally insufficient to support a second degree murder conviction, and that the victim's statements, as recounted through the testimony of two witnesses—likely Cabrera and Willis—did not fit within a recognized exception to the hearsay rule. *Id.* at 33–34. Because petitioner's ineffective assistance counsel claim was rejected on the merits by the Appellate Division, the state court's finding is entitled to AEDPA deference. This claim is also without merit.

The Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), sets forth the standard governing ineffective assistance of counsel under the Constitution. "[T]o prevail on an ineffective-assistance-of-counsel claim, a defendant must meet a two pronged test: (1) he 'must show that counsel's performance was . . .so deficient that, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance'" and "(2) he must show that 'the deficient performance prejudiced the defense.'" *Bennett v. United States*, 663 F.3d 71, 84 (2d Cir. 2011) (quoting *Strickland*, 466 U.S.

at 687). "It is the accused's 'heavy burden' to demonstrate a constitutional violation under *Strickland*." *Moreno v. Smith*, 2010 WL 2975762, at *15 (E.D.N.Y. July 26, 2010) (quoting *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004)).

Though the *Strickland* test has two prongs, courts need not consider the first "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice." *Ortiz v. Rock*, 2016 WL 6068808, at *8 (E.D.N.Y. Oct. 13, 2016) (quoting *Strickland*, 466 U.S. at 697). Accordingly, where a petitioner's ineffective counsel claim "can be resolved with reference to *Strickland*'s prejudice prong alone," a Court may properly "assume, without deciding" that counsel's performance was deficient, or "fell below an objective standard of reasonableness." *Waiters v. Lee*, 857 F.3d 466, 478 (2d Cir. 2017) (bypassing the first prong); *Basagoitia*, 2012 WL 4511358, at *13.

Courts reviewing prejudice under *Strickland* must determine whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Waiters*, 857 F.3d at 479. "A reasonable probability is a probability sufficient to undermine confidence in the outcome, and thus the chance of an alternate result must be 'substantial' not just 'conceivable.'" *Id.* at 480 (internal quotation marks and citations omitted).

Here, it is clear that counsel's errors, if any, did not affect the outcome of petitioner's trial. First, as discussed above, counsel did seek a missing witness charge, but it was denied. Tr. at 856:2-20, 858:12-20; 912:2-4. Moreover, and also as discussed above, the decision not to give a missing witness charge was undoubtedly proper, and a more vigorous request would no doubt have been unsuccessful.

Though petitioner's trial counsel may have failed to preserve certain arguments concerning the admission of hearsay—and it does appear that trial counsel failed to object on hearsay grounds at a key moment, *see* Tr. at 509:4-8—these errors did not prejudice petitioner. Different hearsay rulings would not have prevented the jury from hearing about the Tippinses' encounter with petitioner on the stairwell or the testimony from others suggesting that petitioner and the victim's relationship was becoming increasingly violent. In fact, because these rulings—whether correct or not—were ultimately harmless, the Appellate Division did not even bother to address the prosecution's argument on appeal that petitioner's trial counsel failed to preserve arguments opposing the admission of the victim's hearsay. *See* Resp't's Appellate Br. at 46–49, Dkt. 10-1 at ECF page 42; *see also Bierenbaum v. Graham,* 607 F.3d 36, 57 (2d Cir. 2010) (noting that because the Appellate Division could have found petitioner's claim unpreserved, but still addressed the merits of the claim, petitioner "cannot claim that counsel was ineffective in failing to preserve the issue for appeal"). Regarding the testimony of Willis and the parole officer, petitioner's trial counsel did in fact raise these issues at trial, but petitioner was nevertheless found guilty. *See* 603:5-13, 919:22–920:1.[15]

For these reasons, petitioner's ineffective counsel claim should be denied.

E. Sufficiency of Evidence

Liberally construed, petitioner's reply raises as a final claim that the evidence at trial was insufficient to convict him of second-degree murder and fourth-degree criminal possession of a weapon. Pet.'s Reply at 12–15. This claim encompasses several distinct points. Petitioner first argues that a "review of the court records, police reports and laboratory results from the forensic

[15] In fact, defense counsel's attempt "to minimize damaging testimony by offering to stipulate to testimony about defendant's parole" is just one example of what was an overall effective performance. *See* Opp. at 36–38 (citing to trial transcript to show how petitioner's trial counsel provided effective representation).

department, shows no credible or physical evidence in this case to sustain a guilty verdict at trial." *Id.* at 12. In connection with this claim, petitioner takes issue with the scientific evidence introduced at trial and questions why no DNA analysis of the victim's fingernails was conducted. *Id.* at 12–13. The remainder of petitioner's claims dispute the persuasiveness of the People's case-in-chief, arguing that the circumstantial evidence was insufficient to support his conviction, and that two witnesses, Cabrera and Najiyah, lacked credibility. *Id.* at 14–15.

Petitioner's sufficiency argument was not presented to the Appellate Division and is accordingly procedurally barred from habeas review. *Aparicio*, 269 F.3d at 93. I nevertheless review the claim and find it to be without merit.

Petitioner's final argument, again liberally construed, challenges both the legal sufficiency of the evidence used to convict him as well as the weight given to the evidence presented at trial. "It is well settled that a 'weight of the evidence' claim is distinct from a 'sufficiency of the evidence' claim and is a state claim based on New York Criminal Procedure Law § 470.15(5) that is not reviewable in [a] federal habeas proceeding." *Blake v. Martuscello*, 2013 WL 3456958, at *9 (E.D.N.Y. July 8, 2013) (collecting cases). In contrast, "legal sufficiency of evidence" claims are cognizable in federal habeas proceedings, though a petitioner making such a claim "bears a very heavy burden." *Einaugler v. Supreme Court of St. of N.Y.*, 109 F.3d 836, 840 (2d Cir. 1997).

Under the Due Process Clause of the Fourteenth Amendment, "a state prisoner 'is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" *Id.* at 839 (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)). When analyzing a sufficiency of the evidence claim, "a court may neither disturb the jury's findings with respect to the witnesses' credibility,

nor make credibility judgments about the testimony presented at petitioner's trial or…weigh conflicting testimony." *Brown v. Lord*, 2003 WL 22670886, at *4 (E.D.N.Y. Oct. 20, 2003) (internal quotation marks and citation omitted). "Rather, when faced with a record of historical facts that supports conflicting inferences, this Court must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and defer to that resolution." *Peart v. Royce*, 2019 WL 3454076, at *6 (N.D.N.Y. July 31, 2019) (internal quotation marks omitted). Thus, the court's limited role in reviewing legal sufficiency claims "is simply to determine whether there is any evidence, if accepted as credible by the trier of fact, sufficient to sustain conviction." *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 330 (1995)).

Here, the evidence introduced at trial, detailed above, was plainly sufficient to sustain petitioner's conviction: Cabrera saw petitioner cursing and banging on the victim's door, Najiyah saw him push his way into the apartment on multiple occasions including the night in question, the victim's downstairs neighbor heard a women yell "a man is killing me," and the Tippinses saw petitioner leaving the victim's apartment seconds before the body was discovered—in an exchange caught by video surveillance cameras. Tr. at 498–502, 542–45, 549–53, 573–77, 620–22, 647–48. Accordingly, the record was not "so totally devoid of evidentiary support that a due process issue is raised." *Bossett v. Walker*, 41 F.3d 825, 830 (2d Cir. 1994).

Petitioner's specific argument that Cabrera and Najiyah lacked credibility is not properly before this Court; "the task of assessing witness credibility rests solely with the jury, and the jury is free to believe part and disbelieve part of any witness's testimony." *Foster v. Warden, Five Points Corr. Facility*, 2019 WL 4918102, at *13 (E.D.N.Y. Sept. 30, 2019) (internal quotation marks omitted). Likewise, the jury was free to credit or discredit the medical examiners'

testimony concerning the analysis of DNA at the crime scene. Petitioner's counsel attempted to undermine the medical examiners' testimony at trial by making the same argument petitioner now makes: that the police should have conducted an analysis of the DNA underneath the victim's fingernails, *see* Tr. at 892, 917, but there is no indication this persuaded the jury, or that the prosecution's case was lacking without this DNA evidence.

Petitioner's complaint that the prosecution's case relied on circumstantial evidence is likewise meritless. "It is well settled that crimes 'may be proven entirely by circumstantial evidence.'" *Hudson v. Perez*, 2013 WL 5229797, at *10 (S.D.N.Y. Sept. 17, 2013) (quoting *United States v. Suref*, 15 F.3d 225, 228 (2d Cir. 1994)). Here, the sequence of events provided overwhelming circumstantial evidence tying petitioner to the victim's murder. Accordingly, petitioner's sufficiency claim should be rejected.

CONCLUSION

For all the reasons stated above, I respectfully recommend that Johnson's petition for a writ of habeas corpus be denied in its entirety. Typically, any objections to the recommendations made in this Report would have to be made within fourteen days after service of the Report; in light of petitioner's *pro se* status and that service of this Report will be effected by mailing, however, that time is extended such that any objections shall be filed no later than December 23, 2020. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. Proc. 72(b)(2). Failure to file timely objections may waive the right to appeal the District Court's order. *See Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (discussing waiver under the former ten day limit).

/s/
STEVEN M. GOLD
United States Magistrate Judge

Brooklyn, New York
November 25, 2020
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New York Official Reports

95 A.D.3d 1237, 943 N.Y.S.2d 910 (Mem), 2012 N.Y. Slip Op. 04031

***1** The People of the State of New York, Respondent

v

Erik Johnson, Appellant.

Supreme Court, Appellate Division, Second Department, New York
2010-03508, 3299/06
May 23, 2012

CITE TITLE AS: People v Johnson

Lynn W. L. Fahey, New York, N.Y. (Barry Stendig of counsel), for appellant.
Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano and Daniel Bresnahan of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Lasak, J.), rendered March 25, 2010, convicting him of murder in the second degree and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant was convicted, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the fourth degree. The defendant appeals from the judgment of conviction. We affirm.

"[E]ven if the Supreme Court erred in denying the defendant's request for a missing witness charge, any error was harmless, as there was overwhelming evidence of the defendant's guilt and no significant probability that the error contributed to his conviction" (*People v Smalls*, 81 AD3d 669, 670 [2011]; *see People v Chardon*, 83 AD3d 954, 955 [2011]; *compare People v Brown*, 75 AD3d 515, 516 [2010]). For the same reason, any error in admitting certain hearsay testimony of third parties as to what the victim and one of the witnesses said was harmless (*see People v Harvey*, 270 AD2d 959, 960 [2000]).

The defendant's remaining contention is without merit. Angiolillo, J.P., Lott, Roman and Miller, JJ., concur.

End of Document

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS: CRIMINAL TERM: PART TAP D

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THE PEOPLE OF THE STATE OF NEW YORK,

-against- Indictment No. 3299/06
CONT. TRIAL

ERIK JOHNSON,

Defendant.

----------x

February 11, 2010
125-01 Queens Boulevard
Kew Gardens, New York 11415

B E F O R E:

THE HONORABLE GREGORY D. LASAK

A P P E A R A N C E S:

RICHARD A. BROWN, ESQ.,
District Attorney, Queens County
BY: SHAWN CLARK, ESQ.
Assistant District Attorney

JUDAH MALTZ, ESQ.,
Attorney for the Defendant

Nancy Samms,
Senior Court Reporter

ns

MR. MALTZ: I don't believe it's clear.

THE COURT: It's in the charge. It's very clear. You have your exception.

MR. MALTZ: Requests to charge.

THE COURT: You have a request to charge?

MR. MALTZ: I request the charge of the missing witness regarding Thomas Livingston that your Honor --

THE COURT: I denied that.

MR. MALTZ: Well, I want to preserve the issue for appeal. I want to raise the issue again.

THE COURT: That request is denied again.

MR. MALTZ: I also except to your Honor's decision not to charge missing witness but also lack of evidence, I request the court to tell the jury lack of evidence as well.

THE COURT: Mr. Maltz, do you have a problem with your hearing?

MR. MALTZ: No.

THE COURT: You brought that up three times at the sidebar. It's in the charge.

MR. MALTZ: You asked me if I have additional requests.

THE COURT: No, I didn't. I said did you have any exceptions. I asked that at the beginning of the sidebar.

MR. MALTZ: That's it.

THE COURT: Thank you. Do you both agree to give

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS: CRIMINAL TERM: PART TAP D

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Indictment No. 3299/06
CONT. TRIAL

ERIK JOHNSON,

Defendant.

----------x

February 9, 2010
125-01 Queens Boulevard
Kew Gardens, New York 11415

B E F O R E:

THE HONORABLE GREGORY D. LASAK

A P P E A R A N C E S:

RICHARD A. BROWN, ESQ.,
District Attorney, Queens County
BY: SHAWN CLARK, ESQ.
Assistant District Attorney

JUDAH MALTZ, ESQ.,
Attorney for the Defendant

Nancy Samms,
Senior Court Reporter

ns

THE COURT CLERK: Case on trial, People versus Erik Johnson. The defendant is on his way up.

MR. CLARK: For the People Assistant District Attorney Shawn Clark. Good morning, your Honor.

THE COURT: Good morning.

MR. MALTZ: For Mr. Johnson, Judah Maltz. Good morning, your Honor.

THE COURT: Good morning. Mr. Clark, how long is this witness, about?

MR. CLARK: Fifteen minutes maybe.

THE COURT: All right. Then you will rest?

MR. CLARK: Yes.

THE COURT: Okay. Mr. Maltz.

MR. MALTZ: I make a request before we bring in the jury.

THE COURT: You want to wait for your client?

MR. MALTZ: Yes.

THE COURT OFFICER: He is on his way, Judge.

THE COURT CLERK: Case on trial, People versus Erik Johnson. All parties are now present, your Honor. The defendant is present.

THE COURT: Yes, Mr. Maltz?

MR. MALTZ: Before we call the next witness, your Honor, I believe it's Dr. Mitchell, I believe the district attorney is going to rest their case with Dr.

Mitchell.

The law requires if I ask for a missing witness charge, that request must be made before the People rest the case. I believe the failure to call a necessary and material witness, Mr. Thomas Livingston, the gentleman who was supposed to be in the vehicle with the young lady, the 7-year-old girl, who was with the child on November 8, 2006 between the hours of 5:00 -- 6:00 P.M. to about 8:00 P.M., and he was the one supposed to have made the telephone calls to the victim and spoken to the victim at the particular time period, the district attorney made a big argument, hey day in opening statement that we would hear from Mr. Livingston, and he would testify as to the conversation he had with the victim and one time there was a busy signal, and he called again, and she answered the phone, and she hung up the phone.

So in light of the fact that the People do not intend to call the witness, I ask for a missing witness charge.

MR. CLARK: Just to correct something, first of all, Mr. Maltz indicated -- I never told this jury that they would hear from Thomas Livingston. I mentioned him, and I informed the jury that he was a person whose name they would be hearing throughout the course of the

trial. I never said I was going to call him as a witness.

Second of all, I did detail some of the events with Mr. Thomas Livingston in them, and all the events were testified to by his daughter Najiyah Livingston who was with him. Najiyah Livingston testified that after they left the school in her father's car, her father called her mother, and then her father asked her who was there when you left, and the witness said she told her father Erik was there, and the father took them over to the aunt's apartment. Everything said in the opening statement to the jury was covered by Najiyah Livingston.

Mr. Livingston was not a witness to this murder. He was not on the second floor at a little after eight at 41-12 12th Street. He won't be able to tell us whether the defendant is guilty or not guilty of the charges, and any piece of circumstantial evidence that he may have was already testified to by his daughter who he is duplicative and his daughter is a better witness for.

Let me explain that. His daughter is the one that leaves the apartment at approximately 6:00 P.M., and the defendant runs into the apartment. She is the one who sees the defendant with her mother and the last one to see her alive other than the defendant. She goes

down to the father's car and goes to school and then the two of them with the brother go over to the aunt's house.

She testified to where her father was the entire time. Her father never came into the building. He was out in the car and anything else other than that that could be linked to probative value as to what he could testify to has already been testified to by his daughter. So he would be duplicative, number one, and, number two, he is not a material witness so he certainly can't be considered a missing witness.

MR. MALTZ: Judge, I disagree. I believe Mr. Clark made reference to Mr. Livingston and the phone calls he made that evening or afternoon 6:00 which he told the daughter to come downstairs, that he made a series of phone calls and conferred with Asma Johnson up until 8:00 P.M. I think he was a witness. He was even available to the People. He was outside the door when Najiyah Livingston testified, and he elected not to call the witness.

I think it was a necessary witness, and he was within the People's control, and I ask for a missing witness charge.

THE COURT: Decision reserved. Any other matters before we bring the jury in?

yesterday.

MR. MALTZ: What about the missing witness charge?

THE COURT: That application is denied.

MR. MALTZ: Exception, your Honor.

THE COURT: You have your exception for the record.

MR. MALTZ: Nothing further, your Honor.

THE COURT: Thank you. Anything further, Mr. DA?

MR. CLARK: No, your Honor.

THE COURT: All right. 2:00. Please put Mr. Johnson back in.

(Defendant exits the courtroom.)

(Luncheon recess taken.)

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 April, two thousand twenty-four.

Erik Johnson,

Petitioner - Appellant,

v.

Patrick Griffin,

Respondent - Appellee.

ORDER

Docket No: 22-2007

Appellant, Erik Johnson, 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 denied the panel rehearing by order filed on March 27, 2024. 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