

S.D.N.Y. – W.P.
13-cv-7317
Karas, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of October, two thousand twenty-two.

Present:

Debra Ann Livingston,
Chief Judge,
William J. Nardini,
Steven J. Menashi,
Circuit Judges.

Patrick Bowie,

Petitioner-Appellant,

v.


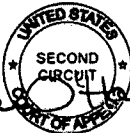
22-151

William Lee, Supt. Greenhaven Correctional facility,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, appointment of counsel, and other relief. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

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

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PATRICK BOWIE,

Petitioner,

- against -

WILLIAM LEE,

Superintendent, Green Haven Correctional Facility

Respondent.

13 Civ. 7317 (KMK)(PED)

**REPORT AND
RECOMMENDATION**

**TO: THE HONORABLE KENNETH M. KARAS,
UNITED STATES DISTRICT JUDGE**

I. INTRODUCTION

Patrick Bowie (“Petitioner”), proceeding *pro se*, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence upon a jury verdict in New York Supreme Court, Orange County (De Rosa, J.). [Dkt. 1.] On August 31, 2007, Petitioner was convicted of two counts of murder in the first degree, four counts of robbery in the first degree, criminal possession of a weapon in the second degree, and conspiracy in the second degree. On October 4, 2007, Petitioner was sentenced to life in prison without parole, which he is currently serving at the Green Haven Correctional Facility in Dutchess County, New York.

The Petition comes before me pursuant to an Order of Reference entered January 15, 2014. [Dkt. 7.] For the reasons that follow, I respectfully recommend that Your Honor **DENY** the Petition.

II. BACKGROUND¹

A. Factual History

1. Events Leading to the Crime

Petitioner had been in a romantic relationship with the victim, Fermina Nunez, for several years. In September 2006, Nunez ended their relationship after Petitioner moved his ex-wife, Francesca Cappellan, and their child into his home in Middletown, New York. Between September and December 2006, Petitioner attempted to contact Nunez hundreds of times. On numerous occasions he traveled to Nunez's place of business, the Final Touch Salon in Middletown. Sometimes he would stay outside and watch her work. Other times he would enter the salon and try to speak to Nunez. Petitioner would travel to Nunez's home unannounced and wait for her. He called Nunez over a thousand times. He approached Nunez's children and family to ask them to convince Nunez to return to him. On December 3, Petitioner arrived unannounced to Nunez's brother's place of business and offered him \$10,000 to \$15,000 to persuade Nunez to restart their relationship. He declined. Petitioner's attempted contacts with Nunez continued through the end of December.

On December 1, Petitioner began contacting Melvin Green. According to Sharae Green, Melvin Green's wife, Green and Petitioner had been friends for years. Petitioner placed 74 calls to Green between December 1 and December 19. Green did not respond to any of them. Petitioner visited Green's apartment in the Bronx, New York on December 19. After a meeting with Petitioner, Green shut off his phone until December 25 when Petitioner visited Green's

¹ The information in this section is taken from the Petition, Petitioner's January 14, 2019 Supplemental Brief [Dkt. 80], Respondent's Memorandum of Law in Opposition and attached exhibits [Dkt. 89, 90], and Petitioner's Reply [Dkt. 103].

home again. According to Sharae Green, Petitioner and Green spoke to each other behind closed doors for 45 minutes that day. Between December 28 and December 30, Petitioner and Green made 91 additional calls to each other. On December 29, Green traveled from the Bronx to Middletown where he stayed until 2:00 a.m. the following morning before returning home.

On December 30, Green returned to Middletown. That morning, Petitioner arrived at Nunez's salon but did not speak to her. He returned again in the afternoon with flowers and asked Nunez to dinner and to restart their relationship. Nunez refused. According to Petitioner, Nunez stated she was busy, and Petitioner left. According to eyewitnesses, Petitioner and Nunez had an argument, at which point Petitioner stated that Nunez and her family would see "what he was capable of" before leaving. Green and Petitioner remained near the salon that evening.

2. The Crime

Nunez's salon stayed open late on December 30 to accommodate customers styling their hair for New Year's Eve. At around 11:00 p.m., three individuals were in the salon with Nunez: two of her friends and employees, Deborah Carabello and Milagros Picon, and another patron, Esther Deslanedes. Between 10:45 p.m. and 11:45 p.m., Petitioner and Green made ten phone calls to each other.

At 11:45 p.m., Green entered the salon unmasked wearing a New York Yankees hat, a dark leather jacket, blue jeans, and black Timberland work boots. He carried a loaded, chipped, black and brown .38 caliber revolver. Green ordered the women to the floor and demanded their valuables. He walked to the cash register and unsuccessfully attempted to open it. Green asked for the owner, and Nunez responded. Green ordered her to open the cash register, which she did, and Green placed its contents into his coat pockets. Green forced Nunez onto the ground next to

Carabello and pushed Carabello away. He stepped onto the back of Nunez's leg. He pointed the gun at the back of her head and fired a single shot. Green fled the scene. Nunez died instantly.

The Orange County Police Department were called at 11:54 p.m.. At that same minute, Green called Petitioner. After that call, all communication between Petitioner and Green ceased.

3. Investigation and Arrest

Detective Thomas Miller of the City of Middletown Police Department investigated the crime scene. He discovered Nunez lying face down with a gunshot wound to her head. Deslanedes, Carabello, and Picon each gave statements. They identified Nunez, and each provided a physical description of the shooter and his clothing. Detective Miller observed a boot impression on Nunez's pant leg where Green had stepped on her. There were numerous pieces of potato on the floor around Nunez's body.

Police interviewed Nunez's friends and relatives and quickly learned of her relationship with Petitioner. On December 31, Investigator Jan Golding and Sergeant Gerald Mishk of the New York State Police Department interviewed Nunez's brother who provided them with Petitioner's cell phone number. The same day, Investigator Jim Reilly of the Orange County District Attorney's Office prepared a subpoena to obtain records associated with Petitioner's cell phone number. The records revealed the over one thousand calls Petitioner placed to Nunez, as well as the numerous calls with a number associated with Green. The records also revealed cellular tower data indicating Petitioner's general location when placing calls. Investigator William Manley of the New York State Police analyzed the cellular tower data and mapped Petitioner's and Green's locations.

At around noon that same day, Petitioner arrived at the Middletown Police Department with his attorney and met with Detective Thomas Keating and Investigator Rene Ferro.

Petitioner was not under arrest, and he arrived voluntarily. He was interviewed with his attorney present. Detective Keating asked Petitioner's attorney if he could ask Petitioner questions, and he agreed. Petitioner stated that he was home the night of December 30 when he received a call from his sister that something had happened to Nunez. Petitioner stated that he contacted his attorney in the early morning hours of December 31 and met with him in person at around 8:00 a.m. that day before arriving at the police station.

Later that day, Detective Keating met with Officer Larry Beresnoy of the Middletown Police Department, as well as Sergeant Brendan Duke of the 43rd Precinct of the New York Police Department, which covers the southeast portion of the Bronx. Using Petitioner's cell phone records and the police database, they were able to identify Green as the owner of the phone number appearing in Petitioner's call logs. The next day on January 1, 2007, Deslandes identified Green in a photo array conducted by Senior Investigator Terry Mullin of the New York State Police. That same day, Detective Matthew Johnson and Investigator John Ramos met with Picon at her home and presented her with a photo array. She identified Green's photograph and stated that he was present at the salon during the shooting.

Based on this information, the investigators contacted Green at his home in the Bronx on January 1, 2007. Investigator Paul Dequato arrived at Green's home with members of the Middletown Police. He spoke with Sharae Green who confirmed that Green had known Petitioner for years. Investigator Dequato spoke with Green who admitted that he knew Petitioner and that he had had a phone conversation with him on the night of the murder. Green was taken into custody and brought to the Middletown Police Department where he met with Detectives Johnson and Miller who read him his *Miranda* rights.

During the interview, Green admitted that he shot and killed Nunez on the order of Petitioner with a weapon supplied by Petitioner. He admitted that Petitioner had hired him to carry out the murder. He stated that he and Petitioner had surveyed Nunez's salon on the evening of the crime. He explained that he had used a potato as a suppresser on the gun and that he hid the gun in his home. Green signed a written confession of the crime. He was then remanded to the Orange County Jail.

On the same day, Middletown Police Detective Joseph Tobin was assigned to surveil Petitioner's home. In the early morning hours of January 2, Sgt. Mishk and other officers arrived at Petitioner's residence and secured the premises in anticipation of a warrant. Petitioner refused to allow police into the home and refused to come out. Petitioner called a cab to pick him up from the rear of his home, but was unable to leave due to the police securing the premises. Shortly after midnight, Detective Tobin, who was a paramedic, was asked to respond to the front of Petitioner's residence for a medical emergency. Petitioner exited the residence, and Detective Tobin observed puncture wounds on Petitioner's neck, arms, and groin. Petitioner admitted that the wounds were self-inflicted, and that he had stabbed himself numerous times over the past two hours. Petitioner was taken into custody and arrested for murder. He was turned over to medical personnel and later remanded to the Orange County Jail.

Following the arrest, police executed a search warrant of Petitioner's home. [Dkt. 90-1 at 25.] They recovered, among other things, a Nextel cell phone. Police executed a search warrant at Green's home on the same day. [Dkt. 90-1 at 18.] They recovered a black and brown .38 caliber revolver with a defaced serial number that was wrapped in a towel. The revolver contained four live rounds and one spent shell casing. Police also recovered a pair of black

Timberland work boots, a pair of blue jeans with a belt, a black leather jacket, five prepaid cell phones, a blackberry cell phone, and a New York Yankees hat.

A DNA analysis revealed trace amounts of Petitioner's and Green's DNA on the towel in which the revolver had been wrapped. Police observed that the bullet found in Nunez was shot from a .38 caliber revolver. The boot impression on Nunez's pant leg was consistent with the size and tread pattern of the Timberland work boots recovered from Green's home. The .38 caliber revolver found in Green's home was identified by Nunez's brother as belonging to Petitioner. He stated that he had seen Petitioner with the revolver as recently as the previous summer, believing him to be a detective. Picon and Carabello also identified the revolver as the one Green had used the night of the murder. Picon, Carabello, and Deslanedes identified the clothes obtained from Green's home as the same clothes he wore during the murder.

On January 4, 2007, Detective Johnson conducted a photo array with assistance from an interpreter, Ricardo Arias, at the Orange County District Attorney's Office. They presented the photo array to Picon who selected Petitioner's photograph and identified him by name.

On February 6, 2007, by Orange County Indictment No. 2007-040, Petitioner and Green were charged with two counts of murder in the first degree, two counts of murder in the second degree, four counts of robbery in the first degree, one count of criminal possession of a weapon in the second degree, and one count of conspiracy in the second degree. [Dkt. 90-1 at 3-16.]

Over the next six months, Petitioner and Green were detained in the Orange County Jail and housed in separate areas. During that time, they corresponded through letters which they passed through another inmate, Marlon Avila. On June 1, 2007, Investigator Reilly interviewed Avila with Avila's attorney present. Avila stated that he had had separate conversations with Green and Petitioner regarding the murder. He reported that Petitioner complained about Green

calling him after the murder and admitted that he was supposed to meet with Green after the murder to collect the gun. He also reported that Petitioner instructed Green to change his statement made to the police.

On July 10, 2007, Avila wrote to the Orange County District Attorney's Office through his attorney and stated that he was in possession of letters between Petitioner and Green. He provide fifteen letters to Orange County Investigator Thomas Reinle two weeks later. On July 24, 2007, police executed search warrants of Petitioner's and Green's jail cells. [Dkt. 90-1 at 83, 93.] They recovered a cache of letters hidden in Petitioner's pillow. Portions of the letters were written using code words. DNA analysis revealed Green's and Petitioner's DNA on the letters. Later, police matched the handwriting to handwriting on Petitioner's bank records, and his handwriting was identified by eyewitnesses. The letters made numerous references to Judge De Rosa, who had been assigned to the case, Petitioner's defense counsel Jose Camacho, and Petitioner's scheduled court appearances. The letters also made references to Petitioner and Green by name in the third person.

The letters stated that Petitioner provided Green with a "burner," meaning a gun, for a "party," referring to the hit on Nunez, in exchange for "jellybeans," referring to payment. Petitioner instructed Green to change the statement he had given to police and to tell investigators that Green was looking at various properties with Petitioner. Petitioner gave Green the location and description of specific homes and instructed Green to tell police that they had been visiting those properties during the night of the murder. They also discussed their attorneys and legal strategy, and Petitioner assured Green that he would be able to reduce the charges to possession of a weapon and not murder. Green expressed his frustration with Petitioner after not

having received full payment. Petitioner also expressed frustration with Green for speaking to the police, which, according to Petitioner, implicated him in the crime.

B. Procedural History

1. Pre-Trial Motions

a. Omnibus Motion

Petitioner, through counsel, filed an omnibus motion on April 22, 2007. [Dkt. 90-1 at 33-51.] Petitioner sought, *inter alia*, production of all evidence favorable to Petitioner pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963); suppression of any statements made by Petitioner to police on the grounds that they were illegally obtained pursuant to *People v. Huntley*, 15 N.Y.2d 72 (N.Y. 1965); suppression of any out of court police arranged identification of Petitioner pursuant to *United States v. Wade*, 388 U.S. 218 (1968); severance of Petitioner's trial from Green's; and authorization to obtain compensation to obtain experts, including but not limited to experts on DNA and ballistics.

By Decision and Order dated June 1, 2007, Judge De Rosa scheduled an omnibus pre-trial hearing. [Dkt. 90-1 at 70-74.] He granted Petitioner's application under *Brady*, which was unopposed. *Id.* He denied Petitioner's application for compensation to hire experts and the application for severance, with leave to renew both applications. *Id.*

b. Joint Pre-Trial Hearing

Judge De Rosa held hearings addressing all remaining pre-trial motions pertaining to both Petitioner and Green on June 4, June 18, and July 2, 2007. [Dkt. 90-14, 90-15, and 90-16.] Petitioner and Green were both present and represented by separate counsel. Judge De Rosa rendered a decision on August 16, 2007. [Dkt. 90-2 at 78-83.]

Pursuant to *Wade*, Petitioner moved to suppress the January 4 photo array identification by Picon and administered by Detective Johnson with assistance from Arias. [Dkt. 90-14 at 5.] Detective Johnson testified that he met with Arias and Picon on January 4. *Id.* at 50. The photo array and instructions were admitted into evidence. *Id.* at 51. Detective Johnson read Picon the instructions and placed the photo array in front of her. *Id.* at 52. Picon selected Petitioner's photograph and identified him by the name Patricio. *Id.* at 53. Arias testified that he translated Detective Johnson's instructions to Picon as well as Picon's responses to Detective Johnson. *Id.* at 5-6. Judge De Rosa held that the photo array was admissible at trial, finding that it was conducted in a reasonable manner with no undue suggestiveness. [Dkt. 90-2 at 83.]

Pursuant to *Huntley*, Petitioner moved to suppress the use of his statements made to police on December 31. Detective Keating testified that he met with Petitioner and his attorney on December 31, 2006 in the Middletown Police Department. [Dkt. 90-14 at 83-85.] He identified Petitioner and Attorney Camacho in the courtroom. *Id.* at 84. He testified that Petitioner had arrived at the police department with his attorney voluntarily, and he was not under arrest and not in handcuffs. *Id.* at 85. Detective Keating asked counsel whether he could ask Petitioner questions, and counsel agreed. [Dkt. 90-14 at 85-86]. During the interview, Petitioner stated that he knew Nunez, that she had broken up with him two months earlier, and that he was home on the night of her death. *Id.* at 86-87. He stated that his sister had called him that night, and thereafter Petitioner called his attorney at 2:00 a.m. on December 31. *Id.* at 86. He stated that he had met with Nunez at approximately 4:00 p.m. on December 30 at her salon, at which point counsel did not let police ask additional questions. *Id.* at 88-89. After the interview, Petitioner and counsel left, and Petitioner was not placed under arrest. *Id.* at 89.

Judge De Rosa held that the statements were admissible because they were made voluntarily and in the presence of Petitioner's attorney. [Dkt. 90-2 at 82.]

Petitioner also moved to suppress the use of statements made to Detective Tobin on January 2. Detective Tobin testified that he was assigned to surveil Petitioner's residence on January 1. [Dkt. 90-14 at 17.] During the early morning hours of January 2, Detective Tobin was called to the front of Petitioner's residence to evaluate him for medical purposes. *Id.* at 17-18. Detective Tobin explained that he had been a paramedic for 13 years. *Id.* at 18. He identified Petitioner in the courtroom. *Id.* He testified that he observed Petitioner on January 2 with a puncture wound to his neck and multiple wounds to his arms. *Id.* at 19. He had asked Petitioner whether he had any other injuries, and Petitioner told him that he had stabbed himself in the arms. *Id.* He testified that Petitioner appeared calm and was able to answer his questions logically. *Id.* at 19-20. He then turned Petitioner over to medical personnel. *Id.* at 20-21. Judge De Rosa held that these statements were admissible because Detective Tobin's questions were non-accusatory and related to Petitioner's medical condition, and Petitioner's answers were voluntary. [Dkt. 90-2 at 82-83.]

Judge De Rosa granted Petitioner's motion for severance and scheduled Green's trial for August 6, 2007 and Petitioner's trial for August 20, 2007. [Dkt. 90-16 at 70.]

2. Trial Motions

At trial, Petitioner, through counsel, moved to exclude any reference to the use of a "Bronx silencer."² [Dkt. 90-17 at 4.] Without objection, Judge De Rosa granted the application.

² "Bronx silencer" is apparently a colloquial term describing a potato affixed to the barrel of a gun as a makeshift suppressor. It does not work. *See, e.g.,* David Emery, *Potato Used as Suppressor*, The Museum of Hoaxes. http://hoaxes.org/weblog/comments/potato_used_as_silencer. Retrieved October 24, 2020.

Id. Petitioner also moved to exclude any mention of potatoes being found in his kitchen shortly after the murder on the grounds of prejudice given the presence of potato scraps found at the crime scene. Judge De Rosa denied the application, reasoning that the evidence was not overly prejudicial and was a question of fact as to weight and not admissibility. *Id.* at 5. Petitioner, through counsel, also moved to exclude photographs of his wounds during the early morning hours of January 2, as well as evidence that he attempted to call a taxi to the back of his home that morning. *Id.* Judge De Rosa denied both applications. *Id.*

On the morning of August 20, Petitioner through counsel sought an adjournment of the trial to obtain funds to hire a DNA identification expert and a ballistics expert. *Id.* at 9-12. Judge De Rosa denied the request for an adjournment, but reserved ruling on whether the county would be able to provide funds. *Id.* at 12-15. The next day, he granted Petitioner \$2,500.00 to obtain experts, with leave to seek an additional \$2,500.00 if needed. [Dkt. 90-19 at 5].

3. Trial, Conviction and Sentencing

Trial commenced on August 20, 2007. At the end of the prosecution's case in chief, Petitioner through counsel moved to dismiss all charges against him on the sole basis that the prosecution had failed to meet its burden. [Dkt. 90-27 at 76.] Viewing the evidence in the light most favorable to the non-moving party, Judge De Rosa held that the prosecution had made a prima facie case and dismissed the motion. *Id.* at 77-78. Just prior to summations, Petitioner through counsel also made an application to redact the letters obtained from Petitioner's jail cell as to any portions referring to a false alibi or a confession by Green. [Dkt. 90-29 at 27.] The application was denied. *Id.* at 33.

On August 31, 2007, the jury returned a verdict of guilty on two counts of murder in the first degree, four counts of robbery in the first degree, one count of criminal possession of a

weapon in the second degree, and one count of conspiracy in the second degree. [Dkt. 90-31 at 71-88.] Petitioner through counsel moved to set aside the verdict, which Judge De Rosa denied. *Id.* at 88. On October 4, 2007, Petitioner was sentenced to two life sentences without parole, with additional sentences in the aggregate of 25 years imprisonment to be served consecutively to the life sentences, and an additional five years of post-release supervision. [Dkt. 90-31 at 1-29.]

4. Direct Appeal

Petitioner, through counsel, timely appealed his conviction to the Appellate Division, Second Department, on the grounds that: (1) the evidence was legally insufficient to support his conviction, and (2) the verdict was against the weight of the evidence. [Dkt. 90-2 at 85-109.] Petitioner filed a *pro se* supplemental brief raising additional grounds: (1) the court failed to properly instruct the jury on the use of circumstantial evidence; (2) the search of his jail cell pursuant to a warrant was improper; (3) Petitioner was prejudiced when Green was presented to the jury during Petitioner's trial for identification wearing an orange jumpsuit; and (4) the trial court erred by admitting into evidence bank records and "other evidence" which Petitioner did not identify, as well as testimony through the use of a court interpreter. [Dkt. 90-3 at 47-62.]

By decision and order dated April 5, 2011, the Appellate Division affirmed the judgment and dismissed the appeal. *People v. Bowie*, 83 A.D.3d 729 (N.Y. App. Div. 2d Dep't 2011). The Appellate Division held that Petitioner's challenge to the legal sufficiency of the evidence was unpreserved. *Id.* The Appellate Division, nevertheless, dismissed the claim on the merits and held that the evidence was legally sufficient to establish Petitioner's guilt. *Id.* The Appellate Division also held that the verdict was not against the weight of the evidence and summarily denied the remaining contentions on the merits. *Id.*

Petitioner, through counsel, filed an application before the New York State Court of Appeals for leave to appeal the Appellate Division's denial, which was summarily denied on July 26, 2011. *People v. Bowie*, 17 NY3d 804 (N.Y. 2011). On July 16, 2012, the Court of Appeals summarily denied Petitioner's motion for reconsideration. *People v. Bowie*, 19 N.Y.3d 971 (N.Y. 2012).

5. The Instant Petition and Stay of Proceedings

Petitioner, *pro se*, timely filed the Petition on October 8, 2013 on the following grounds: (1) the evidence was insufficient to support the verdict; (2) the verdict was against the weight of the evidence; (3) ineffective assistance of trial counsel; and (4) ineffective assistance of appellate counsel. [Dkt. 1.]

Petitioner conceded that his claims for ineffective assistance of trial and appellate counsel had not been exhausted. By letter dated March 5, 2014, Petitioner informed me that he had filed a motion pursuant to New York Criminal Procedure Law (N.Y.C.P.L.) § 440.10 in October 2013, and he requested a stay in order to exhaust his claims. [Dkt. 10.] The request was unopposed. Finding good cause and no undue delay, I granted a stay by Order dated March 21, 2014. [Dkt. 12.] Petitioner was required to file a motion to lift the stay and reopen his case within 30 days of the resolution of his subsequent state applications. *Id.*

6. Post-Petition State Court Proceedings

Petitioner, *pro se*, filed a motion to vacate and set aside his conviction pursuant to N.Y.C.P.L. § 440.10 before the Supreme Court of New York, Orange County on October 15, 2013. [90-6 at 3-13.] Petitioner made the following claims: (1) ineffective assistance of trial counsel, insofar as his counsel failed to call fact and expert witnesses, including a bank employee to explain Petitioner's financial transactions, and by failing to object to the

introduction of the letters obtained from Petitioner's jail cell on the grounds of a confrontation clause violation; (2) violation of his right to due process when Green was presented during Petitioner's trial for identification wearing an orange jumpsuit; (3) actual innocence; (4) the evidence was insufficient to support the conviction and instead based on improper inferences; and (5) prosecutorial misconduct by introducing Petitioner's bank records into evidence. *Id.*

The County Court denied the motion by Decision and Order dated July 30, 2014. [Dkt. 90-6 at 56-58.] Regarding the claims for ineffective assistance of trial counsel, the County Court reasoned that Petitioner failed to offer any evidence other than his own conclusory allegations. *Id.* at 57. The County Court dismissed Petitioner's remaining claims pursuant to N.Y.C.P.L. § 440.10(2) because they had been raised on appeal and denied. *Id.* Petitioner moved for reconsideration, which was denied on December 9, 2015. [Dkt. 21 at 4-6.]

Petitioner made an application to the Appellate Division for leave to appeal, which was summarily denied on February 20, 2015. [Dkt. at 90-7 at 3.] Petitioner then filed an application for leave to appeal before the New York Court of Appeals, which was denied on May 25, 2015 on the basis that the Appellate Division's denial was not appealable under N.Y.C.P.L. § 450.90(1). [Dkt. 90-7 at 5.] Petitioner made a second application to the Appellate Division for leave to appeal the County Court's December 9 denial, which was summarily denied on March 9, 2016. [Dkt. 90-7 at 87.] Petitioner appealed the Appellate Division's denial again before the New York Court of Appeals, which was summarily denied on June 9, 2016. [Dkt. 27 at 2.] Petitioner moved for reconsideration before the Court of Appeals, which was denied on November 1, 2016 by summary order. [Dkt. 90-8 at 22.]

Respondent moved to lift the stay by letter motion dated November 23, 2016 on the basis that Petitioner had exhausted his state court remedies. [Dkt. 32.] By Order dated March 27,

2017, I denied the motion and directed Petitioner to file a Writ of Error Coram Nobis, if he had not already done so, within 30 days. [Dkt. 33.] Upon Petitioner's request, I extended his deadline to file to May 31, 2017. [Dkt. 38.]

Petitioner, *pro se*, timely filed an application for a Writ of Error Coram Nobis before the Appellate Division on May 23, 2017 claiming ineffective assistance of appellate counsel. [Dkt. 90-8.] He claimed that appellate counsel failed to raise errors caused by alleged ineffective assistance of trial counsel. *Id.* at 60. Petitioner alleged that trial counsel: (1) failed to object to testimony concerning notes which Petitioner claimed were written by Avila; (2) failed to object to the admission of the letters seized from Petitioner's jail cell; (3) failed to object to the presence of Green at Petitioner's trial wearing an orange jumpsuit; (4) did not call expert witnesses; and (5) failed to rebut the prosecution's theory that Petitioner engaged in a conspiracy and their use of circumstantial evidence. *Id.* at 54, 62-65. Petitioner separately claimed that testimony from Investigator Manley deprived him of a fair trial. *Id.* at 4, 66. The Appellate Division denied the application by summary Order and Decision dated December 6, 2017. [Dkt. 90-9 at 53.]

Petitioner filed for leave to appeal before the Court of Appeals on January 2, 2018 [Dkt. 90-10 at 37-41], which was denied by Order dated March 15, 2018. [Dkt. 90-10 at 3.] Petitioner filed an application to reargue the application for a Writ of Error Coram Nobis, which was denied by the Appellate division on May 17, 2018. [Dkt. 90-10 at 54.]

7. Termination of the Stay and Full Submission

On June 5, 2018, I issued an Order to Show Cause as to why I should not lift the stay and reopen the case for further proceedings. [Dkt. 54.] By letter dated June 6, 2018, Petitioner asked that I continue the stay because he had retained a private investigator who allegedly acquired

new evidence. [Dkt. 60.] Petitioner referred to new witnesses and affidavits, which he did not name and did not provide. *Id.* The only new documents Petitioner included were a copy of a check dated December 7, 2006 for \$10,000.00, stating in the memo section “Re: Patrick Bowie 57 Prospect Avnue,” and information regarding Avila’s arrest records. *Id.* at 30, 34-72.

On July 2, 2018, prior to my decision on the Order to Show Cause, Petitioner, *pro se*, filed a second § 440.10 motion. [Dkt. 90-10 at 56-64.] In addition to the claims contained in the Petition, Petitioner raised new allegations of prosecutorial misconduct. *Id.* The attached exhibits were the same documents which Petitioner filed in his response to the Order to Show Cause. [Dkt. 90-10 at 65-102 and 90-11 at 1-74.] By order dated November 30, 2018, I determined that Petitioner had exhausted the claims made in his Petition, and that the Petition was ripe for consideration. [Dkt. 69.] Accordingly, I lifted the stay. *Id.* I allowed Petitioner to file a supplemental brief and any other papers he may choose to submit. *Id.*

Petitioner timely filed a supplemental brief on January 14, 2018, which reasserted the claims made in his Petition. [Dkt. 80.]³ Petitioner also made new claims which were presented to me for the first time: (1) prosecutorial misconduct, including a violation under *Brady v. Maryland*, 373 U.S. 83 (1963); and (2) actual innocence. *Id.* at 12-14. Following the submission of Respondent’s memorandum of law, Petitioner was granted an additional ninety days to file a reply, which he did on August 12, 2019. [Dkt. 103.]

By letter dated April 20, 2020, Petitioner requested leave to file a supplemental submission, which Your Honor granted. [Dkt. 108.] Petitioner filed no new evidence, and instead asked for another stay pending additional state court proceedings. [Dkt. 112.]

³ The documents filed at Dkt. 79 and Dkt. 80 are identical, except that Dkt. 79 is missing certain pages. Petitioner refiled the supplemental brief at Dkt. 80 for completion.

Considering the amount of time afforded to Petitioner, the lack of new evidence, and my finding that the Petition was ripe for consideration, I denied Petitioner's request for a further stay and deemed the matter fully submitted. [Dkt. 116.]

III. APPLICABLE LAW

"Habeas review is an extraordinary remedy." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (citing *Reed v. Farley*, 512 U.S. 339, 354 (1994)). Before a federal district court may review the merits of a state criminal judgment in a *habeas corpus* action, the court must first determine whether the petitioner has complied with the procedural requirements set forth in 28 U.S.C. §§ 2244 and 2254. If there has been procedural compliance with these statutes, the court must then determine the appropriate standard of review applicable to the petitioner's claim(s) in accordance with § 2254(d). The procedural and substantive standards applicable to *habeas* review, which were substantially modified by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), are summarized below.

A. Timeliness Requirement

A federal *habeas corpus* petition is subject to AEDPA's strict, one-year statute of limitations. *See* 28 U.S.C. § 2244(d). The statute provides four different potential starting points for the limitations period, and specifies that the latest of these shall apply. *See id.* § 2244(d)(1). Under the statute, the limitation period is tolled only during the pendency of a properly filed application for State post-conviction relief, or other collateral review, with respect to the judgment to be challenged by the petition. *See id.* § 2244(d)(2). The statute reads as follows:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(d)(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id. § 2244(d).

The one-year limitation period is subject to equitable tolling, which is warranted when a petitioner has shown “‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way’ and prevented timely filing.” *Holland v. Florida*, 130 S. Ct. 2549, 2262 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). In the Second Circuit, equitable tolling is confined to “rare and exceptional circumstance[s],” *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (per curiam) (internal quotation omitted), which have “prevented [the petitioner] from filing his petition on time,” *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (internal quotation marks and emphasis omitted). The applicant for equitable tolling must “demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing – a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances.” *Valverde*, 224 F.3d at 134.

B. Exhaustion Requirement

A federal court may not grant *habeas* relief unless the petitioner has first exhausted his claims in state court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see* 28 U.S.C. § 2254(b)(1) (“[a]n 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 unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant”); *id.* § 2254(c) (the petitioner “shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented”). The exhaustion requirement promotes interests in comity and federalism by demanding that state courts have the first opportunity to decide a petitioner’s claims. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982).

To exhaust a federal claim, the petitioner must have “fairly present[ed] his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim,” and thus “giving the State the opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotation marks and citations omitted). “Because non-constitutional claims are not cognizable in federal habeas corpus proceedings, a habeas petition must put state courts on notice that they are to decide federal constitutional claims.” *Petrucelli v. Coombe*, 735 F.2d 684, 687 (2d Cir. 1984) (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982)). Such notice requires that the petitioner “apprise the highest state court of both the factual and legal premises of the federal claims ultimately asserted in the habeas petition.”

Galdamez v. Keane, 394 F.3d 68, 73 (2d Cir. 2005) (internal citation omitted). A claim may be “fairly presented” to the state courts therefore, even if the petitioner has not cited “chapter and verse of the Constitution,” in one of several ways:

- (a) [R]eliance on pertinent federal cases employing constitutional analysis,
- (b) reliance on state cases employing constitutional analysis in like fact situations,
- (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and
- (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Daye v. Attorney Gen. of State of N.Y., 696 F.2d 186, 194 (2d Cir. 1982). A *habeas* petitioner who fails to meet a state’s requirements to exhaust a claim will be barred from asserting that claim in federal court. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

However, “[f]or exhaustion purposes, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred.” *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997) (internal quotation omitted). “In such a case, a petitioner no longer has ‘remedies available in the courts of the State’ within the meaning of 28 U.S.C. § 2254(b).” *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991). Such a procedurally barred claim may be deemed exhausted by a federal *habeas* court. *See, e.g., Reyes*, 118 F.3d at 139. However, absent a showing of either “cause for the procedural default and prejudice attributable thereto,” *Harris v. Reed*, 489 U.S. 255, 262 (1989), or “actual innocence,” *Schlup v. Delo*, 513 U.S. 298 (1995), the petitioner’s claim will remain unreviewable by a federal court.

Finally, notwithstanding the procedure described above, a federal court may yet exercise its discretion to review and deny a mixed petition containing both exhausted and unexhausted claims, if those unexhausted claims are “plainly meritless.” *Rhines v. Weber*, 544 U.S. 269, 277 (2005); *see* 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be denied

on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”); *Padilla v. Keane*, 331 F. Supp.2d 209, 216 (S.D.N.Y. 2004) (interests in judicial economy warrant the dismissal of meritless, unexhausted claims).

C. Procedural Default

Even where an exhausted and timely *habeas* claim is raised, comity and federalism demand that a federal court abstain from its review when the last-reasoned state court opinion to address the claim relied upon “an adequate and independent finding of a procedural default” to deny it. *Harris*, 489 U.S. at 262; *see also Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Levine v. Comm’r of Corr. Servs.*, 44 F.3d 121, 126 (2d Cir. 1995).

A state court decision will be “independent” when it “fairly appears” to rest primarily on state law. *Jimenez v. Walker*, 458 F.3d 130, 138 (2d Cir. 2006) (citing *Colman*, 501 U.S. at 740). A decision will be “adequate” if it is “firmly established and regularly followed’ by the state in question.” *Garcia v. Lewis*, 188 F.3d 71, 77 (2d Cir. 1999) (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)).

D. AEDPA Standard of Review

Before a federal court can determine whether a petitioner is entitled to federal *habeas* relief, the court must determine the proper standard of review under AEDPA for each of the petitioner’s claims. 28 U.S.C. § 2254(d)(1)-(2). This statute “modifie[d] the role of federal habeas corpus courts in reviewing petitions filed by state prisoners,” and imposed a more exacting standard of review. *Williams v. Taylor*, 529 U.S. 362, 402 (2000). For petitions filed after AEDPA became effective, federal courts must apply the following standard to cases in which the state court adjudicated on the merits of the claim:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d)(1)-(2). The deferential AEDPA standard of review will be triggered when the state court has both adjudicated the federal claim “on the merits,” and reduced its disposition to judgment. *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001).

Under the first prong, a state court decision is contrary to federal law only if it “arrives at a conclusion opposite to that reached by the [the Supreme Court] on a question of law or if [it] decides a case differently than [the Supreme Court] on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at 413. A decision involves an “unreasonable application” of Supreme Court precedent if the state court “identifies the correct governing legal rule from the Supreme Court cases but unreasonably applies it to the facts of the particular state prisoner’s case,” or if it “either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Id.* at 407.

Under the second prong of AEDPA, the factual findings of state courts are presumed to be correct. 28 U.S.C. § 2254(e)(1); see *Nelson v. Walker*, 121 F.3d 828, 833 (2d Cir. 1997). The petitioner must rebut this presumption by “clear and convincing evidence.” § 2254(e)(1).

IV. ANALYSIS

Petitioner presents the following claims: (1) the verdict was based on insufficient

evidence; (2) the verdict was against the weight of the evidence; (3) ineffective assistance of trial counsel; (4) ineffective assistance of appellate counsel; (5) prosecutorial misconduct; and (6) actual innocence.⁴

1. Exhaustion and Timeliness

Petitioner timely filed and properly exhausted his first four claims, but the remaining claims of prosecutorial misconduct and actual innocence were neither timely nor properly exhausted. Petitioner's conviction became final on October 14, 2012, after the 90-day expiry of Petitioner's time to file a writ of certiorari following the New York Court of Appeals' denial of his leave to appeal. *See Chrysler v. Guiney*, 14 F. Supp.3d 418, 433 (S.D.N.Y. 2014) ("Pursuant to 28 U.S.C. § 2244(d)(1)(A), a judgment becomes final only after the denial of certiorari or the expiration of time for seeking certiorari—in the latter case, ninety days after a decision by the New York Court of Appeals."). Therefore, AEDPA's one-year limitations period ended on October 14, 2013.

The Petition was filed on October 8, 2013, six days before the expiry of the one-year limitations period. There, Petitioner asserted his first two claims, that the verdict was based on insufficient evidence, and that the verdict was against the weight of the evidence. Both claims

⁴ In his August 15, 2019 Reply, Petitioner set forth, for the first time, a laundry list of additional contentions, including that the indictment was jurisdictionally defective, the trial court lacked subject matter jurisdiction over his case, there were deficiencies in service, and a vague reference to Rule 11 sanctions. [*See Reply*, Dkt. 103 at 34-35, "Grounds For Release that Petitioner Did Not Know".]

I recommend that Your Honor decline to consider these arguments. *See Flemming v. New York*, Case No. 06 Civ. 16255 (LAP), 2013 WL 4831197, at *8 n.11 (S.D.N.Y. Sept. 10, 2013 ("To the extent petitioner raises claims for the first time in reply papers, or in subsequent letters to the Court, I decline to consider those arguments."); *Johnson & Johnson v. Guidant Corp.*, 525 F.Supp.2d 336, 359 (S.D.N.Y.2007) ("[a]rguments first raised in reply memoranda are not properly considered....").

were exhausted prior to filing the Petition. Petitioner asserted both claims on direct appeal, and he properly exhausted his opportunities to appeal those claims in subsequent state court proceedings. Therefore, these two claims are both timely and exhausted.

The Petition also contained claims of ineffective assistance of trial and appellate counsel. Petitioner acknowledged that neither claim had been exhausted at the time of filing. Nevertheless, Petitioner exhausted his claim for ineffective assistance of trial counsel by filing a post-petition motion to vacate, and he exhausted his claim for ineffective assistance of appellate counsel by filing a motion for Writ of Error Coram Nobis. However, Respondent argues that neither claim should be considered timely by virtue of the fact that they had been unexhausted when Petitioner originally asserted them in his Petition.

Contrary to Respondent's argument, both claims were timely filed. The Supreme Court has observed that where, as here, a petitioner files a mixed petition containing both exhausted and unexhausted claims, and a district court dismisses the petition, the one-year limitations period would lapse before a petitioner has the opportunity to exhaust his claims. *Rhines*, 544 U.S. at 275. The Court explained:

If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review. . . . Similarly, if a district court dismisses a mixed petition close to the end of the 1-year period, the petitioner's chances of exhausting his claims in state court and refiling his petition in federal court before the limitations period runs are slim.

Id. As a result, district courts may grant reasonable stays, rather than dismissing unexhausted petitions, to allow a petitioner to exhaust otherwise unexhausted claims before returning to federal court. *Id.* at 274-76. "Once the petitioner exhausts his state remedies, the district court will lift the stay and allow the petitioner to proceed in federal court." *Id.* at 275-76. Under this

scheme, therefore, unexhausted claims filed in a timely petition are still “timely” for *habeas* purposes, even where they are not exhausted until after the expiry of the limitations period. *See, e.g., Keating v. New York*, 708 F.Supp.2d 292 (E.D.N.Y. 2010) and *Keating v. New York*, 2013 WL 3187032 (E.D.N.Y. June 20, 2013)⁵ (staying a mixed petition to allow the petitioner to exhaust certain claims, and hearing all claims three years later as timely). Therefore, Petitioner’s claims for ineffective assistance of trial and appellate counsel are both timely and exhausted.

However, Petitioner’s remaining claims of prosecutorial misconduct and actual innocence are neither exhausted nor timely. Presumably, Petitioner maintained his innocence throughout his state court proceedings. He also made a pre-trial motion under *Brady*, which was granted as unopposed. Nevertheless, Petitioner never raised either argument in any state post-conviction proceeding. No New York State court ever had the chance to hear these claims. Petitioner, therefore, failed to exhaust both claims.

These claims are also untimely. The first time Petitioner asserted either claim during the *habeas* process was in his January 14, 2018 supplemental brief. [Dkt. 80 at 12-14.] The filing of the Petition did not toll AEDPA’s one-year limitations period, and therefore the limitations continued to run even when Petitioner initially filed the Petition. *See Rhines*, 544 U.S. at 274 (“the filing of a petition for habeas corpus in federal court does not toll the statute of limitations.”). Because AEDPA’s one-year limitations period ended on October 13, 2013, and the stay was not granted until March 21, 2014, Petitioner’s opportunity to file new claims had already expired.

The Supreme Court has held that a *habeas* petitioner cannot assert new claims that were

⁵ The Court will provide Petitioner with a copy of all unreported cases cited in this Report and Recommendation.

absent from the original petition after the expiry of the limitations period, even where the original petition was timely. *Mayle v. Felix*, 545 U.S. 644, 656-57 (2005). To the extent that a petitioner seeks to assert new claims, the Supreme Court instructed district courts to consider such amendments under the meaning of Fed. R. Civ. P. 15(c)(2)'s relation-back provision. *Id.* at 656. Hence, new claims may be deemed to relate back to the original petition if they arise from the same conduct, transaction, or occurrence. The Supreme Court ruled that each theory under which a *habeas* petition could be granted is to be considered as a discrete transaction and occurrence, and simply relating to the same trial, conviction, or sentence is insufficient to relate back to original pleadings. *Id.* at 662.

Given this framework, Petitioner's claims of prosecutorial misconduct and actual innocence are "new" and do not relate back to his original Petition. The alleged *Brady* violation would have arisen from the prosecution's failure to produce documents and evidence that may have been favorable to Petitioner. The original Petition contains no such argument and does not reference any allegedly exculpatory material relevant under *Brady*. Additionally, Petitioner's *Brady* motion was addressed pre-trial and granted, whereas the *habeas* Petition pertains solely to matters occurring during and after trial. The discrete alleged instances of prosecutorial conduct were also never mentioned in the Petition.

Petitioner's claim of actual innocence is also "new" and does not sufficiently relate back to the complaint. Unlike claims that attack the sufficiency of the evidence used in a conviction which can serve as an independent basis to grant a *habeas* petition, "actual innocence" is not, in itself, a constitutional claim. *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Courts have acknowledged that actual innocence is a distinct a separate claim. *See, e.g., Poindexter v. Nash*, 333 F.3d 372 (2d Cir. 2003) (quoting *Smith v. Murray*, 477 U.S. 527, 537 (1986) ("the concept

of ‘actual[]’ ... innocence is distinct from [the concept of] ‘legal []’ innocence.”). Though Petitioner claimed the evidence was insufficient to support his conviction, he never presented the argument that he was actually innocent to a state court after his conviction. It is, therefore, a new argument that does not relate back to the Petition.

Nevertheless, a district court may still consider unexhausted arguments that are “plainly meritless.” *Rhines*, 544 U.S. at 277. Additionally, a district court may consider “actual innocence” when determining whether certain claims are precluded by procedural bars. For example, a federal court may review a claim that is procedurally barred if the petitioner can show a “fundamental miscarriage of justice,” which occurs where a petitioner is “actually innocent of the crime for which he has been convicted.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Cotto v. Herbert*, 331 F.3d 217, 239 n.10 (2d Cir. 2002). Petitioner’s stand-alone claim for actual innocence, when viewed liberally, can be interpreted as a request to overcome such procedural bars.

Accordingly, I respectfully recommend your Honor consider Petitioner’s stand-alone claim of actual innocence first and deny it on the merits. I recommend that Your Honor deny Petitioner’s claim attacking the sufficiency of the evidence as procedurally barred, or, in the alternative, deny it on the merits. Petitioner’s claim attacking the weight of the evidence should be dismissed because it is not cognizable under *habeas* review. Petitioner’s claims for ineffective assistance of trial and appellate counsel should be denied on the merits. Petitioner’s claim under *Brady* should be dismissed as time barred, or, in the alternative, denied as plainly meritless.

2. Actual Innocence

The Supreme Court has held that “‘actual innocence’ is not itself a constitutional claim

but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” *Herrera*, 506 U.S. at 404. As such, a claim of actual innocence is analyzed in the same manner as a claim made under the “fundamental miscarriage of justice” standard. Therefore, a party seeking *habeas* relief on the basis of actual innocence must not only demonstrate some underlying constitutional violation, but must also come forward with newly discovered evidence showing that his conviction was factually incorrect. *Id.* at 400.

The “fundamental miscarriage of justice” standard is satisfied only under extraordinary circumstances. “Such a miscarriage of justice occurs ‘in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent.’” *Washington v. James*, 996 F.2d 1442, 1447 (2d Cir.1993). A petitioner must show, “by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner [guilty].” *Id.* (citing *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992)). Put another way, Petitioner must present an “extraordinarily high and truly persuasive demonstration of actual innocence.” *Ortiz v. Barkley*, 558 F.Supp.2d 444, 458 (S.D.N.Y. 2008).

Petitioner fails to do so here. In fact, the evidence against him was quite overwhelming. Petitioner was convicted of two counts of first degree murder, both carrying life sentences. Both require a showing that he, “with intent to cause the death of another person, he causes the death of such person or of a third person.” N.Y. Penal Law § 125.27 (McKinney). In addition, the first count required a showing that:

the defendant committed the killing or procured commission of the killing pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement;

N.Y. Penal Law § 125.27(1)(a)(vi) (McKinney). The second count required a showing that:

the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery ... or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime ... provided however, the victim is not a participant in one of the aforementioned crimes and, provided further that, unless the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter;

N.Y. Penal Law § 125.27(1)(a)(vii) (McKinney).

There is no question that Fermina Nunez was murdered, or that Green robbed and killed her. The evidence also shows that Petitioner intended to have Nunez killed. Petitioner attempted to contact Nunez thousands of times and stalked her home, place of work, and family following their breakup, demonstrating his obsession with her. The prosecution argued that this behavior showed motive, that Petitioner was obsessed with asserting control over Nunez, which supports intent.

The other physical and documentary evidence also supports a finding of intent, as well as the other elements of the crimes. Eye witness testimony confirmed that the gun used to kill Nunez belonged to Petitioner. Petitioner's DNA was found on the towel in which the murder weapon was wrapped. The cell tower data confirm that Green and Petitioner were together just hours before the murder and had been right outside of the salon together. The cellular phone records showed the two men spoke to each other just minutes before the murder and immediately after the murder. That Petitioner gave his weapon to Green to carry out the murder, along with the timeline of calls between the two, demonstrate premeditation and planning.

This same evidence supports a finding that Petitioner procured the commission of

Nunez's murder through Green under § 125.27(1)(a)(vi). He assisted Green in the killing by giving him the location, surveying it location with him, and providing the murder weapon. The letters seized from Petitioner's jail cell also support this finding. The letters were undoubtedly written by Petitioner. They were found in his jail cell hidden in his pillow. They contained his DNA and matched his handwriting. They referred to Petitioner and Green by name, referred to Petitioner's attorney by name, referred to Judge De Rosa by name, and discussed Petitioner's legal proceedings in detail. Therein Petitioner admits that he agreed to pay Green to carry out the murder. The letters used certain code words, but the "code" is easy to break: Green's complaint that Petitioner never paid him "10 jellybeans" for the "party" transparently referred to Petitioner's agreement to pay Green for the murder.

The evidence also supports a finding under § 125.27(1)(a)(vii). The evidence shows that Green murdered Nunez right after robbing her salon. Eye witnesses confirmed that Green entered the salon with Petitioner's weapon and robbed Nunez, Carabello, Pecon, and Deslanedes. The telephone conversations between Green and Petitioner prior to the crime, their location at the crime scene just prior to the murder, and the jail cell letters written after the fact support a finding that Petitioner commanded Green to commit the crime.

Green's written confession to police that Petitioner hired him to commit the crime, which was consistent with the remaining evidence of record, is extremely damaging to Petitioner's claim for actual innocence. [Dkt. 90-12 at 90-102.] Petitioner not only acknowledged Green's confession, but has asked Green to change his statement and tried to create an false alibi that the two men were viewing properties during the night of the murder. Petitioner expressly asked Green to change his confession, admitting that it implicated Petitioner in the murder. Green's confession was never presented at Petitioner's trial, and, therefore, would not be relevant when

examining the sufficiency of the evidence. However, a claim for actual innocence does not concern procedural issues at trial, but instead, “actual, factual innocence.” *Schlup*, 513 U.S. at 324. Though the confession was not before the jury, it is before the Court for purposes of assessing Petitioner’s actual innocence claim, and it presents a compelling case of Petitioner’s guilt which he simply does not overcome.

But for Petitioner’s conclusory and self-serving assertions, Petitioner provides no compelling evidence that he is actually innocent. Instead, he relies on piecemeal and disjointed statements that, when taken together, defy logic. He attempts to explain his telephone calls with Green by claiming that he was helping Green purchase property in Middletown. Indeed, the evidence showed that Petitioner worked in real estate. Even so, Petitioner’s argument falls flat. The prosecution produced a detailed timeline of their phone conversations, and the cellular tower data mapped their physical locations during their calls. For the most part, the two were either nowhere near each other during their calls, or they were in the Bronx, not examining properties in Middletown. The only exception was when both men were calling each other near the salon where the murder took place on the day it took place. Any jury would be hard-pressed to believe that Green and Petitioner were discussing properties minutes before the murder, and that Green called Petitioner to schedule an open house minutes after he murdered Nunez.

Petitioner’s bizarre explanation falls apart even more when viewed in light of the letters recovered from his jail cell. Petitioner, after criticizing Green for admitting to the murder to the police, instructed him to change his story. Petitioner directed Green to change his statement to the police and create an alibi that they were viewing properties together, and Petitioner named specific properties and provided Green with their descriptions and locations. This story is the exact argument that Petitioner presents in his Petitioner. The *post hoc* creation of this false alibi

undermines Petitioner's story.

Petitioner's new evidence is unavailing. First, Petitioner introduces a December 7, 2006 check for \$10,000 made to Karen Bryant, with the memo reading "Re: Patrick Bowie 57 Prospect Avnue." Petitioner claims that this check proves that he did not pay Green to carry out the murder. Petitioner also makes an ambiguous reference to testimony from a bank employee to explain the transaction. Petitioner's argument is misplaced. The crime of first degree murder under Section 125.27(1)(a)(vi) requires a showing that Petitioner agreed to pay Green to carry out the murder, not that Petitioner actually paid Green. The evidence showed that such an agreement occurred, namely the jail cell letters where Green and Petitioner discuss exchanging "jellybeans" for the party, and using "jellybeans" to pay their attorneys fees. Green's confession similarly supports that the agreement occurred. The claim that Green never received payment is irrelevant. In fact, it was the prosecution's theory that Green never received payment. When Petitioner chastised Green for confessing to the police, Green complained to Petitioner that Petitioner never paid him. Thus, Petitioner's claim that he never paid Green actually conforms to the prosecution's case.

The fact that Petitioner may have conducted other, legitimate business is irrelevant. The evidence shows that Petitioner worked in real estate, and, therefore, Petitioner had the means to pay Green. The fact that Petitioner may have engaged in other business transactions in no way exonerates him from the commission of a contemporaneous crime, nor does it detract from the overwhelming evidence of his guilt. It is true that the prosecution submitted Petitioner's bank records into evidence, but they never argued that that specific transaction on December 7, 2006 was to pay Green. Instead, the bank records were used to match Petitioner's handwriting with the letters seized from his jail cell. They were also used to demonstrate that Petitioner had the

capability of paying Green to carry out the murder. Neither the check nor testimony from a bank employee, therefore, undercut the people's argument that Petitioner agreed to pay Green to carry out the murder.

Petitioner introduced an October 17, 2018 sworn affidavit by Green stating that both he and Petitioner were innocent. He also introduced a second affidavit from Green maintaining his innocence. [Dkt. 80 at 42-43.] Green's sworn affidavit, almost a decade after Petitioner's conviction, carries no weight. Green changed his story multiple times and was eventually convicted in his own trial. The evidence shows that Petitioner urged him to change his story yet again, by way of the letters seized from his jail cell. That Green, once again, changed his story and signed a self-serving affidavit carries no credibility.

Petitioner introduced forensic evidence which similarly does nothing to support his claim. He refers to an April 17, 2007 DNA analysis of the gun, which states there is insufficient residue to determine a DNA match. [Dkt. 80 at 22-24.] He also refers to a January 16, 2007 latent fingerprint report showing that there were no fingerprints on the gun or bullets. [Dkt. 80 at 24.] However, this is irrelevant, particularly because Petitioner was not the shooter; Green fired the weapon. Moreover, Petitioner's DNA was found on the towel in which the gun was wrapped, which Petitioner ignores. The absence of Petitioner's DNA or fingerprints does not overcome the overwhelming evidence linking Petitioner to the weapon.

Finally, Petitioner makes vague references to "additional" evidence allegedly collected by a private investigator. [Dkt. 60 at 15.] Petitioner submitted no such evidence, despite being given the opportunity to do so. Vague references to unknown, unnamed evidence simply do not present a compelling case for innocence. Petitioner's claim that he is actually innocent, therefore, fails to satisfy the high burden, and Petitioner fails to demonstrate a miscarriage of

justice.

3. Sufficiency of the Evidence

Petitioner's claim that the verdict was based on insufficient evidence is procedurally barred from federal review because it was decided based on adequate state-law grounds independent of a federal question. Even if not procedurally barred, the claim fails on the merits.

Federal courts are generally not permitted to review questions of federal law presented in a petition for *habeas corpus* when the decision rests upon state-law grounds independent of the federal question and adequate to support the judgment. *Cone v. Bell*, 556 U.S. 449, 465 (2009). A state law ground is "adequate" if the rule, "is firmly established and regularly followed by the state in question." *Whitley v. Ercole*, 642 F.3d 278, 286 (2d Cir. 2011).

The Appellate Division denied Petitioner's claim of insufficiency of the evidence based on an independent and adequate state law ground, that Petitioner had failed to preserve his claim by raising a contemporaneous objection at trial. *People v. Bowie*, 83 A.D.3d at *1. Petitioner, through counsel, made a general motion for a trial order of dismissal, but did not specifically direct the motion on the issue of sufficiency of the evidence. [Dkt. 90-27 at 76.] It is well settled that New York State's contemporaneous objection rule is an adequate and independent state-law ground to bar federal *habeas* review. *See, e.g., Kozlowski v. Hulihan*, 511 F. App'x 21, 25 (2d Cir. 2013). Under this rule, in order to preserve a challenge to the legal sufficiency of a conviction for review by the Appellate Division, a criminal defendant must move for a trial order of dismissal, and that argument must be "specifically directed" at the error being urged. *People v. Hawkins*, 11 N.Y.3d 484, 492 (N.Y. 2008). "As we have repeatedly made clear—and underscore again—general motions simply do not create questions of law for this Court's review." *Id.* Even though the Appellate Division proceeded to consider, and deny, Petitioner's

claim on the merits, the claim is still procedurally barred. “When a state court says that a claim ‘is not preserved for appellate review’ but then rules ‘in any event’ on the merits, such a claim is procedurally defaulted. *Green v. Travis*, 414 F.3d 288, 294 (2d Cir. 2005). Therefore, Petitioner’s claim is procedurally barred.

As stated, a federal court may review a claim that is barred by an independent and adequate state law ground if, “the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 729. In order to establish prejudice, Petitioner must show that the alleged errors at trial resulted in a, “substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Gutierrez v. Smith*, 702 F.3d 103, 112 (2d Cir. 2012). A fundamental miscarriage of justice occurs where a petitioner, “is actually innocent of the crime for which he has been convicted.” *Cotto v. Herbert*, 331 F.3d 217, 239 n.10 (2d Cir. 2002). Petitioner has not argued that there was cause for procedural, default, or actual prejudice, and the record does not demonstrate any such prejudice. As explained, Petitioner’s claim for actual innocence fails. Petitioner’s claim for legal sufficiency is, therefore, procedurally barred.

Even if this claim is not procedurally barred, it fails on the merits. In reviewing such a claim, the Court must consider whether, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Cavazos v. Smith*, 565 U.S. 1, 7 (2011). Put another way, Petitioner must show that, “no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *McDaniel v. Brown*, 558 U.S. 120, 121 (2010). A reviewing court must apply this standard, “with explicit reference to the substantive elements of the criminal offense

as defined by state law.” *Langston v. Smith*, 630 F.3d 310, 314 (2d Cir. 2011).

Here, the prosecution submitted ample evidence to satisfy the charges of first degree murder under Sections 125.27(1)(a)(vi) and (vii) and to support each element of the crimes. Petitioner does not attack the sufficiency of the evidence linking Green to the crime. “There undoubtedly was sufficient evidence to demonstrate that Melvin Green was the robber who killed Fermina Nunez.” [Dkt. 1 at 20.] Rather he attacks the sufficiency of the evidence linking himself to Green, in light of the fact that he himself did not pull the trigger. However, it is well settled under New York State law that, as here, an individual may be convicted under Sections 125.27(1)(a)(vi) and (vii) even when he is not the individual who carried out the murder. *See, e.g., People v. Glanda*, 5 A.D.3d 945, 945-46 (N.Y. App. Div. 3d Dep’t 2004).

Petitioner argues that the use of circumstantial evidence was insufficient to warrant a conviction, as opposed to direct evidence. Petitioner also challenges the use of the circumstantial evidence charge, without explanation. Federal courts make no such distinction. “Circumstantial evidence in this respect is intrinsically no different from testimonial evidence.” *Holland v. United States*, 348 U.S. 121, 140 (1954). It is similarly well-settled in New York that criminal defendants may be convicted on the basis of circumstantial evidence. *See, e.g., People v. Alexander*, 153 A.D.2d 507, 507 (N.Y. App Div. 1st Dep’t 1989), *aff’d*, 75 N.Y.2d 979 (N.Y. 1990). To that end, “the law draws no distinction between direct and circumstantial evidence in requiring the government to carry its burden of proof.” *United States v. MacPherson*, 424 F.3d 183, 190 (2d Cir. 2005). Juries are thus able to draw reasonable inferences base on circumstantial evidence. Judge De Rosa made this clear in the jury charge on circumstantial evidence. [Dkt. 90-22 at 22.] There was no error, therefore, in the use of circumstantial evidence to convict Petitioner, nor was there any defect in the charge itself.

Petitioner argues that the inferences on which the jury convicted him required “too many leaps in logic and questionable inference to support it.” [Dkt. 1 at 20.] I disagree. In principal, there is no problem in convicting an individual based on reasonable inferences. “The possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter to sufficiency analyses because ‘it is the task of the jury, not the court, to choose among competing inferences.’” *United States v. MacPherson*, 424 F.3d at 190. Even so, the inferences were, in fact, reasonable and closely related to the evidence.

Petitioner attacks the circumstantial nature of the evidence used to find that he intended to have Nunez killed, claiming that he never intended her any harm. [Dkt. 1 at 21.] Based on the intangible nature of intent, “intent is often established by circumstantial evidence.” *United States v. Anderson*, 747 F.3d 51, 66 (2d Cir. 2014). Here, it was reasonable for the jury to find, based on Petitioner’s actions and statements to Nunez and her family, his exchanges with Green, and the documentary evidence, that Petitioner both planned the murder and intended for Green to shoot Nunez.

Petitioner argues that the phone calls could have been about anything. This argument is an issue of fact that was left for the jury. Here, the evidence is viewed in the light most favorable to the prosecution. Petitioner, therefore, cannot rely on speculation and hypothetical possibilities, and must instead demonstrate that no reasonable jury could have reached the instant finding. Petitioner’s pontificating about possible conversation topics is, therefore, inappropriate here. To be sure, the jury’s factual finding as to the content of his conversations with Green was not only reasonable but also sufficiently supported by the evidence, and it is not for the Court to reassess the evidence upon review.

Notably, the jury convicted Petitioner on more than just circumstantial evidence. DNA

evidence and eyewitness testimony showed that the murder was committed using Petitioner's weapon. The cellular tower data placed Petitioner near the scene of the crime hours before the murder, and telephone records showed him speaking with Green just before and after the crime. The letters seized from his jail cell, which contained his DNA, were tantamount to a confession. In any event, there was sufficient evidence to convict Petitioner.

Petitioner's remaining arguments are without merit. Petitioner attacks the evidence regarding his self-inflicted wounds when he was arrested. A reasonable jury could infer consciousness of guilt, insofar as Petitioner apparently attempted to take his own life after realizing that he had been caught. Petitioner stated that no one at trial testified that he wanted to harm Nunez, which was simply not true. Nunez's brother, for example, testified that Petitioner made threats against Nunez and her family.

Petitioner challenges the admissibility of the letters seized from his jail cell on the basis that Avila violated a separate court order. Petitioner introduces what appears to be an assortment of documents associated with Avila's criminal history, including a fingerprint record, past addresses, and security alerts. [Dkt. 60 at 34-72.] This includes a court-ordered injunction against Avila from reaching out to law enforcement except with permission. *Id.* at 63-72. Avila's compliance, or alleged lack thereof, of a separate court order in a completely unrelated case has nothing to do with Petitioner's case and the admissibility of evidence. The prosecution obtained the letters through their investigation with assistance from Avila and his attorney. They successfully established sufficient grounds to lay a foundation for their admission. Therefore, the letters constitute valid, sufficient evidence supporting Petitioner's guilt. In the light most favorable to the prosecution, Petitioner fails to show that the evidence was insufficient.

4. Weight of the Evidence

Petitioner also seeks relief on the basis that his conviction was against the weight of the evidence. A claim based on the “weight of the evidence” is separate and distinct from a claim based on “insufficiency of the evidence.” *Smith v. Lee*, Case No. 11 Civ. 0530 (MKB), 2014 WL 1343066, at *10 (E.D.N.Y. Mar. 31, 2014). A claim attacking the weight of the evidence is based in state law and is not reviewable in a federal habeas proceeding. *Id.* (citing *McKinnon v. Superintendent, Great Meadow Corr. Facility*, 422 F. App’x 69, 75 (2d Cir. 2011)).

Accordingly, this claim should be dismissed.

5. Ineffective Assistance of Trial Counsel

Petitioner argues that his trial counsel was ineffective because he: a) failed to meet with and prepare witnesses; b) failed to investigate and prepare for trial; c) failed to object to the search, seizure, and admission of letter's from Petitioner's jail cell; d) failed to object to Green's appearance at trial wearing an orange jumpsuit; e) failed to object to prosecutorial misconduct during summation; f) failed to pay biennial dues; and g) failed to preserve certain arguments for appeal.

In order to establish a claim for ineffective assistance of trial counsel, Petitioner must demonstrate: (1) that his attorney’s performance “fell below an objective standard of reasonableness,” and (2) that there is a “reasonable probability” that, but for counsel’s error, “the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984). “The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel flounder on that standard.” *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001). Here, “AEDPA review must be ‘doubly deferential’ in order to afford ‘both the state court and the defense attorney the benefit of the doubt.’” *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)) (internal

quotations omitted).

Under the first prong, “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005) (quoting *Strickland*, 466 U.S. at 690). The second prong focuses on prejudice, and Petitioner bears the burden of establishing both deficient performance and prejudice. *See Greiner*, 417 F.3d at 319. However, “there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Strickland*, 466 U.S. at 697.

a. Failure to Meet with and Prepare Witnesses

“The decision not to call a particular witness is typically a question of trial strategy,” *Pierre v. Ercole*, 560 F. App'x 81, 82 (2d Cir. 2014) (quoting *Greiner*, 417 F.3d at 323), and, “[t]hus, the decision ‘whether to call specific witnesses—even ones that might offer exculpatory evidence—is ordinarily not viewed as a lapse in professional representation.’” *Id.* (quoting *United States v. Best*, 219 F.3d 192, 201 (2d Cir.2000)). Moreover, “complaints of uncalled witnesses are not favored in federal habeas review, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified [to] are largely speculative.” *Hodges v. Bezio*, Case No. 09 Civ. 3402, 2012 WL 607659, *10 (E.D.N.Y. Feb. 24, 2012) (citations omitted).

Petitioner argues that his attorney should have called a witness from the bank to explain a certain bank transaction where Petitioner took out a check for \$10,000.00 on December 7, 2020, as well as an individual who conducted the alleged real estate transaction. As noted above in connection with Petitioner’s actual innocence claim, Petitioner’s rationale for this testimony is misdirected, because the prosecution never argued that the \$10,000 check was used to finance

the murder. Instead, the prosecution theory – bolstered by the jailhouse correspondence – was that Petitioner *never* paid Green the agreed-upon bounty for the murder. Instead, the bank records served as known samples of Petitioner’s handwriting, and also demonstrated that Petitioner had the financial wherewithal to pay for the killing. Counsel’s decision not to call witnesses to testify about the purported real estate transaction was therefore well within the bounds of sound trial strategy.

Petitioner argues that his attorney should have called Shawn Weiss, a DNA expert from North Carolina [Dkt. 60 at 9], in order to rebut evidence linking Petitioner to the letters found in his jail cell. The record is clear that counsel acted diligently to obtain expert assistance. He made a pre-trial motion to secure funds for an expert, which he renewed before the trial commenced. The motion was granted, and counsel secured funds with leave to seek more if needed. The record shows that counsel reached out to Mr. Weiss but ultimately decided not to call him. The evidence convincingly demonstrates that Petitioner’s DNA was present on the jailhouse letters, and Petitioner provides no evidence that Mr. Weiss would have offered testimony rebutting that evidence. The only other mention of DNA evidence were reports showing Petitioner’s DNA on the towel in which Green hid the gun, and showing the absence of DNA on the gun itself. Again, trial counsel is afforded great deference in deciding, as a point of strategy, not to call witnesses who may be superfluous or, at worst, detrimental to his client.

Finally, Petitioner makes a vague reference to “other witnesses” but fails to name any or what they would have allegedly stated. This complete lack of specificity is fatal to this claim. Considering Petitioner’s high burden coupled with the deference given to counsel, Petitioner simply cannot rely on pure speculation. In any event, a review of the trial transcript shows that plaintiff’s attorney did call witnesses to testify on his behalf, including Cappellan. [Dkt. 90-28

at 2-78, 90-29 at 1-17.] Petitioner's argument that his counsel failed to meet with and prepare witnesses, therefore, should be rejected.

b. Failure to Investigate and Prepare for Trial

Petitioner makes a conclusory accusation that his attorney "fail[ed] to investigate and prepare for trial." [Dkt. 80 at 5.] Petitioner's state court filings, Petition, and supplemental pleadings shed no further light on this argument. Petitioner merely states, "Trial counsel had substantially failed to rebut the prosecutor's theory at trial" and that he "failed to uncover exonerating evidence." *Id.* at 12-13. Petitioner's only specific contention is that counsel did not present evidence regarding the December 7, 2006 check for \$10,000.00, which, Petitioner argues, is "unquestionable documentary proof" of his innocence. [Dkt. 80 at 2-3.] As noted above, this argument is meritless. It was well within counsel's discretion in crafting the trial strategy to choose not to proffer meritless arguments.

In general, the right to effective assistance of counsel does not guarantee perfect representation. *See, e.g., Morris v. Garvin*, Case No. 98 Civ. 4661(JG), 2000 WL 1692845, at *3 (E.D.N.Y. Oct. 10, 2000). Certainly, the fact that Petitioner ultimately lost his case does not show that his attorney was ineffective. Moreover, a review of the record shows that counsel did, in fact, investigate and prepare for trial. Notably, Mr. Camacho was not a court-appointed attorney but was privately retained by Petitioner. Petitioner contacted him hours after the murder. Mr. Camacho immediately met with Petitioner that day before accompanying him to speak with the police and advised Petitioner during the voluntary police interview. Counsel appeared at each hearing and at trial, competently represented Petitioner in pre-trial and trial matters, and adequately presented Petitioner's defense. Petitioner points to no evidence that counsel failed to prepare or investigate, but for Petitioner's dissatisfaction with the ultimate

result.

c. Failure to Object to the Search, Seizure, and Admission of Letters from Petitioner's Jail Cell

Petitioner asserts a plethora of arguments as to why his counsel should have challenged the search of his jail cell and the seizure and admission of the letters resulting from the search. He calls the search itself illegal. He argues that the letters were privileged mail. He challenges their foundation, claiming insufficient evidence tying him to the letters. He invokes the Sixth Amendment confrontation clause. He claims that the police were not allowed to speak with Avila. These arguments should be rejected.

The search was not illegal. Pretrial detainees have a limited and diminished reasonable expectation of privacy to their cells. *Bell v. Wolfish*, 441 U.S. 520, 557 (1979) (“any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope.”); *United States v. Friedman*, 300 F.3d 111, 123 (2d Cir. 2002) (“pretrial detainees may have some residual privacy interests that are protected by the Fourth Amendment...”). Moreover, the police obtained and executed a valid search warrant to obtain the letters. Petitioner does not offer any specific argument to challenge the validity of the search or the warrant, but for a conclusory statement that it was illegal.

The letters were not privileged. They were not attorney/client communications or work product concerning litigation. They did not pertain to medical conditions. They were not between spouses. These were communications between Petitioner and Green. I cannot identify, and Petitioner does not invoke, a single valid privilege under which the communications may fall.

The Supreme Court has recognized certain protections for inmates concerning their mail,

but none of those protections apply here. Inmates have a first amendment right to send and receive mail, but non-privileged mail may still be opened outside the presence of an inmate. *Martin v. Tyson*, 845 F.2d 1451 (5th Cir. 1988) *cert. denied* 488 U.S. 863 (1988). Moreover, the letters were not “mail.” Instead, these were clandestine messages Petitioner exchanged with Green and transmitted via Avila, messages which Petitioner would have preferred to keep hidden, given how incriminating they were to his case. Merely wishing that a writing be kept secret is insufficient to establish a legal privilege.

There was a sufficient foundation to introduce the letters and link them to Petitioner. There was DNA evidence as well as handwriting identification, the letters were recovered from Petitioner’s pillow, and they include identifiable references to Petitioner and his case. Petitioner offers no rebuttal, apart from conclusory and self-serving allegations.

Petitioner also asserts that trial counsel should have objected to the search itself, but this argument, too, would have been meritless. New York, like federal, law limits review of the validity of a search warrant to an analysis of “the sufficiency of what is found within the four corners of the underlying affidavit.” *Lopez v. Greiner*, 323 F. Supp. 2d 456, 473 (S.D.N.Y. 2004), *aff’d*, 159 F. App’x 320 (2d Cir. 2005) (citing *People v. Roberts*, 600 N.Y.S.2d 582, 583 (4th Dep’t 1993)). A warrant is valid if it describes the places to be searched or items to be seized and is supported by probable cause. *Id.* The New York Court of Appeals has construed New York State’s constitution as requiring a higher threshold showing of probable cause than what federal law requires. *Id.* The Supreme Court has held that courts should analyze the totality of the circumstances to evaluate the sufficiency of a warrant affidavit. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

In New York, warrants based on informants must satisfy a two-prong test. First, the

warrant application must establish the veracity of the informant's information, and second must establish the basis for the informant's knowledge, known as the *Aguilar/Spinelli* test. *Lopez*, 323 F. Supp. 2d at 473-74 (citing *People v. Griminger*, 71 N.Y.2d 635, 640 (N.Y. 1988)); see *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).

Here, the warrant application satisfied both prongs. The warrant sought the written correspondence hidden in Petitioner's jail cell passed through Avila to Green. The warrant set forth ample probable cause, describing with specificity Avila's meetings and communications with Petitioner and Green, and detailing the manner in which he helped them pass letters back and forth. Avila had provided 15 examples of the letters, further bolstering his credibility. Avila had personally observed these conversations and the specific letters. The warrant, and the search that followed, were both valid. Thus, counsel was not required to object to the search, because any such objection would have been plainly meritless.

Petitioner also invokes the Sixth Amendment confrontation clause, to no avail. To the extent that Petitioner's argument is addressed to Avila's role in the recovery of the letters, no confrontation issue arises because no statement from Avila were admitted at trial; instead, the letters were authenticated through other evidence. To the extent that Petitioner suggests that a confrontation clause objection would have barred admission of the letters themselves, that contention is without merit because the letters were not "testimonial" and were admissible as statements in furtherance of the conspiracy between Petitioner and Green. See *Crawford v. Washington*, 541 U.S. 36, 51, 56 (2004). Because such an objection would have been futile, counsel was under no obligation to make the objection.

d. Failure to Object to Green's Appearance Wearing an Orange Jumpsuit at Petitioner's Trial

Petitioner appears to argue that his attorney should have objected when the prosecution had Green produced during the trial so that eyewitnesses could identify him as the shooter. Although Green had already been tried and convicted of the Nunez murder at the time of Petitioner's trial, those facts were not before the jury, so the prosecution had to prove that Green was the killer in order to establish Petitioner's role in procuring the crime. There is no real argument that Green's identification was not relevant and admissible at Petitioner's trial, so there is also no basis for Petitioner's contention that his attorney was derelict in not objecting to this evidence.

Petitioner also asserts that his attorney should have objected when Green was produced before the jury in an orange prison jumpsuit. But trial counsel may have reasoned that the visual contrast between Petitioner – on trial in street clothes – and Green in the telltale jumpsuit played well for Petitioner before the jury, a strategic judgment which is immune from scrutiny under *Strickland*. Moreover, in light of the of evidence that Green committed a cold-blooded homicide, it is inconceivable that Green's appearance in prison garb unfairly prejudiced Petitioner or affected the outcome of his trial. *Cf. Jefferson v. LeClair*, 417 F. Supp. 3d 462, 477-78 (E.D.N.Y. 2013) (even claims that the *accused defendant* was made to appear before the jury in prison garb are subject to harmless error analysis) (collecting cases). The Second Department concluded as much on direct appeal, despite the lack of an objection, summarily rejecting Petitioner's argument (advanced in his supplemental *pro se* brief) that he was prejudiced by Green's appearance in the jumpsuit. 83 A.D.3d at 729.

e. Failure to Object to Prosecutorial Misconduct During Summation

Petitioner argues that his counsel failed to object to alleged prosecutorial misconduct during summation. Petitioner fails to identify any such misconduct during summation, but for

his own vague references.⁶ In any event, a review of the prosecutor's summation does not show any misconduct. The prosecutor carefully recounted the evidence and testimony that had been admitted during trial and stayed within the record. The prosecutor did not make any inflammatory or overly prejudicial statements and stayed within the confines of the law. Petitioner fails to make a showing that his counsel should have objected to anything during the prosecutor's summation, and thus fails his burden under *Strickland*.

f. Failure to Pay Biennial Dues

Petitioner provides an excerpt of a news article indicating that his attorney may not have paid his biennial bar registration fees on time at the time of trial. [Dkt. 60 at 99-100.] Petitioner's argument is nothing more than an ad hominem and completely irrelevant attack against his attorney. This argument is not rooted in *Strickland* and does nothing to satisfy either prong.

g. Failure to Preserve Claims for Appellate Review

Petitioner argues that he was prejudiced when trial counsel failed to preserve certain arguments for appellate review. [Dkt. 80 at 6.] The Appellate Division, in denying Petitioner's direct appeal, noted that Petitioner's arguments for sufficiency and weight of the evidence were unpreserved. Even though counsel made a motion for a trial order of dismissal, the motion did not specifically raise those grounds. Nevertheless, Petitioner fails to show prejudice under *Strickland* because the Appellate Division went on to consider both claims in the alternative and denied them on the merits. Moreover, I have reviewed the evidence above and conclude as well

⁶ Petitioner refers to other alleged instances of prosecutorial misconduct as a standalone claim, but not during summation as related to his ineffective assistance of counsel claim. Those allegations are addressed below.

that the evidence was sufficient to support the convictions. Petitioner, therefore, fails to satisfy the second prong of *Strickland*.

6. Ineffective Assistance of Appellate Counsel

Petitioner claims that his appellate counsel was ineffective for failing to raise the confrontation clause issue and for failing to raise ineffective assistance of trial counsel. The two-part test under *Strickland* applies. See *Aparicio v. Artuz*, 269 F.3d 78, 95 (2d Cir. 2001) (“Although it was born in the context of ineffective assistance of trial counsel, *Strickland*’s two-prong test applies equally to claims of ineffective assistance of appellate counsel on a defendant’s first appeal as of right.”) (internal citations omitted).

Petitioner’s claim clearly fails under *Strickland*’s second, prejudice prong. Even though appellate counsel did not raise these issues, Petitioner filed a *pro se* supplemental brief raising all of these arguments. The state responded, and the Appellate Division rejected the arguments on the merits. Given that the arguments were raised by Petitioner and rejected on the merits, Petitioner fails to show a reasonable probability that the outcome would have been different had his appellate counsel raised those issues herself.

Regardless, Petitioner’s claim fails on the first prong as well. As analyzed above, Petitioner’s confrontation clause and ineffective assistance of trial counsel claims are without merit, so Petitioner’s appellate counsel had no obligation to raise them. “The failure to include a meritless argument does not fall outside the ‘wide range of professionally competent assistance’ to which Petitioner was entitled. *Aparicio*, 269 F.3d at 99 (internal citation omitted).

7. Prosecutorial Misconduct

As noted above, this claim is untimely and unexhausted. In the event Your Honor concludes otherwise, Petitioner’s claim for alleged prosecutorial misconduct should nonetheless

be denied as plainly meritless. “The appropriate standard of review for a habeas corpus claim alleging prosecutorial misconduct is the narrow one of due process, and not the broad exercise of supervisory power. The petitioner must demonstrate that the alleged misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Williams v. Artus*, Case No. 11 Civ. 5541, 2013 WL 4761120, at *12 (E.D.N.Y. Sept. 4, 2013). A prosecutor’s misconduct cannot give rise to a constitutional claim absent “egregious misconduct.” *Morris v. Kikendall*, Case No. 07 Civ. 2422, 2009 WL 1097922, at * 15 (E.D.N.Y. Apr. 23, 2009).

Petitioner’s accusations that the prosecution committed a “fraud” on the court [Dkt. 80 at 11-12] or “mislead the jury” [Dkt. 80 at 3] are conclusory and should be rejected on that basis. The few articulated allegations, also vague and conclusory, similarly fail.

Petitioner argues that the prosecution misled the jury by introducing his bank records into evidence. He similarly accuses the prosecution of misconduct because they did not move into evidence a copy of the December 7, 2006 check. Even if the prosecution had argued that the December 7 transaction was used to pay Green, it would not have been “fraud.” Rather, that argument would have been a question of fact about which the jury could draw a reasonable inference. It is well settled that juries are allowed to draw reasonable inferences from evidence presented to them. *Jones v. Duncan*, 162 F. Supp. 2d 204, 216 (S.D.N.Y. 2001) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Even so, the prosecution never made this argument. They introduced Petitioner’s bank records to establish that Petitioner had the wherewithal to pay Green, and to identify his handwriting. The prosecution’s theory was that Green was never in fact paid for the crime.

Petitioner argues that he was prejudiced when the County Court allowed evidence of

potatoes at the scene of the crime, as well as investigators' observations that there were potatoes in Petitioner's kitchen. Judge De Rosa allowed the jury to hear this evidence and determined that any issues related to weight of the evidence. It was proper to allow the jury to make a reasonable inference that when Petitioner gave Green his gun to carry out the murder, he also gave him a potato to use as a "Bronx silencer." Judge De Rosa excluded the phrase "Bronx silencer," but still allowed the jury to hear evidence about the potatoes. Allowing the jury to consider this evidence was certainly reasonable in light of the fact that Green had stated that Petitioner had given him a potato along with the gun. In fact, whereas Petitioner claims that the prosecution spent an exorbitant amount of time discussing potatoes, the prosecution actually only mentioned potatoes once, when questioning Detective Miller about what he saw at the scene of the crime, and never mentioned them again.

Petitioner argues that the testimony of Carabello and Deslandes were both "relevant" and could establish that the prosecution prejudiced Petitioner at trial. Both women were eyewitnesses to the killing, and Petitioner points to testimony, elicited by his attorney on cross-examination, suggesting that their identifications of Green as the shooter were equivocal or were tainted by police coercion. [Dkt. 80, ECF pp. 26 - 33, *annotating trial transcript* pp. 263 - 366 (Delandes), 26 - 33 (Carabello).] But these facts were fully vetted before the jury at trial, and, as noted elsewhere, there was ample additional evidence implicating Green. Petitioner in no way establishes any prosecutorial misconduct claim on the basis of these witnesses' testimony.

Petitioner argues that he was prejudiced by Investigator Manley's testimony. Investigator Manley was in charge of reviewing cellular tower data tracking Petitioner's phone. The prosecution called another witness, Natalie Erdossy, a custodian of records for Sprint Nextel, who explained that when an individual places a call on a cellular device, it will connect

to the strongest tower, which is typically the tower closest to the individual. She also verified the authenticity of the cellular tower data which Investigator Manley used. Investigator Manley explained how the records showed which physical cellular towers were used when Petitioner placed various calls, and how he was able to deduce Petitioner's location during the calls. This evidence was not only probative but extremely damaging to Petitioner's alibi. There was nothing unfair about this testimony, and Petitioner's argument appears to rest simply on the fact that the testimony was harmful to the defense.

Petitioner accuses the prosecution of misconduct in contacting Avila. He points to an injunction, issued in a completely unrelated case, which prohibited Avila from speaking with law enforcement on his own, and then accuses the prosecution of violating the court order. Even if this were true, Petitioner fails to show how this affected his due process rights. In any event, the prosecution did not violate the order. The order prohibited Avila from contacting police on his own. Here, Avila contacted his attorney, who in turn contacted law enforcement. Investigator Reinle testified that Avila spoke through his attorney, to whom Avila provided the documents. Petitioner fails to show, therefore, that the prosecution's communications with Avila violated his due process rights.

Finally, Petitioner alleges that the prosecution violated his rights under *Brady*. The Supreme Court has held that prosecutors cannot withhold material, exculpatory evidence from a criminal defendant. *Brady v. Maryland*, 373 U.S.83, 91 (1963). But Petitioner identifies no evidence which would have triggered *Brady*. The closest Petitioner comes to identify *Brady* material are his bank records. This material does not fall under *Brady*, because they were neither exculpatory, nor were they withheld. At trial, when the records were admitted, the prosecution stated that they had already been turned over to Petitioner. The copy of the December 7, 2006

check was already in Petitioner's possession. Petitioner identifies no other possible *Brady* material.

Petitioner makes no other specific allegations of prosecutorial misconduct. A review of the record, including the pre-trial and trial transcripts, similarly do not reveal any misconduct by the prosecution. Petitioner, thus, fails to satisfy the extremely high bar of showing that the prosecution acted so egregiously as to deny him his due process rights.

IV. CONCLUSION

For the reasons set forth above, I conclude, and respectfully recommend that Your Honor conclude, that the instant Petition for a Writ of Habeas Corpus be denied. I recommend that no certificate of appealability be issued because reasonable jurists would not find it debatable that Petitioner has failed to demonstrate by a substantial showing that he was denied a constitutional right. *See* 28 U.S.C. § 2253 (c); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Dated: May 14, 2021
White Plains, New York

Respectfully submitted,



Paul E. Davison, U.S.M.J.

NOTICE

Pursuant to 28 U.S.C. § 636(b)(1)(C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts, the parties shall have fourteen (14) days from service of this Report and Recommendation to serve and file written objections. If copies of this Report and Recommendation are served upon the parties by mail, the parties shall have an additional three (3) days, or a total of seventeen (17)

days, from service of this Report and Recommendation to serve and file written objections. *See also* Fed. R. Civ. P. 6(a). Such objections, if any, along with any responses to the objections, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of the Honorable Kenneth M. Karas, at the Honorable Charles L. Briant Jr. Federal Building and United States Courthouse, 300 Quarropas Street, White Plains, New York 10601, and to the chambers of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered. *See Caidor v. Onondaga County*, 517 F.3d 601, 604 (2d Cir. 2008).

Requests for extensions of time to file objections must be made to Judge Karas.

Copy Mailed to:

Patrick Bowie
DIN # 07A5516
Green Haven Correctional Facility
P.O. Box 4000
Stormville, NY 12582

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK BOWIE,

Petitioner,

v.

WILLIAM LEE, Superintendent, Green
Haven Correctional Facility,

Respondent.

No. 13-CV-7317 (KMK) (PED)

ORDER ADOPTING REPORT &
RECOMMENDATION

Appearances:

Patrick Bowie
Stormville, NY
Pro Se Petitioner

Andrew R. Kass, Esq.
Orange County District Attorney's Office
Goshen, NY
Counsel for Respondent

KENNETH M. KARAS, United States District Judge:

Patrick Bowie ("Petitioner"), proceeding pro se, has filed a Petition for a Writ of Habeas Corpus (the "Petition"), pursuant to 28 U.S.C. § 2254, challenging his August 30, 2007 conviction, following a jury trial in New York Supreme Court, Orange County ("County Court"), for two counts of Murder in the First Degree, four counts of Robbery in the First Degree, one count of Criminal Possession of a Weapon in the Second Degree, and one count of Conspiracy in the Second Degree. (*See generally* Pet. for Writ of Habeas Corpus ("Pet.") (Dkt. No. 1).)

Petitioner timely filed a direct appeal of his conviction to the New York Supreme Court, Appellate Division, Second Department ("Second Department"), which affirmed the conviction on April 5, 2011. *See People v. Bowie*, 919 N.Y.S.2d 893 (2d Dep't 2011). The New York

Court of Appeals (“Court of Appeals”) denied Petitioner’s motion for leave to appeal on July 26, 2011, *see People v. Bowie*, 17 N.Y.3d 804 (2011), and denied Petitioner’s motion for reconsideration of that denial on July 16, 2012, *see People v. Bowie*, 19 N.Y.3d 971 (2012).

On October 15, 2013, Petitioner moved before the County Court to vacate his conviction pursuant to New York Criminal Procedure Law (“NY CPL”) § 440.10 (“First 440.10 Motion”), which the County Court denied on July 30, 2014. (*See Resp’t’s Mem. of Law in Opp’n to Pet. (“Resp’t’s Opp’n”) (Dkt. No. 89) Exs. 40 & 44.*)¹ The Second Department denied Petitioner’s motion for leave to appeal on February 20, 2015, (*see Resp’t’s Opp’n Ex. 48*), and the Court of Appeals denied Petitioner’s motion for leave to appeal on May 25, 2015, *see People v. Bowie*, 25 N.Y.3d 1069 (2015). The County Court denied Petitioner’s motion for reconsideration on December 9, 2015, (*see Resp’t’s Opp’n Ex. 56*), and the Second Department denied Petitioner’s motion for leave to appeal the denial of his motion for reconsideration on March 9, 2016, (*see Resp’t’s Opp’n Ex. 59*). Petitioner had also attempted to appeal the County Court’s denial of his motion for reconsideration as of right; the Second Department dismissed this appeal as improper on March 29, 2016. (*See Resp’t’s Opp’n Ex. 60.*) On June 29, 2016, the Court of Appeals dismissed Petitioner’s application for leave to appeal the Second Department’s March 9, 2016 Order, *see People v. Bowie*, 27 N.Y.3d 1128 (2016); the Court of Appeals denied Petitioner’s motion for reconsideration of that dismissal on November 1, 2016, *see People v. Bowie*, 28 N.Y.3d 1071 (2016).

¹ Respondent filed the 77 exhibits attached to his Opposition in 13 volumes, each of which is a compilation of exhibits. (*See Dkt. Nos. 90-1–90-13.*) The Court will refer to these exhibits by the exhibit numbers assigned by Respondent, who has helpfully provided an index indicating which exhibits appear in which volumes. (*See Resp’t’s Opp’n ii–vii.*) Where possible, the Court will refer to the exhibit’s native pagination. Where the exhibit is not natively paginated, the Court will refer to the page numbers stamped at the top-right corner of each page by Respondent, unless otherwise noted.

On May 23, 2017, Petitioner filed a petition for a Writ of Error Coram Nobis (“Coram Nobis Petition”) before the Second Department, (*see* Resp’t’s Opp’n Ex. 63), which denied it on December 6, 2017, *see People v. Bowie*, 64 N.Y.S.3d 607 (2d Dep’t 2017). The Court of Appeals denied Petitioner’s application for leave to appeal the Second Department’s denial on March 15, 2018, *see People v. Bowie*, 31 N.Y.3d 981 (2018), and denied Petitioner’s motion to reconsider that denial on May 16, 2018, *see People v. Bowie*, 31 N.Y.3d 1079 (2018). The Second Department denied Petitioner’s motion for leave to reargue his Coram Nobis Petition on May 17, 2018. (*See* Resp’t’s Opp’n Ex. 73.)

Petitioner filed a supplemental brief in support of the Petition (“Petitioner’s Supplemental Brief”) on January 14, 2019. (*See* Suppl. Br. Relief from J. (“Pet’r’s Suppl. Br.”) (Dkt. No. 80).) Respondent filed a Memorandum of Law opposing the Petition, as supplemented, on May 6, 2018. (*See* Aff. in Opp’n to Pet. (“Resp’t’s Aff.”) (Dkt. No. 88); Resp’t’s Opp’n; *see also* Dkt. No. 90 (attaching exhibits and transcripts).) Petitioner filed a Memorandum of Law in reply to Respondent’s Opposition (“Petitioner’s Reply”) on August 12, 2019. (*See* Reply to Resp’t’s Answer for a Writ of Habeas Corpus (“Pet’r’s Reply”) (Dkt. No. 103).)

In a thorough Report and Recommendation (“R&R”) dated May 14, 2021, Magistrate Judge Paul E. Davison (“Judge Davison”) recommended that the Petition be denied in its entirety. (*See* Report & Recommendation (“R&R”) 1 (Dkt. No. 120).) Petitioner filed Objections to the R&R on August 3, 2021, after seeking and receiving an extension of time to object. (*See* Pet’r’s Obj’s to R&R (“Obj’s”) (Dkt. No. 132).) Respondent has not responded to the Objections. After a review of the R&R and Petitioner’s Objections, the Court adopts the result recommended in the R&R and denies the Petition.

I. Background

The factual and procedural background of this case is set forth in the R&R and the Court assumes the Parties' familiarity therewith. (*See* R&R 1–18.) The Court nevertheless summarizes the relevant facts and procedural history.

A. Factual Background

Fermina Nunez (“Nunez”) and Petitioner had been in a romantic relationship for several years when in September 2006, Petitioner moved his ex-wife and their child into his home in Middletown, NY, leading Nunez to break off her relationship with Petitioner. (Resp’t’s Opp’n 2.) In the months that followed, Petitioner went to great lengths to resume his relationship with Nunez, including visiting Nunez at her place of work (the Final Touch Salon in Middletown, which Nunez also owned) on numerous occasions, calling Nunez on the phone over 1,000 times, contacting Nunez’s brothers and children, and even offering one of Nunez’s brothers \$10,000 to \$15,000 to persuade Nunez to resume the relationship. (*Id.* at 2–3, 5.)

Beginning in December 2006, Petitioner began to make dozens of calls to Melvin Green (“Green”), an old friend of Petitioner’s, and on December 19, Petitioner visited Green at his apartment in the Bronx. (*Id.* at 5–7.) After their December 19 meeting, Green turned off his phone—making and receiving zero calls—until December 25, when Petitioner resumed his calls to Green. (*Id.* at 5.) On that same day, Petitioner visited Green’s apartment again, and the two spoke behind closed doors for approximately 45 minutes. (*Id.* at 5–6.)

On December 30, 2006, Petitioner visited Nunez at the Final Touch Salon several times, and the two had a verbal argument that was witnessed by Nunez’s employees and salon patrons. (*Id.* at 3.) Nunez told Petitioner that the relationship was over, and Petitioner responded by

telling Nunez that she would be sorry and both she and her family would know “what he was capable of.” (*Id.*)

The salon stayed open late on December 30 to accommodate patrons who wanted to style their hair for New Year’s Eve; at 11:00pm, Nunez was still at the salon with two of her employees, Deborah Carabello (“Carabello”) and Milagros Picon (“Picon”), and a patron, Esther Deslandes (“Deslandes”). (*Id.*) At around 11:45pm, Green entered the salon wearing a New York Yankees baseball cap, a dark leather jacket, jeans, and Timberland work boots, with his face uncovered, and armed with an old, chipped, black-brown .38-caliber revolver. (*Id.* at 4.) Green brandished the revolver at Nunez, Carabello, Picon, and Deslandes, and demanded all of their cash and valuables. (*Id.*) After the women complied, Green asked for the owner of the salon, and compelled Nunez to open the cash register. (*Id.*) After removing the cash from the register, Green forced Nunez to the ground, stepped on the back of Nunez’s leg, fired a single shot from the revolver directly into the back of Nunez’s head, and fled the scene. (*Id.*) Nunez died almost instantly. (*Id.*) Petitioner and Green spoke on the phone 91 times between December 28 and 30; the final communication between the two was a call from Green to Petitioner at almost the exact minute that a 911 call was made to Orange County Police following Nunez’s murder. (*Id.* at 5–6.) Thereafter, Petitioner and Green had no further telephone contact. (*Id.* at 6.)

Police officers from the City of Middletown Police Department responded to the scene and quickly identified Petitioner as a suspect based on interviews with friends and witnesses to Petitioner’s argument with Nunez earlier that day. (*Id.* at 4–5.) Responding officers also found small pieces of potatoes at the crime scene among the blood splatters, which indicated to police that the shooter may have attempted to use a potato as a homemade silencer. (*Id.* at 5, 19.)

On December 31, 2006, Petitioner voluntarily visited the Middletown Police Department with his attorney and met with two detectives. (Resp't's Aff. 2-3.) Petitioner recounted his romantic history with Nunez, and stated that he was at home the night of December 30 when he received a phone call from his sister that something had happened to Nunez. (*Id.* at 3; Resp't's Opp'n 7.) Petitioner told police that after he learned of Nunez's death, he contacted his attorney. (*Id.*) The detectives observed that Petitioner's demeanor during the interview was overly calm and affectless; moreover, Petitioner did not indicate that he had contacted Nunez's family following her murder to send his condolences. (Resp't's Opp'n 7.)

After identifying Petitioner as a potential suspect, police had swiftly obtained access to Petitioner's phone records. (Resp't's Aff. 3.) The phone records quickly led police to Green, who was identified by eyewitnesses as the shooter; Green was then arrested on January 1, 2007. (*Id.*) After his arrest, Green confessed both to the murder and to being paid by Petitioner to carry it out, and while he was being booked at the Orange County Jail, police recovered a pair of Timberland boots that matched a footprint found on the back of Nunez's pants. (*Id.*; *see also* Resp't's Opp'n Ex. 75, Ex. 6.)² Green also indicated that the murder weapon was in his Bronx apartment. (Resp't's Aff. 3.)

On January 2, 2007, Petitioner was arrested and charged with Nunez's murder. (Resp't's Opp'n 7.) When police arrived at Petitioner's home to execute the arrest warrant, Petitioner had multiple stab wounds in his neck, arms, and groin, which Petitioner admitted were self-inflicted. (*Id.* at 7-8; Resp't's Aff. 4.) After Petitioner was taken into custody, police executed a search

² Exhibit 75 to Respondent's Opposition is the prosecution's opposition to Petitioner's Second 440.10 Motion, *see infra*, which itself includes a number of exhibits, organized numerically. When citing to the exhibits to the prosecution's opposition to Petitioner's Second 440.10 Motion, the Court will refer to the exhibits' native numbering and pagination.

warrant of Petitioner's home, in which they observed a pool of blood on the floor, two knives, and potatoes in a wire basket in the kitchen. (Resp't's Opp'n 8.) That same day, police executed a search warrant at Green's home, where they recovered another pair of Timberland boots, a pair of jeans, a black leather jacket with \$45 in cash in a pocket, several cell phones, a New York Yankees baseball cap, and a .38-caliber revolver with a defaced serial number and one spent shell casing wrapped in a towel. (*Id.*; Resp't's Aff. 3–4.)

Petitioner and Green were charged in a joint indictment on February 6, 2007 with two counts of Murder in the First Degree, two counts of Murder in the Second Degree, four counts of Robbery in the Second Degree, one count of Criminal Possession of a Weapon in the Second Degree, and one count of Conspiracy in the Second Degree. (Resp't's Opp'n Ex. 1.) Green was also charged with an additional count of Criminal Possession of a Weapon in the Second Degree. (*Id.*)

Following their indictment, Petitioner and Green were both held at the Orange County Jail, and though they were housed separately, the two corresponded via letters passed through a fellow inmate named Marlon Avila ("Avila"). (Resp't's Opp'n 8.) On July 24, 2007, Avila turned over a sample of those letters to the Orange County District Attorney's Office via his attorney. (*Id.*) Police executed search warrants in both Petitioner and Green's cells two days later, and recovered additional letters. (*Id.*) Though the letters were written in "code," the code is rudimentary and easily understandable in context. (*Id.* at 8–9.) The letters are also inculpatory. (*See* Resp't's Opp'n Ex. 10.) In the letters, among other things, Petitioner and Green attempt to fashion a cohesive alibi to explain their many calls and Green's presence in Middletown. (*See id.*) Green also complains to Petitioner about Petitioner's failure to pay him "ten jelly beans for the party," and Petitioner implores Green to execute a new affidavit claiming

that his post-arrest confession was false and the result of police coercion. (*Id.* at 112–16, 133–34; *see also* Resp’t’s Opp’n 10.)

At trial, the prosecution introduced copious evidence, including Petitioner’s cell phone records, the letters, and testimony from 33 witnesses. (Resp’t’s Aff. 5–6; Pet., Dkt. No. 1 at 12.)³ Moreover, DNA analysis revealed traces of Petitioner’s and Green’s DNA on the towel in which police found the .38-caliber revolver wrapped in Green’s home. (Resp’t’s Opp’n 10.) Nunez’s brother also identified the revolver as belonging to Petitioner, and eyewitnesses identified the revolver as the murder weapon. (*Id.* at 11.) Further, ballistics analysis demonstrated that the bullet recovered from Nunez’s head could have been shot from the .38-caliber revolver, and other evidence demonstrated that the boot impression on Nunez’s pant leg was consistent with the size and tread design of the Timberland boots recovered from Green. (*Id.* at 10.) Finally, Petitioner’s financial records also showed that a \$10,000 withdrawal had been made in December 2006, and that the handwriting on Petitioner’s bank records matched the handwriting in the letters provided to prosecutors by Avila and found in Petitioner’s jail cell. (*Id.*) Petitioner offered testimony from four other witnesses in his case-in-chief, but—as relevant to the instant Objections—did not offer any expert testimony, though the County Court had authorized defense counsel to retain a firearms and ballistics expert and a DNA analysis expert at public expense. (*See id.* at 11–12; Resp’t’s Opp’n Ex. 74, Ex. E.)⁴

³ The Petition was filed across two docket entries, and contains Petitioner’s appellate brief to the Second Department as support for Petitioner’s weight of the evidence and sufficiency of the evidence claims. When citing to the Petition, the Court refers to the document’s native paragraph numbering. When citing to the brief slotted into the middle of the Petition, the Court refers to the docket number containing the relevant page and the ECF-stamped page numbers at the top right-hand corner of each page.

⁴ Exhibit 74 to Respondent’s Opposition is Petitioner’s Second 440.10 Motion, *see infra*, which itself includes a number of exhibits, organized alphabetically. When citing to the exhibits

On August 30, 2007, the jury convicted Petitioner of two counts of Murder in the First Degree, four counts of Robbery in the First Degree, one count of Criminal Possession of a Weapon in the Second Degree, and one count of Conspiracy in the Second Degree. (Resp't's Aff. 6.)

B. Appellate Procedural History

Petitioner timely appealed his conviction to the Second Department, filing both a brief via his appellate counsel on May 8, 2009, and a supplemental brief pro se on August 13, 2010. (See Resp't's Opp'n Exs. 12, 16.) In his first appellate brief, filed via appellate counsel, Petitioner argued (1) that the evidence presented at trial was insufficient to support the verdict; and (2) that the verdict was against the weight of the evidence. (Resp't's Opp'n Ex. 12.) In his second appellate brief, filed pro se, Petitioner argued (1) that the County Court erred in admitting his bank records over trial counsel's objection; (2) that the County Court erred in admitting the letters recovered from Petitioner's jail cell, since police violated the cell search warrant in seizing the letters; (3) that his trial counsel's decision not to present Green's affidavit (presumably, the affidavit revising his confession) to the jury denied Petitioner his right to a fair trial; and (4) that the prosecution failed to meet its burden of proof as to an agreement or payment between Petitioner and Green, and thus, that the indictment should have been dismissed. (Resp't's Opp'n Ex. 16.)⁵ On April 5, 2011, the Second Department affirmed

to Petitioner's Second 440.10 Motion, the Court will refer to the exhibits' native lettering and pagination.

⁵ These four grounds for relief constitute the questions presented in Petitioner's statement made pursuant to § 5528(a)(2) of the New York Civil Practice Law and Rules ("NY CPLR"). Liberally construed, Petitioner also raised additional grounds for relief in the brief itself, including that the County Court failed to properly instruct the jury on the use of circumstantial evidence and that the County Court erred in admitting certain evidence and allowing certain testimony (though precisely what evidence and what testimony is not clear). (Resp't's Opp'n Ex. 16.)

Petitioner's conviction, holding that "[Petitioner's] challenge to the legal sufficiency of the evidence supporting is unpreserved for appellate review," and "[i]n any event, . . . [the evidence] was legally sufficient to establish [Petitioner's] guilt beyond a reasonable doubt." *Bowie*, 919 N.Y.S.2d at 894. The court was further "satisfied that the verdict of the guilt was not against the weight of the evidence," and found Petitioner's "remaining contentions" to be "without merit." *Id.* The Court of Appeals denied Petitioner's motion for leave to appeal on July 26, 2011, *see Bowie*, 17 N.Y.3d at 804, and denied Petitioner's motion for reconsideration of that denial on July 16, 2012, *see Bowie*, 19 N.Y.3d at 971.

On October 8, 2013, Petitioner timely filed the Petition, in which he raised four grounds for relief. (*See Pet.*) However, Petitioner acknowledged that two of the grounds for relief raised in the Petition were unexhausted—his claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel—and sought an order staying the proceedings and holding the Petition in abeyance to allow him to exhaust those claims. (*See id.*) Judge Davison granted Petitioner's request, and entered a stay on March 21, 2014. (*See Order (Dkt. No. 12).*)

Petitioner filed his First 440.10 Motion pro se on October 15, 2013, appearing to argue (1) that his trial counsel provided ineffective assistance by (a) "fail[ing] to investigate and prepare" for trial by "failing to contact . . . and/or prepare" certain unidentified witnesses to testify on Petitioner's behalf, (b) failing to retain a DNA analysis expert witness to testify on Petitioner's behalf, (c) failing to object to Green's presentment for identification at trial in an orange prison jumpsuit, and (d) failing to object to the introduction of the letters recovered from his jail cell, since the introduction of the letters violated his Sixth Amendment Confrontation Clause right where neither Avila nor Avila's attorney was called to testify; (2) that Petitioner was "actually and factually innocent of" the charges brought against him; and (3) that in "deliberately

mislead[ing] the jury into believing that certain money transactions were utilized to pay for the commission of a crime when these funds were exclusively used to conduct legal business transactions,” the prosecution engaged in misconduct. (Resp’t’s Opp’n Ex. 40.) The County Court denied Petitioner’s First 440.10 Motion on July 30, 2014, explaining (1) Petitioner failed to provide any evidence, “let alone clear and convincing evidence,” to establish his “actual innocence”; (2) that Petitioner provided no evidence “other than his conclusory allegations” in support of his claim of ineffective assistance of counsel; and (3) that Petitioner’s claims “regarding errors at trial are matters of record and therefore could have been or were previously raised on appeal,” and thus, were ineligible for relief pursuant to NY CPL § 440.10. (Resp’t’s Opp’n Ex. 44.) The Second Department and Court of Appeals both denied Petitioner’s motions for leave to appeal the County Court’s ruling on his First 440.10 Motion, (*see* Resp’t’s Opp’n Ex. 48); *see also Bowie*, 25 N.Y.3d at 1069, and the County Court denied Petitioner’s motion for reconsideration, (*see* Resp’t’s Opp’n Ex. 56). The Second Department then denied Petitioner’s motion for leave to appeal the County Court’s denial of Petitioner’s motion for reconsideration and dismissed Petitioner’s attempt to appeal the denial as of right. (*See* Resp’t’s Opp’n Exs. 59, 60.) Finally, the Court of Appeals dismissed Petitioner’s application for leave to appeal from the Second Department’s denial of his motion for leave to appeal the County Court’s denial of his motion for reconsideration, *see Bowie*, 27 N.Y.3d at 1128, and denied Petitioner’s motion for reconsideration of that dismissal, *see Bowie*, 28 N.Y.3d at 1071.

On November 22, 2016, Respondent moved to lift the stay on the basis that Petitioner had fully exhausted his state court remedies, (*see* Dkt. No. 32), which Judge Davison denied, instructing Petitioner to file a petition for Writ of Error Coram Nobis, (*see* Dkt. No. 33).

On May 23, 2017, Petitioner filed his Coram Nobis Petition, arguing that his appellate counsel was ineffective for failing to argue in his direct appeal (1) that trial counsel was ineffective for (a) failing to object to “the testimony concerning the notes written by . . . Avila,” (b) failing to object to the County Court’s admittance of the letters seized in the cell search, (c) failing to object to Green’s presentment for identification wearing an orange jumpsuit, (d) failing to utilize the services of expert witnesses; and (e) “failing to rebut the prosecution’s conspiracy theory,” which Petitioner argued was established via introduction of evidence concerning Petitioner’s \$10,000 withdrawal in December 2006; and (2) that Petitioner’s constitutional right to a fair trial was violated by the introduction of testimony from a police investigator concerning cell tower data. (Resp’t’s Opp’n Ex. 63.) The Second Department summarily denied Petitioner’s Coram Nobis Petition on December 6, 2017, explaining simply that Petitioner “failed to establish that he was denied the effective assistance of appellate counsel.” *Bowie*, 64 N.Y.S.3d at 608. The Court of Appeals denied Petitioner’s application for leave to appeal the Second Department’s denial of his Coram Nobis Petition on March 15, 2018, *see Bowie*, 31 N.Y.3d at 981, and denied Petitioner’s motion to reconsider that denial on May 16, 2018, *see Bowie*, 31 N.Y.3d at 1079. The Second Department denied Petitioner’s motion for leave to reargue his Coram Nobis Petition on May 17, 2018. (*See* Resp’t’s Opp’n Ex. 73.)

By letters to this Court dated May 24 and 29, 2018, Petitioner requested that the stay remain in place despite his exhaustion of his ineffective assistance of trial counsel and ineffective assistance of appellate counsel claims, asserting that he had either “new” or “newly discovered” evidence that he wished to present to the state court in a new NY CPL § 440.10 motion. (*See* Dkt. Nos. 51, 52.) On June 5, 2018, Judge Davison entered an Order to Show Cause, ordering Petitioner to show cause as to why the Court should not lift the stay. (*See* Order (Dkt. No. 54).)

On July 2, 2018, Petitioner filed a second motion to vacate his conviction pursuant to NY CPL § 440.10 (“Second 440.10 Motion”), reasserting many arguments that he had previously raised in other post-conviction proceedings. (See Resp’t’s Opp’n Ex. 74.) Petitioner appears to have raised one new ground for relief: that the prosecution committed a *Brady* violation by “deliberately with[olding] certain portions of [Petitioner’s] bank records that would have contradicted the prosecut[ion]’s theory.” (*Id.* (underlining omitted).) Petitioner submitted his Second 440.10 Motion to this Court in response to Judge Davison’s June 5, 2018 Order to Show Cause. (See Dkt. No. 70.) By order dated November 30, 2018, Judge Davison concluded that any claims raised in his Second 440.10 Motion did not correspond to the claims set forth in the Petition, and lifted the stay. (See Order 3 (Dkt. No. 69) (“The purpose of the stay was to allow Petitioner to exhaust the ineffective assistance claims . . . set forth in his petition. He has now done so. Under these circumstances, a further stay to accommodate Petitioner’s desire to pursue additional remedies in the state courts would constitute an abuse of discretion under [*Rhines v. Weber*, 544 U.S. 269 (2005)].” (citation omitted)).)

Petitioner filed Petitioner’s Supplemental Brief on January 14, 2019. (See Pet’r’s Suppl. Br.) Judge Davison issued the R&R on May 14, 2021, recommending that the Petition be denied in its entirety. (See R&R 1.) Petitioner subsequently filed the Objections. (See Obj’s.)⁶

⁶ The Objections were docketed across multiple docket entries. (See Dkt. Nos. 132–132-1.) However, the Objections retain the document’s native pagination. When citing to the Objections, the Court will refer to the document’s native pagination.

II. Discussion

A. Applicable Law

1. Review of a Magistrate Judge's R&R

A district court reviewing a report and recommendation addressing a dispositive motion “may accept, reject, or modify, in whole or in part, the findings or recommendations made by [a] magistrate judge.” 28 U.S.C. § 636(b)(1). Under 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), a party may submit objections to the magistrate judge’s report and recommendation. The objections must be “specific” and “written,” FED. R. CIV. P. 72(b)(2), and must be made “[w]ithin 14 days after being served with a copy of the recommended disposition,” *id.*; *see also* 28 U.S.C. § 636(b)(1), plus an additional three days when service is made pursuant to Federal Rules of Civil Procedure 5(b)(2)(C)–(F), *see* FED. R. CIV. P. 6(d), for a total of seventeen days, *see* FED. R. CIV. P. 6(a)(1).

Where a party submits timely objections to a report and recommendation, as Petitioner has done here, the Court reviews *de novo* the parts of the report and recommendation to which the party objected. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(3). The district court “may adopt those portions of the . . . report [and recommendation] to which no ‘specific written objection’ is made, as long as the factual and legal bases supporting the findings and conclusions set forth in those sections are not clearly erroneous or contrary to law.” *Eisenberg v. New Eng. Motor Freight, Inc.*, 564 F. Supp. 2d 224, 226 (S.D.N.Y. 2008) (quoting FED. R. CIV. P. 72(b)(2)).

Finally, pleadings submitted by *pro se* litigants are held to a less strict standard than those drafted by attorneys. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (“Even in the formal litigation context, *pro se* litigants are held to a lesser standard than other parties.”

(italics omitted)). Because Petitioner is proceeding pro se, the Court construes his pleadings “to raise the strongest arguments that they suggest.” *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (italics and quotation marks omitted). However, this “does not exempt a [pro se litigant] from compliance with relevant rules of procedural and substantive law.” *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983) (quotation marks omitted).

2. Standard of Review

Petitions for writs of habeas corpus are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which provides that a state prisoner may seek habeas corpus relief in federal court “on the ground that he is in custody in violation of the Constitution or laws . . . of the United States.” 28 U.S.C. § 2254(a).

The writ may not issue for any claim adjudicated on the merits by a state court unless the state court’s 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.”

Epps v. Poole, 687 F.3d 46, 50 (2d Cir. 2012) (quoting 28 U.S.C. § 2254(d)(1)–(2)). In this context, “it is the habeas applicant’s burden to show that the state court applied [federal law] to the facts of his case in an objectively unreasonable manner.” *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (“The petitioner carries the burden of proof.”).

A decision is “contrary to” clearly established Federal law if (1) “the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases,” or (2) “the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent.” *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A decision is “an unreasonable application of clearly established Federal law” if a state court “correctly identifies the governing legal rule but applies

it unreasonably to the facts of a particular prisoner's case.” *Id.* at 407–08 (alterations and quotation marks omitted). “Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of th[e Supreme] Court’s decisions. And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice.” *White v. Woodall*, 572 U.S. 415, 419 (2014) (citations and quotation marks omitted); *see also id.* at 420 (noting that a petitioner must show a state court ruling was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement” (quotation marks omitted)); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (“The question under AEDPA is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.”).

“Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quotation marks omitted). Consequently, a federal court must deny a habeas petition in some circumstances even if the court would have reached a conclusion different than the one reached by the state court, because “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* at 102; *see also Cullen*, 563 U.S. at 202–03 (“Even if the [Federal] Court of Appeals might have reached a different conclusion as an initial matter, it was not an unreasonable application of our precedent for the [state court] to conclude that [the petitioner] did not establish prejudice.”); *Hawthorne v. Schneiderman*, 695 F.3d 192, 197 (2d Cir. 2012) (“Although we might not have decided the issue in the way that the [New York State] Appellate Division did—and indeed we are *troubled by the outcome we are constrained to reach*—

we . . . must defer to the determination made by the state court . . .” (emphasis added) (citation omitted)).

Additionally, under AEDPA, the factual findings of state courts are presumed to be correct. *See* 28 U.S.C. § 2254(e)(1); *Nelson v. Walker*, 121 F.3d 828, 833 (2d Cir. 1997) (“When reviewing a habeas petition, the factual findings of the New York Courts are presumed to be correct.” (alteration and quotation marks omitted)). The petitioner must rebut this presumption by “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *see also Cotto v. Herbert*, 331 F.3d 217, 233 (2d Cir. 2003) (same).

Finally, only Federal law claims are cognizable in habeas proceedings. “[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also* 28 U.S.C. § 2254(a) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”).

3. Procedural Requirements for Habeas Corpus Relief

“Habeas review is an extraordinary remedy,” *Bousley v. United States*, 523 U.S. 614, 621 (1998), and a petitioner seeking a writ of habeas corpus must comply with the strict requirements of AEDPA, *see* 28 U.S.C. § 2254. Before the Court reviews the merits of a habeas corpus petition, the Court must determine whether Petitioner complied with the procedural requirements set forth in 28 U.S.C. §§ 2244 and 2254.

a. Timeliness

AEDPA imposes upon a petitioner seeking federal habeas relief a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). The statute of limitations is tolled if any state post-conviction proceedings are pending after the conviction becomes final. *See* 28 U.S.C. § 2254(d)(2). The limitations period is also subject to equitable tolling, which is warranted only when a petitioner has shown “(1) that he [or she] has been pursuing his [or her] rights diligently, and (2) that some extraordinary circumstances . . . prevented timely filing.” *Finley v. Graham*, No. 12-CV-9055, 2016 WL 47333, at *5 (S.D.N.Y. Jan. 4, 2016) (alterations in original) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

b. Procedural Bar

A federal court “will not review questions of federal law presented in a habeas petition when the state court’s decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment.” *Downs v. Lape*, 657 F.3d 97, 101 (2d Cir. 2011) (quotation marks omitted). A judgment is “independent” if the “last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.” *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quotation marks omitted). A procedural bar is “adequate . . . if it is based on a rule that is firmly established and regularly followed by the state in question.” *Monroe v. Kuhlman*, 433 F.3d 236, 241 (2d Cir. 2006) (quotation marks omitted). In “exceptional cases,” the “exorbitant application of a generally sound [state procedural] rule renders the state ground inadequate to stop consideration of a federal question.” *Lee v. Kemna*, 534 U.S. 362, 376 (2002).

c. Exhaustion

“Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged

violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citation and quotation marks omitted); *see also* 28 U.S.C. § 2254(b)(1)(A) ("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 unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . ."). To satisfy this requirement, "the prisoner must fairly present his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin*, 541 U.S. at 29 (quotation marks omitted); *see also* 28 U.S.C. § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."). This requirement reflects important "notions of comity between the federal and State judicial systems." *Strogov v. Att'y Gen. of State of N.Y.*, 191 F.3d 188, 191 (2d Cir. 1999).

There are two components to the exhaustion requirement. *See McCray v. Bennet*, No. 02-CV-839, 2005 WL 3182051, at *7 (S.D.N.Y. Nov. 22, 2005) ("A two-step analysis is used to determine whether a claim has been exhausted . . ."). First, "a petitioner [must] fairly present federal claims to the state courts in order to give the state the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Carvajal v. Artus*, 633 F.3d 95, 104 (2d Cir. 2011) (alterations and quotation marks omitted); *see also Turner v. Artuz*, 262 F.3d 118, 123 (2d Cir. 2001) (same); *Oliver v. Kirkpatrick*, No. 06-CV-6050, 2012 WL 3113146, at *5 (E.D.N.Y. July 31, 2012) (same). This requirement is satisfied if the claim is presented in a way that is "likely to alert the [state] court[s] to the claim's federal nature," *Carvajal*, 633 F.3d at 104 (quoting *Lurie v. Wittner*, 228 F.3d 113, 124 (2d Cir. 2000)), and the state courts are

“apprise[d] . . . of both the factual and the legal premises of the federal claims ultimately asserted in the habeas petition,” *Galdamez v. Keane*, 394 F.3d 68, 73 (2d Cir. 2005); *see also Bermudez v. Conway*, No. 09-CV-1515, 2012 WL 3779211, at *8 (E.D.N.Y. Aug. 30, 2012) (same). In other words, a state prisoner need not cite “chapter and verse of the Constitution” to satisfy this requirement. *Carvajal*, 633 F.3d at 104 (quotation marks omitted). A petitioner may satisfy this requirement by:

- (a) reliance on pertinent federal cases employing constitutional analysis[;]
- (b) reliance on state cases employing constitutional analysis in like fact situations[;]
- (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution[;] and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. (quotation marks omitted). However, it is “not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made.” *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (citation omitted). Rather, the claims must be made in such a way so as to give the state courts a “fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.” *Id.* (quotation marks omitted).

“Second, having presented his federal constitutional claim to an appropriate state court, and having been denied relief, the petitioner must have utilized all available mechanisms to secure [state] appellate review of the denial of that claim.” *Klein v. Harris*, 667 F.2d 274, 282 (2d Cir. 1981), *overruled on other grounds*, *Daye v. Att’y Gen.*, 696 F.2d 186, 195 (2d Cir. 1982) (en banc); *see also Pettaway v. Brown*, No. 09-CV-3587, 2010 WL 7800939, at *9 (S.D.N.Y. May 3, 2010) (same), *adopted by* 2011 WL 5104623 (S.D.N.Y. Oct. 26, 2011). In New York, “a criminal defendant must first appeal his or her conviction to the Appellate Division, then must seek further review of that conviction by applying to the Court of Appeals for a certificate granting leave to appeal.” *Galdamez*, 394 F.3d at 74. If the petitioner fails to exhaust his or her

state remedies through the entire appeal process, he or she may still fulfill the exhaustion requirement by collaterally attacking the conviction via available state methods. *See Klein*, 667 F.2d at 282–83 (noting that, “where the petitioner did not utilize all the appellate procedures of the convicting state to present his claim . . . the petitioner must utilize available state remedies for collateral attack of his conviction in order to satisfy the exhaustion requirement”); *Bernardez v. Bannon*, No. 12-CV-4289, 2016 WL 5660248, at *3 (S.D.N.Y. Sept. 29, 2016). For example, in New York a defendant may challenge a conviction based on matters not in the record that could not have been raised on direct appeal, *see* N.Y. CRIM. PROC. LAW § 440.10(1)(f), but a defendant may not seek collateral review of claims that could have been raised on direct appeal and were not, *see id.* § 440.10(2)(c); *see also O’Kane v. Kirkpatrick*, No. 09-CV-5167, 2011 WL 3809945, at *7 (S.D.N.Y. Feb. 15, 2011) (“Under New York law, all claims that are record-based must be raised in a direct appeal It is only when a defendant’s claim hinges upon facts outside the trial record, that he may collaterally attack his conviction by bringing a claim under [NY] CPL § 440.10.”), *adopted by* 2011 WL 3918158 (S.D.N.Y. Aug. 25, 2011). In addition, New York permits only one application for direct review. *See Jiminez v. Walker*, 458 F.3d 130, 149 (2d Cir. 2006) (“[The petitioner] has already taken his one direct appeal [under New York law]”). “New York procedural rules bar its state courts from hearing either claims that could have been raised on direct appeal but were not, or claims that were initially raised on appeal but were not presented to the Court of Appeals.” *Sparks v. Burge*, No. 12-CV-8270, 2012 WL 4479250, at *4 (S.D.N.Y. Sept. 18, 2014).

Accordingly, in those situations, a petitioner no longer has any available state court remedy, and the claims are therefore deemed exhausted, but procedurally defaulted. *See Carvajal*, 633 F.3d at 104 (“If a habeas applicant fails to exhaust state remedies by failing to

adequately present his federal claim to the state courts so that the state courts would deem the claim procedurally barred, we must deem the claim procedurally defaulted.” (alteration and quotation marks omitted)); *see also Aparicio v. Artuz*, 269 F.3d 78, 90 (2d Cir. 2001) (noting the reality that deeming an unrepresented claim to be exhausted is “cold comfort”). A dismissal of a habeas petition on such grounds is a “disposition . . . on the merits.” *Carvajal*, 633 F.3d at 104 (quotation marks omitted). “An applicant seeking habeas relief may escape dismissal on the merits of a procedurally defaulted claim only by demonstrating ‘cause for the default and prejudice’ or by showing that he is ‘actually innocent’ of the crime for which he was convicted.” *Id.* (quoting *Aparicio*, 269 F.3d at 90); *see also Dretke v. Haley*, 541 U.S. 386, 388 (2004) (holding that “a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of a cause and prejudice to excuse the default,” or showing that the petitioner “is actually innocent of the underlying offense”).

B. Application

Petitioner makes six arguments in support of his Petition, across the original Petition and Petitioner’s Supplemental Brief: (1) the evidence was insufficient to support the verdict, (*see* Pet. ¶ 12); (2) the verdict was against the weight of the evidence, (*id.*); (3) Petitioner’s trial counsel was ineffective for (a) failure to meet with and prepare witnesses, (b) failure to investigate and prepare for trial, (c) failure to object to the introduction of letters provided to prosecutors by Avila and obtained via the cell search on multiple grounds, including that Petitioner was allegedly denied his Confrontation Clause rights and the search itself was illegal, (d) failure to object to Green’s presentment for identification at trial wearing an orange prison jumpsuit, (e) failure to object to “prosecutorial misconduct during summation,” (f) failure to pay biennial dues, and (g) failure to preserve claims for appellate review, (Pet’r’s Suppl. Br. 5–6,

unnumbered 40–41; Pet. ¶ 12); (4) Petitioner’s appellate counsel was ineffective for “failure to raise a Confrontation Clause violation and an ineffective assistance of [trial] counsel claim for failure to preserve,” (Pet’r’s Suppl. Br. 6; Pet. ¶ 12); (5) prosecutorial misconduct based on the prosecution’s alleged fraud on the County Court by presenting evidence of Petitioner’s \$10,000 withdrawal in December 2006 when “said transaction was factually a business transaction,” (Pet’r’s Suppl. Br. 11–12); and (6) actual innocence, (*id.* at 14–15).⁷ Judge Davison dismissed all six claims. (*See* R&R 23–53.)⁸

⁷ Petitioner attached a number of documents to his Supplemental Brief, which are neither labeled as exhibits nor paginated. When citing to the brief itself, the Court refers to the brief’s native pagination. When citing to the documents attached to the brief, the Court refers to the ECF-stamped page numbers at the top-right corner of each page in the format of “unnumbered [page].”

⁸ Judge Davison noted that “[i]n his August 15, 2019 Reply, Petitioner set forth, for the first time, a laundry list of additional contentions, including that the indictment was jurisdictionally defective, the trial court lacked subject matter jurisdiction over his case, there were deficiencies in service, and a vague reference to Rule 11 sanctions.” (R&R 24 n.4.) Judge Davison recommended that this Court “decline to consider these arguments,” since they were improperly raised for the first time on reply. (*Id.*) Petitioner objects to this recommendation, arguing that “some of the arguments were included in pre-trial motions and post-conviction motions as well as reconsideration motions, and replies” and urges that “all previous state court submissions furnished by the Petitioner should be part of this record in order for this Court to render a decision based on a full review that includes all circumstances!” (Obj’s 25.) Petitioner’s objections are inapposite. Judge Davison’s recommendation is based on Petitioner’s briefing before *this* Court; any arguments that Petitioner may or may not have made in submissions to state courts are irrelevant.

Longstanding Second Circuit precedent instructs courts “not [to] consider an argument raised for the first time in a reply brief,” *United States v. Pocioc*, 833 F. App’x 847, 849 (2d Cir. 2020) (summary order) (quoting *United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003)), and “this rule is consistently applied in the habeas context,” *Williams v. Chappius*, No. 16-CV-829, 2018 WL 7133267, at *10 (S.D.N.Y. Nov. 16, 2018) (citation omitted), *report and recommendation adopted*, 2019 WL 330630 (S.D.N.Y. Jan. 25, 2019), *appeal dismissed*, No. 19-484 (2d Cir. Apr. 29, 2019); *see also Melo v. United States*, 825 F. Supp. 2d 458, 464 (S.D.N.Y. 2011) (noting, in habeas context, that the petitioner waived ineffective assistance of counsel argument “because he raised it for the first time in his [r]epley”). Petitioner cites no authority nor raises any unique circumstance to justify a departure from this precedent; indeed, given the substantial procedural leeway afforded to Petitioner in this Action, Petitioner is a particularly poor candidate for such a departure. As such, this Court will accept Judge Davison’s recommendation and decline to consider these arguments.

Petitioner has filed extensive objections, raising his disagreements on a page-by-page—and, at times, a sentence-by-sentence—basis. Petitioner also appears to raise new claims in the Objections, which were neither raised in the Petition nor Petitioner’s Supplemental Brief. (*See, e.g.*, Obj’s 3 (arguing that any statements flowing from Green’s allegedly warrantless arrest should have been suppressed); *id.* at 4 (arguing that the trial court erred in admitting evidence of items found by police executing search warrant of Petitioner’s home); *id.* at 28–29 (arguing that an alleged “scheme” by the prosecution “violated [Petitioner’s] procedural due process of law”).)

This Court will not consider any claims raised by Petitioner in his Objections which were not raised in the Petition. *See Read v. Superintendent Mr. Thompson*, No. 13-CV-6962, 2016 WL 165716, at *11 (S.D.N.Y. Jan. 13, 2016) (explaining that “[the] [p]etitioner’s failure to raise [a claim] in his [] [p]etition . . . precludes [its] consideration”); *see also Davis v. Herbert*, No. 00-CV-6691, 2008 WL 495316, at *1 (S.D.N.Y. Feb. 25, 2008) (“[U]pon review of a habeas petitioner’s objections to a magistrate judge’s report and recommendation, the [c]ourt may not consider claims raised for the first time in the petitioner’s objections.”); *McPherson v. Johnson*, No. 95-CV-9449, 1996 WL 706899, at *2 (S.D.N.Y. Dec. 9, 1996) (“[The] [p]etitioner cannot raise, in his objection to the [m]agistrate [j]udge’s [r]eport, new claims not raised in his initial petition.”). Given the somewhat disjointed structure of the Objections, the Court will follow the structure of the R&R to address Petitioner’s proper objections.

1. Exhaustion and Timeliness

Judge Davison found that Petitioner’s claims of prosecutorial misconduct and actual innocence were both untimely (since “[t]he first time Petitioner asserted either claim during the habeas process was in his January 14, 2018 supplemental brief,” over four years after AEDPA’s one-year limitations period ended, (R&R 26)) and unexhausted (since “Petitioner never raised

either argument in any state post-conviction proceeding,” (*id.*), and thus, procedurally barred. However, noting that “a district court may still consider unexhausted arguments that are ‘plainly meritless,’” (*id.* at 28 (quoting *Rhines*, 544 U.S. at 277)), Judge Davison determined that even if Petitioner’s claims of prosecutorial misconduct and actual innocence were not procedurally barred, they were meritless. (*Id.*) Petitioner objects to this conclusion, arguing both that he “should not be penalized for the missteps and ineffectiveness of appellate counsel,” presumably in failing to exhaust these claims, and that “[t]he contention that Petitioner never raised either argument of prosecutorial misconduct and actual innocence ‘in any state post-conviction proceeding’ is inaccurate.” (Obj’s 26–27.)⁹

Petitioner is correct that Judge Davison erred in concluding that “Petitioner never raised either argument in any state post-conviction proceeding.” (R&R 26.) To the contrary, Petitioner raised both claims in various forms, though only Petitioner’s claim of actual innocence is properly exhausted. As Petitioner noted in the Objections, Petitioner argued in his First 440.10 Motion that he was “actually and factually innocent of” the charges against him. (Resp’t’s Opp’n Ex. 40, at 5, 7–8.) The County Court denied this claim, explaining that Petitioner failed to provide any evidence, “let alone clear and convincing evidence,” to establish his actual innocence, (Resp’t’s Opp’n Ex. 44, at 2), and Petitioner unsuccessfully sought to appeal the County Court’s ruling, sought reconsideration of the County Court’s ruling, and sought to appeal the denial of his unsuccessful motion for reconsideration, (*see* Resp’t’s Opp’n Exs. 48, 56, 59, 60); *see Bowie*, 25 N.Y.3d at 1069; *see also Bowie*, 28 N.Y.3d at 1071; *Bowie*, 27 N.Y.3d at

⁹ The Court notes that the Objections are written with atypical punctuation, including frequent underlining and parentheses. Any alterations to quotations from the Objections by the Court are indicated by brackets; all other punctuation appearing in quotations from the Objections is native.

1128. Thus, Petitioner’s claim of actual innocence is exhausted. *See Klein*, 667 F.2d at 282 (explaining that to satisfy AEDPA’s exhaustion requirement, a petitioner “must have fairly presented to an appropriate state court the same federal constitutional claim that he now urges upon the federal courts,” and “utilized all available mechanisms to secure appellate review of the denial of that claim”).

However, Petitioner’s claim of prosecutorial misconduct is unexhausted. While Petitioner did argue that “the prosecution deliberately mislead [sic] the jury into believing that certain money transactions [sic] were utilized to pay for the commission of a crime when these funds were exclusively used to conduct legal business transactions” in his First 440.10 Motion, (*see* Resp’t’s Opp’n Ex. 40, at 8), the County Court found that this claim was ineligible for NY CPL § 440.10 relief, because it was a “matter[] of record and therefore could have been . . . raised on [direct] appeal,” (Resp’t’s Opp’n Ex. 44). But because Petitioner is entitled to only one direct appeal under New York state law, *see* N.Y. CT. APP. R. § 550.20, he no longer has any further remedies available before the state courts, and his claim here is therefore deemed exhausted, but procedurally defaulted, *see Carvajal*, 633 F.3d at 104 (“If a habeas applicant fails to exhaust state remedies by failing to adequately present his federal claim to the state courts so that state courts would deem the claim procedurally barred, we must deem the claim procedurally defaulted.” (alteration and quotation marks omitted)).¹⁰

¹⁰ Petitioner includes in the Objections an argument concerning “The Brady Violation” that “[i]n a separate proceeding Index No. 4143-2015 Petitioner filed an Article 78 Motion that the District Attorney of Orange County nor anyone in that office wants to discuss or uncover,” apparently seeking the production of certain documents concerning Avila’s criminal case. (Obj’s 27–28.) The Court fails to see the relevance of any such proceeding to Petitioner’s claims. First, the existence of this proceeding has no impact on whether Petitioner’s claim of prosecutorial misconduct is exhausted; as explained, Petitioner needed to raise this claim in a direct appeal. Second, as Judge Davison explained elsewhere in the R&R and as this Court will explain *infra*,

Ultimately, however, Judge Davison's determination as to exhaustion is of little import to the disposition of these claims, because Judge Davison is correct that Petitioner's claims of actual innocence and prosecutorial misconduct are untimely, and, in any event, meritless. As explained above, AEDPA imposes upon a petitioner seeking federal habeas relief a strict one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). The statute of limitations is statutorily tolled if any state post-conviction proceedings are pending after the conviction becomes final, and subject to equitable tolling when a petitioner has shown that "(1) that he [or she] has been pursuing his [or her] rights diligently, and (2) that some extraordinary circumstances . . . prevented timely filing." *Finley*, 2016 WL 47333, at *5 (alterations in original) (quotation marks omitted).

As Judge Davison explained, Petitioner's conviction became final on October 14, 2012, following the expiration of the 90-day period in which Petitioner was eligible to file a writ of certiorari with the United States Supreme Court following the Court of Appeals' denial of his motion for leave to appeal. (*See* R&R 24.) Thus, AEDPA's one year limitations period ended on October 14, 2013. (*See id.*) While Petitioner filed the original Petition within that limitations period, Petitioner did not raise either his claim of actual innocence or prosecutorial misconduct until January 14, 2018, when he filed Petitioner's Supplemental Brief. (*Compare* Pet. with Pet'r's Suppl. Br.) And, as Judge Davison explained, "[t]he Supreme Court has held that a habeas petitioner cannot assert new claims that were absent from the original petition after the expiry of the limitations period, even where the original petition was timely." (R&R 26–27

Avila's alleged violation of a separate court order in a completely unrelated case and Avila's credibility (or lack thereof) are wholly irrelevant to Petitioner's claims. Thus, there are no documents that Petitioner could attain via this separate Article 78 proceeding that could affect Petitioner's claims here.

(italics omitted) (citing *Mayle v. Felix*, 545 U.S. 644, 656–57 (2005)).) Petitioner makes no attempt to argue that these claims should have been subject to tolling, rather, Petitioner’s only objection to Judge Davison’s determination that these claims are untimely appears to be the conclusory assertion that “Petitioner had been [sic] timely throughout this entire process without default, and has diligently pursued his rights.” (Obj’s 25.) Thus, Petitioner’s claims of actual innocence and prosecutorial misconduct are untimely, and barred from habeas review.¹¹

Finally, even if Petitioner’s claims of actual innocence and prosecutorial misconduct were not procedurally barred as unexhausted or untimely, this Court agrees with Judge Davison that both claims fail on the merits, for the reasons explained below. *See Rhines*, 544 U.S. at 277 (courts may deny unexhausted habeas claims that are “plainly meritless”); *see also* 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”).

2. Actual Innocence

As Judge Davison explained in the R&R, “the Supreme Court has held that ‘actual innocence is not itself a constitutional claim but instead a gateway through which a habeas

¹¹ Judge Davison went on to explain that there is an exception to this rule via Fed. R. Civ. P. 15(c)(2)’s relation-back provision, where “new claims may be deemed to relate back to the original petition if they arise from the same conduct, transaction, or occurrence.” (R&R 27.) However, because “[t]he Supreme Court [has] ruled that each theory under which a habeas petition could be granted is to be considered as a discrete transaction and occurrence, and simply relating to the same trial, conviction, or sentence is insufficient to relate back to the original pleadings,” (*id.* (italics omitted) (citing *Mayle*, 545 U.S. at 662)), Judge Davison found that “Petitioner’s claims of prosecutorial misconduct and actual innocence are ‘new’ and do not relate back to his original Petition,” (*id.*). Even construing the Objections liberally, *Triestman*, 470 F.3d at 474, Petitioner lodges no specific objection to this determination from Judge Davison, and this Court, upon review of the R&R, finds that “the factual and legal bases supporting” Judge Davison’s ruling on this claim “are not clearly erroneous or contrary to law,” *Eisenberg*, 564 F. Supp. 2d at 226.

petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” (R&R 29.)¹² As such, “a petitioner seeking access to a federal habeas court in the face of a procedural obstacle must advance *both* a legitimate constitutional claim *and* a credible and compelling claim of actual innocence.” *Rivas v. Fischer*, 687 F.3d 514, 540 (2d Cir. 2012). A claim of actual innocence is thus analyzed in the same manner as a claim made under the “fundamental miscarriage of justice” standard: “the evidence must establish sufficient doubt about [the petitioner’s] guilt to justify the conclusion that his [continued punishment] would be a miscarriage of justice *unless* his conviction was the product of a fair trial.” *Id.* at 541 (quoting *Schlup*, 513 U.S. at 316). The Second Circuit has explained that to satisfy this standard, a claim of actual innocence must be both “credible” and “compelling.” *Id.* (citing *House v. Bell*, 547 U.S. 518, 521, 538 (2006)). “For the claim to be ‘credible,’ it must be supported by ‘new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.’” *Id.* (quoting *Schlup*,

¹² Petitioner appears to have attempted to raise both a “gateway” claim of actual innocence—which the Supreme Court has explained is “procedural, rather than substantive,” *Schlup v. Delo*, 513 U.S. 298, 314 (1995)—and a “free-standing” claim of actual innocence based on the Eighth Amendment. (See Pet’r’s Suppl. Br. 14 (“Petitioner has made the requisite showing required to obtain relief on the merits of an Eight[h] and Fourteenth Amendment claim of Actual Innocence. ‘The United States Supreme Court has recognized that a credible showing of actual innocence may allow a prisoner to pursue . . . constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief’ – that is, actual innocence is a gateway to review of another claim which is otherwise procedurally barred.” (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013))).) While the Supreme Court has hinted at the possibility that a habeas petitioner could be entitled to relief based *solely* on his or her actual innocence, this claim appears to be limited to the capital context, if it exists at all. *Schlup*, 513 U.S. at 316 (explaining that in capital case, “the evidence of innocence would have had to be strong enough to make his execution constitutionally intolerable *even if* his conviction was the product of a fair trial” (quotation marks omitted)). Moreover, as described *infra*, Petitioner has not even made a “gateway” showing of actual innocence, so even assuming *arguendo* that he could state a “free-standing” claim of actual innocence in a non-capital case, such a claim would fail.

513 U.S. at 324). “For the claim to be ‘compelling,’ the petitioner must demonstrate that ‘more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.’” *Id.* (quoting *House*, 547 U.S. at 538); accord *Olivares v. Ercole*, 975 F. Supp. 2d 345, 351–54 (S.D.N.Y. 2013) (same); see also *Dunham v. Travis*, 313 F.3d 724, 730 (2d Cir. 2002) (finding that habeas petitioner could not demonstrate “actual innocence” where the petitioner “presented no new evidence of innocence and did not make the necessary showing under *Schlup*”). As Judge Davison noted, this is an incredibly high bar. (R&R 29 (“Put another way, Petitioner must present an ‘extraordinarily high and truly persuasive demonstration of actual innocence.’” (quoting *Ortiz v. Barkley*, 558 F. Supp. 2d 444, 458 (S.D.N.Y. 2008))).)

The Court agrees with Judge Davison that Petitioner does not meet this high threshold, as the evidence he has presented for his innocence is neither credible nor compelling. At the outset, the Court emphasizes that a claim of actual innocence can only succeed in overcoming a procedural bar if it is, inter alia, “supported by ‘new reliable evidence.’” *Rivas*, 687 F.3d at 540 (emphasis added) (quoting *Schlup*, 513 U.S. at 324). However, “[o]nce it has been determined that the new evidence is reliable, *Schlup* unequivocally requires that reviewing courts consider a petitioner’s claim in light of the evidence in the record as a whole.” *Doe v. Menefee*, 391 F.3d 147, 162 (2d Cir. 2004). Thus, Judge Davison’s recounting of the record is critical to determine “whether [the] new evidence truly throws the petitioner’s conviction into doubt, or whether it is so overwhelmed by the weight of other evidence that it is insufficient to raise a question as to a petitioner’s factual innocence,” but Petitioner’s actual innocence claim cannot rise or fall only on the existing evidence. *Id.*

a. Existing Evidence

The Court agrees with Judge Davison that the evidence against Petitioner at trial was “overwhelming,” as it included: evidence that Petitioner relentlessly contacted Nunez and her family following their breakup in an attempt to convince Nunez to resume their relationship; cell tower data demonstrating that Petitioner and Green were together just hours before the murder; phone records demonstrating that Petitioner and Green spoke to each other just minutes before the murder and immediately after; eyewitness testimony confirming that the gun used to kill Nunez belonged to Petitioner; and dozens of jailhouse letters between Petitioner and Green in which the two effectively admit to their conspiracy. (R&R 29–31.) Moreover, Green’s written confession to police—which was not admitted at Petitioner’s trial, but can be considered in assessing a claim of actual innocence, *see Doe*, 391 F.3d at 162 (explaining that because “the issue before [a court considering a claim of actual innocence] is not legal innocence but factual innocence,” “reviewing courts [must] consider *all* evidence without regard to its admissibility”)—is, as Judge Davison aptly put it, “extremely damaging,” (R&R 31). In it, Green admitted, *inter alia*, that “[Petitioner] came to [Green] and asked [Green] if [Green] knew anyone who would kill his ex-girlfriend” and told Green “he would pay the person to do it”; that when an effort to hire a third party to commit the murder failed, Petitioner “told [Green] that he paid [Green] and he expected to get done what he paid [Green] to get done”; that “[Petitioner] wanted [Green] to kill his ex-girlfriend in the daytime” and “make it look like a robbery so that [Petitioner] would not be implicated”; and that “[Petitioner] gave [Green] a handgun” that Green later used to murder Nunez. (*See* Resp’t’s Opp’n Ex. 75, Ex. 6.)

While Petitioner lodges numerous objections to this recitation of the existing evidence, none of Petitioner’s arguments is convincing. First, many of Petitioner’s arguments are either facially illogical or irrelevant. For instance, Petitioner appears to argue that the evidence does

not demonstrate that Petitioner was obsessed with Nunez following their breakup, because “there were never any police reports or Orders of Protection presented at trial against Petitioner” and “Petitioner was the cheater, and was involved with more than one woman at the same time, therefore it don’t [sic] make sense to say that Petitioner was obsessed with [Nunez].” (Obj’s 29.) Common sense dictates that a jilted ex-partner can become obsessed with his or her former companion even if he or she has other romantic attachments, and such an obsession is not only signified by the existence of a protective order; it can also be signified by, for instance, the jilted ex-partner calling his or her former companion over 1,000 times in a period of a few months, as Petitioner did. As another example, Petitioner argues that that “[n]ever ever, was any payment to Green or anyone ever proven at trial” and “no one claimed that Petitioner was present during the robbery in spite of the Prosecutor insinuating otherwise.” (*Id.* at 28.) But the prosecution’s theory was that Petitioner never paid Green, which is supported by a jailhouse letter from Green to Petitioner in which Green complains that Petitioner never paid him. (*See* Resp’t’s Opp’n Ex. 10, at 133 (“I still never even got the other ten jelly beans from the party.”).) And, it is undisputed that Petitioner was not present at the robbery; the prosecution’s theory, on which Petitioner was convicted, was murder for hire.

Further, the actual innocence inquiry is not a means to attack the sufficiency or the weight of the evidence on which Petitioner was convicted.¹³ Rather, as explained above, an evaluation of the record as a whole is only relevant insofar as the new evidence presented throws Petitioner’s conviction into doubt such that no reasonable juror, in considering all of the evidence presented (i.e., both the existing record and the new evidence), would find Petitioner

¹³ Petitioner has separately raised both sufficiency of the evidence and weight of the evidence challenges, which this Court will address *infra*.

guilty. *See Doe*, 391 F.3d at 162–63. As such, Petitioner’s rehashing of the evidence presented to the state jury without the framing of how the new evidence might affect that evidence is not relevant to his claim of actual innocence. *See Brown v. Cunningham*, No. 14-CV-3515, 2015 WL 2405559, at *13 (S.D.N.Y. Apr. 22, 2015) (“A showing of actual innocence requires more than merely arguing that the jury’s finding of guilt is against the weight of the evidence.” (citation omitted)), *report and recommendation adopted*, 2015 WL 3536615 (S.D.N.Y. 2015); *see also Eduardo v. Smith*, No. 10-CV-622, 2010 WL 5584599, at *5 (S.D.N.Y. Jan. 11, 2010) (“It cannot be said that, in light of the new evidence, no reasonable juror would have voted to find [the] [p]etitioner guilty [since] [t]he [new evidence] do[es] not contradict evidence presented by the [prosecution] at trial.”); *Brown v. Jones*, No. 18-CV-359, 2019 WL 2569649, at *5 (N.D.N.Y. June 21, 2019) (“[The] [p]etitioner offers no new evidence of his innocence. Instead, he seeks to rehash what was already decided by again calling into question the strength of the evidence previously considered by the jury. Accordingly, he has failed to plead, let alone demonstrate, actual innocence.”).

b. New Evidence

The Court further agrees with Judge Davison that “Petitioner’s new evidence is unavailing,” (R&R 33), and wholly insufficient to “throw[] . . . [P]etitioner’s conviction into doubt,” *Doe*, 391 F.3d at 162.

First, Petitioner introduced a December 7, 2006 cashier’s check for \$10,000 made out to Karen Bryant, with the memo reading “Re: Patrick Bowie 57 Prospect Avnue [sic],” and an accompanying letter dated September 3, 2010 from Patricia Ulvila at the Orange County Trust Company (who appears to have signed the cashier’s check) which states: “On December 7, 2006, an Official Bank check . . . was issued to [Petitioner]. The check was payable to Karen Bryant in the amount of \$10,000.00. The check cleared on 12/12/2006.” (Pet’r’s Suppl. Br. at

unnumbered 17–19.) Petitioner claimed in the Petition that this proves that the prosecution’s theory of murder for hire was false, since “said transaction was factually a business transaction that the [P]etitioner made to buy a property.” (*Id.* at 11.) Judge Davison concluded that “Petitioner’s argument is misplaced,” because the crime of which Petitioner was convicted requires only a showing that Petitioner and Green had an agreement, which was amply supported by evidence separate and apart from Petitioner’s \$10,000 withdrawal in December 2006. (R&R 33.) Moreover, as noted above, the prosecution’s theory at trial was actually that Petitioner never paid Green; Petitioner’s bank records were submitted as a handwriting sample, but also to demonstrate that Petitioner had the financial wherewithal to orchestrate the conspiracy. (*Id.* at 33–34.) In the Objections, Petitioner largely repeats the argument made in the Petition: that “[t]he Prosecutor’s purpose of using Petitioner’s bank records to prove ‘handwriting’ is a smoke screen,” “[t]here’s no doubt that the Jury believed there was an agreement between Petitioner and Green because of the bank records,” and “if the Jury had viewed the actual check, the Jury would have seen that the check was used for legitimate business and had nothing to do with Green, which would have certainly contradicted the Prosecutor’s theory.” (Obj’s 31–33.) This Court agrees with Judge Davison. This evidence does not even undercut the prosecution’s theory at trial, and certainly is not “compelling” according to the standard set out in *Schlup*.

Second, Petitioner introduced two sworn affidavits from Green stating that both he and Petitioner were innocent. (Pet’r’s Suppl. Br. at unnumbered 20, 42–43.) Judge Davison concluded that this evidence carries no weight, noting that Green changed his story multiple times before being convicted at his own trial and that there are numerous jailhouse letters from Petitioner to Green in which Petitioner urged Green to claim that his confession to police was coerced and to sign a new affidavit. (*See* R&R 34; *see also, e.g.*, Resp’t’s Opp’n Ex. 10, at 115

(“A) Did [Petitioner] ever give you burner – NO[;] B) Did [Petitioner] ever tell you harm anyone[;] C) Did [Petitioner] ever give you \$ - NO[;] D) calls was about house hunting & help[;] E) last call was Happy New Year[.] *Need sorry notarized statement today*”).) Petitioner argues in the Objections that “[t]he affidavit isn’t self serving and carries credibility in this case because his affidavit coupled with the fact that he refused to testify falsely at trial for the Prosecutor reflects a person maintaining their innocence,” and “[t]here’s other affidavits [sic] that Petitioner now has in his possession, which is part of the reason the District Attorney continues avoiding any hearing!” (Obj’s 33.) First, this Court cannot consider “other affidavits” that have not been presented here, and Petitioner’s opportunity to present new evidence to this Court has long passed. *See Read*, 2016 WL 165716, at *11 (explaining that “[the] [p]etitioner’s failure to raise [a claim] in his [] [p]etition . . . precludes [its] consideration”). Moreover, the question is whether affidavits written by Green declaring his and Petitioner’s innocence and disavowing Green’s signed confession constitute “compelling” evidence sufficient to throw Petitioner’s conviction into doubt such that a reasonable juror could not find Petitioner guilty. The Court agrees with Judge Davison that this evidence simply does not meet this high bar, especially because this hypothetical reasonable juror would be considering these affidavits alongside evidence that these affidavits were written at Petitioner’s behest.

Finally, Petitioner introduced forensic evidence demonstrating that there was insufficient evidence to determine whether Petitioner’s DNA was on the gun and that there were no fingerprints on the gun or bullets. (*See* Pet’r’s Suppl. Br. at unnumbered 22–24.) Judge Davison concluded that this is irrelevant, because there is no dispute that it was Green who fired the weapon, not Petitioner, and there was substantial evidence separate and apart from this forensic evidence which linked Petitioner to the murder weapon. (R&R 34.) Petitioner fails to engage

with this conclusion in his Objections, instead extraneously arguing that “if the results of the forensic evidence were in the Prosecutor’s favor, Petitioner is certain that: The Prosecutor would have used the forensic evidence to have built [sic] a real case and the (R&R) would be singing a different tune,” and that “there’s no doubt that if there were ‘prints’ on the weapon or the bullets, the Prosecutor would have had a party.” (Obj’s 33–34.) In any event, the Court agrees with Judge Davison that this forensic evidence is far from “compelling” evidence sufficient for Petitioner to succeed on his claim of actual innocence.

Judge Davison’s recommendation on this claim is adopted.

3. Sufficiency of the Evidence

Judge Davison concluded that Petitioner’s claim that the verdict was based on insufficient evidence is procedurally barred from habeas review, or, in the alternative, meritless. (R&R 35.) Petitioner does not appear to contest this conclusion, instead arguing that this “is just more reasons [sic] for this Court to carefully review Petitioner’s claim of ineffective assistance of counsel which is crucial & warranted.” (Obj’s 34.)

The Court agrees with Judge Davison that Petitioner’s sufficiency of the evidence claim is procedurally barred from habeas review. As explained above, a federal court “will not review questions of federal law presented in a habeas petition when the state court’s decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment.” *Downs*, 657 F.3d at 101 (quotation marks omitted). Here, the Second Department explicitly stated that Petitioner’s sufficiency of the evidence claim was “unpreserved for appellate review,” *Bowie*, 919 N.Y.S.2d at 894, thus, the Second Department’s decision on Petitioner’s sufficiency of the evidence claim was based on an independent and adequate state law ground: Petitioner’s failure to preserve his sufficiency of the evidence claim for appellate

review, as required by NY CPL § 470.05, *see People v. Hawkins*, 11 N.Y.3d 484, 492 (2008) (“To preserve for this [c]ourt’s review a challenge to the legal sufficiency of a conviction, a defendant must move for a trial order of dismissal, and the argument must be specifically directed at the error being urged. As we have repeatedly made clear—and underscore again—general motions simply do not create questions of law for this [c]ourt’s review.” (quotation marks and citations omitted) (collecting cases)). While the Second Department did also find that “[i]n any event,” the evidence presented at trial “was legally sufficient to establish the [Petitioner’s] guilt beyond a reasonable doubt,” *Bowie*, 919 N.Y.S.2d at 894, the Second Circuit has made clear that “where a state court says that a claim is ‘not preserved for appellate review’ and then rule[s] ‘in any event’ on the merits, such a claim is not preserved,” *Fama v. Comm’r of Corr. Servs.*, 235 F.3d 804, 810 n.4 (2d Cir. 2000) (quoting *Glenn v. Bartlett*, 98 F.3d 721, 724–25 (2d Cir. 1996)); *accord Grant v. Bradt*, No. 10-CV-394, 2012 WL 3764548, at *3 (S.D.N.Y. Aug. 30, 2012) (same).

The only way that Petitioner can overcome this procedural bar is if he can demonstrate “‘cause for the default and prejudice’” or that he is “‘actually innocent’ of the crime for which he was convicted,” *Carvajal*, 633 F.3d at 104 (quoting *Aparicio*, 269 F.3d at 90). Petitioner cannot establish “cause” and “prejudice.” A habeas petitioner can establish “cause” if he or she can demonstrate that “some objective factor, external to [t]he [p]etitioner’s defense, interfered with his [or her] ability to comply with a state procedural rule,” *Gutierrez v. Smith*, 702 F.3d 103, 111–12 (2d Cir. 2012), but as Judge Davison observed, (R&R 36), Petitioner has offered no explanation for his failure to preserve his sufficiency of the evidence claim at trial based on this standard. Given that Petitioner cannot demonstrate “cause,” it is unnecessary for the Court to determine whether he has demonstrated “prejudice,” but as explained below, because Petitioner’s

sufficiency of the evidence claim is meritless, there was no error at trial at all, let alone one which “resulted in ‘substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions,’” as required to establish prejudice. *Gutierrez*, 702 F.3d at 112 (alteration in original) (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986)). And, as explained above, Petitioner cannot demonstrate that he is actually innocent. *See supra* II.B.2.

The Court further agrees with Judge Davison that even if Petitioner’s sufficiency of the evidence claim were not procedurally barred, this claim is meritless. First, as Judge Davison explained, a habeas court examining a sufficiency of the evidence claim must resolve all factual disputes in favor of the prosecution. (*See* R&R 36.) *See also Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (“[*Jackson v. Virginia*, 443 U.S. 307 (1979)] unambiguously instructs that a reviewing court ‘faced with a record of historical facts that supports conflicting inferences 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 must defer to that resolution.’” (quoting *Jackson*, 443 U.S. at 319)); *accord Hamilton v. Superintendent, E. N.Y. Corr. Facility*, No. 11-CV-1332, 2015 WL 13306815, at *15 (S.D.N.Y. Sept. 10, 2015) (“In evaluating a legal-insufficiency claim, a court does not ‘ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt.’ Rather, ‘the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (quoting *Jackson*, 443 U.S. at 318–19)), *report and recommendation adopted*, 2017 WL 19441144 (S.D.N.Y. May 9, 2017), *appeal dismissed*, 2017 WL 6878094 (2d Cir. Dec. 12, 2017). Consistent with this directive, Judge Davison found that “the prosecution submitted ample evidence to satisfy the charges [brought against Petitioner] and to support each element of the [crimes],” rejecting the counterarguments

made by Petitioner concerning the use of circumstantial evidence and the admissibility of the letters recovered from the cell search. (R&R 37–39.)

In the Objections, Petitioner reasserts his claims that his conviction was based on insufficient evidence because it was based exclusively on circumstantial evidence and because the jailhouse letters should not have been admitted into evidence because they were allegedly obtained in violation of the cell search warrant and Avila’s separate court-ordered injunction. (*See* Obj’s 35–39.) None of the arguments raised in the Objections is availing. The crux of Petitioner’s argument regarding circumstantial evidence appears to be that the evidence presented against Petitioner at trial was “so scant that the Jury could only speculate or conjecture [sic] as to [Petitioner’s] guilt or innocence.” (*Id.* at 35.) But, as outlined by the Court above in evaluating Petitioner’s claim of actual innocence, the evidence presented against Petitioner was far from “scant,” and in fact, was overwhelming. Petitioner goes on to take issue with the way in which the jury weighed certain evidence presented at trial, (*see id.* at 35–36 (“Petitioner’s actions and visits with the family was normal routine [sic], there were no threatening statements ever to the victim or her family, this can be verified by this Court reviewing the trial records.”)), and with the credibility of certain witnesses who testified at trial, (*see id.* at 36–37 (“[W]hat’s not true is the false testimony given by the victim’s brother at trial, however, the witness, (the only witness) that gave testimony at trial concerning threats was . . . Picon who lied and ‘at the time’ did not speak or understand English. Again, ironically, no one else in the crowd heard any threats or arguments except . . . Picon, that’s what’s reasonable not to believe [sic].”)). But such vague, self-serving, and unsupported disagreements cannot form the basis of a sufficiency of the evidence claim, and in any event, as Judge Davison explained elsewhere in the R&R and as this Court explains below, “a habeas court must defer to the assessments of the weight of the

evidence and credibility of the witnesses that were made by the jury.” *Garrett v. Perlman*, 438 F. Supp. 2d 467, 470 (S.D.N.Y. 2006) (citation omitted); *see also Cavazos*, 565 U.S. at 8 (dismissing sufficiency of the evidence claim, explaining, “it is not the job of [a habeas court] . . . to decide whether the [prosecution’s] theory was correct”; “the jury decided that question, and its decision is supported by the record”).

As for the jailhouse letters, Petitioner argues that “[t]he (R&R) has a twist compared to Petitioner’s argument, Petitioner’s main point was not the ‘admissibility’ of the (legal mail) (letter to attorney) & (the notes) but the complete violation of the cell search warrant itself.” (Obj’s 37.) This Court sees no distinction between these two arguments. The remedy for an unlawful search is the exclusion of the evidence obtained as a result of that search at trial. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961). Nonetheless, as explained below, the cell search was lawful and the letters were properly admitted at trial. Petitioner also reasserts his argument that the letters should not have been admitted at trial because the prosecution was only able to obtain the letters due to Avila’s intervention, and in contacting the prosecutor’s office, Avila allegedly violated a court-ordered injunction in another action. (*See* Obj’s 37–39.) However, Petitioner fails to demonstrate why this is relevant; rather, this Court agrees with Judge Davison that “Avila’s compliance, or alleged lack thereof, of a separate court order in a completely unrelated case has nothing to do with Petitioner’s case and the admissibility of evidence.” (R&R 39.)

In sum, the Court finds that Petitioner’s sufficiency of the evidence claim is procedurally barred, and, in any event, without merit. Judge Davison’s recommendation on this point is adopted.

4. Weight of the Evidence

Judge Davison recommended that Petitioner's weight of the evidence claim be denied, because "[a] claim attacking the weight of the evidence is based on state law and is not reviewable in a federal habeas proceeding." (R&R 40.) Petitioner does not appear to lodge a specific objection to this portion of the R&R, but Petitioner spends a substantial portion of the Objections arguing that the jury weighed the evidence improperly. For example, Petitioner argues that there was no evidence that he and Nunez had gotten into an argument on the day of her murder, because the only witness who testified about the argument was Picon, who "did not speak or understand much English at all," as evidenced by the fact that "the Prosecutor introduced an interpreter in court in order to translate with this witness." (Obj's 2.) But given the presence of an interpreter at trial, the jury was clearly aware of the fact that Picon was not fluent in English, and thus could have concluded—as Petitioner urges—that it would have been impossible for Picon to testify to the substance of Petitioner and Nunez's alleged argument, which presumably would have been in English.

Petitioner may disagree with the way in which the jury weighed the evidence or with the credibility assessments that the jury made, but "assessments of the weight of the evidence or the credibility of witnesses are for the jury and not grounds for reversal on habeas appeal." *Garrett*, 438 F. Supp. 2d at 470 (alterations omitted) (quoting *Maldonado v. Scully*, 86 F.3d 32, 35 (2d Cir. 1996)); *id.* at 470–71 (denying habeas petition based on an argument that a particular witness's testimony was "incredible" because "a habeas court must defer to the assessments of the weight of the evidence and credibility of the witnesses that were made by the jury" (quoting *Frazier v. New York*, 187 F. Supp. 2d 102, 109–10 (S.D.N.Y. 2002))); *see also Steinhilber v. Kirkpatrick, M.*, No. 18-CV-1251, 2020 WL 9074808, at *34 (S.D.N.Y. Aug. 21, 2020) ("[I]t is

well established that a weight of the evidence claim is based on state law and is not cognizable on federal habeas review.” (collecting cases)), *report and recommendation adopted sub. nom, Steinhilber v. Kirkpatrick*, 2021 WL 12544554 (S.D.N.Y. Apr. 5, 2010).

Judge Davison’s recommendation on this point is adopted.

5. Ineffective Assistance of Trial Counsel

Petitioner argues that his trial counsel was ineffective for seven separate alleged failures, as set out by Judge Davison: (1) failure to meet with and prepare witnesses; (2) failure to investigate and prepare for trial; (3) failure to object to the search, seizure, and admission of letters from Petitioner’s jail cell; (4) failure to object to Green’s appearance wearing an orange jumpsuit at Petitioner’s trial; (5) failure to object to prosecutorial misconduct during summation; (6) failure to pay biennial dues; and (7) failure to preserve arguments for appeal. (*See* R&R 40–49; *see also* Pet’r’s Suppl. Br. 5–6, unnumbered 40–41; Pet. ¶ 12.)

The Sixth Amendment of the United States Constitution provides that a criminal defendant shall enjoy the right to effective assistance of counsel. *See Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam). A claim for ineffective assistance of counsel is analyzed under the two-part test set out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984): to be entitled to relief, a petitioner must show that (1) his or her attorney’s conduct was constitutionally deficient because it fell below an “objective standard of reasonableness,” *id.* at 687–88, and that (2) the petitioner was prejudiced by the ineffective representation—that is, but for the deficiency, there is a reasonable probability that “the result of the proceeding would have been different,” *id.* at 694.

To determine whether counsel’s conduct is deficient under the first prong, “the court must determine whether, in light of all of the circumstances, the identified acts or omissions were

outside the wide range of professionally competent assistance.” *Lindstadt v. Keane*, 239 F.3d 191, 198–99 (2d Cir. 2001) (alterations and quotation marks omitted). Petitioner cannot meet this prong based solely on disagreements with counsel’s strategy or advice. Indeed, there is a “strong presumption” that counsel’s conduct fell within the vast spectrum of reasonable assistance, and it is Petitioner’s burden to demonstrate “that counsel’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986); *see also Bonilla v. Lee*, 35 F. Supp. 3d 551, 575 (S.D.N.Y. 2014) (same); *Henderson v. Martuscello*, No. 10-CV-5135, 2013 WL 6463348, at *15 (S.D.N.Y. Dec. 10, 2013) (“Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, even where counsel adopts a course of action (or inaction) that seems risky, unorthodox[,] or downright ill-advised.” (alteration and citation omitted)). Thus, to satisfy this prong, Petitioner must demonstrate that his counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. In assessing counsel’s conduct, “a reviewing court must judge his conduct on the basis of the facts of the particular case, ‘viewed as of the time of counsel’s conduct,’ and may not use hindsight to second-guess his strategy choices.” *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (citations omitted) (quoting *Strickland*, 466 U.S. at 490).

To satisfy the second prong, “[the petitioner] must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding below would have been different.” *United States v. Caracappa*, 614 F.3d 30, 49 (2d Cir. 2010) (quotation marks omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “It is not enough for the defendant to show that the

errors had some conceivable effect on the outcome of the proceeding,” as “[v]irtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” *Id.* at 693.

“‘[P]urely speculative’ arguments about the impact of an error do not establish prejudice.”

DeCarlo v. United States, No. 11-CV-2175, 2013 WL 1700921, at *4 (S.D.N.Y. Apr. 17, 2013) (alteration in original) (quoting *United States v. Weiss*, 930 F.3d 185, 199 (2d Cir. 1991)).

Moreover, “a court hearing an ineffectiveness claim must consider the totality of the evidence [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Strickland*, 466 U.S. at 695–96.

Finally, the Supreme Court has instructed that “there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.” *Id.* at 697. The Court will analyze each of Petitioner’s claims of ineffective assistance in turn.

a. Failure to Meet with and Prepare Witnesses

Petitioner first claims that he was denied effective assistance because his trial counsel failed to call a series of witnesses: (1) a witness from Petitioner’s bank, who apparently could have testified that Petitioner’s \$10,000 withdrawal in December 2006 was used to finance a legitimate business transaction, not Nunez’s murder; (2) Shawn Weiss (“Weiss”), a DNA expert from North Carolina that Petitioner had received court authorization to hire at public expense, who could have rebutted evidence that Petitioner’s DNA was found on the envelopes containing the jailhouse letters; and (3) unidentified “other witnesses,” who allegedly could have testified to Petitioner’s innocence or otherwise helped his case. (R&R 40–42.) Judge Davison determined Petitioner could not make out a claim of ineffective assistance on this basis, observing at the

outset that “[t]he decision not to call a particular witness is typically a question of trial strategy,” and thus, “is not ordinarily viewed as a lapse in professional representation” sufficient to demonstrate ineffective assistance. (*Id.* at 41 (quoting *Pierre v. Ercole*, 560 F. App’x 81, 82 (2d Cir. 2014)); *see also id.* (“[C]omplaints of uncalled witnesses are not favored in federal habeas review.” (quoting *Hodges v. Bezio*, No. 09-CV-3402, 2012 WL 607659, at *10 (E.D.N.Y. Feb. 24, 2012))).) Judge Davison then concluded that (1) the bank witness would not have advanced Petitioner’s case at trial, since, again, the prosecution did not argue that the \$10,000 withdrawal was used to finance Nunez’s murder, (2) it would have been reasonable for trial counsel to determine that Weiss’s testimony may have been superfluous or even detrimental given the convincing evidence that Petitioner’s DNA was present on the envelopes holding the jailhouse letters, and (3) that Petitioner’s vague reference to “other witnesses” without any specific description of what testimony they may have offered was an attempt to rely on pure speculation. (*Id.* at 41–43.)

Petitioner objects to each of these conclusions. First, Petitioner appears to concede that the prosecution did not argue at trial that the \$10,000 withdrawal was used to finance Nunez’s murder, but claims that “[a]ctions and documents in evidence, ‘speaks [sic] louder than words,’” and reargues that “[t]he bank employee” or various other individuals “could have swayed the Jury from believing that the money was used for criminal activity and tipped the scales in favor of Petitioner.” (Obj’s 40–41.) The Court does not agree. Given that the prosecution did not use Petitioner’s bank records to argue that Petitioner had used the \$10,000 withdrawal to finance the murder, calling the witness that Petitioner describes would have at least been a waste of time. Petitioner’s trial counsel could have also determined that calling a witness to testify about the withdrawal would have only drawn attention to the size of Petitioner’s assets, supporting the

argument actually made by the prosecution that Petitioner had the financial wherewithal to finance the conspiracy. *See United States v. Smith*, 198 F.3d 377, 386 (2d Cir. 1999) (“The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial.” (quoting *United States v. Eisen*, 974 F.2d 246, 265 (2d Cir. 1992))); *see also Perez v. United States*, No. 14-CV-3995, 2017 WL 1628902, at *8 (S.D.N.Y. May 1, 2017) (denying claim of ineffective assistance of counsel based on counsel’s “strategic decision” not to call a witness whose testimony “would not have been helpful”).

Second, Petitioner argues that his trial counsel’s failure to utilize Weiss constituted ineffective assistance because “[t]here were [sic] no DNA on any of the (notes) or Petitioner’s letter to counsel, according to the trial record, there was DNA on the (envelope),” thus, “[t]here’s no evidence that indicates who actually wrote the notes.” (Obj’s 41–42.) This is simply not accurate. As Judge Davison explained, the letters “referred to Petitioner and Green by name, referred to Petitioner’s attorney by name, referred to [the County Court judge] by name, and discussed Petitioner’s legal proceedings in detail.” (R&R 31.) Moreover, the letters were found in Petitioner’s jail cell hidden in his pillow, and witnesses testified that the letters matched his handwriting. (*Id.* at 31; *see also, e.g.*, Trial Tr. 454:2–13 (“Q Now, Mr. Nunez, during the course of knowing [Petitioner], have you had occasion to see his handwriting? A Yes Q I show you People’s 24 for identification. I ask you to open it and look at the contents inside and

tell me if you recognize the handwriting? A Yes, this is [Petitioner's] handwriting.”).^{14, 15}

Finally, as Petitioner acknowledges, the envelopes in which certain of the letters were found had Petitioner's DNA. Given the ample evidence demonstrating that Petitioner did, in fact, write the jailhouse letters, Petitioner's trial counsel's decision not to call a superfluous witness did not constitute ineffective assistance.

Finally, Petitioner argues that “[n]one of the defense witnesses would have been superfluous or detrimental if trial counsel would have called them to testify,” and that “there's no speculation” since “one thing we now know for sure, is that since my witnesses weren't called, look at my current status, the only thing detrimental [sic] was not calling them!” (Obj's 42.) To the extent Petitioner is referring to the unspecified “other witnesses” Judge Davison considered in the R&R, Petitioner's objections do not change the fact that a vague reference to “other witnesses” cannot satisfy Petitioner's burden “to show that the state court applied [federal law] to the facts of his case in an objectively unreasonable manner.” *Woodford*, 537 U.S. at 25; *see also Perez*, 2017 WL 1628902, at *8 (“[Petitioner's] vague and unsupported assertions that unnamed witnesses would have provided unspecific helpful testimony are wholly insufficient to make out a prima facie case that counsel performed deficiently in failing to call these witnesses.” (italics omitted)). Moreover, the fact of Petitioner's conviction (i.e., his “current status”) cannot constitute proof of ineffective assistance on its own, or every single conviction would necessarily be the result of ineffective assistance. *See Strickland*, 466 U.S. at 689 (“It is all too tempting for

¹⁴ While not dispositive, the Court notes that Petitioner has actually provided the Court with a number of handwriting samples in the form of handwritten letters to the Court, and Petitioner's handwriting is quite distinctive. (*Compare, e.g.*, Dkt. No. 131 *with* Resp't's Opp'n Ex. 10.)

¹⁵ Respondent filed the full pre-trial hearing, trial, and sentencing transcripts in multiple sub-parts, across multiple docket entries. (*See* Dkt. Nos. 90-14–90-32.) When citing these transcripts, the Court will refer to the transcript's native page and line numbers.

a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court examining counsel's defense after it as proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort to be made to eliminate the distorting effects of hindsight[.]” (citation omitted)); *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963) (“A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence.”).

Petitioner cannot demonstrate that he was denied effective assistance of counsel based on his trial counsel's alleged failure to meet with and prepare witnesses; Judge Davison's recommendation on this point is adopted.

b. Failure to Investigate and Prepare for Trial

Petitioner next claims that he was denied effective assistance of counsel because his trial counsel “failed to investigate and prepare” for trial. (*E.g.*, Pet. ¶ 12.) Judge Davison concluded that this argument was meritless, noting that Petitioner had failed to state with specificity what his trial counsel allegedly failed to investigate, and that “a review of the record shows that counsel did, in fact, investigate and prepare for trial.” (R&R 43–44.) Among other things, Judge Davison pointed to the fact that Petitioner's trial counsel was privately retained, and was actively involved in Petitioner's case from Petitioner's very first meeting with detectives the day after Nunez's murder up to and through Petitioner's sentencing. (*Id.*) Petitioner argues in the Objections that “[w]hat's not mentioned [in the R&R] is all the poor decisions made by trial counsel,” and “[t]he fact that trial counsel was not court appointed means nothing,” since “any and every attorney no matter if retained privately or court appointed, counsel is supposed to represent the client effectively.” (Obj's 42.) Petitioner is absolutely correct that he—and every criminal defendant—is entitled to the effective assistance of counsel that is guaranteed by the

Sixth Amendment regardless of whether that counsel is retained privately or court appointed, but Petitioner misunderstands Judge Davison's point. Judge Davison in no way suggested that because Petitioner chose to retain private counsel, his trial counsel was to be held to a lower standard. Rather, Judge Davison noted the fact that Petitioner's trial counsel was retained and thus involved in Petitioner's case from even before Petitioner's arrest (whereas court-appointed counsel would not have become involved in Petitioner's case until after his arrest) as an illustration of the efforts Petitioner's trial counsel made to provide Petitioner with effective representation.

Petitioner appears to argue that his trial counsel made "poor decisions" because he failed to preserve certain claims for appeal. (R&R 42–43.) Petitioner has separately raised failure to preserve certain claims for appeal as an alternative ground for his claim of ineffective assistance, and this Court will address it below. In any event, failure to preserve a claim for appeal does not constitute a "failure to investigate," and this Court agrees with Judge Davison that Petitioner's "failure to investigate" claim is meritless.

Judge Davison's recommendation on this point is adopted.

c. Failure to Object to the Search, Seizure, and Admission of Letters from Petitioner's Jail Cell

Petitioner claims that his trial counsel was ineffective for failing to object to the search, seizure, and admission of the letters obtained via the cell search on various grounds, including that the letters were privileged and the fruits of an illegal search and further that the introduction of the letters violated his Confrontation Clause rights. (See Pet. ¶ 12; Pet'r's Suppl. Br. 5–6.) Judge Davison rejected each of Petitioner's theories, concluding that the search was not illegal, the letters were not privileged, there was a sufficient foundation to introduce the letters, that the cell search warrant was valid, and that Petitioner's Confrontation Clause rights were not violated,

and thus that trial counsel's failure to raise any of these objections did not constitute ineffective assistance. (R&R 44–46.) Petitioner raises several objections to these findings.

First, Petitioner claims that his argument is not that the cell search itself was illegal, but rather “that during the cell search (the warrant itself was violated) according to the directions of the warrant specifying ‘what’ and ‘what wasn’t included.’” (Obj’s 43.) As such, it appears that Petitioner does not object to Judge Davison’s conclusion that the warrant itself was valid, but rather objects to Judge Davison’s conclusion that the cell search was legal, because Petitioner claims that police violated the terms of the warrant in executing the cell search.¹⁶ Petitioner appears to argue that police violated the terms of the warrant because at least certain of the letters seized were in an envelope that “was addressed to counsel, sealed and marked ‘legal mail,’” (Obj’s 43), and the warrant specifically states that “[s]uch property to be seized . . . does not include any communication, including writings, correspondence, or mail, between [Petitioner] and his attorney,” (Pet’r’s Suppl. Br. at unnumbered 39). The Court does not agree. “The [Petitioner] cites no authority for the proposition that [envelopes] self-labelled as ‘attorney-client privilege’ are categorically immunized from cursory review during a search pursuant to a warrant. Nor does [Petitioner] cite any authority for the proposition that materials can become privileged by the simple expedient of labelling them as such.” *United States v. Schulte*, No. 17-

¹⁶ Petitioner argues that one of the facts cited by Judge Davison in support of his conclusion that the warrant application satisfied the *Aguillar/Spinelli* test was inaccurate. Specifically, Petitioner argues that Judge Davison’s claim that “Avila had personally observed” conversations between Petitioner and Green, (R&R 46), was false, because “[d]uring Petitioner’s entire time at the jail . . . Petitioner and Green were not allowed contact!”, and “in order for Petitioner and Green to have had ‘any conversation’ there would certainly be a need for contact and so Avila also lied concerning this issue as well.” (Obj’s 44–45). This argument is semantic. Avila told prosecutors that he passed letters and messages between Petitioner and Green—a claim which appears to be supported by the letters themselves, (*see* Resp’t’s Opp’n Ex. 10, at 139 (“Just have [Avila] see [Petitioner] at the hut A.S.A.P.!”))—and the word “observed” could easily be in reference to this activity.

CR-548, 2019 WL 5287994, at *3 (S.D.N.Y. Oct. 18, 2019) (citations omitted) (collecting cases); *see also Nat'l Day Laborer Organizing Network v. U.S. Immigr. & Customs Enf't*, 486 F. Supp. 3d 669, 689–90 (S.D.N.Y. 2020) (“[W]hile sometimes relevant, the label affixed to a document is not itself dispositive as to whether the privilege applies.” (collecting cases)). And, as Judge Davison concluded, the letters were clearly not privileged communications, which would have been obvious to the police executing the warrant upon even a cursory review. Thus, the Court finds that the search warrant was not violated.

Second, Petitioner reasserts his argument that his Sixth Amendment Confrontation Clause rights were violated when the letters were introduced without either Avila or Avila’s attorney being called to testify. (*See, e.g.*, Obj’s 12, 38–39.) The Confrontation Clause bars the use of testimonial out-of-court statements offered against a defendant in lieu of in-court testimony subject to cross-examination. While the Supreme Court has declined “to spell out a comprehensive definition of ‘testimonial,’” it has explained that “at a minimum,” the term applies to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *accord DeJesus v. Perez*, 813 F. App’x 631, 633 (2d Cir. 2020) (summary order). More broadly, statements are considered “testimonial” when they are “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (quotation marks omitted); *see also Michigan v. Bryant*, 562 U.S. 344, 354 (2011) (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a causal remark to an acquaintance does not.” (quotation marks and alteration omitted)). Petitioner’s Confrontation Clause rights were not violated because no statement from Avila or his attorney

was admitted at trial at all, let alone a “testimonial” statement.¹⁷ The letters were not authenticated at trial by a statement from Avila attesting to the fact that the letters were written by Petitioner, rather, they were authenticated by, inter alia, DNA evidence, handwriting analysis, and the substance of the letters themselves (which include identifiable references to Petitioner and his case).

Because neither Petitioner’s Fourth Amendment nor his Confrontation Clause rights were violated, Petitioner’s trial counsel was not ineffective for failing make the objections about which Petitioner complains. *See United States v. Regalado*, 518 F.3d 143, 149 n.3 (2d Cir. 2008) (“Failure to make a meritless argument does not amount to ineffective assistance.” (alteration and citation omitted)). Judge Davison’s recommendation on this point is adopted.

d. Failure to Object to Green’s Appearance Wearing an Orange Jumpsuit at Petitioner’s Trial

Petitioner argues that he was denied effective assistance of counsel based on his trial counsel’s failure “to adequately object to the prejudicial nature of having [Green] (who was not on trial) brought into the courtroom in orange colored prison garb.” (Pet. ¶ 12.) Judge Davison concluded that because “the prosecution had to prove that Green was the killer in order to establish Petitioner’s role in procuring the crime,” “[t]here is no real argument that Green’s identification was not relevant and admissible at Petitioner’s trial, so there is also no basis for Petitioner’s contention that his attorney was derelict in not objecting to this evidence.” (R&R

¹⁷ Elsewhere in the Objections, Petitioner refers to Avila as the prosecution’s “principal witness,” and argues that Avila “was a major and crucial part of Petitioner’s case for the Prosecutor.” (Obj’s 52, 53.) This is plainly untrue, and Petitioner’s inordinate focus on Avila throughout the Objections (and indeed, through all of the post-conviction proceedings) is inappropriate. The prosecution called 33 witnesses in its case in chief, including three eyewitnesses to Green’s murder of Nunez and multiple members of Nunez’s family that Petitioner had attempted to coerce and bribe in an unsuccessful attempt to win Nunez back, and not including Avila. Nor were any statements from Avila admitted at trial. As such, Avila’s credibility or lack thereof, reputation, and criminal history are simply irrelevant.

47.) As for Green's attire, Judge Davison determined that "trial counsel may have reasoned that the visual contrast between Petitioner—on trial in street clothes—and Green in the telltale jumpsuit played well for Petitioner before the jury," and thus that this was "a strategic judgment which is immune from scrutiny under *Strickland*." (*Id.*) Petitioner objects to both conclusions.

First, Petitioner argues that "Green was not produced at trial for the purpose of being identified as the shooter," since "the Jury had already viewed Green, knew who he was and his charges," because "his trial took place prior to Petitioner's trial." (Obj's 45.) This is inaccurate. As Petitioner notes on the very same page of the Objections, "the [County Court] had granted separate trials," (*id.*), the purpose of which is to empanel different juries. As such, the jury at *Petitioner's* trial had not already viewed Green, though if Green's trial took place prior to Petitioner's trial, the jury at *Green's* trial certainly would have. Petitioner also argues that if "the contention used in this (R&R) is true that: Green was produced for the purpose of eyewitnesses identifying him, then the Prosecutor would have produced Petitioner at Green's trial as well." (*Id.*) The Court does not agree with Petitioner's logic. Petitioner and Green were both indicted and charged with Murder in the First Degree, which necessarily required the prosecution to prove that Petitioner and Green each was responsible for Nunez's murder. There is no dispute that Petitioner did not pull the trigger, so—as Judge Davison explained—the prosecution had to prove that Green was the killer as a prerequisite to proving Petitioner's guilt. The prosecution did so by presenting the testimony of eyewitnesses, who identified Green as the killer. There would have been no purpose in presenting Petitioner at Green's trial for identification.

Second, Petitioner argues that "a picture paints a thousand words for the Jury," and thus it was a "poor 'strategic judgment'" for his trial counsel to allow Green to be presented in prison garb. (*Id.*) Petitioner argues that "it's obvious that the Prosecutor wanted Petitioner's Jury to

‘know’ that Green was convicted and pass judgment,” and “[i]n any event, it was a high level of prejudice [sic]!” (*Id.* at 45–46.) However, Petitioner’s objection is not at odds with Judge Davison’s conclusion. Judge Davison found that it would have been reasonable for Petitioner’s trial counsel to believe that the jury seeing Green in prison garb (and thus perhaps assume that Green had been convicted, as Petitioner suggests) would benefit Petitioner’s case. The prosecution presented highly compelling evidence that Green was the shooter—Petitioner even concedes as much, (*see* Pet., Dkt. No. 1 at 20 (“There undoubtedly was sufficient evidence to demonstrate that . . . Green was the robber who killed . . . Nunez”))—so, as Judge Davison explained, Petitioner’s trial counsel could have thought that drawing as much of a distinction between Petitioner and Green as possible was helpful. This Court agrees that this was a strategic choice that is unchallengeable on habeas review. *See Garguilo*, 324 F.2d at 797 (“It may well be that another attorney would have resolved these problems differently and that [the petitioner] would have profited by sounder advice[,] . . . [but] [the court is] not conducting a seminar in trial procedures, at least where the tactics involved are over those which conscientious attorneys might differ.”).

e. Failure to Object to Prosecutorial Misconduct During Summation

Petitioner also claims that he was denied effective assistance of counsel because of his trial counsel’s “[f]ailure to object to prosecutorial misconduct during summation.” (Pet. ¶ 12.) Judge Davison noted that “Petitioner fails to identify any such misconduct during summation” with respect to his ineffective assistance claim, and concluded that “a review of the prosecutor’s summation does not show any misconduct.” (R&R 47–48.) In the Objections, Petitioner refers to an episode at trial in which the prosecution apparently violated an order by the County Court by asking a witness about an incident of domestic violence between Petitioner and Nunez. (Obj’s 46.) Upon review of the trial record, it does appear that the prosecution asked a witness if

the witness was present when “[Petitioner] slapped [Nunez] in the face,” but Petitioner’s trial counsel objected to that question, and the objection was sustained. (Trial Tr. 779:9–13.) And, the prosecution made no reference to this incident in summation. (*See id.* at 847:21–903:16.) This Court agrees with Judge Davison that the prosecution’s summation does not show any misconduct, and thus, Petitioner’s trial counsel was not ineffective for failing to object to it. *See Regalado*, 518 F.3d at 149 n.3 (“Failure to make a meritless argument does not amount to ineffective assistance.” (alteration and citation omitted)). Nor is there any basis to grant the Petition based on a single inappropriate question given that the County Court sustained trial counsel’s objection.

Judge Davison’s recommendation on this point is adopted.

f. Failure to Pay Biennial Dues

Petitioner attached to his Petition an excerpt of a news article indicating that his attorney may or may not have timely paid his biennial bar registration fees at the time of trial, and what appears to be an email dated April 7, 2008 indicating that Petitioner’s trial counsel was “delinquent in filing his [bar] registrations for the 2006-07 & 2008-09 biennial periods.” (Pet’r’s Suppl. Br. at unnumbered 40–41.) Judge Davison summarily dismissed this claim as “nothing more than an ad hominem and completely irrelevant attack against his attorney,” and “not rooted in *Strickland*.” (R&R 48.) In the Objections, Petitioner doubles down, arguing that “trial counsel ‘certainly’ did not pay his biennial Bar Registration Fees on time” and analogizes the situation to “a person operating an unregistered vehicle.” (Obj’s 46.) Petitioner then argues that “[t]he news article further supports the fact that the Prosecutor relied extremely [sic] on the Jury believing that Petitioner had used ‘that’ \$10,000 check to pay for illegal activity,” and makes a series of other irrelevant accusations against the prosecution. (*Id.* at 46–47; *see, e.g. id.* at 47 (suggesting that the prosecutor supplied the reporter with information as a “Beat You to the

Punch tactic”).) This Court agrees with Judge Davison that this is a gratuitous attempt by Petitioner to malign his trial counsel, and not a legitimate basis for an ineffective assistance claim.

Judge Davison’s recommendation on this point is adopted.

g. Failure to Preserve Certain Arguments for Appeal

Finally, Petitioner argues that his counsel was ineffective for failing to preserve certain arguments for appellate review. (*E.g.*, Pet. ¶ 12.) Judge Davison concluded that although the Second Department noted that Petitioner’s sufficiency of the evidence claim was “unpreserved for appellate review,” *Bowie*, 919 N.Y.S.2d at 894, because the Second Department went on to consider the merits of the claim in the alternative, Petitioner failed to demonstrate that he was prejudiced under *Strickland*. (R&R 48–49). While Petitioner restates in a conclusory fashion on a number of occasions in the Objections that his trial counsel failed to preserve claims for appellate review, (*see, e.g.*, Obj’s 26, 34–35, 42–43), Petitioner lodges no specific objection to Judge Davison’s determination that Petitioner failed to demonstrate prejudice under *Strickland*. The Court, upon review of the R&R, finds that “the factual and legal bases supporting” Judge Davison’s ruling on this claim “are not clearly erroneous or contrary to law.” *Eisenberg*, 564 F. Supp. 2d at 226.

Judge Davison’s recommendation on this point is adopted. Thus, in sum, The Court finds that Petitioner is not entitled to habeas relief on his claims of ineffective assistance of trial counsel.

6. Ineffective Assistance of Appellate Counsel

Petitioner claims that his appellate counsel was ineffective for failing to raise the Confrontation Clause and ineffective assistance of trial counsel claims on appeal. (*See* Pet. ¶ 12.) Judge Davison rejected this claim, finding that because his Confrontation Clause and

ineffective assistance of trial claims were without merit, his appellate counsel had no obligation to raise them, and moreover, that because Petitioner raised these issues in a pro se supplemental brief which the Second Department considered in affirming Petitioner's conviction, Petitioner was not prejudiced. (R&R 49.) Petitioner does not appear to object to this conclusion, and this Court upon reviewing this portion of the R&R, finds that "the factual and legal bases supporting" this finding "are not clearly erroneous or contrary to law." *Eisenberg*, 564 F. Supp. 2d at 226.

Judge Davison's recommendation on this point is adopted.

7. Prosecutorial Misconduct

Finally, Judge Davison rejected Petitioner's claim of prosecutorial misconduct as procedurally barred, or in the alternative, meritless. Judge Davison explained that "[t]he appropriate standard of review for a habeas corpus claim alleging prosecutorial misconduct is the narrow one of due process, and not the broad exercise of supervisory power. The petitioner must demonstrate that the alleged misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." (R&R 50 (quoting *Williams v. Artus*, No. 11-CV-5541, 2013 WL 4761120, at *12 (E.D.N.Y. Sept. 4, 2013)); *see also id.* ("A prosecutor's misconduct cannot give rise to a constitutional claim absent 'egregious misconduct.'" (quoting *Morris v. Kikendall*, No. 07-CV-2422, 2009 WL 1097922, at *15 (E.D.N.Y. Apr. 23, 2009))).) Judge Davison found that none of Petitioner's allegations of prosecutorial misconduct—including (1) that the prosecution misled the jury by introducing his bank records into evidence, (2) that he was prejudiced when the County Court admitted testimony about the potatoes found both at the crime scene and in Petitioner's kitchen, (3) that Carabello and Deslandes' identifications of Green as the shooter were equivocal or tainted by police coercion, (4) that Petitioner was prejudiced by the testimony an investigator who explained the cell tower data,

(5) that the prosecution engaged in misconduct by contacting Avila, and (6) that the prosecution violated Petitioner's *Brady* rights by withholding the cashier's check—met this high bar. (*Id.* at 50–53.) Petitioner raises objections to certain of these conclusions, appearing to reassert his arguments that (1) the prosecution misled the jury by introducing Petitioner's bank records without the cashier's check, (2) evidence of the potatoes was irrelevant, and (3) the cell tower data was misleading. (Obj's 48–50.) The Court will address each of these objections in turn.¹⁸

First, Petitioner argues—again—that “the Prosecutor had ‘concealed’ the check/information from the Jury which prevented the Jury from reviewing the check as part of the evidence that could have convinced the Jury that, the Petitioner did not use his bank account for criminal activity.” (Obj's 48.) This Court has already addressed Petitioner's claims regarding the check, *see supra* II.B.2.b, and rejects this claim for the same reasons. Petitioner also argues that “the check was not in Petitioner's possession at the time [the prosecution] claims,” (Obj's 50), presumably in opposition to Judge Davison's conclusion that Petitioner's *Brady* rights were not violated because the check was neither exculpatory nor withheld, (*see* R&R 52–53). But Judge Davison's finding that the check was in Petitioner's possession at the time of trial was not dispositive, because Judge Davison also determined that the check was not exculpatory. (*See id.*) For all of the reasons previously stated, this Court agrees.

Second, Petitioner argues that “the potatoes had absolutely nothing to do with the crime or crime scene,” since they are just “a vegetable that everyone has,” and therefore that he was prejudiced by the introduction of testimony that pieces of potatoes were found at the crime scene

¹⁸ As for the other claims of prosecutorial misconduct raised in the Petition and rejected by Judge Davison, the Court, upon review of the R&R, finds that “the factual and legal bases supporting” Judge Davison's ruling on these claims is “not clearly erroneous or contrary to law.” *Eisenberg*, 564 F. Supp. 2d at 226.

and that potatoes were found in Petitioner's home. (Obj's 49.) This is simply a weight of the evidence challenge, which this Court has explained is not cognizable on habeas review. *See supra* II.B.4. Petitioner is correct that potatoes are a very common vegetable and that "[n]o testing or prints connected the potatoes to the Petitioner," but this information was also available to the jury, and it was up to the jury to determine what weight to assign to this evidence, if any. (Obj's 49.)¹⁹

Finally, Petitioner argues that the cell tower data introduced via the testimony of a police investigator was misleading because "[t]hey show a general area" in which Petitioner's home was also located, and thus, "the calls Petitioner made from home would hit off the same tower that service the crime scene area." (Obj's 50.) However, Petitioner explains in the very next sentence that the police investigator's "testimony had confirmed this during cross-examination at trial," (*id.*), and thus, this too is simply a weight of the evidence challenge that is not cognizable on habeas review, *see supra* II.B.4. Moreover, to the extent Petitioner is suggesting that the cell tower demonstrates that Petitioner was at his home at the time the crime was committed and that this constitutes an alibi, this suggestion is inapposite since, again, the prosecution's theory at trial was not that Petitioner was the shooter or even present at the crime scene.

In sum, Petitioner cannot demonstrate that the prosecution engaged in any misconduct, let alone misconduct egregious enough to "infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Williams*, 2013 WL 4761120, at *12 (quotation marks omitted). Judge Davison's recommendation on this point is adopted.

¹⁹ Petitioner acknowledges that Green's signed confession states that Petitioner gave Green the murder weapon with a potato stuck onto the end of the barrel, but reasserts his argument that Green signed the confession under duress. (Obj's 49.) However, Green's confession was never introduced at Petitioner's trial, thus, it had no influence on the jury's verdict.

III. Conclusion

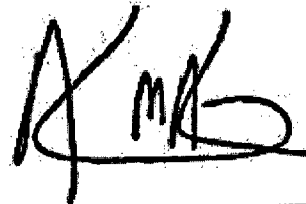
The Court, having conducted a thorough review of the remainder of the R&R, finds no error, clear or otherwise. The Court therefore adopts the outcome of Judge Davison's R&R. Petitioner's writ of habeas corpus is accordingly dismissed with prejudice.

As Petitioner has not made a substantial showing of the denial of a constitutional right, a Certificate of Appealability shall not be issued, *see* 28 U.S.C. § 2253(c)(2); *Lucidore v. N.Y. State Div. of Patrol*, 209 F.3d 107, 111–12 (2d Cir. 2000), and the Court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this judgment on the merits would not be taken in good faith, *see Coppedge v. United States*, 369 U.S. 438, 445 (1962) (“We consider a [petitioner’s] good faith . . . demonstrated when he seeks appellate review of any issue not frivolous.”); *Burda Media Inc. v. Blumenberg*, 731 F. Supp. 2d 321, 322–23 (S.D.N.Y. 2010) (citing *Coppedge* and noting that “[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it was not taken in good faith” (italics and quotation marks omitted)).

The Clerk of the Court is respectfully directed to enter judgment in favor of Respondent, send a copy of this Order to Petitioner at the address listed on the docket, and close the case.

SO ORDERED.

Dated: December 28, 2021
White Plains, New York



KENNETH M. KARAS
United States District Judge

**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 June, two thousand twenty-three.

Patrick Bowie,

Petitioner - Appellant.

v.

William Lee, Supt. Greenhaven Correctional facility,

Respondent - Appellee.

ORDER

Docket No: 22-151

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

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk




W. G. ...
...
...
...
...



...

...

...

...

...

...

...

...

...

...

