APPENDICES

N.D.N.Y.
21-cv-1007
Nardacci, 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 20th day of February, two thousand twenty-five.

Present:

José A. Cabranes,
Raymond J. Lohier, Jr.,
Richard J. Sullivan,
Circuit Judges.

Daniel Jones,

Petitioner-Appellant,

v. 24-1938

Danielle Tope, Psychology Doctor,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability ("COA") and an injunction. Upon due consideration, it is hereby ORDERED that the motion for a COA is 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 also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). It is further ORDERED that the motion for an injunction is DENIED as moot.

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

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

A

21-100UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DANIEL JONES,

Petitioner,

v. 9:21-CV-01007 (AMN/ML)

DANIELLE TOPE, Psy. D.,

Respondent.

APPEARANCES: **OF COUNSEL:**

DANIEL JONES
C22582
CNY PC
P.O. Box 300
Marcy, NY 13403
Petitioner, *pro se*

HON. LETITIA JAMES **PAUL B. LYONS, ESQ.**
New York State Attorney General Assistant Attorney General
28 Liberty Street
New York, NY 10005
Attorneys for Respondent

Hon. Anne M. Nardacci, United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On September 13, 2021, Petitioner *pro se* Daniel Jones ("Petitioner"), filed a petition seeking *habeas corpus* relief pursuant to 28 U.S.C. § 2254. Dkt. No. 1 (the "Petition"). In the Petition, Petitioner asserts ten grounds upon which he should be released from the custody of the New York State Office of Mental Health, under whose supervision he is currently civilly confined.

See Dkt. No. 1 at 8-31.[1] The Petition's grounds for relief concern alleged procedural deficiencies which Petitioner asserts pervaded the probable cause hearing, mental abnormality trial waiver, and dispositional hearing held pursuant to Article 10 of the New York Mental Hygiene Law ("MHL"). *See id.* On March 17, 2022, after an extension, Respondent submitted certain records, an Answer, and a memorandum of law ("Respondent's brief") seeking to dismiss the Petition as improper and meritless. Dkt. Nos. 16-18. On June 13, 2022, Petitioner filed a Traverse in support of his Petition. Dkt. No. 29.

The Petition was referred to United States Magistrate Judge Miroslav Lovric, who, on February 16, 2024, issued a Report and Recommendation recommending that the Petition be dismissed and no certificate of appealability be issued. Dkt. No. 38 at 24-25 (the "Report-Recommendation"). Magistrate Judge Lovric advised the parties that under 28 U.S.C. § 636(b)(1), they had fourteen days to file written objections and failure to object to the Report-Recommendation within fourteen days would preclude appellate review. *Id.* at 25 & n.3. On March 4, 2024, Petitioner filed Objections to the Report-Recommendation. Dkt. No. 39 (the "Objections"). On April 18, 2024, following an extension, Respondent submitted a response to the Objections. Dkt. No. 43.

For the reasons set forth below, the Court[2] adopts the Report-Recommendation in its entirety.

II. STANDARD OF REVIEW

A. The Antiterrorism and Effective Death Penalty Act

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal

[1] Citations to court documents utilize the pagination generated by CM/ECF, the Court's electronic filing system.

[2] This case was reassigned to the undersigned on January 19, 2023. Dkt. No. 35.

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court may award *habeas corpus* relief with respect to a claim adjudicated on the merits in state court only if the adjudication resulted in an outcome that: (1) 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) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *DeBerry v. Portuondo*, 403 F.3d 57, 66 (2d Cir. 2005) (quoting 28 U.S.C. § 2254(d)). This standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (*per curiam*) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)). The Supreme Court has repeatedly explained that "a federal *habeas* court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents." *Nevada v. Jackson*, 569 U.S. 505, 508-09 (2013) (*per curiam*) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

B. Review of a Report and Recommendation

This Court reviews *de novo* those portions of a magistrate judge's report-recommendation that have been properly preserved with a specific objection. 28 U.S.C. § 636(b)(1)(C). "To be 'specific,' the objection must, with particularity, 'identify [1] the portions of the proposed findings, recommendations, or report to which it has an objection and [2] the basis for the objection.'" *Petersen v. Astrue*, 2 F. Supp. 3d 223, 228-29 (N.D.N.Y. 2012) (alteration in original) (quoting N.D.N.Y. Local Rule 72.1(c)). If no specific objections have been filed, this Court reviews a magistrate judge's report-recommendation for clear error. *See id.* at 229 (citing Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition). Similarly, when a party files "[g]eneral or conclusory objections, or objections which merely recite the same arguments [previously] presented to the magistrate judge," the district court reviews a magistrate judge's report-

recommendations for clear error. *O'Diah v. Mawhir*, No. 9:08-CV-322 (TJM) (DRH), 2011 WL 933846, at *1 (N.D.N.Y. Mar. 16, 2011) (citations omitted); *accord Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (a "statement, devoid of any reference to specific findings or recommendations to which [the plaintiff] objected and why, and unsupported by legal authority, was not sufficient to preserve" a claim); *Petersen*, 2 F. Supp. 3d at 228-29 & n.6 (collecting cases). "When performing [ ] a 'clear error' review, 'the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Dezarea W. v. Comm'r of Soc. Sec.*, No. 6:21-CV-01138 (MAD/TWD), 2023 WL 2552452, at *1 (N.D.N.Y. Mar. 17, 2023) (quoting *Canady v. Comm'r of Soc. Sec.*, No. 1:17-CV-0367 (GTS/WBC), 2017 WL 5484663, at *1 n.1 (N.D.N.Y. Nov. 14, 2017)).

"[I]n a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.'" *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2007) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)) (additional citations omitted). The Second Circuit has held that courts are obligated to "make reasonable allowances to protect *pro se* litigants" from inadvertently forfeiting legal rights merely because they lack a legal education. *Id.* (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)). That said, "even a *pro se* party's objections to a Report and Recommendation must be specific and clearly aimed at particular findings in the magistrate's proposal . . . ." *Machicote v. Ercole*, No. 06 Civ. 13320 (DAB) (JCF), 2011 WL 3809920, at *2, (S.D.N.Y. Aug. 25, 2011) (citation omitted); *accord Caldwell v. Petros*, No. 1:22-cv-567 (BKS/CFH), 2022 WL 16918287, at *1 (N.D.N.Y. Nov. 14, 2022). After appropriate review, "the court may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

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III. DISCUSSION

Petitioner has properly challenged his civil confinement pursuant to a judgment of a state court with a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. *See Roache v. McCulloch*, No. 9:16-CV-1069-JKS, 2019 WL 4327271, at *3 (N.D.N.Y. Sept. 12, 2019) (citing, *inter alia*, 28 U.S.C. § 2254(a); *Duncan v. Walker*, 533 U.S. 167, 176 (2001) (a state court order of civil commitment satisfies § 2254's "in custody" requirement)); *accord Buthy v. Comm'r of Office of Mental Health of N.Y.*, 818 F.2d 1046, 1051-52 (2d Cir. 1987) (petition for a writ of *habeas corpus* pursuant to § 2254 is the appropriate method for an individual to challenge the fact or duration of an involuntary civil commitment to a state psychiatric institution). Petitioner's Objections are organized into ten categories, generally tracking the ten grounds initially articulated in the Petition, and functionally objecting to the entire substance of the Report-Recommendation.[3] *See* Dkt. No. 39 at 1-15. Although each particular objection is alone not necessarily specific, even when read with the solicitude due to Petitioner in light of his *pro se* status,[4] the Court herein conducts a *de novo* review of the Report-Recommendation.

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[3] Petitioner did not, however, specifically object to the summaries of the background facts and parties' positions in the Report-Recommendation, *see* Dkt. No. 38 at 2-13, and the Court finds that these sections are devoid of clear error. Accordingly, the background facts are adopted, except with respect to any particular factual dispute identified in the discussion below.

[4] In particular, Petitioner's objections to the pages cited in the Report-Recommendation appear to be the result of the Court's use of the pagination generated by the CM/ECF system (located in blue typeface font at the top center of each page), rather than the pagination included in the document (located at bottom center of each page but beginning after the cover page and table of contents). As such, this objection is not a basis to set aside any portion of the Report-Recommendation. The Court also notes that, in further deference to Petitioner's *pro se* status, it will address each ground in the Petition without first reviewing issues of exhaustion or procedural default, and will instead focus on the merits of each asserted ground. *See McCulloch*, 2019 WL 4327271, at *4 ("Despite [petitioner's] failure to exhaust a number of his claims, this Court nonetheless may deny those unexhausted claims on the merits and with prejudice.") (citing 28 U.S.C. § 2254(b)(2)).

A. Ground 1: The Untimely Probable Cause Hearing

Petitioner's first ground concerns the fact that a probable cause hearing pursuant to MHL § 10.06(g), which had been scheduled to occur on March 7, 2012, was adjourned until June 27, 2012—a delay of nearly four months. Dkt. No. 1 at 8-9. Petitioner maintains that he was neither responsible for the delay nor consented to it. *Id.* The Report-Recommendation adopted the reasoning of Respondent's brief, specifically highlighting that "the delay in holding the hearing was primarily attributable to Petitioner's request for a change in venue" and that "[t]he New York Appellate Division's denial of Petitioner's claim did not unreasonably apply clearly established Supreme Court law." Dkt. No. 38 at 17; *see also id.* at 6. In his Objections, Petitioner argues against the Report-Recommendation's conclusions with respect to the first ground because: (a) in requesting a change in venue he did not "consent[ ] to a waiver of all time frames for holding a probable [cause] hearing;" and (b) "the delay in conducting the probable cause hearing was a chain of violating" Petitioner's procedural due process rights by extending his "detention beyond the days allotted by the statute." Dkt. No. 39 at 1-2. On this ground, the Court agrees with the Report-Recommendation that Respondent has the better argument.

The MHL affords a detained individual a probable cause hearing to "commence no later than seventy-two hours from the date of the [individual's] anticipated release date." MHL § 10.06(h). However, the same section of the MHL makes clear that a "failure to commence the probable cause hearing within the time periods specified shall not result in the dismissal of the petition and shall not affect the validity of the hearing or the probable cause determination." *Id.* Accordingly, while Petitioner may have correctly identified a failure to comply with state law, such failure is, per the terms of the state law, not one upon which the state would grant the relief

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Petitioner seeks.[5] It follows then, that the error is not so egregious as to constitute a violation of Petitioner's constitutional rights to procedural due process. On this point, Petitioner's citation to *Mental Hygiene Legal Serv. v. Spitzer*, No. 07 CIV. 2935 (GEL), 2007 WL 4115936, at *11-15 (S.D.N.Y. Nov. 16, 2007), *aff'd sub nom.*, No. 07-5548-CV, 2009 WL 579445 (2d Cir. Mar. 4, 2009), is unavailing. There, the court preliminarily enjoined enforcement of indeterminate detention without a determination of probable cause. Further, Petitioner is unable to identify any prejudice he suffered as a result of the delayed hearing, because the state court ultimately found probable cause to detain Petitioner,[6] and as such, he was not detained any longer than had the hearing occurred within the statutory time. *See Atkinson v. Okocha*, No. 20-CV-4497 (JS) (ST), 2021 WL 1550493, at *5 (E.D.N.Y. Apr. 19, 2021) ("Plaintiff has not alleged how the brief delay in holding the probable cause hearing harmed Plaintiff, particularly given the fact that his continued detention was ordered."). The Court therefore adopts the Report-Recommendation as to this ground.

B. Ground 2: Probable Cause Found Based on Legally Insufficient Evidence

Petitioner's second ground asserts that his due process rights were violated by the state court determination of probable cause for his continued detention because it was based on legally insufficient evidence. Dkt. No. 1 at 9-11. In the Report-Recommendation, Magistrate Judge Lovric determined that this objection was procedurally defaulted without an exception, *see* Dkt. No. 38 at 17-18, and concluded that the objection was in any event insufficient on state law grounds and meritless, *see id.* at 19. In particular, Magistrate Judge Lovric rightly noted that the MHL

[5] Furthermore, MHL § 10.08(f) provides that "[t]ime periods specified by provisions of this article for actions by state agencies are goals that the agencies shall try to meet, but failure to act within such periods shall not invalidate later agency action."

[6] The legal sufficiency of this finding is discussed below in Section III.B.

expressly states that no appeal may be taken from a determination of probable cause, and that any error in the determination "was mooted by the subsequent mental abnormality finding by clear and convincing evidence."[7] *Id.* (citing MHL § 10.13(b); *State v. Kenneth H*, 190 A.D.3d 33, 37-38 (3d Dep't 2020)). Petitioner's citation to *State v. Kerry K.*, 157 A.D.3d 172 (2d Dep't 2017), is unavailing because there the appellate division overturned a determination of mental abnormality, but did not disturb the earlier predicate probable cause determination. *See id.* at 188 (reversing a determination of mental abnormality because "it was error to permit the State's experts to testify about the 1982 convictions" which were vacated due to the defendant's actual innocence, but affirming use of sworn statements regarding unindicted conduct found to be sufficiently reliable and more probative than prejudicial). Accordingly, the Court adopts the Report-Recommendation as to this ground.

C. Ground 3: The Untimely Mental Abnormality Trial

Petitioner's third ground asserts that his subsequent mental abnormality trial was delayed such that his federal due process rights were violated. Dkt. No. 1 at 11-12. After determining that this ground was procedurally defaulted because it was not presented to the New York Court of Appeals, *see* Dkt. No. 38 at 20, Magistrate Judge Lovric recommended that this ground be dismissed because it was barred by state law and was in any event meritless, *see id.* at 20-21. In his objections in support of this ground, Petitioner notes that he did allege "cause" for not including

[7] Petitioner also alleges that the probable cause hearing improperly relied only on the testimony of Dr. Colistra, the State's psychiatric examiner. Dkt. No. 1 at 9-10. This assertion is insufficient to provide federal *habeas* relief because courts in this circuit have found testimony from a medical expert alone to be sufficient to comport with procedural due process even at the trial stage of the MHL Article 10 process. *See, e.g.*, *McCulloch*, No2019 WL 4327271, at *10-12 (analyzing a similar argument as either "a federal due process or confrontation [clause] claim" and finding that the state court's reliance "exclusively on [oral] expert testimony" "reasonable and in compliance with clearly established Supreme Court law"); *see also State v. Floyd Y.*, 22 N.Y.3d 95, 105-06 (2013) ("In many [MHL] article 10 trials, expert testimony may be the only thing a jury hears.").

this ground in his state court application. Dkt. No. 39 at 3-5. His alleged cause appears to be that "the Court of Appeals was precluded from review based on the state constitution as it lacked jurisdiction on a question of fact" and that "[t]he Appellate Division ba[s]ed its review on a state procedural issue." *Id.* at 4. These objections are not sufficient to overcome Magistrate Judge Lovric's recommendation with respect to this ground. Indeed, neither issue Petitioner specifically identifies in his Objections would provide cause for failing to follow state procedures to preserve his claim, which he was not otherwise inhibited from doing, and, in any event, he was not ultimately prejudiced by the Appellate Division's denial. *See* Dkt. No. 38 at 20-21; *see, e.g.*, *O'Dell v. Schneiderman*, No. 9:13-CV-635 (GLS/ATB), 2014 WL 2573159, at *11 (N.D.N.Y. June 9, 2014) (finding that a "two year delay in scheduling the [mental abnormality] trial did not violate plaintiff's constitutional rights," where the "court had already found that plaintiff was sufficiently dangerous at the probable cause hearing"). Finally, to the extent that Petitioner correctly argues that not all, or even most, of the delay in Petitioner's mental abnormality trial was his fault, such delay was not prejudicial because Petitioner ultimately waived his right to a trial by acknowledging that he had a mental abnormality, and delays of comparable or longer length are not unconstitutional. *See Flowers v. Warden, Conn. Corr. Inst.*, 853 F.2d 131, 133 (2d Cir. 1988) (collecting cases with delays ranging from 24 months to 6 years where no speedy trial violation was found); *Roache*, 2019 WL 4327271, at *4 (finding no prejudice from a 16-month delay). Accordingly, the Court adopts the Report-Recommendation as to this ground.

D. Ground 4: Petitioner's Admission of Mental Abnormality Was Not Made Knowingly, Voluntarily, and Intelligently

Petitioner's fourth ground is that his admission of mental abnormality at the hearing was not made knowingly, voluntarily, and intelligently in accordance with due process. Dkt. No. 1 at 12-14. The Report-Recommendation adopted the reasoning of Respondent's brief in determining

that this ground was meritless because the waiver was both knowing and intelligent, *see* Dkt. No. 18 at 39-41, and free of undue or coercive influence, *see id.* at 41-43. Dkt. No. 38 at 8-9, 22. Petitioner's objection in support of this ground articulates three reasons that his waiver was insufficient: (1) "The trial court implied to Petitioner [that] it had already determined he suffered from a mental abnormality," (2) he was never informed that the State had the burden to "prove [b]y clear and convincing evidence [that] he suffered a mental abnormality" and Petitioner "never stated that he had serious difficulty in controlling his conduct," and (3) "the waiver was not made clear, unmistakable and without ambiguity." Dkt. 39 at 6. Petitioner also notes that he later moved to withdraw his admission. *Id.*

As to this ground, the Court notes that Petitioner acknowledges that at his August 8, 2016 mental abnormality trial, "after speaking with assigned counsel, and weighing his options[, he] agreed to waive his right to a jury trial and state that he had a mental abnormality. [Petitioner] further stated that his waiver was voluntary, knowingly and intelligently given." Dkt. No. 1 at 13.[8] A month later, however, on September 7, 2016, Petitioner renewed his request for assignment of new counsel and moved to withdraw his trial waiver. *Id.* at 13-14. The court granted Petitioner's first request and assigned new counsel, who then represented Petitioner in arguing to reverse his trial waiver by submitting a brief and arguing the motion at a June 15, 2017 hearing. *Id.* at 14. The state court denied the motion and found that Petitioner's waiver was knowing, intelligent, and voluntary, and that there was no ineffective assistance of counsel. *Id.* Nothing in Petitioner's objections on this ground[9] sway the Court to reject Magistrate Judge Lovric's recommendation.

[8] Petitioner also notes that he had previously filed a *pro se* motion with the court seeking assignment of new counsel, and the court had deferred ruling on it. Dkt. No. 1 at 13.

[9] Petitioner also makes arguments here more applicable to his grounds based on ineffective assistance of counsel, discussed in Section III.G below, or the use of hearsay evidence, discussed in Section III.H below.

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Significantly, even if the standard for waiving an MHL Article 10 mental abnormality trial is the same as for waiving trial in criminal matters, *cf.* Dkt. No. 18 at 39 (arguing there is no established federal law on the matter), Petitioner contemporaneously acknowledged the rights he had and was giving up, including the right to have a jury and not the judge or the State's experts make the mental abnormality determination, and further asserted that he was following the reasoned advice of counsel.[5] *See* Dkt. No. 1 at 13; Dkt. No. 18 at 40-41. Further, Petitioner identifies no specific flaw with Respondent's reasoning, which relied on the determinations of the Appellate Division in denying his appeal on these grounds, and which did consider the breadth of his argument, despite Petitioner's conclusory allegations to the contrary. *See* Dkt. No. 18 at 41-43. Accordingly, the Court adopts the Report-Recommendation as to this ground.

E. Ground 5: The State Court Failed to Conduct a Proper Trial Waiver Allocution

Petitioner's fifth ground is that the state court failed to conduct a proper allocution during his mental abnormality trial waiver. Dkt. No. 1 at 14-16. Petitioner's objections make clear that this ground largely reiterates Petitioner's concerns with the procedure addressed in his other grounds based on the mental abnormality trial waiver, grounds four, six, and seven. *See* Dkt. No. 39 at 6-9 (identifying ground five as "Petitioner's waiver was not voluntary" and reiterating Petitioner's prior request for assignment of new counsel due to ineffectiveness, his later move to withdraw his waiver, and his disagreement that there is no federal standard for such a waiver). Insofar as the Court has determined that Petitioner's allegations that his trial waiver was not knowing, intelligent, and voluntary is without merit, *see supra* § III.D, the Court will proceed to consider the specific challenges to the waiver procedure discussed in grounds six and seven. Those determinations notwithstanding, the Court adopts the Report-Recommendation as to this ground. *See* Dkt. No. 38 at 8-9, 21-22.

F. Ground 6: The State Court Improperly Refused Petitioner's Adjournment Request

Petitioner's sixth ground is that the state court improperly refused Petitioner's request for an adjournment of his mental abnormality trial, in violation of his due process rights. Dkt. No. 1 at 16-18. The basis for Petitioner's adjournment request was the fact that prior to the scheduled trial date, Petitioner's expert, Dr. Ewing, revised his expert report to concur with the State's experts' revised reports, which found that Petitioner had a mental abnormality and was a dangerous sex offender requiring confinement, and included new allegations of sexual abuse Petitioner perpetrated against two of his stepchildren for many years before his incarceration. *Id.* at 17-18. The State indicated that the stepchildren were prepared to serve as witnesses at the mental abnormality trial, *id.* at 17, and the state court found that Petitioner was not prejudiced by late notice of the two new witnesses and denied the request for a continuance, *id.* at 18. On this ground, Magistrate Judge Lovric adopted the reasoning of Respondent's brief that there was no established federal law on the standard for granting an adjournment in a civil confinement trial, and that the state court decision here comported with constitutional requirements in criminal matters as reasonable and not arbitrary, and Petitioner was not prejudiced. Dkt. No. 38 at 21; Dkt. No. 18 at 44-46 (noting, *inter alia*, that in the 14 months after the mental abnormality trial waiver, neither Petitioner nor his counsel could retain an expert to testify in Petitioner's favor).

Petitioner's objections in support of this ground largely reiterate his general objections or concerns raised previously, and discussed above, *see, e.g.*, §§ III.D-E. *See* Dkt. No. 39 at 8-10. Petitioner acknowledges in his Objections that the disclosure of new witness evidence was made "a few months before commencement of the trial," *id.* at 8, but argues that his "adjournment claim was not limited to his request seeking another independent doctor [expert], but was based on additional facts as articulated in his Traverse." *Id.* at 9 (citing Dkt. No. 29 at 20-24). However, in his Traverse, Petitioner makes this very argument with no additional facts. *See* Dkt. No. 29 at 23

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("Based on the aforementioned facts presented reveal/show Petitioner was prejudiced by not permitting him an adjournment to obtain an independent expert to represent him . . . ."). As noted by Respondent and endorsed by Magistrate Judge Lovric, Petitioner was not prejudiced by the denial of his adjournment request because he did not ultimately find an expert to testify in his favor at the dispositional hearing, 14 months later. *See* Dkt. No. 38 at 21-22; Dkt. No. 18 at 43-46. Because his only other articulated argument in support of this ground is more appropriately addressed in the immediately subsequent discussion about effective assistance of counsel, the Court adopts the Report-Recommendation as to this ground.

G. Ground 7: Petitioner Was Deprived of Effective Assistance of Counsel

Petitioner's seventh ground concerns alleged ineffective assistance of counsel at his mental abnormality trial and related proceedings. Dkt. No. 1 at 18-25. Magistrate Judge Lovric noted that there is no well-established federal law concerning ineffective assistance of counsel at civil confinement proceedings, *see* Dk. No. 18 at 48-51, and found that, even if there were, the state trial and appellate courts did not unreasonably deny Petitioner's claim, *see id.* at 51-58. Dkt. No. 38 at 8-9, 22. In his objections supporting this ground, Petitioner argues that the trial court improperly failed to inquire into Petitioner's complaints about his assigned counsel, and states in conclusory terms that if it had, there would have been a ruling in Petitioner's favor. Dkt. No. 39 at 10-11. Moreover, Petitioner argues that the New York Court of Appeals has applied federal constitutional standards for ineffective assistance of counsel to individuals challenging civil confinement, and that he would have met the standard under *Strickland v. Washington*, 464 U.S. 668 (1984). *Id.* at 11.

Upon *de novo* review, the Court agrees with Magistrate Judge Lovric that Petitioner's ineffective assistance of counsel argument is without merit. The Court accepts *arguendo*

Petitioner's position that in *State v. Floyd Y.*, 22 N.Y.3d 95 (2013), the New York Court of Appeals held that individuals subject to MHL Article 10 civil confinement proceedings are entitled to a right to counsel commensurate with similar criminal rights. *See id.* at 105 (observing that MHL "article 10 provides for a host of procedural protections" including that the "respondent has a right to counsel"). However, Petitioner's complaints about his counsel's representation largely concern procedural timing issues which Petitioner does not and apparently cannot link to any prejudicial outcome. *See, e.g.*, Dkt. No. 1 at 18-19 (identifying failures to respond to Petitioner's letters and the filing of a motion to dismiss the MHL petition only "a few days before trial was to commence"). Further, Petitioner notes several effective aspects of his counsel's representation, including having the mental abnormality trial moved forward from November 2016 to June 13, 2016. *Id.* Petitioner also notes that his counsel declined to advance certain arguments, including with respect to the State's failure to follow timing guidelines for MHL proceedings and the hearsay evidence in the State's experts' reports, *see id.* at 19-22, which arguments this Court has found to be without merit, *see supra* §§ III.A & n.5, III.C, *infra* § III.H. Petitioner's argument that, as a result of his counsel's lack of preparedness, he was left with no choice but to waive a trial and admit to a mental abnormality, is plainly belied by the record in this case and the waiver allocution. *See* Dkt. No. 18 at 46-48 (quoting the waiver allocution and Petitioner's acknowledgment that he could argue his case to a jury). Moreover, "[t]he failure to include a meritless argument does not fall outside the 'wide range of professionally competent assistance' to which Petitioner was entitled." *Aparicio v. Artuz*, 269 F.3d 78, 99 (2d Cir. 2001) (quoting *Strickland,* 466 U.S. at 690). Accordingly, Petitioner has not adequately alleged error, let alone made a "showing that [his] counsel's errors were so serious as to deprive [him] of a fair trial[.]" *Strickland*, 466 U.S. at 687, 694 (1984); *Murden v. Artuz*, 497 F.3d 178, 198 (2d Cir. 2007) (noting that "[u]nder *Strickland*, a

defendant must show that . . . there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *United States ex rel. Bradley v. McMann*, 423 F.2d 656, 657 (2d Cir. 1970) (even though counsel "did not interview or consult with [petitioner] until the day trial was to begin" petitioner failed to demonstrate how the trial outcome would have been different sufficient to support his ineffective assistance of counsel claim); *McCulloch*, 2019 WL 4327271, at *8 (holding that petitioner's "ineffective assistance claims fail to satisfy the *Strickland* standard" because "he does not demonstrate how [his counsel's] actions prejudiced his defense"). The Court thus adopts the Report-Recommendation as to this ground.

H. Ground 8: The State Court Improperly Considered Unsubstantiated Hearsay

Petitioner's eighth ground is that the state court violated his due process rights by improperly considering unsubstantiated hearsay allegations at the dispositional hearing that followed his mental abnormality trial waiver. Dkt. No. 1 at 25-27. In the Report-Recommendation, Magistrate Judge Lovric adopted the reasoning of Respondent's brief in dismissing this ground because there is no clearly established federal law providing for the use of hearsay at a dispositional hearing in a civil confinement proceeding, *see* Dkt. No. 18 at 62-62, and because, in any event, the included hearsay evidence did not make the dispositional hearing fundamentally unfair, *see id.* at 65-69. Dkt. No. 38 at 9-10, 22. In his objections supporting the ground, Petitioner argues that federal due process does apply to MHL Article 10 dispositional hearings, *but see McCulloch*, 2019 WL 4327271, at *10 ("The Supreme Court has not clearly established that the Sixth Amendment right to confront and cross-examine witnesses attaches in involuntary civil commitment proceedings."), and notes that in *Floyd Y.*, 22 N.Y.3d 95, the inclusion of hearsay testimony was found to be prejudicial, whereas in Petitioner's case it has not

been. *See* Dkt. No. 39 at 12. Petitioner specifically complains that "prior to the hearsay evidence Petitioner's independent [medical] examiner found no mental abnormality, then when the hearsay evidence . . . [came to light], changed his report and determined based on that evidence [that Petitioner] had a mental abnormality." *Id.*[10]

Initially, it is clear that Petitioner is primarily concerned with the fact that his own expert, rather than the state court or other fact finder, relied on hearsay evidence to determine that Petitioner had a mental abnormality and required confinement. This concern is understandable, because the MHL "essentially envisions a "battle of the experts" to determine whether the respondent has a mental abnormality." *Floyd Y.*, 22 N.Y.3d at 105-06. It is notable, however, that there is no "inflexible rule excluding all basis hearsay" and instead "hearsay basis evidence is admissible if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the 'probative value in helping the jury evaluate the [expert's] opinion substantially outweighs [its] prejudicial effect.'" *Id.* at 107-09 (quoting Fed. R. Evid. 703). Significantly, Petitioner does not allege that the hearsay evidence, whether the alleged hearsay probation records or the evidence from Petitioner's two minor stepchildren, played more than the allowable role of permitting the fact finder to understand the basis for the admissible expert testimony. *See McCulloch*, 2019 WL 4327271, at *11 ("Under both federal and New York law, expert testimony 'is not rendered inadmissible' merely because it

[10] In *Floyd Y.*, the court held that "[t]he admission of the unreliable hearsay was not harmless error. The State alleged that Floyd Y. was a pedophile and presented evidence that he had abused four prepubescent children. However, two of those allegations were based on hearsay that violated Floyd Y.'s due process rights. There is a reasonable possibility the jury could have reached another verdict had it not heard testimony that Floyd Y. had committed those two sex offenses." *Floyd Y.*, 22 N.Y.3d at 110. Here, unlike in *Floyd Y.*, Petitioner's own medical expert found the hearsay evidence sufficiently probative and reliable to revise his report to determine that Petitioner had a mental abnormality and was a dangerous sex offender requiring confinement. *See supra* § III.F.

relies on other evidence which is itself not admissible.") (citing Fed. R. Evid. 703; *Floyd Y.*, 22 N.Y.3d at 107 ("we have held that hearsay may play a role in an expert's testimony because the expert may base an opinion on hearsay if it 'is of a kind accepted in the profession as reliable in forming a professional opinion'")). As such, this objection fails. Further, it does not appear that the state court made any error by determining that the hearsay in question was sufficiently reliable in light of the record of the case. *See, e.g.*, *State v. Kerry K.*, 157 A.D.3d 172, 188 (2d Dep't 2017) (it was not error to include sworn statements regarding unindicted conduct found to be sufficiently reliable and more probative than prejudicial). Finally, it bears noting that there was ample evidence in the record, even disregarding the hearsay evidence from the stepchildren, such that Petitioner was not prejudiced by the inclusion of the hearsay testimony. *See* Dkt. No. 18 at 67-68 (describing the State's evidence, including Petitioner's refusal to engage in treatment and lack of remorse for his actions, and Petitioner's inability to present favorable expert testimony). Accordingly, the Court adopts the Report-Recommendation as to this ground.

I. Ground 9: The State Did Not Meet Its Burden at the Dispositional Hearing

Petitioner's ninth ground is that the State did not meet its burden of proving that Petitioner was a dangerous sex offender requiring civil confinement by clear and convincing evidence at the dispositional hearing. Dkt. No. 1 at 27-29. Magistrate Judge Lovric recommended dismissing this ground because Petitioner failed to exhaust the claim by not raising it to the Appellate Division or the Court of Appeals, and because the claim is meritless, as explained in Respondent's brief. *See* Dkt. No. 38 at 22-23 (citing Dkt. No. 18 at 69-74). In his objections in support of this ground, Petitioner argues that the claim has properly been exhausted and is thus preserved, and objects to the Report-Recommendation's conclusion "that the evidence before the state court was sufficient." Dkt. No. 39 at 13-14. On the merits, Petitioner essentially argues that the evidence before the court

only consisted of expert reports and opinions, which were based largely on inadmissible hearsay, and which without such hearsay would not provide the necessary clear and convincing evidence. *See id.*; *see also* Dkt. No. 29 at 35-37.

Upon *de novo* review, the Court finds that this ground for relief in the Petition is without merit even under the more stringent standard for criminal—as opposed to civil confinement—proceedings articulated in *Jackson v. Virginia*, 443 U.S. 309, 319 (1979) (evidence is legally sufficient to support a criminal conviction if, "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"). Initially, Petitioner's objections with respect to the hearsay evidence from probation records and his two minor stepchildren included in the State's experts' reports and opinions is without merit, as explained above. *See supra* § III.H. Beyond hearsay, Petitioner's remaining argument is that the State's experts relied on the facts that (a) Petitioner has maintained his innocence of the sexual offenses for over 25 years, and (b) "Petitioner did not fully participate in sex offender treatment" while incarcerated, which is insufficient to find that Petitioner was a dangerous sex offender who had trouble controlling his criminal behavior. Dkt. No. 29 at 36; Dkt. No. 39 at 14. However, this argument was presented to and rejected by the Appellate Division. *See* Dkt. No. 18 at 73 ("the Appellate Division held that the hearing 'court's determination following the dispositional phase of the proceedings is supported by the written opinions and testimony of two experts'") (quoting *State v. Daniel J.*, 180 A.D.3d 1347, 1350 (4th Dep't 2020)). The record is clear that enough evidence was presented, discounting the hearsay evidence, for a reasonable factfinder to have determined that Petitioner was dangerous and required civil confinement. *See* Dkt. No. 18 at 67 (observing that the State evidence included: "petitioner's years-long, escalating pattern of sexually abusing children, as established by his

guilty plea to abusing his stepdaughter and stepson from his first marriage, and his convictions for sexually assaulting two prepubescent girls during home invasions in 1991; his inability to stop himself despite adverse consequences; his failure to take part in sex offender treatment while in prison; and his refusal to admit his wrongdoing").[11] The Court accordingly adopts the Report-Recommendation as to this ground, as well.

J. Ground 10: The State Court Violated Petitioner's Procedural Rights

Petitioner's final ground is that he has been deprived of due process as a result of the multiple violations of the procedural protections afforded by MHL Article 10. Dkt. No. 1 at 29-31. Petitioner's objection in support of this ground makes clear that it is in substance a catch-all for the procedural violations he identified earlier in the Petition as grounds for relief. *See* Dkt. No. 39 at 14-15 (describing his challenge as applying to the full "State action and an erroneous deprivation due to inadequate procedures collectively[,]" and again citing *Spitzer*, 2007 WL 4115936). Petitioner's specific objection here is that the Report-Recommendation only analyzed Petitioner's concerns with respect to the timing of the probable cause hearing and mental abnormality trial waiver, *see id.* at 14, apparently because the Report-Recommendation only cited to the earlier discussion of Petitioner's first and third grounds, *see* Dkt. No. 38 at 23. However, in the Petition, ground ten only discusses two specific concerns: the timing of Petitioner's probable cause hearing, and the fact that his case was referred to a case review team that ultimately referred

[11] Petitioner also argued, for the first time in his Traverse, that his behavior while previously on supervised release from incarceration indicates that he is no longer dangerous, *see* Dkt. No. 29 at 37, however even if accepted as true, *cf.* Dkt. No. 18 at 20 (observing that "[a]lthough petitioner had engaged in community-based sex-offender treatment while on probation in the 1980s, he had continued to offend"), such evidence does not refute the ample evidence the state court relied on to reach the opposite conclusion by clear and convincing evidence. *See State v. Kenneth II*, 190 A.D.3d 33, 40 (3d Dep't 2020) ("When reviewing legal sufficiency, courts must review the evidence that was admitted at trial . . . and view that evidence in a light most favorable to the nonmoving party.") (citing, *inter alia*, *State of New York v Floyd Y.*, 30 N.Y.3d 963, 964 (2017)).

him for civil detention. *See* Dkt. No. 1 at 29-31. For the reasons stated above, Petitioner's timing concerns are insufficient. *See supra* §§ III.A, III.C. Further, as discussed above, Magistrate Judge Lovric rightly observed in his analysis of Petitioner's eighth and ninth grounds that Petitioner had failed to assert sufficient bases for his release, *see supra* §§ III.H, III.I, so Petitioner suffered no prejudice from the referral for civil detention at the onset of the MHL process. Accordingly, having determined that Petitioner's other arguments concerning alleged procedural deficiencies in his MHL Article 10 processes are without merit, the Court adopts the Report-Recommendation as to this final ground.

K. Certificate of Appealability

Finally, in light of the Court's *de novo* determinations above, the Court agrees with Magistrate Judge Lovric that a certificate of appealability is not appropriate in this case because Petitioner has not made "a substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 225w3(c)(2). *See* Dkt. No. 38 at 23-24.[12]

Accordingly, the Report-Recommendation is adopted in its entirety.

IV. CONCLUSION

For these reasons, the Court hereby

ORDERS that the Report-Recommendation, Dkt. No. 38, is **ADOPTED in its entirety**; and the Court further

ORDERS that the Petition for a writ of *habeas corpus*, Dkt. No. 1, is **DENIED and DISMISSED**; and the Court further

ORDERS that no certificate of appealability shall be issued with respect to any of

[12] Any further request for a certificate of appealability must be addressed to the Court of Appeals. *See* Fed. R. App. P. 22(b).

Petitioner's claims; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Respondent's favor, serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules, and close the case.

IT IS SO ORDERED.

Dated: June 26, 2024
Albany, New York

Anne M. Nardacci
U.S. District Judge

B. 2.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DANIEL JONES,

Petitioner,

v.

9:21-CV-1007
(AMN/ML)

DANIELLE TOPE, Psy. D.,

Respondent.

APPEARANCES:

OF COUNSEL:

DANIEL JONES
Pro se Petitioner
CNY Psychiatric Center
Post Office Box 300
Marcy, New York 13403

LETITIA A. JAMES
New York State Attorney General
Counsel for Respondent
28 Liberty Street
New York, New York 10005

PAUL B. LYONS, ESQ.
Assistant Attorney General

MIROSLAV LOVRIC, United States Magistrate Judge

REPORT and RECOMMENDATION

Currently before the Court in this habeas corpus proceeding filed by the petitioner, Daniel Jones ("Petitioner"), pursuant to 28 U.S.C. § 2254, is a referral to the undersigned for a report and recommendation from United States District Court Judge Anne M. Nardacci regarding the Petition. (Dkt. No. 1.) Petitioner is currently involuntarily civilly confined at the Central New York Psychiatric Center ("CNYPC") in the Sex Offender Treatment Program ("SOTP") under the custody of the New York State Office of Mental Health ("OMH") pursuant to Article 10 of

the New York State Mental Hygiene Law. On September 13, 2021, Petitioner filed a *pro se* Petition seeking a writ of habeas corpus challenging his confinement at CNYPC. (Dkt. No. 1.) Respondent opposed that motion and Petitioner filed a traverse. (Dkt. Nos. 16, 17, 18, 20, 29.) For the following reasons, the undersigned recommends that the Petition be denied.

I. BACKGROUND

In 1985, Petitioner pleaded guilty to one count of sexual abuse in the first degree with respect to multiple incidents of sexual acts by Petitioner against his two stepdaughters and one stepson that occurred between 1979 and 1982. (Dkt. No. 20, Attach. 2 at 93; Dkt. No. 20, Attach. 2 at 102-104.) He was sentenced to a term of five years probation. (Dkt. No. 20, Attach. 2 at 93; Dkt. No. 20, Attach. 2 at 102-104.)

Underlying the relevant civil commitment in this habeas petition, a jury found Petitioner guilty of attempted rape in the first degree, two counts of sexual abuse in the first degree, and other related offenses. (Dkt. No. 20, Attach. 2 at 92.) On May 13, 1992, Petitioner was sentenced on those convictions to an aggregate indeterminate term of imprisonment from ten to twenty years. (*Id.*)

Before the expiration of Petitioner's prison sentence, the State petitioned under N.Y. Mental Hyg. Law § 10 for Petitioner to remain civilly confined in the State's custody, and Petitioner was assigned counsel. (Dkt. No. 20, Attach. 2 at 89-100, 127-28.)

On June 27, 2012, the Erie County Supreme Court found probable cause to believe that Petitioner would require civil management pursuant to N.Y. Mental Hyg. Law § 10.06. (Dkt. No. 20, Attach. 2 at 135-36; Dkt. No. 20, Attach. 2 at 395-448.)

On August 8, 2016, Petitioner waived a jury trial and consented to a finding of mental abnormality as defined by Article 10 of the N.Y. Mental Hyg. Law. (Dkt. No. 20, Attach. 2 at

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230-231; Dkt. No. 20, Attach. 2 at 524-529.) Petitioner later moved to vacate his waiver and consent, but the court denied his motion. (Dkt. No. 20, Attach. 2 at 250-203, 580-599.)

On July 13, 2017, Petitioner filed a state habeas corpus petition. (Dkt. No. 17, Attach. 1 at 1-7.) On September 14, 2017, the Erie County Supreme Court denied Petitioner's state habeas corpus petition. (Dkt. No. 17, Attach. 1 at 19-20.) On September 26, 2017, Petitioner appealed this order ("Appeal 3"). (Dkt. No. 17, Attach. 1 at 51.)

Following a dispositional hearing, on November 21, 2017, the Erie County Supreme Court concluded that Petitioner is a dangerous sex offender requiring confinement and ordered him committed to a secure treatment facility to receive further sex offender treatment. (Dkt. No. 20, Attach. 2 at 601-683; Dkt. No. 20, Attach. 2 at 685-688.) On December 6, 2017, Petitioner appealed this order ("Appeal 1"). (Dkt. No. 17, Attach. 1 at 36.)

On November 29, 2017, Petitioner filed a motion pursuant to N.Y. C.P.L.R. §§ 4404(b), 5015 seeking reconsideration and to vacate the order of commitment. (Dkt. No. 20, Attach. 2 at 794-844.) On April 17, 2018, the Erie County Supreme Court denied Petitioner's motion. (Dkt. No. 20, Attach. 2 at 792.) On April 30, 2018, Petitioner appealed the denial of his reconsideration motion ("Appeal 2"). (Dkt. No. 20, Attach. 2 at 788.)

On October 25, 2018, Petitioner filed a motion to consolidate his appeals. (Dkt. No. 17, Attach. 1 at 21-56.) On November 13, 2018, the New York Appellate Division Fourth Department, granted Petitioner's motion to consolidate to the extent that it sought to consolidate Appeal 1 and Appeal 2, and denied Petitioner's motion to the extent that it sought to consolidate Appeal 3 with Appeals 1 and 2. (Dkt. No. 17, Attach. 1 at 57-60.)

On November 19, 2018, Petitioner filed a stipulation to withdraw Appeal 3. (Dkt. No. 17, Attach. 1 at 61-62.) On November 30, 2018, the New York Appellate Division Fourth Department dismissed Appeal 3. (Dkt. No. 17, Attach. 1 at 63.)

Through counsel, Petitioner asserted the following six arguments related to Appeals 1 and 2: (1) the State failed to show probable cause to continue to detain Petitioner and his due process rights were violated by the delay in the probable cause hearing; (2) Petitioner's due process rights were violated by the delay in holding the mental abnormality hearing; (3) Petitioner's admission to a mental abnormality should be vacated; (4) the trial court should have excluded all testimony concerning the unsubstantiated hearsay allegations of Petitioner's stepchildren at the disposition hearing; (5) the Appellate Court should exercise its independent power of review and find that the State did not meet its burden of proving by clear and convincing evidence that Petitioner was a dangerous sex offender requiring confinement; and (6) the trial court should have granted Petitioner's *pro se* N.Y. C.P.L.R. § 4404 motion. (Dkt. No. 20, Attach. 2 at 861-926.)

On February 7, 2020, the Appellate Division unanimously affirmed the commitment order, and on June 23, 2020, the New York Court of Appeals denied leave to appeal. *State v. Daniel J.*, 180 A.D.3d 1347 (N.Y. App. Div. 4th Dep't 2020), *lv. denied*, 35 N.Y.3d 908 (2020); (Dkt. No. 20, Attach. 2 at 1008-10, 1067.)

II. GROUNDS RAISED

A. Petition

On September 13, 2021, Petitioner commenced this proceeding by the filing of a verified Petition for writ of habeas corpus. (Dkt. No. 1.) The Petition asserts the following ten grounds for habeas relief: (1) Petitioner's due process rights were violated by the untimely probable cause

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hearing ("Ground 1"); (2) Petitioner's due process rights were violated by the court's finding of probable cause based on legally insufficient evidence ("Ground 2"); (3) Petitioner's due process rights were violated by the untimely mental abnormality hearing ("Ground 3"); (4) Petitioner's due process rights were violated because his admission of mental abnormality was not made knowingly, voluntarily, and intelligently ("Ground 4"); (5) Petitioner's due process rights were violated because the court failed to conduct a proper allocution during his trial waiver ("Ground 5"); (6) Petitioner's due process right to present evidence was violated by the court's refusal to grant an adjournment ("Ground 6"); (7) Petitioner was deprived of effective assistance of counsel ("Ground 7"); (8) Petitioner's due process rights were violated because the court considered unsubstantiated hearsay allegations at the dispositional hearing ("Ground 8"); (9) Petitioner's due process rights were violated because the State did not meet its burden of proving by clear and convincing evidence that Petitioner was a dangerous sex offender requiring confinement ("Ground 9"); and (10) Petitioner was deprived of due process because his procedural rights pursuant to N.Y. Mental Hyg. Law § 10.01, *et seq.* were violated ("Ground 10"). (*See generally* Dkt. No. 1.)

B. Respondent's Answer and Memorandum of Law

Generally, Respondent makes the following six arguments in support of her answer: (1) Petitioner's claim regarding the delay in conducting the probable cause hearing is meritless; (2) Petitioner's challenge to the court's probable cause finding is unexhausted, procedurally barred, and meritless; (3) Petitioner's speedy trial claim is unexhausted, procedurally barred, and meritless; (4) there is no merit to Petitioner's unexhausted claims challenging his mental abnormality trial waiver, the effectiveness of his counsel, and the denial of his adjournment

request; (5) Petitioner's hearsay claim is meritless; and (6) Petitioner's legal sufficiency claim as to the court's dispositional finding is unexhausted and meritless. (*See generally* Dkt. No. 18.)

More specifically, with respect to her first argument (addressing Grounds 1 and 10), Respondent asserts that the delay in holding the probable cause hearing was attributable to Petitioner, who requested that the proceeding be removed to Erie County. (Dkt. No. 18 at 27-30.) Respondent argues that the base of Petitioner's claim is not a due process claim, but a violation of N.Y. Mental Hyg. Law § 10.06(h), and federal habeas corpus relief does not lie for errors of state law. (*Id.* at 28-29.) Moreover, Respondent argues that—even if the claim were cognizable—the Supreme Court has never addressed whether due process could be violated by a delay in holding a civil commitment probable cause hearing and thus, it cannot be said that the state court unreasonably applied clearly established federal law within the meaning of the AEDPA. (*Id.* at 29.) Further, Respondent argues that Petitioner has not established a violation of state law so egregious as to amount to constitutional error because N.Y. Mental Hyg. Law § 10.06(h) states that failure to commence the probable cause hearing within the time periods specified shall not result in the dismissal of the petition and shall not affect the validity of the hearing or the probable cause determination. (*Id.* at 29-30.) Finally, Respondent argues that Petitioner cannot establish that he was prejudiced by the delay because the court ultimately found probable cause. (*Id.* at 30.)

With respect to her second argument (addressing Ground 2), Respondent argues that Petitioner's challenge to the court's probable cause finding was raised to the Appellate Division solely on state law terms and, in any event, is barred on adequate and independent state law grounds because the Appellate Division denied the claim as non-appealable. (Dkt. No. 18 at 30-33.) Moreover, Respondent argues that Petitioner's challenge to the probable cause finding is

procedurally defaulted because Petitioner has already had the one direct appeal and one leave application to which he is entitled. (*Id.*) Further, Respondent argues that Petitioner cannot overcome the bar to federal habeas review of the procedurally defaulted claim because he cannot establish cause nor can he establish prejudice. (*Id.* at 31-32.) Moreover, Respondent argues that, even if the claim was properly exhausted, the New York State procedural rule that no appeal lies from an order finding probable cause, is a firmly established and regularly followed state practice that may be deemed adequate to prevent subsequent review by this Court. (*Id.* at 32.) Finally, Respondent argues that the claim is meritless because the Constitution does not guarantee a right to a probable cause hearing in a civil commitment proceeding and any error in the probable cause hearing was cured by Petitioner's subsequent decision to waive the trial. (*Id.* at 32-33.)

With respect to her third argument (addressing Grounds 3 and 10), Respondent argues that Petitioner failed to raise his speedy trial claim in his detailed leave application to the Court of Appeals and it is thus, the claim is unexhausted and defaulted under state law. (Dkt. No. 18 at 33-34.) Further, Respondent argues that the Appellate Division found that Petitioner failed to preserve for its review the speedy trial claim and failure to preserve an issue for appeal is an adequate and independent state ground barring habeas review. (*Id.* at 34.) Finally, Respondent argues that the speedy trial claim is meritless because (1) a violation of state statute—N.Y. Mental Hyg. § 10.07(a)—is not automatically a federal constitutional violation unless the error was sufficiently egregious to amount to a denial of due process under the Fourteenth Amendment; (2) the Supreme Court has never opined that a delay in a civil commitment proceeding can violate either the Sixth Amendment or due process and thus, the state court could not have unreasonably applied such law; (3) Petitioner's knowing, intelligent, and voluntary

waiver of his right to a jury trial renders academic his challenge to the trial delay; (4) the delay attributable to the prosecution in this case was not so excessive as to violate due process because the vast majority of the delay was at Petitioner's request (over the State's objection) so that he could collaterally attack his 1992 conviction and to accommodate his expert; and (5) given that Petitioner's dangerousness had already been determined by the court at the probable cause hearing, and that Petitioner waived a trial where he could have challenged that finding of dangerousness, there is no basis to find that due process was violated by the delay in holding a trial. (Dkt. No. 18 at 35-37.)

With respect to her fourth argument (addressing Grounds 4, 5, 6, and 7), Respondent asserts that Petitioner's claims challenging his mental abnormality trial waiver are unexhausted and meritless. (Dkt. No. 18 at 37-61.) Respondent asserts that Petitioner's claim that his trial waiver was coerced and involuntary is unexhausted because his arguments to the Appellate Division relied solely on state law and did not "fairly present" a federal constitutional claim. (*Id.* at 37-38.) Moreover, Respondent argues that the claims are meritless because (1) there is no clearly established Supreme Court law providing the standard for reviewing claims as to the voluntariness of the waiver of a civil commitment trial so it cannot be said that the state court unreasonably applied clearly established federal law within the meaning of the AEDPA; (2) the record establishes that Petitioner's waiver was both knowing and intelligent; (3) the record establishes that Petitioner's waiver was voluntary; (4) there is no merit to Petitioner's adjournment claim given that (a) there is no clearly established Supreme Court law regarding the standard for reviewing the denial of an adjournment request in a civil commitment proceeding and thus, the Appellate Division could not have unreasonably applied such law, and (b) the trial court's denial of the adjournment was neither unreasonable or arbitrary and Petitioner cannot

show prejudice; (5) Petitioner's waiver-allocution claim is meritless given that (a) Petitioner has not established that the court's purportedly improper statement affected his decision to waive trial, (b) Petitioner stated on the record that no one was forcing him to waive his right to a jury trial, and (c) due process does not require any particular script be followed by the court, Petitioner's own statements implied his awareness that the State carried the burden at trial, and even if he was unaware of the State's burden, it is not probable that such knowledge affected his decision to waive trial; (6) Petitioner's ineffective assistance of counsel claim is meritless given that (a) there is no clearly established Supreme Court law governing ineffective assistance of counsel claims in civil commitment proceedings, and (b) even if there was clearly established Supreme Court precedence, the Appellate Division did not unreasonably apply it; (7) Petitioner's failure to inquire claim is without merit given that (a) there is no clearly established Supreme Court law holding that a trial court has a duty to inquire into a claim of dissatisfaction with assigned counsel made by an indigent respondent in a civil commitment proceeding, (b) Petitioner's complaints about his attorney did not merit further inquiry from the trial court, (c) the trial court did, in fact, conduct an adequate inquiry into Petitioner's complaints about his attorney, and (d) although the trial court reserved decision on reassignment during the hearing of August 8, 2016, it subsequently granted a motion for substitution of counsel, who then filed a motion to withdraw Petitioner's trial waiver, which the court denied and "affirmatively" ruled that counsel had not been ineffective. (Dkt. No. 18 at 39-61.)

With respect to her fifth argument (addressing Ground 8), Respondent asserts that Petitioner's claim that his due process rights were violated by the admission of hearsay at the dispositional hearing, is meritless. (Dkt. No. 18 at 61-69.) More specifically, Respondent argues that there is no clearly established Supreme Court law on the standard for reviewing the

admission of hearsay in civil commitment proceedings, and even assuming that such law exists, the Appellate Division's decision did not unreasonably apply the law. (*Id.*) Respondent asserts that any error in admitting hearsay evidence in this case was harmless because the case against Petitioner relied primarily on admissible evidence including (1) expert testimony about crimes that Petitioner was convicted of or admitted to, and (2) Petitioner's refusal to participate in sex offender treatment while in prison. (*Id.*) Further, Respondent asserts that Petitioner failed to establish that any error in admitting the hearsay was so egregious or fundamentally unfair as to violate due process. (*Id.*)

With respect to her sixth argument (addressing Ground 9), Respondent asserts that Petitioner's claim that the State failed to establish by clear and convincing evidence that Petitioner was a dangerous sex offender requiring confinement, is unexhausted and meritless. (Dkt. No. 18 at 69-74.) More specifically, Respondent argues that (1) Petitioner failed to raise this claim in federal terms in the Appellate Division, and (2) Petitioner failed to mention the claim (in state or federal terms) in his leave application to the Court of Appeals and has failed to allege cause for his failure and/or prejudice. (*Id.*) Respondent argues that in any event, the claim is without merit because the Appellate Division's denial of the claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. (*Id.*) Further, Respondent argues that the New York Appellate Division's holding—that the trial court's disposition finding was supported by the written opinions and testimony of two experts—was correct and should not be second-guessed. (*Id.*)

C. Petitioner's Traverse

Petitioner makes the following ten arguments in his Traverse: (1) the delay in conducting the probable cause hearing violated Plaintiff's due process right because (a) his request for a

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removal to Erie County was not a consent to a delay in the proceeding, and (b) he exhausted the claim by raising it on direct appeal in federal terms; (2) his due process rights argument related to the probable cause hearing (a) has merit because the probable cause finding was not supported by legally sufficient evidence, (b) was exhausted because the cases he relied on employed a constitutional analysis in similar factual situations, and (c) should not be barred based on adequate and independent state law grounds because the procedural rule—that no appeal lies from a finding of probable cause—is not fairly established and regularly followed; (3) Petitioner's due process rights were violated by the court's failure to hold a trial within sixty days of the probable cause finding and (a) this argument was raised before the Appellate Division and leave application to the Court of Appeals, (b) the New York appeals courts had a duty to review whether Petitioner's fundamental constitutional rights were violated and, despite having an opportunity, failed to make a finding, (c) in any event, the denial of a claim on state law procedural grounds does not deprive the habeas court of jurisdiction, (d) the statutory violation establishes presumptive prejudice; (4) there is merit to Petitioner's exhausted claim asserting that his trial waiver was not made knowingly and intelligently because the trial court failed to (a) inform Petitioner that the state carried the burden at trial, (b) explain the elements of a mental abnormality, and (c) elicit a factual statement or admission from Petitioner implying that he had serious difficulty controlling his conduct; (5) there is merit to Petitioner's exhausted claim asserting that his trial waiver was not made voluntarily because the record reflects that he was under undue pressure in light of (a) the motion he submitted to the trial court outlining his concerns that his assigned counsel was unprepared for trial, (b) the trial court's statement suggesting that it had already determined Petitioner suffered from a mental abnormality before the evidence was introduced or received by the court, (c) the trial court's failure to inquire

further when asked whether anyone was forcing Petitioner to make an admission of a mental abnormality and he stated that it was a hard question, and (d) Petitioner filed a motion to withdraw his waiver which provided specific facts showing that his waiver was not voluntary; (6) there is merit to Petitioner's claim that the denial of his adjournment request violated due process because the State made a late disclosure that effectively left Petitioner without an expert witness to testify on his behalf and present evidence in his case; (7) Petitioner's claim that his assigned counsel provided ineffective assistance of counsel has merit because (a) there is established Supreme Court precedent governing ineffective counsel claims in civil commitment proceedings, and (b) Attorney Cutting was unfamiliar with the facts and law of Petitioner's case and it was never his intention to challenge the State's case or present an expert witness on Petitioner's behalf; (8) the trial court failed to conduct a sufficient inquiry into Petitioner's concerns regarding his assigned counsel; (9) Petitioner's hearsay claim has merit because (a) the State's case relied on experts who relied almost exclusively on inadmissible hearsay, (b) the trial court demonstrated its partiality by having an ex parte conversation with Petitioner's independent doctor and determined that Petitioner had a mental abnormality before any evidence was admitted, and (c) the error admitting the hearsay was not harmless and suggested Petitioner's inability to control his sexual behavior; and (10) Petitioner's exhausted legal sufficiency claim has merit because (a) the factors relied upon by the State's experts did not support a finding that Petitioner had the required difficulty to control his conduct, (b) the State's experts relied upon unsubstantiated hearsay concerning sexual abuse of Petitioner's stepdaughters from his second marriage, (c) the trial court considered how long Petitioner was in the community before reoffending but the alleged re-offense was not a crime he pleaded guilty to and thus should not have been considered a re-offense, (d) the trial court improperly considered that Petitioner has

maintained his innocence for over 25 years—which includes when Petitioner was eligible for parole or conditional release if he admitted his guilt—and did not fully participate in sex offender treatment while incarcerated, and (e) no expert testified that a diagnosis of pedophilia alone demonstrated Petitioner's serious difficulty in controlling his sexual conduct. (Dkt. No. 29 at 5-38.)

III. RELEVANT LEGAL STANDARDS

A. Legal Standard Governing Review of Habeas Petition

A person in custody pursuant to the judgment of a state court may file a petition for a writ of habeas corpus in the United States District Courts if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §§ 2241(c)(3), 2254(a); *Williams v. Taylor*, 529 U.S. 362, 375 n.7 (2000). The fact that Petitioner is challenging his civil commitment for mental illness rather than his underlying criminal conviction does not change the outcome as civil commitments are typically challenged in habeas proceedings. *See Duncan v. Walker*, 533 U.S. 167, 176 (2001) (stating that a state court order of civil commitment satisfies § 2254's "in custody" requirement). A person in state custody may challenge his confinement under 28 U.S.C. § 2241 or 28 U.S.C. § 2254. However, a § 2241 petition generally challenges the execution of a sentence such as "the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions." *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001). Because Petitioner challenges the term of his confinement rather than the conditions surrounding it, he has properly brought his claim under § 2254. *See Buthy v. Comm'r of Office of Mental Health of New York*, 818 F.2d 1046, 1051-52 (2d Cir. 1987) (petitioning for a writ of habeas corpus pursuant to §

2254 is the appropriate method for an individual to challenge the fact or duration of his involuntary civil commitment to a state psychiatric institution).

Where a case challenging a civil commitment is initiated by the filing of a petition for habeas corpus, the case is governed by the deferential standard of review prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d). *Ernst J. v. Stone,* 452 F.3d 186, 188 (2d Cir. 2006). Under AEDPA, this Court cannot grant relief unless the decision of the state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). A state-court decision is contrary to federal law if the state court applies a rule that contradicts controlling Supreme Court authority or "if the state court confronts a set of facts that are materially indistinguishable from a decision" of the Supreme Court, but nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

To the extent that the Petition raises issues of the proper application of state law, they are beyond the purview of this Court in a federal habeas proceeding. *See Swarthout v. Cooke*, 131 S. Ct. 859, 863 (2011) (per curiam) (holding that it is of no federal concern whether state law was correctly applied).

In applying these standards on habeas review, this Court reviews the "last reasoned decision" by the state court. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991); *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000). Where there is no reasoned decision of the state court addressing the ground or grounds raised on the merits and no independent state grounds exist for not addressing those grounds, this Court must decide the issues de novo on the record before it.

See Dolphy v. Mantello, 552 F.3d 236, 239-40 (2d Cir. 2009) (citing *Spears v. Greiner*, 459 F.3d 200, 203 (2d Cir. 2006)); *cf. Wiggins v. Smith*, 539 U.S. 510, 530-31 (2003) (applying a de novo standard to a federal claim not reached by the state court). In so doing, the Court presumes that the state court decided the claim on the merits and the decision rested on federal grounds. *See Coleman v. Thompson*, 501 U.S. 722, 740 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989); *see also Jimenez v. Walker*, 458 F.3d 130, 140 (2d Cir. 2006) (explaining the *Harris-Coleman* interplay); *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 810-11 (2d Cir. 2000) (same). This Court gives the presumed decision of the state court the same AEDPA deference that it would give a reasoned decision of the state court. *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011) (rejecting the argument that a summary disposition was not entitled to § 2254(d) deference); *Jimenez*, 458 F.3d at 145-46. Under the AEDPA, the state court's findings of fact are presumed to be correct unless the petitioner rebuts this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

B. 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) (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (internal quotation and other citations omitted)); 28 U.S.C. § 2254(b)(1). The prisoner must "fairly present" his claim in each appropriate state court, including the highest court with powers of discretionary review, thereby alerting that court to the federal nature of the claim. *Baldwin*, 541 U.S. at 29; *Bossett v. Walker*, 41 F.3d 825, 828 (2d Cir. 1994).

"A habeas petitioner has a number of ways to fairly present a claim in state court without citing 'chapter and verse' of the Constitution, including '(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.'" *Hernandez v. Conway*, 485 F. Supp. 2d 266, 273 (W.D.N.Y. 2007) (quoting *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982)).

Where a petitioner has failed to exhaust his claims, but he cannot return to state court, petitioner's claims are then "deemed" exhausted, but barred by procedural default. *Bossett v. Walker*, 41 F.3d 825, 828-29 (2d Cir. 1994). The merits of such a procedurally defaulted claim may not be reviewed by a federal court unless the petitioner can show both cause for the default and actual prejudice resulting from the alleged violation of federal law, or if he can show that the constitutional violation has resulted in the conviction of one who is "actually innocent." *Rivas v. Fischer*, 687 F.3d 514, 540 (2d Cir. 2012); *Clark v. Perez*, 510 F.3d 382, 393 (2d Cir. 2008) (internal quotation and citations omitted). The actual innocence prong is referred to as the fundamental miscarriage of justice exception. *Rivas,* 687 F.3d at 540. "Cause" exists if "the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Prejudice exists if there is a "reasonable probability" that the result of the proceeding would have been different absent the alleged constitutional violation. *Stickler v. Greene*, 527 U.S. 263, 289 (1999).

IV. ANALYSIS[1]

A. Ground 1

After carefully considering the matter, I recommend that Petitioner's claim regarding the delay in holding his probable cause hearing (Ground 1) be denied for the reasons set forth in Respondent's memorandum of law. (Dkt. No. 18 at 27-30.) The undersigned merely would like to highlight Respondent's argument that the delay in holding the hearing was primarily attributable to Petitioner's request for a change in venue. (*Id.*) The New York Appellate Division's denial of Petitioner's claim did not unreasonably apply clearly established Supreme Court law. *Daniel J.*, 180 A.D.3d at 1328 (citing N.Y. Mental Hyg. § 10.06(g)).

B. Ground 2

After carefully considering the matter, I recommend that Petitioner's claim that the trial court's finding of probable cause was based on legally insufficient evidence (Ground 2) be denied for the reasons set forth in Respondent's memorandum of law. (Dkt. No. 18 at 30-33.)

As an initial matter, Ground 2—which is a federal constitutional claim—does not appear to have been "fairly presented" to the Appellate Division, given that Petitioner's evidence-sufficiency arguments related to the finding of probable cause, were framed in the context of state evidentiary law. (Dkt. No. 20, Attach. 2 at 905-07.) "While this means that Petitioner's claim is unexhausted, it still may be reviewable under one of the narrow exceptions provided for

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[1] As the New York State Court of Appeals affirmed the Appellate Division's decision without explanation, the undersigned has reviewed the last state court decision that provided a rationale. *See Daniel J.*, 180 A.D.3d 1347; *Willson v. Sellars*, 138 S. Ct. 1188, 1192 (2018) (holding that a federal habeas court reviewing an unexplained state-court decision on the merits "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning," but that "the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision").

'procedurally defaulted' claims." *Bennett v. Dill*, 21-CV-1450, 2022 WL 4451040, at *8 (E.D.N.Y. Sept. 23, 2022) (citing *Galdamez v. Keane*, 394 F.3d 68, 73 (2d Cir. 2005); *Murray v. Carrier*, 477 U.S. 478, 485 (1986)). However, "Petitioner's claim is procedurally defaulted as he has already had one appeal and one application for leave to appeal to the New York Court of Appeals, and therefore can no longer raise the claim in any state forum." *Bennett*, 2022 WL 4451040, at *8 (citing *Ramirez v. Attorney Gen.*, 280 F.3d 87, 94-95 (2d Cir. 2001)).

As set forth by Respondent, Petitioner fails to provide any reason why this claim was not presented to the Appellate Division on appeal, thereby failing to meet the criteria of the first exception to procedural default. *Id.* (citing *Stepney v. Lopez*, 760 F.2d 40, 45 (2d Cir. 1985)).

Turning to the "fundamental miscarriage of justice" exception for procedural default, it "is more difficult to apply here given that Petitioner is challenging a bench [decision] that led to his *civil confinement*. The Supreme Court has stated that this exception is reserved for 'petitions that advance a substantial claim of *actual innocence*.'" *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 321-22, 325, 327 (1995) (emphasis added)). "This standard does not map neatly onto a case involving civil confinement. There does not appear to be Second Circuit case law interpreting the 'actual innocence' standard in the context of civil confinement, nor have other circuits enunciated a clear rule." *Id.* (citing *Brown v. Watters*, 599 F.3d 602, 609-10 (7th Cir. 2010) ("The correct application of the actual innocence exception to civil commitment cases is a difficult one. We have no explicit guidance from the Supreme Court or from our sister circuits. . . . [Therefore, we shall] proceed to adjudicate the merits.")).

The Court need not decide whether and how the "actual innocence" exception to procedural default applies to civil commitments because, as discussed below, I recommend that

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Petitioner's Ground 2 claim be dismissed as (1) barred on adequate and independent state grounds, and (2) meritless.

More specifically, the New York State Appellate Division Fourth Department held that Petitioner's "contention regarding the sufficiency of the evidence presented at the probable cause hearing is not properly before us because no appeal lies from the order finding probable cause." *Daniel J.*, 180 A.D.3d at 1348 (citing *Matter of State of New York v. Stein*, 85 A.D.3d 1646, 1648 (N.Y. App. Div. 4th Dep't 2011), *aff'd* 20 N.Y.3d 99 (N.Y. 2012), *cert. denied* 568 U.S. 1216 (2013)). Further, N.Y. Mental Hyg. Law § 10.13(b) expressly states that "[n]o appeal may be taken from an order entered pursuant to . . . this article determining that probable cause has been established to believe that the . . . sex offender requir[es] civil management." As set forth by Respondent, New York state courts have consistently applied this provision to deny appeals from probable cause findings. Thus, there is an independent and adequate state ground barring federal review.

Moreover, as set forth by Respondent, any error in the probable cause hearing was cured by Petitioner's subsequent decision to waive trial and admit to having a mental abnormality. *State v. Kenneth II*, 190 A.D.3d 33, 37-38 (N.Y. App. Div. 3d Dep't 2020) (finding that if the trial court erred in permitting waiver of a probable cause hearing, the error was mooted by the subsequent mental abnormality finding by clear and convincing evidence, which is "a higher standard than would be applied at a probable cause hearing.").

As a result, I recommend that Ground 2 be denied.

C. Ground 3

After carefully considering the matter, I recommend that Petitioner's claim that his due process rights were violated by the failure to hold a trial within sixty days after the probable

cause finding (Ground 3) be denied for the reasons stated in Respondent's memorandum of law. (Dkt. No. 18 at 33-37.)

As an initial matter, Petitioner failed to raise Ground 3 in his leave application to the New York Court of Appeals. (Dkt. No. 20, Attach. 2 at 979-1005.) This claim is procedurally defaulted because Petitioner has already had one appeal and one application for leave to appeal to the New York Court of Appeals. Further, Petitioner failed to provide any reason why Ground 3 was not presented to the Court of Appeals, thereby failing to meet the criteria for the first exception to procedural default.

As set forth above in Part IV.B. of this Report and Recommendation, it is difficult to apply the "fundamental miscarriage of justice" exception, to challenges of bench trials that led to civil confinement. However, the Court need not decide whether and how the "actual innocence" exception to procedural default applies to civil commitments because, as discussed below, I recommend that Petitioner's Ground 3 claim be dismissed as (1) barred on adequate and independent state grounds, and (2) meritless.

More specifically, the New York State Appellate Division Fourth Department held that Petitioner "failed to preserve for our review his contention that he was denied due process because a jury trial was not held within 60 days of the probable cause hearing." *Daniel J.*, 180 A.D.3d at 1348 (citing *Matter of State of New York v. Trombley*, 98 A.D.3d 1300, 1302 (N.Y. App. Div. 4th Dep't 2012), *lv denied* 20 N.Y.3d 856 (N.Y. 2013)). The failure to preserve a claim for appeal is considered a state procedural rule, which "preclude[s the claim] from habeas review pursuant to the adequate and independent state ground doctrine." *Switzer v. Graham*, 05-CV-6706, 2010 WL 1543855, *4 (W.D.N.Y. Apr. 16, 2010) (citing *Richardson v. Greene*, 497 F.3d 212, 218 (2d Cir. 2007); *Fore v. Ercole*, 594 F. Supp. 2d 281 (E.D.N.Y. 2009); *Walker v.*

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Goord, 427 F. Supp. 2d 272 (W.D.N.Y. 2006)). Thus, there is an independent and adequate state ground barring federal review.

Moreover, as set forth by Respondent, the delay in holding Petitioner's trial was attributable primarily to his requests—over the State's objection—so that he could collaterally attack his underlying conviction (Dkt. No. 20, Attach. 2 at 452-465; Dkt. No. 20, Attach. 2 at 148) and to accommodate his expert (Dkt. No. 20, Attach. 2 at 466-469; Dkt. No. 20, Attach. 2 at 144-45.) Further, as set forth by Respondent, the trial court had already found that Petitioner was sufficiently dangerous at the probable cause hearing and the delay in scheduling the trial did not violate his constitutional rights. This finding was further buttressed by Petitioner's waiver of his mental abnormality trial.

As a result, I recommend that Ground 3 be denied.

D. Grounds 4, 5, 6, and 7

The parties asserted arguments with respect to Grounds 4, 5, 6, and 7 together and seem to reframe Grounds 4, 5, 6, and 7 as asserting that Petitioner's waiver of his right to a jury trial on whether he had a mental abnormality was involuntary because (1) the court improperly refused to grant Petitioner an adjournment to find a new expert, thereby coercing Petitioner into waiving trial, (2) the trial court made coercive statements during the waiver allocution and failed to ensure the waiver was voluntary, (3) Petitioner's counsel was unprepared for trial, and (4) the court failed to inquire into, or decide, Petitioner's motion for the substitution of counsel. (Dkt. No. 18 at 37-61; Dkt. No. 29 at 14-32.)

Petitioner's Appellate Division brief on direct appeal appears to primarily focus on state law terms but does mention federal constitutional claims. (Dkt. No. 20, Attach. 2 at 911 [referring to Petitioner's due process rights]; Dkt. No. 20, Attach. 2 at 912 ["Appellant does have

a fundamental due process right in Article 10 proceedings."]; Dkt. No. 20, Attach. 2 at 914 ["Inasmuch as respondent contends that he received ineffective assistance of counsel under both the state and federal standards . . ."].) Assuming, without deciding, that these claims were exhausted, I recommend that they be dismissed as meritless.

For the reasons set forth in Respondent's memorandum of law, I find that Petitioner's waiver of his right to a jury trial was entered knowingly, intelligently, and voluntarily. (Dkt. No. 18 at 39-43.) Moreover, I find that for the reasons stated in Respondent's memorandum of law Petitioner's (1) adjournment claim (*id.* at 43-46); (2) waiver allocution claim (*id.* at 46-48); (3) ineffective assistance of counsel claim (*id.* at 48-58), and (4) failure-to-inquire claims (*id.* at 58-61), are meritless.

As a result, I recommend that Grounds 4, 5, 6, and 7 be denied.

E. Ground 8

After carefully considering the matter, I recommend that Petitioner's claim that his due process rights were violated by the admission at the dispositional hearing, of expert testimony discussing hearsay accusations (Ground 8) be denied for the reasons stated in Respondent's memorandum of law. (Dkt. No. 18 at 61-69.)

F. Ground 9

After carefully considering the matter, I recommend that Petitioner's claim that his due process rights were violated because the State did not prove by clear and convincing evidence that he was a dangerous sex offender requiring confinement (Ground 9) be denied for the reasons stated in Respondent's memorandum of law. (Dkt. No. 18 at 69-74.)

As noted by Respondent, this claim is unexhausted because Petitioner failed to raise it in federal terms in the Appellate Division and failed to raise this claim at all in his leave application

to the New York Court of Appeals. (*Id.*) Moreover, as set forth by Respondent, in any event, the claim is meritless.

As a result, I recommend that Ground 9 be denied.

G. Ground 10

After carefully considering the matter, I recommend that Petitioner's claim regarding the delay in holding his probable cause hearing and mental abnormality trial be dismissed for the reasons set forth in Respondent's memorandum of law. (Dkt. No. 18 at 27-30, 33-37.) As set forth by Senior United States District Judge James K. Singleton, Jr., in *Roache v. McCulloch*, 16-CV-1069, 17-CV-0574, 2019 WL 4327271, at *5 (N.D.N.Y. Sept. 12, 2019) (Singleton, J.), a claim for speedy trial based on state law violations of N.Y. Mental Hyg. Law § 10.01, *et seq.*, is not cognizable on federal habeas review. *Roache*, 2019 WL 4327271, at *5 (citing *Bermudez v. Conway*, 09-CV-1515, 2012 WL 3779211, at *9 (E.D.N.Y. Aug. 30, 2012); *Hodges v. Bezio*, 09-CV-3402, 2012 WL 607659, at *4 (E.D.N.Y. Feb. 24, 2012); *Rodriguez v. Superintendent*, Collins Corr. Facility, 548 F. Supp. 2d 226, 23-37 (N.D.N.Y. 2008)).

Moreover, as set forth above in (1) Part IV.A. of this Report and Recommendation, Petitioner's claim regarding the delay in conducting his probable cause hearing is meritless, and (2) Part IV.C. of this Report and Recommendation, Petitioner's claim regarding the delay in conducting his mental abnormality trial is meritless.

As a result, I recommend that Ground 10 be denied.

V. CERTIFICATE OF APPEALABILITY

To appeal a final order denying a request by a state prisoner for habeas relief, a petitioner must obtain from the court a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A); *see also* Fed. R. App. P. 22(b)(1) ("[T]he applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)."). In

the absence of a COA, a federal court of appeals lacks jurisdiction to entertain an appeal from the denial of a habeas petition. *Hoffler v. Bezio*, 726 F.3d 144, 152 (2d Cir. 2013). A COA may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Hoffler*, 726 F.3d at 154. A petitioner may demonstrate a "substantial showing" if "the issues are debatable among jurists of reason; . . . a court could resolve the issues in a different manner; or . . . the questions are adequate to deserve encouragement to proceed further."[2] *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (quotation marks omitted).

In this instance, I find that jurists of reason would not find it debatable as to whether the petition in this matter is meritorious. Accordingly, I recommend against the issuance of a COA.

ACCORDINGLY, it is

RECOMMENDED that the petition be **DENIED and DISMISSED**, and that a certificate of appealability not be issued to Petitioner; and it is further

ORDERED that the Clerk of the Court shall file a copy of this Report and Recommendation on the parties, along with copies of the unpublished decisions cited herein in accordance with the Second Circuit's decision in *Lebron v. Sanders*, 557 F.3d 76 (2d Cir. 2009) (per curiam).

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[2] A similar standard applies when a COA is sought to challenge the denial of a habeas petition on a procedural basis. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000) ("[A] COA should issue . . . if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.").

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report.[3] Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW**. 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 6(a), 6(d), 72; *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)).

Dated: February 16, 2024
Binghamton, New York

Miroslav Lovric
U.S. Magistrate Judge

[3] If you are proceeding *pro se* and served with this report, recommendation, and order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C).

State of New York
Court of Appeals

Decided and Entered on the twenty-third day of June, 2020

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2020-224
In the Matter of State of New York,
Respondent,
v.
Daniel J.,
Appellant.

Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.

John P. Asiello
Clerk of the Court

SR.1056

In sum, Daniel J.'s motion for leave to appeal does not present any legal issues that merit further review and it should therefore be denied.

CONCLUSION

This Court should deny the motion for leave to appeal.

Dated: March 20, 2020
Albany, New York

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondent

By: _____
JONATHAN D. HITSOUS
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2044

BARBARA D. UNDERWOOD
Solicitor General
JULIE M. SHERIDAN
Senior Assistant Solicitor General
JONATHAN D. HITSOUS
Assistant Solicitor General of Counsel

D

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 18-01059

PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL J., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), dated April 17, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order denied respondent's motion pursuant to CPLR 4404 and CPLR 5015.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same memorandum as in *Matter of State of New York v Daniel J.* ([appeal No. 1] – AD3d – [Feb. 7, 2020] [4th Dept 2020]).

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court

SR.1033

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 18-00009

PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL J., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered November 21, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In appeal No. 1, respondent appeals from an order pursuant to Mental Hygiene Law article 10 in which Supreme Court determined, upon respondent's admission, that he has a mental abnormality that predisposes him to commit sex offenses (*see* § 10.03 [i]) and, after a dispositional hearing, directed that he be committed to a secure treatment facility. In appeal No. 2, respondent appeals from an order of the same court that denied his pro se motion pursuant to CPLR 4404 and 5015 for judgment as a matter of law.

Initially, we note that the appeal from the final order in appeal No. 1 brings up for review the propriety of the order in appeal No. 2 insofar as it denied that part of respondent's motion pursuant to CPLR 4404 (*see* CPLR 5501 [a]; *see generally Matter of White v Byrd-McGuire*, 163 AD3d 1413, 1413-1414 [4th Dept 2018]). We further note that, inasmuch as respondent has not raised on appeal any issues with respect to the denial of that part of his motion pursuant to CPLR 5015, he has abandoned any contentions with respect thereto. We therefore dismiss the appeal from the order in appeal No. 2 (*see generally* CPLR 5501 [a]; *White*, 163 AD3d at 1413-1414; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

Respondent's contention regarding the sufficiency of the evidence presented at the probable cause hearing is not properly before us

NEW YORK SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

IN THE MATTER OF STATE OF NEW YORK,

Petitioner-Respondent,

v.

DANIEL J.,

Respondent-Appellant.

NOTICE OF ENTRY

A.D. No. CA 18-00009

PLEASE TAKE NOTICE that the within is a true and complete copy of the **MEMORANDUM AND ORDER** duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Fourth Department on February 7, 2020.

Dated: Albany, New York
February 28, 2020

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Petitioner-Respondent
The Capitol
Albany, New York 12224

BY: _____
JONATHAN D. HITSOUS
Assistant Solicitor General
Telephone (518) 776-2044
OAG No. 12-137495

TO: Paul B. Watkins, Esq.
Law Office of Paul B. Watkins
115 North Main Street
Fairport, New York 14450

because no appeal lies from the order finding probable cause (*see Matter of State of New York v Stein*, 85 AD3d 1646, 1648 [4th Dept 2011], *affd* 20 NY3d 99 [2012], *cert denied* 568 US 1216 [2013]). Additionally, respondent waived his contention that a delay in holding the probable cause hearing violated his due process rights; respondent consented to that delay, which arose from his request for a change of venue (*see* Mental Hygiene Law § 10.06 [g]).

Respondent failed to preserve for our review his contention that he was denied due process because a jury trial was not held within 60 days of the probable cause hearing (*see Matter of State of New York v Trombley*, 98 AD3d 1300, 1302 [4th Dept 2012], *lv denied* 20 NY3d 856 [2013]).

We also reject respondent's contention that the court erred in denying his request to withdraw his waiver of the right to a jury trial on the issue whether he suffered from a mental abnormality as defined by Mental Hygiene Law article 10 (*see Matter of State of New York v Clyde J.*, 141 AD3d 723, 723 [2d Dept 2016], *lv denied* 28 NY3d 907 [2016]). The record establishes that the court conducted an on-the-record colloquy with respondent to determine that respondent, after an opportunity to consult with his attorney, was knowingly and voluntarily waiving his right to a jury trial (*see Matter of State of New York v Leslie L.*, 174 AD3d 1326, 1328 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]; *Clyde J.*, 141 AD3d at 723-724). Contrary to respondent's contention, the court's colloquy did not suggest that there was a predetermined outcome on the issue of mental abnormality, and indeed the court explained respondent's right to challenge that issue before a jury. We reject respondent's further contention that the court improperly induced him to waive his right to a jury trial and admit to a mental abnormality by denying his request for an adjournment for the purpose of obtaining an evaluation by a second expert. Although the Mental Hygiene Law allows a respondent to be examined by a psychiatric examiner of his or her choice, the statute does not contemplate serial examinations (*see* § 10.06 [e]) and, in any event, the court did not abuse its discretion in denying respondent's request for an adjournment on the eve of trial to secure an additional opinion (*see generally People v Maynard*, 30 AD3d 317, 318 [1st Dept 2006], *lv denied* 7 NY3d 815 [2006]; *People v Palmer*, 278 AD2d 821, 822 [4th Dept 2000], *lv denied* 96 NY2d 786 [2001]). We also reject respondent's contention that the court failed to conduct a sufficient inquiry into his alleged issues with counsel prior to accepting his waiver of the right to a jury trial. Under the circumstances presented here, respondent's assertions that he and his attorney disagreed on strategy and that his attorney had not spoken to him often enough were "insufficient to require any inquiry by the court" (*People v Barnes*, 156 AD3d 1417, 1418 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]). We likewise reject respondent's contention that the court improperly denied his request to withdraw his waiver based on the allegedly ineffective assistance provided by counsel in connection with the waiver and admission to a mental abnormality. The record does not support respondent's contention that counsel was unprepared; rather, counsel properly presented multiple arguments through pretrial motions, and respondent failed to "demonstrate the

absence of strategic or other legitimate explanations" for counsel's decision not to present additional pretrial motions (*Matter of State of New York v Carter*, 100 AD3d 1438, 1439 [4th Dept 2012] [internal quotation marks omitted]).

We agree with respondent that the court erred in admitting in evidence during the dispositional hearing certain hearsay testimony regarding uncharged conduct with respect to which respondent did not admit his guilt (*see Matter of State of New York v John S.*, 23 NY3d 326, 343 [2014], *rearg denied* 24 NY3d 933 [2014]; *Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109 [2013]). Nonetheless, we conclude that the error was harmless because "[t]he State's case against respondent rested primarily on admissible evidence; particularly, expert basis testimony about [crimes for which respondent was convicted or to which he admitted] . . . , and his refusal to participate in sex offender treatment while in prison" (*John S.*, 23 NY3d at 348; *see Matter of State of New York v Charada T.*, 23 NY3d 355, 362 [2014]; *Matter of State of New York v Fox*, 79 AD3d 1782, 1784 [4th Dept 2010]).

We reject respondent's further contention that petitioner failed to prove by clear and convincing evidence that he is a dangerous sex offender requiring confinement. The court's determination following the dispositional phase of the proceedings is supported by the written opinions and testimony of two experts (*see Matter of State of New York v Pierce*, 79 AD3d 1779, 1781-1782 [4th Dept 2010], *lv denied* 16 NY3d 712 [2011]).

For the reasons stated above with respect to respondent's challenge to the propriety of his admission to a mental abnormality, we likewise reject respondent's contention that the court erred in denying that part of his motion pursuant to CPLR 4404.

Entered: February 7, 2020

Mark W. Bennett
Clerk of the Court