

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

REGINALD SWINTON,

PETITIONER,

vs.

STEVEN RACETTE,

RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI
APPENDICES

[BOOK ONE]

[APPENDIX A to E]

REGINALD SWINTON,
PETITIONER, PRO-SE.
AUBURN CORRECTIONAL FACILITY
135 STATE STREET
P.O. BOX 618, DIN # 07-A-3279
AUBURN, NEW YORK 13024

APPENDIX

A

S.D.N.Y.-N.Y.C.
12-cv-9051
Broderick, J.
Maas, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of January, two thousand eighteen.

Present:

Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Reginald Swinton,

Petitioner-Appellant,

v.

17-2105

Supt. Steven Racette,

Respondent-Appellee.

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

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

Catherine O'Hagan Wolfe



S.D.N.Y.-N.Y.C.
15-cv-2812
Broderick, 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 2nd day of January, two thousand eighteen.

Present:

Debra Ann Livingston,
Denny Chin,
Christopher F. Droney,
Circuit Judges.

Reginald Swinton,

Petitioner-Appellant,

v.

17-2127

Walter Fogg,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability ("COA"), appointment of counsel, and acceptance of the formatting of his COA motion. However, this appeal is duplicative of the appeal docketed under 17-2105, and is DISMISSED. *See Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, 757 n.3 (2d Cir. 1986) (dismissing duplicative appeal because "only one appeal will lie from [a] final judgment").

It is further ORDERED that Appellant's motions are DENIED as moot.

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

Catherine O'Hagan Wolfe


APPENDIX

B

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

-----X
REGINALD SWINTON

Plaintiff,

DOCUMENTS
ELECTRONICALLY FILED

DOC #:

DATE FILED: 6/30/2017

12 CIVIL 9051 (VSB) (FM)

15 CIVIL 2812 (VSB) (FM)

-against-

STEVEN RACETTE, Superintendent,
Defendant.
-----X

JUDGMENT

Pro se Petitioner Reginald Swinton filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 on December 11, 2012 ("Petition"); before the Court is Magistrate Judge Maas's September 20, 2016, Report and Recommendation (the "Report" or "R&R") recommending that the petition be denied in full; Petitioner filed written objections to the Report, and the matter having come before the Honorable Vernon S. Broderick, United States District Judge, and the Court, on June 20, 2017, having rendered its Memorandum and Opinion adopting Magistrate Judge Maas's Report and Recommendation in its entirety and denying Swinton's petition for a writ of habeas corpus, and directing the Clerk of Court to close the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Opinion dated June 20, 2017, Judge Maas's Report and Recommendation is adopted in its entirety and Swinton's petition for a writ of habeas corpus is denied; because Petitioner has not made a substantial showing of the denial of a constitutional right a certificate of appealability will not issue; accordingly, the case is closed.

Dated: New York, New York
June 30, 2017

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 7/5/2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
REGINALD SWINTON,

Petitioner,

-v-

STEVEN RACETTE, Superintendent,

Respondent.
-----X

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/20/2017

12-CV-9051 (VSB) (FM)

15-CV-2812 (VSB) (FM)

MEMORANDUM AND OPINION

Appearances:

Reginald Swinton
Auburn, NY
Pro se

Thomas B. Litsky
Assistant Attorney General of Counsel
for Eric T. Schneiderman, Attorney General of the State of New York
New York, NY
Counsel for Respondent

VERNON S. BRODERICK, United States District Judge:

Pro se Petitioner Reginald Swinton filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 on December 11, 2012 ("Petition"). Before me is Magistrate Judge Maas's September 20, 2016 Report and Recommendation ("Report" or "R&R") recommending that the Petition be denied in full. (Doc. 48.) Petitioner filed written objections to the Report. (Docs. 56, 57.) I have reviewed the Report and find it to be thorough and accurate in all respects. For the reasons stated herein, I ADOPT the Report in its entirety, and the Petition is DENIED.

The factual and procedural history is thoroughly set out in the Report, familiarity with which is assumed. Briefly, Petitioner was convicted following a jury trial in New York Supreme

Court, New York County of two counts of rape in the first degree, three counts of criminal sexual acts in the first degree, three counts of burglary in the second degree, and three counts of attempted robbery in the third degree. He was sentenced to an aggregate indeterminate term of 150 years to life. The conviction and sentence were affirmed on appeal. *See People v. Swinton*, 928 N.Y.S.2d 693 (2011).

I. Legal Standards of Review

A. Review of Magistrate Judge's Report

Reviewing a magistrate judge's report and recommendation, I "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). I review *de novo* the portions of the Report to which timely and specific written objections are made. *Id.*; Fed. R. Civ. P. 72(b)(3). "The objection must be specific and clearly aimed at particular findings in the R&R." *Bussey v. Rock*, No. 12-CV-8267 (NSR)(JCM), 2016 WL 7189847, at *2 (S.D.N.Y. Dec. 8, 2016) (internal quotation marks omitted). "Otherwise, the court will review the R&R strictly for clear error when a party makes only conclusory or general objections, or simply reiterates the original arguments." *Id.*

B. AEDPA

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas petitions under 28 U.S.C. § 2254 may not be granted unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). A state court's factual findings are presumed correct unless the

Petitioner comes forward with clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1).

C. *Pro Se Submissions*

“*Pro se* parties are generally accorded leniency when making objections.” *Hill v. Miller*, No. 15 Civ. 6256 (KMW)(JCF), 2016 WL 7410715, at *1 (S.D.N.Y. Dec. 21, 2016) (quoting *Pinkney v. Progressive Home Health Servs.*, No. 06 Civ. 5023, 2008 WL 2811816, at *1 (S.D.N.Y. July 21, 2008)). “Nonetheless, even a *pro se* party’s objections to a[n] [R & R] must be specific and clearly aimed at particular findings in the magistrate’s proposal, such that no party be allowed a ‘second bite at the apple’ by simply relitigating a prior argument.” *Id.*

II. Discussion

Petitioner objects to each of Judge Maas’s conclusions and recommendations, and repeats substantially the same arguments that Judge Maas considered and rejected. Specifically, he generally objects to the Report’s conclusions that: (1) Petitioner’s “weight of the evidence” argument is not a cognizable federal habeas claim, (Doc. 56-1 at 10-11); (2) there was sufficient evidence to support Petitioner’s convictions, (*id.* at 11-14); (3) the trial court’s jury instructions and evidentiary rulings do not warrant habeas relief, (*id.* at 14-24); (4) Petitioner’s *Sandoval* claim fails, (*id.* at 24-28); (5) Petitioner’s sentencing claims are not cognizable on federal habeas review, (*id.* at 28-31); (6) violation of the state speedy trial law is not cognizable on federal habeas review, (*id.* at 31-32, 34-36; Doc. 57 at 4-18); (7) there was no Sixth Amendment speedy trial violation, (Doc. 57 at 18-34); and (8) Petitioner’s appellate counsel was not ineffective, (*id.* at 35-41).¹ Even on *de novo* review, as demonstrated below, all of these claims fail.

¹ Swinton also argues that Judge Maas erred in concluding that Swinton failed to exhaust certain claims. (Doc. 56-1 at 9, 32-34.) Petitioner appears to misunderstand the Report. Swinton cites to footnote 9 of the Report, in which Judge Maas explained that he was declining to address the Government’s argument that certain claims were unexhausted. (See R&R 17 n.9 (“The Respondent contends that certain of Swinton’s claims remain unexhausted

A. *Weight of the Evidence*

First, as Judge Maas correctly concluded, “challenges to the weight of the evidence supporting a conviction, unlike challenges to the sufficiency of the evidence, are not cognizable on federal habeas review.” *Cardena v. Giambruno*, No. 03 CIV 3313 (RWS), 2004 WL 239722, at *4 (S.D.N.Y. Feb. 10, 2004). Petitioner’s weight of the evidence argument is based on state law, for which federal habeas review is not available. *See Douglas v. Portuondo*, 232 F. Supp. 2d 106, 116 (S.D.N.Y. 2002). A jury’s verdict only violates federal due process principles for lack of evidence where the evidence is insufficient to permit any rational juror to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

B. *Sufficiency of the Evidence*

Swinton again asserts that there is insufficient evidence of his guilt with respect to the attack on AP. Swinton has not come forward with new or compelling arguments against the decisions of the Appellate Division and Judge Maas. Therefore, I concur with Judge Maas and the Appellate Division in their finding that there was clearly sufficient evidence from which a reasonable jury could conclude that Petitioner was guilty.

C. *Jury Instructions*

Swinton argues that the trial court erred in allowing the jury to infer that Swinton had committed the attack on AP after finding that he committed other attacks sharing a similar *modus operandi*. The Appellate Division concluded that “[b]ecause the assailant’s identity with respect to the third incident could not be independently established and because the assailant’s conduct during all three incidents was so similar and distinctive, the trial court properly allowed

even after he pursued his *coram nobis* motion. I have not addressed those arguments because Section 2254 provides that a habeas court may *deny* a claim even if it has not been exhausted.”.) In other words, contrary to Petitioner’s belief, Judge Maas did not conclude that Swinton had failed to exhaust; instead, he addressed the claims on the merits.

the jury to consider the issue of defendant's identity as the perpetrator of the third incident through the use of the assailant's modus operandi." *Swinton*, 928 N.Y.S.2d at 695. I find no error in Judge Maas's analysis or conclusion that neither the instructions nor the admission of modus operandi evidence was "contrary to" or an "unreasonable application" of clearly-established federal law.

D. *Sandoval* Violation

"[I]t is well-settled that a petitioner's failure to testify at trial is fatal to any claims of constitutional deprivation arising out of a *Sandoval*-type ruling,' because 'absent such testimony, a court has no adequate non-speculative basis upon which to assess the merits of that claim.'" *Sorrentino v. Lavalley*, No. 12-CV-7668(VSB)(DF), 2016 WL 3460418, at *4 (S.D.N.Y. June 21, 2016) (quoting *Shannon v. Senkowski*, No. 00-CV-2865, 2000 WL 1683448, at *6 (S.D.N.Y. Nov. 9, 2000)). As Judge Maas explained, Petitioner chose not to testify at trial. Therefore, his *Sandoval* claim cannot be redressed on federal habeas review.

E. *Sentence*

Petitioner repeats the arguments made before Judge Maas and the Appellate Division, namely that his sentence exceeded the fifty-year cap set forth in N.Y. Penal Law § 70.30(1)(e)(vi), and because it was excessive and unduly harsh. As the Report explains, § 70.30(1)(e)(vi) does not prohibit aggregate sentences of more than fifty years, *see Swinton*, 928 N.Y.S.2d at 696 (citing *People v. Moore*, 61 N.Y.2d 575, 578 (1984)), and, even if it did, Petitioner's persistent violent felony offender status renders the fifty-year cap in Section 70.30(1)(e)(vi) inapplicable, *see id.* (citing *Roballo v. Smith*, 63 N.Y.2d 485, 488-89 (1984)). (R&R 25-26.) Finally, the Report also correctly notes that the sentencing judge was "permitted to impose consecutive sentences for Swinton's convictions of Rape in the First Degree and

Burglary in the Second Degree as the ‘crimes [were] committed through separate and distinct acts, even though part of a single transaction.’” (R&R 26 (quoting *People v. Salcedo*, 92 N.Y.2d 1019, 1021 (1998).) .Because Petitioner’s sentence is within the statutory range prescribed by state law, there is no federal constitutional issue properly presented for habeas review. *See White v. Keane*, 969 F.2d 1381, 1383 (2d Cir. 1992).

F. *Speedy Trial*

With respect to Petitioner’s claim that there was a speedy trial violation under Section 30.30, Judge Maas correctly points out that any state speedy trial law violation is not cognizable on federal habeas review. *See Smith v. LaClair*, No. 04 Civ. 4356(SAS), 2008 WL 728653, at *3 (S.D.N.Y. Mar. 17, 2008) (“It is well established that a federal habeas court does not sit to correct a misapplication of state law, unless such misapplication violated the Constitution, laws, or treaties of the United States. . . . Because C.P.L. § 30.30 is merely a state law provision requiring the prosecution to be ready for trial, a § 30.30 claim does not raise a federal constitutional claim.” (citations omitted)). With respect to Petitioner’s argument that his Sixth Amendment right to a speedy trial was violated by a 22-month delay between the filing of the criminal complaint and the beginning of trial, I adopt Judge Maas’s *Barker v. Wingo* analysis in its entirety. In particular, as noted in the Report, Petitioner’s argument that the People were acting in bad faith is not supported by the record, and his allegations of prejudice suffered as a result of the delay are insufficient. (R&R 30-31.)

G. *Ineffective Assistance of Appellate Counsel*

Petitioner fails to carry his heavy burden of establishing ineffective assistance of appellate counsel. In support of his speedy trial claims, Petitioner claims that his appellate counsel failed to move to correct the trial record to reflect his absence at the April 20, 2006

conference, resulting in delay attributable to the People. However, as explained in the Report, even if Petitioner was not present at the conference, he was not prejudiced by failure to raise that omission because the record reflects that the time was properly excluded to allow for defense counsel's review of discovery materials. (R&R 35-36.)

Petitioner argues that he was prejudiced by appellate counsel's failure to argue that trial counsel was ineffective for (1) failing to move for a severance of the offenses in the indictment, and (2) failing to argue that Petitioner should not have been deemed a persistent violent felony offender. The Report accurately states that joinder of the counts was appropriate in this case, and therefore neither trial nor appellate counsel was ineffective for failing to argue the contrary, and prejudice did not result. (R&R 43.) In addition, as Judge Maas correctly held, Swinton's prior offenses "are unquestionably defined as felonies under New York law," and therefore counsel's failure to argue otherwise is also not a basis for claiming ineffective assistance. (R&R 45-46.)

Finally, the argument that appellate counsel was ineffective for failing to argue that the trial court erred in denying Swinton's request for appointment of new counsel is likewise meritless. As the Report explains, the trial court adequately addressed and did not err in denying Swinton's *pro se* request on the day of sentencing, and therefore his appellate counsel was not ineffective for failing to raise the issue. (R&R 36-40.)

III. Conclusion

For the reasons stated, I hereby ADOPT Judge Maas's Report and Recommendation, (Doc. 48), in its entirety. Swinton's petition for a writ of habeas corpus is DENIED. Because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). The Clerk of Court is respectfully directed to mail a copy of this order to the *pro se* Petitioner and close the case.

SO ORDERED.

Dated: June 20, 2017
New York, New York


Vernon S. Broderick
United States District Judge

APPENDIX C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**-----X
REGINALD SWINTON

Plaintiff,

ELECTRONICALLY FILED

DOC #:

DATE FILED: 6/30/2017

12 CIVIL 9051 (VSB) (FM)

15 CIVIL 2812 (VSB) (FM)

-against-

STEVEN RACETTE, Superintendent,
Defendant.
-----X**JUDGMENT**

Pro se Petitioner Reginald Swinton filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 on December 11, 2012 ("Petition"); before the Court is Magistrate Judge Maas's September 20, 2016, Report and Recommendation (the "Report" or "R&R") recommending that the petition be denied in full; Petitioner filed written objections to the Report, and the matter having come before the Honorable Vernon S. Broderick, United States District Judge, and the Court, on June 20, 2017, having rendered its Memorandum and Opinion adopting Magistrate Judge Maas's Report and Recommendation in its entirety and denying Swinton's petition for a writ of habeas corpus, and directing the Clerk of Court to close the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Opinion dated June 20, 2017, Judge Maas's Report and Recommendation is adopted in its entirety and Swinton's petition for a writ of habeas corpus is denied; because Petitioner has not made a substantial showing of the denial of a constitutional right a certificate of appealability will not issue; accordingly, the case is closed.

Dated: New York, New York
June 30, 2017

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
REGINALD SWINTON,

Petitioner,

-v-

STEVEN RACETTE, Superintendent,

Respondent.
-----X

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/20/2017

12-CV-9051 (VSB) (FM)

15-CV-2812 (VSB) (FM)

MEMORANDUM AND OPINION

Appearances:

Reginald Swinton
Auburn, NY
Pro se

Thomas B. Litsky
Assistant Attorney General of Counsel
for Eric T. Schneiderman, Attorney General of the State of New York
New York, NY
Counsel for Respondent

VERNON S. BRODERICK, United States District Judge:

Pro se Petitioner Reginald Swinton filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 on December 11, 2012 ("Petition"). Before me is Magistrate Judge Maas's September 20, 2016 Report and Recommendation ("Report" or "R&R") recommending that the Petition be denied in full. (Doc. 48.) Petitioner filed written objections to the Report. (Docs. 56, 57.) I have reviewed the Report and find it to be thorough and accurate in all respects. For the reasons stated herein, I ADOPT the Report in its entirety, and the Petition is DENIED.

The factual and procedural history is thoroughly set out in the Report, familiarity with which is assumed. Briefly, Petitioner was convicted following a jury trial in New York Supreme

Court, New York County of two counts of rape in the first degree, three counts of criminal sexual acts in the first degree, three counts of burglary in the second degree, and three counts of attempted robbery in the third degree. He was sentenced to an aggregate indeterminate term of 150 years to life. The conviction and sentence were affirmed on appeal. *See People v. Swinton*, 928 N.Y.S.2d 693 (2011).

I. Legal Standards of Review

A. *Review of Magistrate Judge's Report*

Reviewing a magistrate judge's report and recommendation, I "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). I review *de novo* the portions of the Report to which timely and specific written objections are made. *Id.*; Fed. R. Civ. P. 72(b)(3). "The objection must be specific and clearly aimed at particular findings in the R&R." *Bussey v. Rock*, No. 12-CV-8267 (NSR)(JCM), 2016 WL 7189847, at *2 (S.D.N.Y. Dec. 8, 2016) (internal quotation marks omitted). "Otherwise, the court will review the R&R strictly for clear error when a party makes only conclusory or general objections, or simply reiterates the original arguments." *Id.*

B. *AEDPA*

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas petitions under 28 U.S.C. § 2254 may not be granted unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). A state court's factual findings are presumed correct unless the

Petitioner comes forward with clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1).

C. Pro Se Submissions

“*Pro se* parties are generally accorded leniency when making objections.” *Hill v. Miller*, No. 15 Civ. 6256 (KMW)(JCF), 2016 WL 7410715, at *1 (S.D.N.Y. Dec. 21, 2016) (quoting *Pinkney v. Progressive Home Health Servs.*, No. 06 Civ. 5023, 2008 WL 2811816, at *1 (S.D.N.Y. July 21, 2008)). “Nonetheless, even a *pro se* party’s objections to a[n] [R & R] must be specific and clearly aimed at particular findings in the magistrate’s proposal, such that no party be allowed a ‘second bite at the apple’ by simply relitigating a prior argument.” *Id.*

II. Discussion

Petitioner objects to each of Judge Maas’s conclusions and recommendations, and repeats substantially the same arguments that Judge Maas considered and rejected. Specifically, he generally objects to the Report’s conclusions that: (1) Petitioner’s “weight of the evidence” argument is not a cognizable federal habeas claim, (Doc. 56-1 at 10-11); (2) there was sufficient evidence to support Petitioner’s convictions, (*id.* at 11-14); (3) the trial court’s jury instructions and evidentiary rulings do not warrant habeas relief, (*id.* at 14-24); (4) Petitioner’s *Sandoval* claim fails, (*id.* at 24-28); (5) Petitioner’s sentencing claims are not cognizable on federal habeas review, (*id.* at 28-31); (6) violation of the state speedy trial law is not cognizable on federal habeas review, (*id.* at 31-32, 34-36; Doc. 57 at 4-18); (7) there was no Sixth Amendment speedy trial violation, (Doc. 57 at 18-34); and (8) Petitioner’s appellate counsel was not ineffective, (*id.* at 35-41).¹ Even on *de novo* review, as demonstrated below, all of these claims fail.

¹ Swinton also argues that Judge Maas erred in concluding that Swinton failed to exhaust certain claims. (Doc. 56-1 at 9, 32-34.) Petitioner appears to misunderstand the Report. Swinton cites to footnote 9 of the Report, in which Judge Maas explained that he was declining to address the Government’s argument that certain claims were unexhausted. (See R&R 17 n.9 (“The Respondent contends that certain of Swinton’s claims remain unexhausted

A. *Weight of the Evidence*

First, as Judge Maas correctly concluded, “challenges to the weight of the evidence supporting a conviction, unlike challenges to the sufficiency of the evidence, are not cognizable on federal habeas review.” *Cardena v. Giambruno*, No. 03 CIV 3313 (RWS), 2004 WL 239722, at *4 (S.D.N.Y. Feb. 10, 2004). Petitioner’s weight of the evidence argument is based on state law, for which federal habeas review is not available. *See Douglas v. Portuondo*, 232 F. Supp. 2d 106, 116 (S.D.N.Y. 2002). A jury’s verdict only violates federal due process principles for lack of evidence where the evidence is insufficient to permit any rational juror to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

B. *Sufficiency of the Evidence*

Swinton again asserts that there is insufficient evidence of his guilt with respect to the attack on AP. Swinton has not come forward with new or compelling arguments against the decisions of the Appellate Division and Judge Maas. Therefore, I concur with Judge Maas and the Appellate Division in their finding that there was clearly sufficient evidence from which a reasonable jury could conclude that Petitioner was guilty.

C. *Jury Instructions*

Swinton argues that the trial court erred in allowing the jury to infer that Swinton had committed the attack on AP after finding that he committed other attacks sharing a similar modus operandi. The Appellate Division concluded that “[b]ecause the assailant’s identity with respect to the third incident could not be independently established and because the assailant’s conduct during all three incidents was so similar and distinctive, the trial court properly allowed

even after he pursued his *coram nobis* motion. I have not addressed those arguments because Section 2254 provides that a habeas court may *deny* a claim even if it has not been exhausted.”.) In other words, contrary to Petitioner’s belief, Judge Maas did not conclude that Swinton had failed to exhaust; instead, he addressed the claims on the merits.

the jury to consider the issue of defendant's identity as the perpetrator of the third incident through the use of the assailant's modus operandi." *Swinton*, 928 N.Y.S.2d at 695. I find no error in Judge Maas's analysis or conclusion that neither the instructions nor the admission of modus operandi evidence was "contrary to" or an "unreasonable application" of clearly-established federal law.

D. Sandoval Violation

"[I]t is well-settled that a petitioner's failure to testify at trial is fatal to any claims of constitutional deprivation arising out of a *Sandoval*-type ruling,' because 'absent such testimony, a court has no adequate non-speculative basis upon which to assess the merits of that claim.'" *Sorrentino v. Lavalley*, No. 12-CV-7668(VSB)(DF), 2016 WL 3460418, at *4 (S.D.N.Y. June 21, 2016) (quoting *Shannon v. Senkowski*, No. 00-CV-2865, 2000 WL 1683448, at *6 (S.D.N.Y. Nov. 9, 2000)). As Judge Maas explained, Petitioner chose not to testify at trial. Therefore, his *Sandoval* claim cannot be redressed on federal habeas review.

E. Sentence

Petitioner repeats the arguments made before Judge Maas and the Appellate Division, namely that his sentence exceeded the fifty-year cap set forth in N.Y. Penal Law § 70.30(1)(e)(vi), and because it was excessive and unduly harsh. As the Report explains, § 70.30(1)(e)(vi) does not prohibit aggregate sentences of more than fifty years, *see Swinton*, 928 N.Y.S.2d at 696 (citing *People v. Moore*, 61 N.Y.2d 575, 578 (1984)), and, even if it did, Petitioner's persistent violent felony offender status renders the fifty-year cap in Section 70.30(1)(e)(vi) inapplicable, *see id.* (citing *Roballo v. Smith*, 63 N.Y.2d 485, 488-89 (1984)). (R&R 25-26.) Finally, the Report also correctly notes that the sentencing judge was "permitted to impose consecutive sentences for Swinton's convictions of Rape in the First Degree and

Burglary in the Second Degree as the ‘crimes [were] committed through separate and distinct acts, even though part of a single transaction.’” (R&R 26 (quoting *People v. Salcedo*, 92 N.Y.2d 1019, 1021 (1998).) Because Petitioner’s sentence is within the statutory range prescribed by state law, there is no federal constitutional issue properly presented for habeas review. *See White v. Keane*, 969 F.2d 1381, 1383 (2d Cir. 1992).

F. Speedy Trial

With respect to Petitioner’s claim that there was a speedy trial violation under Section 30.30, Judge Maas correctly points out that any state speedy trial law violation is not cognizable on federal habeas review. *See Smith v. LaClair*, No. 04 Civ. 4356(SAS), 2008 WL 728653, at *3 (S.D.N.Y. Mar. 17, 2008) (“It is well established that a federal habeas court does not sit to correct a misapplication of state law, unless such misapplication violated the Constitution, laws, or treaties of the United States. . . . Because C.P.L. § 30.30 is merely a state law provision requiring the prosecution to be ready for trial, a § 30.30 claim does not raise a federal constitutional claim.” (citations omitted)). With respect to Petitioner’s argument that his Sixth Amendment right to a speedy trial was violated by a 22-month delay between the filing of the criminal complaint and the beginning of trial, I adopt Judge Maas’s *Barker v. Wingo* analysis in its entirety. In particular, as noted in the Report, Petitioner’s argument that the People were acting in bad faith is not supported by the record, and his allegations of prejudice suffered as a result of the delay are insufficient. (R&R 30-31.)

G. Ineffective Assistance of Appellate Counsel

Petitioner fails to carry his heavy burden of establishing ineffective assistance of appellate counsel. In support of his speedy trial claims, Petitioner claims that his appellate counsel failed to move to correct the trial record to reflect his absence at the April 20, 2006

conference, resulting in delay attributable to the People. However, as explained in the Report, even if Petitioner was not present at the conference, he was not prejudiced by failure to raise that omission because the record reflects that the time was properly excluded to allow for defense counsel's review of discovery materials. (R&R 35-36.)

Petitioner argues that he was prejudiced by appellate counsel's failure to argue that trial counsel was ineffective for (1) failing to move for a severance of the offenses in the indictment, and (2) failing to argue that Petitioner should not have been deemed a persistent violent felony offender. The Report accurately states that joinder of the counts was appropriate in this case, and therefore neither trial nor appellate counsel was ineffective for failing to argue the contrary, and prejudice did not result. (R&R 43.) In addition, as Judge Maas correctly held, Swinton's prior offenses "are unquestionably defined as felonies under New York law," and therefore counsel's failure to argue otherwise is also not a basis for claiming ineffective assistance. (R&R 45-46.)

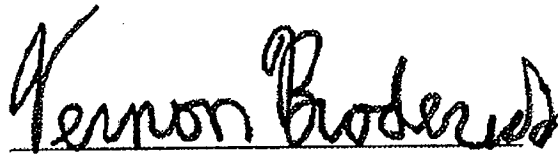
Finally, the argument that appellate counsel was ineffective for failing to argue that the trial court erred in denying Swinton's request for appointment of new counsel is likewise meritless. As the Report explains, the trial court adequately addressed and did not err in denying Swinton's *pro se* request on the day of sentencing, and therefore his appellate counsel was not ineffective for failing to raise the issue. (R&R 36-40.)

III. Conclusion

For the reasons stated, I hereby ADOPT Judge Maas's Report and Recommendation, (Doc. 48), in its entirety. Swinton's petition for a writ of habeas corpus is DENIED. Because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). The Clerk of Court is respectfully directed to mail a copy of this order to the *pro se* Petitioner and close the case.

SO ORDERED.

Dated: June 20, 2017
New York, New York

A handwritten signature in black ink, reading "Vernon Broderick". The signature is written in a cursive, flowing style. The first letter "V" is large and prominent, and the last letter "k" has a long, sweeping tail.

Vernon S. Broderick
United States District Judge

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

-----X
REGINALD SWINTON,

Petitioner,

-against-

WALTER FOGG,

Respondent.
-----X

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 9/22/2016

15 **CIVIL** 2812 (VSB)

JUDGMENT

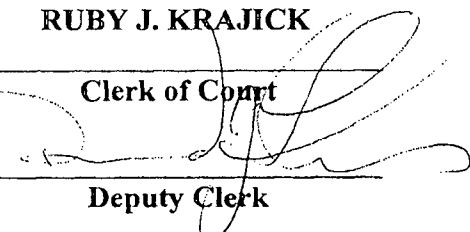
Whereas in 1977, petitioner Reginald Swinton ("Swinton"), entered a plea of guilty in Supreme Court, Bronx County, to a charge of Rape in the First Degree and was sentenced to incarceration for five to fifteen years (the "1975 Conviction"); while he was still in custody, the district court denied his petition for a writ of habeas corpus challenging the 1975 conviction; Petitioner now brings a pro se motion under Rule 60(b) of the Federal Rules of Civil Procedure, seeking reconsideration of the First Habeas petition, and the matter having come before the Honorable Vernon S. Broderick, United States District Judge, and the Court, on September 19, 2016, having rendered its Memorandum & Order finding that this application, notwithstanding its designation, should be construed as a habeas petition attacking the 2007 Conviction on the ground that his persistent violent felony offender adjudication could not be based on his invalid 1975 Conviction, that because that claim is already pending in *Swinton v. Racette*, No. 12 Civ. 9051 (VSB), the Court dismisses this claim without prejudice, that any other substantive claims in his Motion are dismissed without prejudice as beyond the scope of Rule 60(b), and that the claims that are properly within the ambit of Rule 60(b), are denied as untimely and meritless, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum & Order dated September 19, 2016, Petitioner's claim attacking the 2007 Conviction on the ground that his persistent violent felony offender adjudication could not be based

on his invalid 1975 Conviction is dismissed without prejudice because that claim is already pending in *Swinton v. Racette*, No. 12 Civ. 9051 (VSB); any other substantive claims in his Motion are dismissed without prejudice as beyond the scope of Rule 60(b), and the claims that are properly within the ambit of Rule 60(b), are denied as untimely and meritless; the Court finds that Swinton has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue; the Court further certifies pursuant to 28 U.S.C. 1915(a)(3) that any appeal from this Court's Memorandum & Order dated September 19, 2016 would not be taken in good faith and therefore in forma pauperis status is denied for the purpose of an appeal.

DATED: New York, New York
September 22, 2016

RUBY J. KRAJICK

Clerk of Court
BY: 

Deputy Clerk

**THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON** 9/22/2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #
DATE FILED: 9/19/2016

-----X
REGINALD SWINTON,

Petitioner,

- against -

WALTER FOGG,

Respondent
-----X

15-CV-2812 (VSB)

MEMORANDUM & ORDER

VERNON S. BRODERICK, United States District Judge:

Nearly forty years ago, in 1975, petitioner Reginald Swinton ("Swinton") entered a plea of guilty in Supreme Court, Bronx County, to a charge of Rape in the First Degree and was sentenced to incarceration for five to fifteen years (the "1975 Conviction"). While he was still in custody, the district court denied his petition for a writ of habeas corpus challenging the 1975 Conviction. *See Swinton v. Fogg*, No. 77-CV-2532 (S.D.N.Y. Jan. 5, 1978) ("First Habeas"). Swinton currently is serving a 150-year sentence as a persistent violent felony offender. That sentence, imposed in 2007 in Supreme Court, New York County ("2007 Conviction"), was based in part on the 1975 Conviction. He now brings a pro se motion under Rule 60(b) of the Federal Rules of Civil Procedure, seeking reconsideration of the First Habeas petition. (Doc. 2) ("Motion" of "Mot.").

I. Background

In 1975, Swinton was a nineteen-year-old high school dropout living with his parents and working as a messenger. (Mot. at 24). He was charged with multiple counts of rape and other crimes arising out of five separate incidents involving five different women, and two indictments

against him were consolidated for trial. *People v. Swinton*, Nos. 3109/74, 3201/74 (Sup. Ct. Sept. 5, 1975).¹ Swinton alleges that his retained attorney Robert Sackett, Esq., met with him only four times – at Swinton’s arraignment, at the Wade hearing, on the first day of trial, and the following day when his guilty plea was accepted. (Mot. at 25).

On May 12, 1975, the first day of trial, Mr. Sackett advised the trial court that Swinton had agreed to plead guilty to one count of Rape in the First Degree in satisfaction of all of the charges against him. During Swinton’s plea allocation, he initially admitted to the rape but claimed at the end of the allocation that he was innocent; the trial court therefore refused to accept his plea. Swinton then made a request for substitute counsel, which the court denied. The following day, Swinton successfully entered a guilty plea. When Swinton appeared for sentencing with new counsel on August 6, 1975, however, he moved to withdraw his guilty plea. After a hearing regarding the voluntariness of his plea, the trial court denied Swinton’s application and sentenced him to five to fifteen years of imprisonment.

On direct appeal from the 1975 Conviction, Swinton argued that his guilty plea should have been vacated because it was coerced in violation of his Sixth Amendment right to counsel. The Appellate Division, First Department, nevertheless affirmed his conviction without opinion, *People v. Swinton*, 52 A.D.2d 1098 (1st Dep’t 1976), and the Court of Appeals denied leave to appeal.

In 1978, Judge Vincent L. Broderick denied Swinton’s First Habeas petition. See *Swinton v. Fogg*, No 77-CV-2532 (S.D.N.Y. Jan. 5, 1978). Swinton did not appeal. Nearly forty years later, he now has moved pursuant to Rule 60(b) of the Federal Rules of Civil

¹ Unless otherwise indicated, these facts are taken from the court’s decision in *People v. Swinton*, 19 Misc. 3d 247 (Sup. Ct. Feb. 7, 2008) (denying Swinton’s section 440.10 motion seeking to vacate his 1975 Conviction).

Procedure for reconsideration of that decision.

Swinton is currently in custody pursuant to the 2007 Conviction, and his petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging the 2007 Conviction is presently pending. *See Swinton v. Racette*, No. 12-CV-9051 (S.D.N.Y.). In his petition in that proceeding, Swinton seeks to resuscitate his claim regarding the Bronx trial court's denial of his motion for appointment of new counsel in 1975. (12-CV-9051 Docs. Nos. 21, 29).²

II. Discussion

A. *Proper Characterization of Motion*

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court considered whether the limit on successive habeas motions imposed in the Antiterrorism and Effective Death Penalty Act affects the availability of relief under Rule 60(b) from the denial of a habeas petition. The Supreme Court concluded that where a 60(b) motion “attacks the federal court’s previous resolution of the claim on the merits,” such an application must be treated as a successive petition so as not to circumvent the requirement for precertification by the Court of Appeals. *Id.* at 532. By contrast, when a Rule 60(b) motion attacks “the integrity of the federal habeas proceedings,” such as where there are allegations of “[f]raud on the federal habeas court,” it is properly within the ambit of Rule 60(b). *Id.* at 532 & n.5; *see also Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004) (“Rule 60(b) is available for a previous habeas proceeding only when the Rule 60(b) motion attacks the integrity of the previous habeas proceeding rather than the underlying criminal conviction.”).

When the Rule 60(b) motion attacks the conviction, the district court has two procedural

² In addition, on July 28, 2014, Swinton filed a second habeas petition challenging the 1975 Conviction, even though he was no longer in custody on that charge when the petition was filed. That petition was transferred to the United States Court of Appeals for the Second Circuit as a successive petition, and leave to file a successive petition was denied. *See Swinton v. Miller*, No. 14-CV-5923, *leave denied*, No. 14-CV-3153 (2d Cir. Nov. 14, 2014).

options: “([1]) the court may treat the Rule 60(b) motion as ‘a second or successive’ habeas petition, in which case it should be transferred to [the court of appeals] for possible certification, or ([2]) the court may simply deny the portion of the motion attacking the underlying the conviction ‘as beyond the scope of Rule 60(b).’” *Harris*, 367 F.3d at 82 (quoting *Gitten v. United States*, 311 F.3d 529, 534 (2d Cir. 2002)).

Swinton’s application can be understood to make the following arguments:

1. he lacked access to transcripts of the hearings for the plea allocution, voluntariness hearing, and sentencing related to the 1975 Conviction until a lawyer obtained these for him in 2007;
2. Supreme Court cases decided after the denial of his First Habeas petition, including *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), call that decision into question;
3. he was not served with the court’s order directing respondent to answer the habeas petition or respondent’s answer in the First Habeas, thereby depriving him of due process and the court of jurisdiction;
4. the judgment in the First Habeas is void because Judge Broderick made unwarranted assumptions;
5. he was prejudiced by Judge Broderick’s reference to a transcript of Wade hearing testimony that had not been provided to him;
6. Judge Broderick’s sua sponte resolution of his petition deprived him of notice and a meaningful opportunity to reply to the respondent’s answer;
7. Judge Broderick employed the wrong standard and thus wrongly decided the Sixth Amendment issue;
8. he did not know how to appeal the First Habeas decision; and
9. his 2007 Conviction, which led to his sentencing as a persistent violent felony offender, is “directly impacted [by] and contingent on the unconstitutional[] . . . 1978[] order.” (Mot. at 39, n.2).

Some of Swinton’s grounds for relief advance substantive claims and must be treated as seeking

habeas relief, while others attack the integrity of the habeas proceedings in the First Habeas and should be treated as seeking relief under Rule 60(b). The Court addresses separately the substantive habeas claims and Rule 60(b) claims.

B. Substantive Habeas Claims

The threshold jurisdictional showing a habeas petitioner must make is that he is “in custody pursuant to the judgment of a State court.” *Lackawanna Cnty. Dist. Attorney v. Coss*, 532 U.S. 394, 401 (2001) (quoting 28 U.S.C. § 2254(a)). “[T]he habeas corpus statute confers jurisdiction to district courts to entertain habeas petitions for relief solely from persons who satisfy the status or condition of being ‘in custody’ at the time the petition is filed.” *Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994). Because Swinton is no longer in custody, pursuant to the 1975 Conviction, it would be futile to transfer those portions of the motion making substantive claims challenging the 1975 Conviction to the Court of Appeals so that it can consider whether he should be granted leave to file a successive habeas petition. The Court therefore declines to transfer these claims to the Court of Appeals.

The custody requirement is satisfied, however, “when a pro se petition, liberally construed, can be read as asserting a challenge to [a current] sentence[], as enhanced by [an] allegedly invalid prior conviction.” *Valdez v. Hulihan*, 640 F. Supp. 2d 514, 516 (VM) (S.D.N.Y. Aug. 5, 2009) (internal quotation marks omitted) (alterations in original) (quoting *Williams v. Edwards*, 195 F.3d 95, 96 (2d Cir. 1999)). The Court may consider such a petition “only if the petitioner argues that his current sentence was enhanced on the basis of a prior conviction that was obtained under one of three narrow conditions: (1) there was a failure to appoint counsel; (2) a state court unjustifiably refused to rule on a constitutional claim that had been properly presented; or (3) the petition presents compelling evidence of actual innocence.”

Id. (citing *Lackawanna*, 532 U.S. at 403-04).³

Swinton's Motion challenges his 2007 Conviction as having been enhanced by the allegedly invalid 1975 Conviction. *Valdez*, 640 F. Supp. 2d at 516. Swinton, however, already has a pending habeas petition challenging his 2007 Conviction and persistent violent felony offender sentence. When a petitioner files a second habeas petition while a first habeas petition is pending, courts generally construe the second petition as a motion to amend the pending petition. *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002); *Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir. 2001). Here, because Swinton has explicitly raised this same denial-of-counsel claim in his habeas proceeding challenging the 2007 Conviction, *Swinton v. Racette*, No. 12-CV-9051 (ECF Nos. 21, 29), the Court dismisses that claim in this application. The Court will address that claim in his presently pending petition attacking his sentence following the 2007 Conviction. Any other substantive claims attacking Petitioner's expired 1975 Conviction are dismissed without prejudice as beyond the scope of Rule 60(b).

C. Rule 60(b) Claims

"Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only to the extent that [it is] not inconsistent with applicable federal statutory provisions and rules." *Gonzalez*, 545 U.S. at 529 (internal quotation marks omitted, alteration in original). Under Rule 60(b), a party may seek relief from a district court's order or judgment for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to

³ Courts repeatedly have rejected efforts to extend the failure-to-appoint-counsel exception to claims that counsel was ineffective. *See, e.g., Ocasio v. Smith*, No. 07-CV-2754, 2008 WL 110938, at *17 & n. 35 (S.D.N.Y. Jan. 8, 2008) (noting that the *Lackawanna* "exception for a Gideon-like challenge for failure to appoint counsel does not extend to a claim of ineffective assistance of counsel."); *Harrison v. Griffin*, No. 13-CV-4641, 2014 WL 3490917, at *4 (E.D.N.Y. July 11, 2014) ("[A]llegations of ineffective assistance of counsel are insufficient to permit application of this exception to the bar on collaterally attacking an expired conviction used as a sentence enhancement.").

move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason justifying relief.

Fed. R. Civ. P. 60(b).

A one-year limitations period applies to claims under the first three justifications set forth in Rule 60(b). *See* Fed. R. Civ. P. 60(c)(1). A claim under residual clause 6 must show both that the motion was filed within a “reasonable time” and that “‘extraordinary circumstances’ [exist] to warrant relief.” *Old Republic Ins. Co. v. Pac. Fin. Servs. of America, Inc.*, 301 F.3d 54, 59 (2d Cir. 2002) (per curiam) (citation omitted). Swinton’s Motion seeking reconsideration of a decision issued in 1978 is woefully late. Swinton also fails to show that any extraordinary circumstances warrant relief.

The Court also rejects Swinton’s arguments under Rule 60(b)(4) that the judgment concerning the First Habeas is void. Swinton’s disagreement with the decision or its logic does not render the judgment void. He also has failed to show that applying the decision in the First Habeas prospectively would be inequitable. Swinton’s motion under Rule 60(b) is therefore denied as untimely and meritless.

III. Conclusion

The Clerk of Court is directed to assign this matter to my docket, to mail a copy of this order to Petitioner, and to note service on the docket. Petitioner is hereby notified that the Court finds that this application, notwithstanding its designation, should be construed as a habeas petition attacking the 2007 Conviction on the ground that his persistent violent felony offender adjudication could not be based on his invalid 1975 Conviction. Because that claim is already pending in *Swinton v. Racette*, No. 12 Civ. 9051 (VSB), the Court dismisses this claim without

prejudice. Any other substantive claims in his Motion are dismissed without prejudice as beyond the scope of Rule 60(b).

Turning to the claims that are properly within the ambit of Rule 60(b), those claims are denied as untimely and meritless. Finally, because Swinton has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253. The Court further certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore in forma pauperis status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: September 19, 2016
New York, New York


Vernon S. Broderick
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 9/20/16

-----X
REGINALD SWINTON,

Petitioner,

- against -

STEVEN RACETTE, Superintendent,

Respondent.
-----X

**REPORT AND
RECOMMENDATION
TO THE HONORABLE
VERNON S. BRODERICK**

12cv9051-VSB-FM

FRANK MAAS, United States Magistrate Judge.

I. Introduction

Pro se petitioner Reginald Swinton ("Swinton") brings this habeas corpus proceeding pursuant to 28 U.S.C. § 2254 ("Section 2254") to challenge his conviction, following a jury trial in Supreme Court, New York County, on two counts of Rape in the First Degree, three counts of Criminal Sexual Act in the First Degree, three counts of Burglary in the Second Degree, and three counts of Attempted Robbery in the Third Degree. On May 24, 2007, Justice Daniel P. FitzGerald, before whom the case was tried, sentenced Swinton, as a persistent violent felony offender, to an aggregate indeterminate term of 150 years to life.

In his pro se amended petition, (ECF No. 23 at 4 ("Amended Petition" or "Am. Pet.")), Swinton asserts that his conviction should be set aside because:

1. the People's evidence was insufficient to establish his guilt, and the jury's verdict was against the weight of the evidence;
2. the trial court's jury instructions were improper and violated his due process rights;
3. Justice FitzGerald's Sandoval rulings violated his due process rights by unfairly preventing him from testifying;
4. his aggregate sentence violated section 70.30(1)(e)(vi) of the New York Penal Law ("Section 70.30(1)(e)(vi)") in that it exceeded fifty years, and his sentence should be modified to run concurrently in the interest of justice;
5. his right to a speedy trial under section 30.30 ("Section 30.30") of the New York Criminal Procedure Law ("CPL") and the United States Constitution was violated;
6. his appellate counsel was ineffective due to his failure to argue that:

(a) his right to a speedy trial under Section 30.30 was violated; (b) Justice Fitzgerald erroneously refused to appoint new counsel for him despite his request; and (c) his trial counsel was ineffective for failing to:

(i) assist him in filing his pro se speedy trial motion pursuant to Section 30.30; (ii) move to sever the charges against him; (iii) argue that the trial court erroneously sentenced him as a persistent violent felony offender; and (iv) represent him competently during trial.

(See Am. Pet.).

For the reasons set forth below, the Amended Petition should be denied.

Additionally, because Swinton has not made the substantial showing of the denial of a

constitutional right required by 28 U.S.C. § 2253(c)(2), a certificate of appealability should not issue.

II. Background

A. Trial

1. People's Case

The People's proof at trial would have permitted a reasonable juror to find as follows:

Between June 8 and June 23, 2005, Swinton broke into the apartments of three women, ID, EK, and AP.¹ While inside each of their apartments, he demanded money, threatened to kill them, and forced them to engage in sexual acts.

a. ID Incident

On the night of June 7, 2005, ID fell asleep on her living room couch in her apartment on East 89th Street in Manhattan. (Tr. 383).² Around 2:45 a.m., a man broke into ID's apartment by climbing through her window; ID awoke to a figure in her living

¹ The victims are referred to by their initials to protect their identity. Any documents referring to the victims by their full names have been filed under seal. (See ECF No. 10).

² "Ex." refers to the exhibits annexed to the Declaration of Assistant Attorney General Thomas B. Litsky. (See ECF No. 13). "H." refers to the transcript of the pretrial proceedings before Justice FitzGerald on April 23 and 24, 2007. (See ECF No. 15 at Swinton Tr. 1). "H2." refers to the transcript of pretrial proceedings before Justice FitzGerald on April 25, 2007. (Id. at Swinton Tran. 2). "Tr." refers to the trial transcript. (Id. at Swinton Tr. 3-5). "S." refers to the minutes of Swinton's sentencing. (Id. at Swinton Tr. 5). "SR." refers to the supplemental state court record relating to Swinton's coram nobis petition. (ECF No. 27). Exhibits I through L, the pretrial and trial transcripts, and the supplemental state court record were filed under seal in compact disk (CD) format. I have forwarded the relevant CDs in their sealing envelopes to Your Honor's Chambers.

room. (Id. at 384-86, 412). She started screaming, but the intruder silenced her by placing a couch cushion over her face, saying, “Do you want to live?” (Id. at 385-86). He then demanded money from ID, who directed him to her purse. (Id. at 386, 399). After the intruder looked around the apartment,³ he came back to the couch and forced ID to blindfold herself with one of her shirts. (Id. at 387, 395, 408). The man then proceeded to remove ID’s clothing. (Id. at 387). Once ID was naked, the intruder “play[ed] with [her] breasts” and performed oral sex on her. (Id.). He then sat next to ID and inserted his fingers in her vagina, forced her to perform oral sex on him, and had sexual intercourse with her. (Id. at 387-88). At one point during the encounter, ID began shaking, and the man told her to “Relax[,] Relax.”

Due to the blindfold, ID was unable to make a visual identification of the perpetrator. (Id. at 392, 402, 468). At a line-up on July 8, 2005, however, ID identified Swinton’s voice as the voice of the man who had attacked her, saying “if he had spoken softer, whispered . . . [,] it would be him.” (Id. at 416-17, 468). The police also recovered a palm print from ID’s apartment, which was identified as belonging to Swinton. (Id. 247, 259-60, 305-6).

b. EK Incident

In June 2005, EK lived in a duplex apartment on West 87th Street in New York City. (Id. at 82). During the early morning hours of June 14, 2005, EK awoke to a man climbing through her bedroom window. (Id. at 85-87, 116-17). The man quickly

³ ID later determined that nothing had been taken from her apartment. (Id. at 401).

approached her, covered her face with a pillow, and said, “shut up or I’ll kill you.” (Id. at 86, 100). The man demanded money from EK and blindfolded her with her late husband’s scarf. (Id. at 86-87, 97). When EK told the intruder her purse was downstairs, he forced her downstairs where he proceeded to rifle through her wallet and remove the cash. (Id. at 87-88, 101). The man then forced EK to the ground, removed her clothes, fondled her breast, forced her to perform oral sex, and had sexual intercourse with her. (Id. at 88-89). At one point during the incident, the man told EK to “relax.” (Id. at 96).

EK was unable to make a visual or voice identification of the man following incident. (Id. at 467-68). Nevertheless, the police recovered semen from the crime scene, which yielded a DNA profile matching Swinton’s DNA profile. (Id. at 10-13, 450).

c. AP Incident

In June 2005, AP lived in an apartment on East 89th Street in Manhattan, the very same block where ID’s apartment was located. (Id. at 448-49, 490). On June 22, 2005, around 4:15 a.m., AP awoke to the silhouette of a man near her apartment window. (Id. at 501-502, 515-16). The intruder quickly moved toward AP’s bed and covered her mouth with his hand. (Id. at 502-03). He then put a pillow over AP’s face, covering her eyes, and said, “Where’s the money?” (Id. at 503-04, 517-19). Approximately a minute afterward, the man forced AP to blindfold herself with her tee-shirt, saying, “Do as I say if you want to live.” (Id. at 504, 520). While AP was blindfolded, the man rummaged through her purse and stole cash. (Id. at 505, 512). The man then returned to the bed, put

his hand on AP's pubic area, undressed her, and forced her to perform oral sex on him. (Id. at 505-07). Throughout the attack, the intruder repeatedly told AP to "Relax." (Id.).

While there were significant similarities among the three attacks, no physical evidence connected Swinton to the AP incident, nor was AP able to make a visual or voice identification of the perpetrator. (Id. at 287-88, 468, 618-19).

2. Defense Case

Swinton did not present a defense.

B. Pretrial Proceedings

1. Speedy Trial Motion

On September 22, 2006, Swinton filed a pro se motion to dismiss the charges against him on speedy trial grounds. (See Ex. B ("Speedy Trial Motion")). In his Speedy Trial Motion, Swinton argued that the then-346 days of trial delay were "chargeable to the People," and that his right to a speedy trial under Section 30.30 consequently had been violated. (Id. at 8); see also Section 30.30 ("[A] motion [to dismiss the indictment] must be granted where the [P]eople are not ready for trial within . . . six months of the commencement of a criminal action.")).

By order dated February 21, 2007, Justice FitzGerald denied the motion. (Ex. E). Justice FitzGerald concluded that the total time chargeable to the People was "at most" forty days – the period between the filing of the criminal complaint and Swinton's arraignment on the indictment, at which the People "declared their readiness for trial." (Id. at 2-3). The Justice further determined that the time attributable to all subsequent

adjournments was “excludable” because the adjournments were either requested by Swinton, granted with Swinton’s consent, or attributable to motion practice.⁴ (Id. at 2-3).

2. Molineux and Sandoval Hearing

On April 24, 2007, prior to the start of trial, Justice FitzGerald conducted hearings pursuant to People v. Molineux, 168 N.Y. 264 (1901) (“Molineux hearing”), and People v. Sandoval, 34 N.Y. 2d 371 (1974) (“Sandoval hearing”).

a. Molineux Hearing

“A Molineux hearing is a pretrial hearing to determine whether the prosecution may use uncharged crimes or other bad acts to establish a defendant’s . . . identity.” Pers. v. Ercole, No. 08 Civ. 7532 (LAP) (DF), 2015 WL 4393070, at *9 (S.D.N.Y. July 16, 2015). During the Molineux hearing in this case, Justice FitzGerald addressed the People’s argument that the jury should be allowed to consider the similarities among the three incidents to help establish that Swinton was the perpetrator of the attack on AP.⁵ (H. 287-306). In support of that argument, the People maintained that all three incidents had remarkably similar, “unique” features. (Id. at 287-90).

Immediately after the hearing, Justice FitzGerald ruled that the People would be

⁴ Justice FitzGerald later denied Swinton’s motion to renew and reargue his speedy trial motion. (See Ex. G).

⁵ During the Molineux hearing, the People also asserted that the jury should be allowed to consider Swinton’s prior convictions as evidence that he had committed the crimes against AP. (H. 278-79). Justice FitzGerald rejected that argument before moving on to consider, as part of the Sandoval hearing, whether those convictions could be used to impeach Swinton’s credibility if he testified. (Id. at 306).

permitted to argue that the same individual must have been involved in all three incidents. (Id. at 306).

One month later, on May 24, 2007, Justice FitzGerald issued a written opinion further explaining his Molineux ruling. (See Ex. H). In that opinion, the Justice observed that the “common features of the crimes,” including the timing, location, and manner in which they were committed, were “sufficiently unique to suggest that the perpetrator who committed the first two also committed the third.” (Id. at 2).

b. Sandoval Hearing

“A Sandoval hearing is held, upon a defendant’s request, to determine the extent to which he will be subject to impeachment by cross-examination about prior bad acts if he testifies.” Jones v. Artuz, No. 97 Civ. 2063 (NG), 2002 WL 31006171, at *9 (E.D.N.Y. Aug. 30, 2002). During the Sandoval hearing, Justice FitzGerald addressed the admissibility of Swinton’s prior convictions in light of his counsel’s representation that Swinton planned to testify as part of the defense case. (H. 307-40).

The People requested permission to cross-examine Swinton about the details of several of his previous felony convictions, including his: (a) 1975 conviction, following a plea of guilty, on a charge of Rape in the First Degree, which resulted in a sentence of five to fifteen years in prison (the “1975 Conviction”); (b) 1980 conviction, following a jury trial, on a charge of Criminal Trespass, which resulted in a one-year jail sentence; and (c) 1986 conviction, following a jury trial, on a charge of Robbery and Burglary in the First Degrees, which resulted in a twelve and one-half to twenty-five year

sentence. (H. 307-16). The facts underlying all three convictions were strikingly similar to those leading to the charges against Swinton in 2007. In 1975, for example, Swinton pleaded guilty to one count of Rape in the First Degree in satisfaction of charges arising out of his commission of five separate attacks on women, four of which involved breaking into their apartments in the middle of the night or early morning and raping them. (Id. at 313-14). Moreover, both the 1980 and 1986 convictions involved incidents in which Swinton broke into women's apartments in the middle of the night or early morning. (Id. at 308, 310-11).

Justice FitzGerald initially held that, if Swinton chose to testify, the People could introduce evidence of the 1975 Conviction on a charge of Rape in the First Degree. (H2. at 10-11). He later narrowed that ruling so that the People could establish only that Swinton was convicted of a "violent felony offense" in 1975. (Tr. 632-34). Justice FitzGerald made that modification because he "d[id] not want to . . . preclude [Swinton] from testifying." (Id.). Turning to the 1980 conviction, Justice FitzGerald concluded that the People could cross-examine Swinton by asking whether he was convicted of criminal trespass for "unlawfully enter[ing] the apartment of another." (H2. at 9-10). Justice FitzGerald also determined that the People could adduce evidence that Swinton had been convicted of "burglary and robbery in [19]86" and that he had "robbed . . . a person . . . of money and a gold chain inside [an] apartment." (Id. at 8-9). Justice FitzGerald further ruled that the People could establish the length of the sentences related to the above convictions. (Id. at 13).

C. Verdict and Sentencing

Swinton's trial commenced on April 25, 2007. (Tr. 1). On May 7, after less than one day of deliberations, the jury submitted a note to Judge FitzGerald indicating that they had reached a verdict with respect to the first eight counts relating to the ID and EK incidents, but were deadlocked with respect to the last three counts relating to the attack on AP.⁶ (*Id.* at 767, 787-88, 793). In response, Justice FitzGerald accepted the jury's partial verdict, which was guilty of each on the first eight counts. (*Id.* at 787-90). With the consent of the parties, Justice FitzGerald then adjourned the proceedings for the evening and directed the jurors to continue their deliberations regarding the remaining three counts the next morning. (*Id.* at 793-95, 797-98). The following day, the jury found Swinton guilty on those counts. (*Id.* at 802).

The sentencing was held on May 24, 2007. During the proceeding, Swinton made an application for the appointment of substitute counsel, noting his belief that "during the trial [he] was denied . . . effective assistance of counsel." (S. 14). In response, Justice FitzGerald noted that he had "watched [defense counsel] here in court," "[was] aware of his skills," and believed he was "an extremely effective attorney" who had done "an excellent job." (*Id.* at 14-15). Accordingly, Justice FitzGerald denied Swinton's motion. (*Id.*). The Justice then sentenced Swinton, as a persistent violent

⁶ The indictment originally contained sixteen counts. (Ex. A). Justice FitzGerald dismissed Counts Three, Four, Five, Ten, and Fourteen before he submitted the case to the jury. (Tr. 642-43). The remaining eleven counts were consolidated and referred to as Counts One through Eleven. (*Id.*).

felony offender, to an aggregate indeterminate sentence of 150 years to life. (Id. at 15, 18-19). This sentence was comprised of a number of concurrent and consecutive sentences. In general, each of the burglary sentences ran consecutive to the sentences on the sexual crimes, and the sentences related to each of the incidents also ran consecutively. (See id. at 18-19).

D. Subsequent Procedural History

1. Direct Appeal

In his appeal to the Appellate Division, First Department, Swinton advanced seven claims. Specifically, his appellate counsel, Carl S. Kaplan, Esq., contended that: (a) the Molinuex charge was improper and violated Swinton's due process rights; (b) with respect to the charges related to the AP incident, the evidence was insufficient and the jury's verdict was against the weight of the evidence; (c) the Sandoval rulings violated Swinton's due process rights by unfairly preventing him from testifying; (d) the aggregate sentence violated Section 70.30(1)(e)(vi) because it exceeded fifty years; and (e) his sentences should be modified to run concurrently in the interest of justice. (See Ex. I at 29-57). Swinton also filed a pro se supplemental brief, in which he argued that: (f) his right to a speedy trial under Section 30.30 was violated; and (g) he was denied his constitutional right to a speedy trial. (See Ex. J at 9-44).

On August 25, 2011, the Appellate Division unanimously affirmed Swinton's conviction. See People v. Swinton, 928 N.Y.S.2d 693 (2011). The Appellate

Division first held that the trial court's Molinuex charge did not deprive Swinton of his constitutional rights because "the assailant's conduct during all three incidents was so similar and distinctive." Id. at 695. Similarly, the Appellate Division held that Swinton's sufficiency and weight of the evidence challenges with regard to the AP incident were "without merit" because the verdict was supported by the victim's description of the events, which matched Swinton's "unique modus operandi." Id. at 695-96.

The Appellate Division next considered Swinton's Sandoval claim. The court held that Justice FitzGerald did not abuse his discretion because he allowed "only limited inquiry" into Swinton's criminal history, appropriately balancing the probative value of the evidence with its potential to prejudice the jury unfairly. Id. at 696.

The Appellate Division also held that Swinton's sentence did not violate Section 70.30(1)(e)(vi) -- in part, because that provision is inapplicable to defendants who are sentenced as class A offenders. The court also declined to reduce Swinton's sentence in the interest of justice. Id.

Finally, the Appellate Division rejected Swinton's pro se speedy trial claims. Id.

By letter dated September 23, 2011, Swinton sought leave to appeal to the New York Court of Appeals based on each of the issues raised before the Appellate

Division.⁷ (Ex. N). The Court of Appeals denied that application by order dated December 2, 2011. (Ex. Q).

2. Motion for Writ of Error Coram Nobis

On November 15, 2012, Swinton filed a pro se motion with the Appellate Division, seeking a writ of error coram nobis on the ground that his appellate counsel was ineffective for having failed to argue that: (a) his right to a speedy trial under Section 30.30 was violated; (b) Justice FitzGerald erroneously refused to appoint new counsel for him despite his request; and (c) his trial counsel was ineffective. (SR. 15-61). By order dated November 26, 2013, the Appellate Division summarily denied that motion. (Id. at 264). Swinton sought leave to appeal to the Court of Appeals, (id. at 265), which was denied on February 20, 2014, (id. at 273).

3. Habeas Petition

On December 11, 2012, Swinton filed his pro se petition for a writ of habeas corpus. (ECF No. 1). On March 18, 2013, the Respondent filed a memorandum of law in opposition to Swinton's petition. (ECF No. 14 ("Resp't's Mem.")). Thereafter, on March 22, 2013, I granted Swinton's request to stay this matter pending a determination of his coram nobis motion. (See ECF No. 16).

⁷ On October 12, 2011, Swinton filed a pro se supplemental letter also seeking leave to appeal his case to the Court of Appeals. (Ex. O).

Following the Court of Appeals' denial of Swinton's application for leave to appeal from the denial of his coram nobis petition, Swinton filed his Amended Petition on March 5, 2014. (See Am. Pet.; ECF No. 22). On March 11, 2014, Swinton mailed the Court a copy of his reply memorandum addressing the Respondent's original opposition papers, which I subsequently filed under seal. (ECF No. 47 ("Reply")).⁸ Thereafter, on July 18, 2014, the Respondent filed a supplemental memorandum of law in opposition to Swinton's Amended Petition, (ECF No. 28 ("Resp't's Suppl. Mem.")), and Swinton filed a supplemental reply memorandum on November 5, 2014, (ECF No. 33 ("Suppl. Reply")). On February 29, 2016, Swinton submitted amendments to his Reply further discussing his speedy trial claims. (See ECF No. 46 ("Suppl. Speedy Trial Reply")). No further papers having been received, the Amended Petition is ripe for review.

III. Standard of Review

A habeas corpus petition is not a vehicle to relitigate every issue previously determined in state court. Herrera v. Collins, 506 U.S. 390, 401 (1993). Rather, a state prisoner seeking habeas relief under Section 2254 must show that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petitioner bears the burden of proving, by a preponderance of the

⁸ I have forwarded the Reply to Your Honor's Chambers.

evidence, that his rights have been violated. Jones v. Vacco, 126 F.3d 408, 415 (2d Cir. 1997).

Section 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in part, that:

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

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

28 U.S.C. § 2254(d)(1) (emphasis added).

As the Second Circuit noted in Jones v. Stinson, the Supreme Court has “construed the amended statute so as to give independent meaning to ‘contrary [to]’ and ‘unreasonable.’” 229 F.3d 112, 119 (2d Cir. 2000). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Under the “unreasonable application” clause, a federal habeas court should “ask whether the state court’s application of clearly established federal law was objectively unreasonable.” Id. at 409. This standard does not require that reasonable jurists all would agree that the state court was wrong. Id. at

409-10. Rather, the standard “falls somewhere between ‘merely erroneous’ and ‘unreasonable to all reasonable jurists.’” Jones, 229 F.3d at 119 (quoting Francis S. v. Stone, 221 F.3d 100, 109 (2d Cir. 2000)).

Section 2254(d)(2) further authorizes the federal courts to grant a habeas writ when a claim considered on the merits in state court “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). To the extent that a habeas petition challenges factual findings, however, Section 2254(e)(1) provides that “a determination of a factual issue made by a State court shall be presumed to be correct” and “[t]he [petitioner] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” Id. § 2254(e)(1).

Section 2254 thus embodies a “‘difficult to meet’ . . . and ‘highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt.’” Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (quoting Harrington v. Richter, 562 U.S. 86, 102 (2011); Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (per curiam)). Despite this standard, however, if “a federal court is convinced that a prisoner’s custody . . . violates the Constitution, that independent judgment should prevail.” Williams, 529 U.S. at 389.

IV. Discussion⁹

A. Weight and Sufficiency of Evidence Claims

Swinton first advances the associated claims that the People's evidence with respect to the charges related to AP was insufficient to establish his guilt, and that the jury's verdict was against the weight of the evidence. (See Am. Pet. at 1; Reply at 42-48). A defendant's claim that his conviction was contrary to the weight of the evidence is not cognizable on federal habeas review. See Givens v. Burge, No. 02 Civ. 0842 (JSR) (GWG), 2003 WL 1563775, at *10 (S.D.N.Y. Mar. 4, 2003) (collecting cases). On the other hand, the legal sufficiency of the evidence used to convict the defendant is an issue that a habeas court may address. A habeas petitioner challenging the sufficiency of the evidence nevertheless bears a "very heavy burden." Knapp v. Leonardo, 46 F.3d 170, 178 (2d Cir. 1995) (quoting United States v. Rosenthal, 9 F.3d 1016, 1024 (2d Cir. 1993)). To prevail, the petitioner must show that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Bossett v. Walker, 41 F.3d 825, 830 (2d Cir. 1994) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)). In considering such a sufficiency claim, a habeas court must weigh the evidence in the light most favorable to the prosecution and draw all permissible inferences in its favor. Jackson, 443 U.S. at 326.

⁹ The Respondent contends that certain of Swinton's claims remain unexhausted even after he pursued his coram nobis motion. (Resp't's Mem. at 20-24; Resp't's Suppl. Mem. at 4-7). I have not addressed those arguments because Section 2254 provides that a habeas court may deny a claim even if it has not been exhausted. See 28 U.S.C. § 2254(b)(2).

A sufficiency claim therefore does not permit the reviewing court to redetermine the credibility or reliability of witnesses, or substitute its view of the evidence for that of the trier of fact. See Marshall v. Lonberger, 459 U.S. 422, 434 (1983); Maldonado v. Scully, 86 F.3d 32, 35 (2d Cir. 1996). Rather, insofar as there is evidence from which the jury could have drawn an inference favorable to the accused but chose not to, the court must “defer to . . . the jury’s choice of the competing inferences.” United States v. Kinney, 211 F.3d 13, 18 (2d Cir. 2000) (quoting United States v. Morrison, 153 F.3d 34, 49 (2d Cir. 1998)).

Swinton’s sole argument with respect to the sufficiency of the evidence is that the People did not establish beyond a reasonable doubt that he committed the crimes relating to the attack on AP. In that regard, Swinton notes that there was “no physical, forensic or eyewitness evidence identifying [him] as the perpetrator of the [AP] incident.” (Am. Pet. at 1). Moreover, Swinton contends that the other two incidents were not sufficiently similar to permit the jurors to infer that he also was responsible for the AP incident. (Reply at 43 n.12).

Despite Swinton’s contention, there was ample evidence from which the jury could reasonably infer that the same individual committed all three attacks. As the Appellate Division found:

[A]ll three incidents occurred within 15 days of each other and involved an assailant who broke into a premises through a window at night, covered his victim's face with a pillow or cushion, demanded that the victim blindfold herself with an article of her own clothing or clothing found within the victim's premises, repeatedly told each victim to "relax," demanded money, threatened to kill the victim, forced the victim to perform oral sex, and either forced or tried to force the victim to engage in sexual intercourse.

Swinton, 928 N.Y.S.2d at 695. Although Swinton may be correct that some of this behavior, taken alone, is "generic," (Reply at 43 n.12), as the Appellate Division observed, the totality of his "behavior gave rise to a distinct pattern making it "highly probative of . . . [his] identity," Swinton, 87 A.D.3d at 493 (alterations in original) (quoting People v. Beam, 57 N.Y.2d 241, 253 (1982)). Indeed, the attack on AP occurred on the same block as the attack on ID. (Tr. 490). For these reasons, there is no merit to Swinton's claims regarding the weight or sufficiency of the evidence.

B. Improper Jury Instruction

Swinton next contends that the trial court's jury instruction relating to its Molineux ruling violated his due process rights. (See Am. Pet. at 2). Specifically, Swinton argues that Justice FitzGerald erred by permitting the jury to infer that he was the perpetrator of the attack on AP based on his commission of crimes sharing a similar modus operandi. (Id.; Reply at 52).

"A jury instruction is erroneous if it 'misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" United States v. Walsh, 194

F.3d 37, 52 (2d Cir. 1999) (quoting United States v. Bok, 156 F.3d 157, 169 (2d Cir. 1998)). When a habeas petitioner challenges such an instruction, “[t]he only question for [the court] is ‘whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.’” Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)); see also Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (“[I]t must be established not merely that the instruction is undesirable, erroneous, or even universally condemned, but that it violated some [constitutional] right.”) (internal quotation marks omitted). In making this determination, an instruction “must be evaluated not in isolation but in the context of the entire charge.” Jones v. United States, 527 U.S. 373, 391 (1999) (collecting cases).

Swinton has not met the requisite threshold here.

Under both New York and federal law, evidence of other crimes may not be admitted solely to show that a defendant has a propensity for criminal activity. See Fed. R. Evid. 404(b) (“Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”); People v. Rojas, 97 N.Y.2d 32, 36 (2001) (“[A] criminal case should be tried on the facts and not on the basis of a defendant’s propensity to commit the crime charged.”). On the other hand, both jurisdictions permit other crimes evidence to be introduced when it is relevant to an issue other than criminal propensity. See United States v. Gelzer, 50 F.3d 1133, 1139 (2d Cir. 1995) (“Rule 404(b) does not bar all other crime evidence; it bars only the admission of a defendant’s uncharged crimes

to prove propensity to commit the crime charged.”) (internal quotation marks omitted) (quoting United States v. Concepcion, 983 F.2d 369, 392 (2d Cir. 1992)); People v. Allweiss, 48 N.Y.2d 40, 47 (1979) (“When evidence of uncharged crimes is relevant to some issue other than the defendant’s criminal disposition, it is generally held to be admissible.”). Nevertheless, the court must always weigh the probative value of such evidence against its potential prejudicial effect. People v. Till, 87 N.Y.2d 835, 836 (1995).

Prior to the trial, Justice FitzGerald held a Molineux hearing, after which he determined that the jurors would be instructed that they could infer that Swinton committed the crimes related to the AP incident if they concluded that he perpetrated the two other attacks. (H. 306). As he later explained in a written decision, the “common features of the crimes,” including the timing, location, and manner in which they were committed, were “sufficiently unique to suggest that the perpetrator who committed the first two also committed the third.” (Ex. H at 2). In keeping with that ruling, the Justice instructed the jurors that, if they found “beyond a reasonable doubt that [Swinton] . . . committed at least one of the crimes against [EK] or [ID]” and found that the crimes had a “distinctive repetitive pattern,” they then could consider whether the “similarities [among] the crimes [were] unusual enough” to “convince [them] beyond a reasonable doubt” that the same “perpetrator committed all of the crimes . . . , including the crimes against [AP].” (Tr. 747-49). On appeal, the Appellate Division found that, “[b]ecause the assailant’s identity with respect to the third incident could not be independently

established and because the assailant's conduct during all three incidents was so similar and distinctive, the trial court properly allowed the jury to consider the issue of defendant's identity as the perpetrator of the third incident through the use of the assailant's modus operandi." Swinton, 928 N.Y.S.2d at 695.

Insofar as Justice FitzGerald's jury instruction merely restated his Molineux ruling, there is no basis upon which it may be challenged in this forum. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Copes v. Schriver, No. 97 Civ. 2284 (JGK), 1997 WL 659096, at *3 (S.D.N.Y. Oct. 22, 1997) ("[R]ulings by state trial courts on evidentiary issues, even if erroneous, do not rise to the level of a constitutional violation."). Moreover, the Justice clearly instructed the jury to consider "each count separately [to] determine whether there was sufficient proof of guilt with respect to each individual crime charged." (Tr. 749). The jurors must be presumed to have followed this instruction. See Francis v. Franklin, 471 U.S. 307, 324 (1985) ("Absent . . . extraordinary situations . . . we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."). Accordingly, Swinton's argument that the jury charge permitted the jury to consider his criminal propensity is not a basis for granting him relief.

In any event, even if the Court could second-guess Justice FitzGerald's limiting instruction, "[c]ourts have routinely held that federal habeas corpus relief is

unavailable to challenge the admission of propensity or 'prior bad acts' evidence because there is no clearly established Supreme Court law barring the practice." Vargas v. Walsh, No. 10 Civ. 7604 (DAB) (GWG), 2011 WL 1900115, at *5 (S.D.N.Y. Apr. 14, 2011) (collecting cases); see also Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991) ("[W]e express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."). It follows that Justice FitzGerald's decision to admit the evidence subject to a limiting instruction cannot be said to be "contrary to" or an "unreasonable application of" clearly-established federal law. See Williams, 529 U.S. at 412-13.

Swinton therefore is not entitled to habeas relief on the theory that Justice FitzGerald's jury instruction violated his due process rights.

C. Sandoval Claim

Swinton next contends that it was an abuse of discretion for Justice FitzGerald to permit the prosecutor to inquire into his prior convictions if he took the stand. (Am. Pet. at 2; Reply at 57-65). Swinton maintains that this ruling deterred him from testifying in his own defense, thereby depriving him of his due process right to a fair trial. (Reply at 58). Notwithstanding these assertions, it is well established that "Sandoval claims are barred from habeas review where, as here, the petitioner failed to actually take the stand and testify at trial," Wilson v. Heath, 938 F. Supp. 2d. 278, 287 (N.D.N.Y. 2013) (collecting cases), "because in the absence of such testimony the Court

D. Sentencing Claims

Swinton next argues that his aggregate sentence (1) violated Section 70.30(1)(e)(vi) because it exceeds fifty years, and (2) was “unduly harsh” and should be modified to run concurrently in the interest of justice. (See Am. Pet. at 2). Swinton’s sentencing claims, however, are not cognizable on federal habeas review because “the sentence [was] within the range prescribed by state law.” See White v. Keane, 969 F.2d 1381, 1383 (2d Cir. 1992).

Swinton does not argue that his sentence on any of the eleven counts was unlawful. (See Pet at 2; Reply at 65-70). Instead, he maintains that it was improper to run certain of those sentences consecutively. (Id.). He is wrong for at least three reasons.

First, Section 70.30(1)(e)(vi) does not prohibit sentences which in the aggregate are longer than fifty years. Rather, it provides that the maximum term of such sentences shall “be deemed to be fifty years.” See Section 70.30(1)(e)(vi) (emphasis added). As the Appellate Division noted, this “merely requires that the Department of Correctional Services [now the Department of Corrections and Community Supervision] calculate the aggregate maximum length of imprisonment consistent with [that] limitation.” Swinton, 928 N.Y.S.2d at 696.

Second, as the Appellate Division also correctly observed, Section 70.30(1)(e)(vi) is inapplicable to Swinton because he was sentenced as a class A offender.¹⁰ See id.

Finally, although a number of Swinton's sentences were consecutive to one another, (S. 18-19), Section 70.25 of the Penal Law, insofar as relevant, requires concurrent sentencing only when two or more offenses are committed through "a single act or omission," Penal Law § 70.25(2). Here, the crimes related to the three incidents clearly involved separate and distinct acts, as they were committed in different places and concerned three different victims. Moreover, Justice FitzGerald was permitted to impose consecutive sentences for Swinton's convictions of Rape in the First Degree and Burglary in the Second Degree as the "crimes [were] committed through separate and distinct acts, even though part of a single transaction." People v. Salcedo, 92 N.Y.2d 1019, 1021 (1998); see also Phillips v. Miller, No. 01 Civ. 1175 (DF), 2000 WL 33650803, at *16

¹⁰ Section 70.30(1)(e)(vi) "does not apply if at least one of the convictions was for a class A felony." See Roballo v. Smith, 63 N.Y.2d 485, 488 (1984). In Roballo, the Court of Appeals read the term "class A felony" as "referring not to the class of the underlying crime but to the class of the sentence imposed." Id. at 489. Thus, the Court concluded that aggregate sentencing limitations under the statute were inapplicable to individuals who committed lesser crimes but were "sentenc[ed] as class A[]" offenders by virtue of their status as persistent felony offenders. Id. at 490. In Swinton, the Appellate Division extended this reasoning to individuals, such as Swinton, who were sentenced as class A offenders by virtue of their status as persistent violent felony offenders. See 928 N.Y.S.2d at 696 (citing Roballo, 63 N.Y.2d at 489); compare Penal Law §§ 70.02(1)(a); 70.08(3)(a-1) (class B felonies, such as Rape in the First Degree, committed by persistent violent felony offenders, carry minimum indeterminate sentences of twenty-five years to life), with id. §§ 70.00(2)(a), (3)(a)(i) (class A-1 felonies carry indeterminate sentences with a minimum term of fifteen years to twenty-five years and a maximum term of life imprisonment).

(S.D.N.Y. Dec. 3, 2000) (“New York courts have recognized that, in cases involving sex offenses, each act of rape, sodomy, and robbery is a separate and distinct act and the sentences can run consecutively.”) (collecting cases).

In sum, the Penal Law permitted Justice FitzGerald to impose an aggregate indeterminate life sentence of 150 years to life in prison. Accordingly, because Swinton’s individual sentences and aggregate sentence were within the range prescribed by state law, Swinton’s sentencing claims do not present a federal constitutional issue cognizable on habeas review. See White, 969 F.2d at 1383. Swinton’s sentencing claims consequently do not provide a basis for relief.

E. Speedy Trial Claim

Swinton also claims that his Sixth Amendment right to a speedy trial was violated. (See Am. Pet. at 3; Reply at 18-30; Suppl. Speedy Trial Reply). While he also seeks to assert claims based on Section 30.30, those related claims cannot be considered on habeas review.¹¹

¹¹ Swinton claims that the People violated his right to a speedy trial under Section 30.30 and that his right to due process was violated by Justice FitzGerald’s treatment of the Speedy Trial Motion. (See Am. Pet. at 3; Reply at 30-42). Neither of those claims suggests, however, that Swinton’s federal constitutional rights were violated. See, e.g., Parrish v. Lee, No. 10 Civ. 8708 (KMK), 2015 WL 7302762, at *11 (S.D.N.Y. Nov. 18, 2015) (“[Section 30.30] is purely a creature of New York state statute and does not protect a federal constitutional right.”); Smith v. LaClair, No. 04 Civ. 4356 (SAS), 2008 WL 728653, at *3 (S.D.N.Y. Mar. 17, 2008) (“Even if the trial court violated [Section] 30.30 by failing to hold an evidentiary hearing, such failure cannot support a due process claim in a federal habeas proceeding.”). (Swinton’s related claim that his appellate counsel was ineffective for failing to argue that his speedy trial rights under Section 30.30 were violated is considered below.)

There is no bright line rule that establishes when a Sixth Amendment speedy trial violation has occurred. Rather, courts must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant resulting from the delay. Barker v. Wingo, 407 U.S. 514, 530 (1972); Rayborn v. Scully, 858 F.2d 84, 89 (2d Cir. 1988). No individual factor is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533. Instead, the factors are "related . . . and must be considered together with such other circumstances as may be relevant." Id. Here, the balancing of the four factors compels the conclusion that there has been no Sixth Amendment violation as a result of pretrial delay.

Turning first to the length of the delay, the Court need not consider any of the remaining Barker factors unless Swinton is able to show the existence of "some delay which is presumptively prejudicial." Id. at 530. Some twenty-two months elapsed between the filing of the criminal complaint against Swinton and the commencement of his trial. (See Ex. E at 1; Tr. 1). In this Circuit, there is a "general consensus that a delay of over eight months" is sufficient to trigger judicial review for a Sixth Amendment violation. Parrish, 2015 WL 7302762, at *18. Accordingly, the delay in this case plainly suffices.

The mere fact that it took twenty-two months to bring Swinton to trial does not mean that he necessarily presents a compelling case. Indeed, the Second Circuit has

declined to find speedy trial violations even in relatively straightforward cases involving comparable delay. See United States v. Vasquez, 918 F.2d 329, 338 (2d Cir. 1990) (twenty-six-month delay in case involving single narcotics sale). Longer delays also have been tolerated in appropriate circumstances. See, e.g., United States v. Zedner, 401 F.3d 36, 48 (2d Cir. 2005) (seven-year delay did not violate Sixth Amendment right to a speedy trial); Montalvo v. United States, 862 F.2d 425, 426 (2d Cir. 1988) (no speedy trial violation for eight-year delay). Of course, “the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.” Barker, 407 U.S. at 531. Given the relative complexity of this case, the first Barker factor, at best, only slightly favors Swinton’s claim.

The mere fact that the delay was lengthy does not mean that it necessarily was unreasonable. Thus, the second Barker factor examines the reason for the delay. “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the [prosecution.] [However, a] more neutral reason such as negligence or overcrowded courts should be weighted less heavily.” Barker, 407 U.S. at 531. In this case, Swinton contends that the prosecution was responsible for 495 days, or approximately seventeen of the twenty-two months, of trial delay. (Suppl. Speedy Trial Reply at 9). Swinton makes two arguments in support of this assertion. First, he dissects the pretrial proceedings and assigns fault to the People for the vast majority of the delays. (Id. at 4-9). Second, he argues that the People were acting in “bad-faith” throughout the

pretrial proceedings, intentionally delaying the trial for their own benefit. (Id. at 9, 13-14).

As an initial matter, Swinton's contention that the People were acting in bad faith is not supported by the record. According to Swinton, prior to trial, the People were trying to conceal the fact that they did not have any evidence directly linking him to the AP incident. (Id. at 9-14; Am. Pet. at 3). As part of this effort, the People allegedly "intimat[ed] and misrepresent[ed]" that AP, rather than ID, had made a voice identification of Swinton. (Suppl. Speedy Trial Reply at 12). In the meantime, the People were "stalling for time," maintaining a "false impression" of readiness, and intentionally "shifting the blame for the delay to [Swinton]." (Id. at 12-14). Swinton maintains that the People then pulled a "bait-and-switch," revealing at the last minute their lack of evidence and seeking to proceed on a modus operandi theory. (Id. at 11). Even if Swinton were able to establish that the People concealed their lack of any direct evidence concerning to the AP incident, Swinton's contention that they therefore were "stalling for time" and intentionally "shifting the blame for the delay to [him]" is entirely speculative and not supported by the record. Indeed, Swinton has not put forth any plausible explanation as to how this delay could have benefitted the People's case. Moreover, the People successfully tried the case without relying on any direct evidence linking Swinton to the AP incident. There is no reason to believe that they were reluctant to do so at an earlier date.

Swinton's efforts to assign blame to the People for each pretrial adjournment are equally unavailing. As Justice FitzGerald found, many of the pretrial continuances were granted on the consent of the parties or due to defense motion practice, while "[t]he People h[ad] been ready for trial for almost the entire length of the delay." (See Ex. E). Indeed, Swinton's own appellate counsel found, after an "extensive[]" review of the record "considered in the most favorable possible light" to Swinton, that, at most, 154 days of delay could be attributable to the People. (See SR. 75-77).

Accordingly, the second Barker factor weighs against Swinton.

The third Barker factor – the responsibility of the petitioner to assert his right – weighs in favor of Swinton, because he twice asked the trial court to dismiss the indictment on speedy trial grounds. (See Exs. C, F, G).

Finally, the fourth factor requires the Court to assess the degree of prejudice to the defendant. A court considering the prejudice to a defendant in connection with a speedy trial claim should consider whether: (1) the pretrial incarceration was oppressive; (2) a speedier trial would have minimized the "anxiety and concern of the accused"; and (3) the defense was impaired by the delay. Barker, 407 U.S. at 532.

Although Swinton maintains that he suffered a great deal of physical and emotional discomfort during his pretrial detention, (see Reply at 28-30), his showing of prejudice is far from overwhelming. For example, Swinton maintains that the delay increased media attention regarding his case, making it more difficult to select an

impartial jury and “result[ing] in family members being unfairly vilified and, in several instances, attacked in the community.” (Id. at 29). Swinton has not demonstrated, however, that the media attention increased with the passage of time, which is itself a questionable contention. Similarly, Swinton has not established a causal connection between his claimed inability to prepare his defense while in pretrial detention and the length of the delays. (Id.). Although Swinton’s assertions that he was the “object of daily ridicule by the jailers and staff” and was frequently placed in solitary confinement during his pretrial detention are concerning, (id. 28-29), these unsupported allegations also hardly tip the scales in his favor.

In sum, Swinton has not demonstrated that the twenty-two-month delay between the filing of his criminal complaint and his trial violated his Sixth Amendment right to a speedy trial. His speedy trial claim consequently does not provide a basis for any relief.

F. Ineffective Assistance of Appellate Counsel

Swinton also advances several claims relating to his appellate counsel’s alleged ineffectiveness. (See Am. Pet. at 3-5). None of these claims is meritorious.

1. Relevant Law

To prevail on an ineffective assistance of counsel claim, a petitioner must demonstrate that (a) his counsel’s performance “fell below an objective standard of reasonableness” and (b) there is a “reasonable probability that, but for counsel’s

unprofessional errors, the result of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668, 688, 694. With respect to the first of these requirements, there is a “strong presumption that [a lawyer’s] conduct falls within the wide range of reasonable professional assistance.” Id. at 689. This deference is due because “it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.” Bell v. Cone, 535 U.S. 685, 702 (2002). Therefore, a petitioner must overcome the “presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Id. (quoting Strickland, 466 U.S. at 689) (internal quotation marks omitted).

Although the Strickland test has two prongs, a court considering an ineffective assistance claim need not “address both components of the [Strickland] inquiry if the [petitioner] makes an insufficient showing on one.” Strickland, 466 U.S. at 697. Thus, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” Id.

The Strickland test “applies to the evaluation of appellate counsel as well as trial counsel.” Frederick v. Warden, Lewisburg Corr. Facility, 308 F.3d 192, 197 (2d Cir. 2002). In preparing a brief, however, appellate counsel is not required to raise every claim arising out of a trial and has the discretion to eliminate weaker ones. See Jones v. Barnes, 463 U.S. 745, 751-53 (1983); see also Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994) (“[C]ounsel does not have a duty to advance every nonfrivolous argument that

could be made”). In order to satisfy the first prong of the Strickland standard, Swinton therefore must show that his appellate counsel did something more than omit from his brief a nonfrivolous argument that Swinton wished to pursue. Id. He must establish that counsel opted not to raise “significant and obvious issues while pursuing issues that were clearly and significantly weaker.” Mayo, 13 F.3d at 533.

Here, of course, Swinton advances his ineffectiveness claim through a Section 2254 proceeding. As the Supreme Court has noted, “[w]hen a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel,” the court is required to “use a ‘doubly deferential’ standard of review that gives both the state court and the defense attorney the benefit of the doubt.” Burt v. Titlow, 134 S. Ct. 10, 13 (2013) (quoting Cullen, 131 S. Ct. at 1403). For this reason, it is scarcely surprising that “the great majority of habeas petitions that allege constitutionally ineffective counsel” fail. See Lindstadt v. Keane, 239 F.3d 191, 199 (2d Cir. 2001).

2. Application of Law to Facts

a. Speedy Trial Claim

In a variant on his speedy trial claims, Swinton contends that his appellate counsel was ineffective for failing to request a hearing to settle the pretrial record. (See Am. Pet. at 3; Suppl. Reply at 5-17); see also 22 NYCRR § 600.5 (establishing process by which parties may seek to amend transcripts). Specifically, Swinton argues that Mr. Kaplan failed to seek a correction to the transcript of the conference on April 20, 2006,

which indicated that Swinton “ha[d] been produced.” (See Suppl. Reply at 5-17; see also Ex. K at A11). According to Swinton, he was not produced on that day, and therefore the forty-two day continuance granted by Justice FitzGerald during that conference was chargeable to the prosecution. (See Am. Pet. at 3; Suppl. Reply at 5-17). In turn, Swinton contends that, but for this error in the transcript, the Appellate Division would have dismissed the indictment against him pursuant to Section 30.30. (See id.).

Even assuming that Swinton is correct that he was not produced on April 20, 2006, he was not prejudiced by Mr. Kaplan’s alleged failure to seek a hearing to modify the record. Section 30.30 provides that “a motion [to dismiss the indictment] must be granted where the [P]eople are not ready for trial within . . . six months of the commencement of a criminal action.” CPL § 30.30(1)(a). Although Swinton is correct that “[t]he People are not presently ready for trial . . . where they . . . fail to produce an incarcerated defendant for trial,” People v. England, 84 N.Y.2d 1, 4 (1994), time may nevertheless be excluded when a continuance is granted with the consent of defense counsel, see People v. Greene, 637 N.Y.S.2d 79 (1st Dep’t 1996) (“Although delays due to the non-production of a defendant are generally chargeable to the People, . . . this period is excludable as an adjournment requested by the defendant.”) (citing CPL §30.30(4)(b)); see also People v. Meierdiercks, 68 N.Y.2d 613, 614 (1986) (when the defense consents to an adjournment, it “expressly waiv[es] any objection to [pretrial] delays”).

the breakdown in communication.” Id. at 122-23 (internal quotation marks omitted). The second and third of these factors are considered the most critical. Lopez v. Graham, No. 10 Civ. 468 (NGG), 2012 WL 1865502, at *11 (E.D.N.Y. May 22, 2012).

AEDPA, of course, requires federal habeas courts to apply a considerably more deferential standard of review when considering habeas petitions. See 28 U.S.C. § 2254(d). Judges in the Second Circuit nevertheless have found the four-factor test “instructive in determining whether the state courts’ adjudication of [a] Sixth Amendment claim was a reasonable application of an established constitutional right.” See Allison v. Khahaifa, No. 10 Civ. 3453 (KAM), 2011 WL 3298876, at *10 (E.D.N.Y. Aug. 1, 2011). It therefore is appropriate to consider the John Doe factors, while also bearing in mind AEDPA’s deferential framework of review.

The fourth John Doe factor cuts in Swinton’s favor. Indeed, there is nothing in the record to suggest that Swinton “substantially and unjustifiably contributed to the breakdown in communication” between him and his trial counsel Mark Weinstein, Esq. John Doe, 272 F.3d at 123.

All three remaining factors, however, weigh against Swinton. Turning first to the timeliness factor, Swinton did not make his application for the substitution of counsel until May 24, 2007, the day of his sentencing. Had Swinton made his request closer to the date of the verdict, Justice FitzGerald potentially could have granted it

without delaying the sentencing. The lateness of Swinton's application thus cuts against his claim.

The second factor – the extent of the court's inquiry – similarly weighs against Swinton. After Swinton made his pro se application for the substitution of counsel, Justice FitzGerald asked both Swinton and Mr. Weinstein if they had “[a]nything further” to add before he ruled on those applications. (S. 14). Having received no reply, Justice FitzGerald denied the application, noting that he had witnessed Mr. Weinstein throughout the course of the trial and believed him to be “an extremely effective attorney” who had done “an excellent job.” (Id. at 14-15). Although Justice FitzGerald thereafter denied Swinton the opportunity to contest that ruling, (see id. 16-17), Swinton cannot contend that the trial court failed to conduct an adequate inquiry into the basis of his motion for substitution,⁽¹²⁾ see United States v. Smith, 640 F.3d 580, 595 (4th Cir. 2011) (“Less inquiry was needed at the sentencing hearing, as the state of [the defendant's] relationship with counsel was well-known to the court.”). The second John Doe factor therefore cuts against Swinton.

¹² At the same time Swinton made his application for the substitution of counsel, he also requested an adjournment of the sentencing hearing so that he could submit a motion to set aside the verdict. (Id. at 14). Justice FitzGerald denied this request. (Id.). Unbeknownst to Justice FitzGerald, Swinton had drafted a lengthy affidavit in support of his motion to set aside the verdict, in which he set forth numerous alleged errors by his trial counsel. (See S. 14-15; see also SR. 143-210). Swinton now contends that Justice FitzGerald refused to consider his written submissions detailing his reasons for seeking substitute counsel. (See Suppl. Reply at 36-37). Justice FitzGerald cannot be faulted, however, for failing to consider a submission of which he was unaware. Moreover, the Justice had no indication that Swinton's proposed application to set aside the verdict would detail any concerns regarding Mr. Weinstein.

Finally, Swinton cannot prevail on the third John Doe factor, which considers “whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense.” 272 F.3d at 122. Indeed, Justice FitzGerald, who witnessed Mr. Weinstein’s performance throughout the trial, indicated that Mr. Weinstein was “extremely effective.” (S. 14-15). Moreover, even following Swinton’s application for the substitution of counsel, Mr. Weinstein set forth the only argument reasonably available to Swinton at the moment, requesting that Justice FitzGerald be “merciful” and sentence Swinton to “concurrent time.” (Id. at 16).

In sum, three of the four John Doe factors cut against Swinton, including the second and third factors which arguably are the most important, since they “speak most directly to the merits of [Swinton’s] motion and the reasonableness of the trial court’s ruling on those merits.” Lopez, 2012 WL 1865502, at *11. Accordingly, the trial court did not err in denying Swinton’s eleventh-hour pro se application for the substitution of counsel.

Swinton consequently is not entitled to habeas relief based on appellate counsel’s failure to raise his meritless substitution-of-counsel claim.

c. Ineffective Assistance of Trial Counsel

i. Speedy Trial

Swinton also contends that Mr. Kaplan was ineffective for failing to argue that Mr. Weinstein should have assisted him in filing his Speedy Trial Motion. (Suppl. Reply at 16-17).

Swinton cannot establish that he was prejudiced by this alleged failure. Indeed, Swinton raised each argument that he now asserts Mr. Weinstein should have made in his Speedy Trial Motion, which was denied on its merits by Justice FitzGerald. (See Exs. B, D, E). Because “[Swinton] had the opportunity to raise the issue himself before the court, he cannot establish that he was prejudiced by his [trial] counsel’s failure to do so.” Fisher v. Superintendent, No. 12 Civ. 6703 (JPO), 2014 WL 128015, at *21 (S.D.N.Y. Jan. 14, 2014); see also Jackson v. Poole, No. 06 Civ. 188 (PKC) (DF), 2011 WL 4901314, at *11 (S.D.N.Y. July 19, 2011), report and rec. adopted, 2011 WL 4908740 (S.D.N.Y. Oct. 14, 2011) (“[T]he fact that Petitioner was able to raise all of these claims himself . . . leads to the further conclusion that, even if Petitioner’s attorney had acted unreasonably in failing to raise them in the brief filed by counsel, Petitioner suffered no prejudice as a result.”). Mr. Kaplan consequently cannot be faulted for failing to assert this meritless claim.

ii. Failure to Move to Sever

Swinton next contends that his appellate counsel was ineffective for failing to argue that Mr. Weinstein should have moved to sever the charges related to the three separate incidents. (See Am. Pet. at 4; Suppl. Reply at 18-30). He advances two arguments in this regard. First, he maintains that he was subjected to prejudicial spillover which made it likely that the jury convicted him of charges related to the AP incident based on its cumulative evaluation of the evidence, including the evidence relating to the ID and EK incidents. (Suppl. Reply at 27-28). Second, Swinton claims that he was prejudiced because he wished to testify regarding the EK incident but was unable to do so because he wished to refrain from testifying regarding the ID and AP incidents. (Id. at 24-25).

The CPL provides that a single indictment may charge two or more offenses arising out of different criminal transactions if: (a) “proof of [one] offense would be material and admissible as evidence . . . upon a trial of the [other offense],” CPL § 200.20(2)(b); or (b) “such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law,” id. § 200.20(2)(c). Where joinder rests solely upon the fact that such offenses are based on the same or similar law, as prescribed in section 200.20(2)(c) of the CPL, a trial court, “in its discretion” and upon a showing of “good cause,” may sever the offenses. Id. § 200.20(3). Good cause may be established by showing that there is a “substantial likelihood that the jury would be

unable to consider separately the proof as it relates to each offense,” or that the “defendant has both important testimony to give concerning one count and a genuine need to refrain from testifying on the other.” Id.

Despite Swinton’s contention, joinder was proper here under section 200.20(2)(b) of the CPL because proof of the first two incidents was relevant to establishing that Swinton was guilty of the charges related to the last incident. Indeed, because joinder on that basis was proper, Justice FitzGerald, as a matter of law, could not have severed the charges against Swinton. See CPL § 200.20(3); Black v. Rock, 103 F. Supp. 3d 305, 322 (E.D.N.Y. 2015); see also People v. West, 553 N.Y.S.2d 721 (1st Dep’t 1990) (motion to sever was “properly denied . . . upon the prosecution’s showing that the four separate offenses involved a unique modus operandi, thereby making the evidence of each of the four crimes ‘material and admissible’ as to the identity issue in the other crimes charged”) (quoting CPL § 200.20(2)(b)). Furthermore, even if the charges could only have been joined under 200.20(2)(c) of the CPL because the offenses all were defined by similar statutory provisions, the suggestion that Justice FitzGerald would have granted a severance motion is entirely speculative. See People v. Vega, 983 N.Y.S.2d 30, 31 (1st Dep’t 2014) (“The motion and trial courts properly exercised their respective discretion in denying defendant’s motion to sever counts charging two unrelated rapes.”); People v. Williams, 683 N.Y.S.2d 221, 221 (1st Dep’t 1998) (“Defendant’s motion to sever counts relating to the three rapes for which he was initially charged was properly denied.”).

Finally, even if the charges should have been severed, Swinton cannot show that he suffered prejudice. As noted above, Swinton has provided the Court with only a vague description of his intended testimony. (See Ex. K, A12 at 3). Without more information, there is no basis upon which the state trial court – or this Court – could conclude that Swinton’s proffered testimony would have benefitted his defense. See People v. Lane, 56 N.Y.2d 1, 5 (1982) (“[A] defendant claiming that he wishes to testify as to the first allegedly criminal transaction but not as to the second must make a convincing showing that he has both important testimony to give concerning one offense and a strong need to refrain from testifying as to the other.”). Furthermore, Swinton has not shown that the jury’s verdict with respect the AP incident was the result of prejudicial spillover. To the contrary, after less than a day of deliberations, the jury reached a verdict with respect to the first eight counts relating to the ID and EK incidents, but was deadlocked with respect to the last three counts relating to AP. (Tr. 787-88, 793). Only after another day of deliberations did the jury find Swinton guilty of Counts Nine through Eleven. (Id. at 802). This strongly suggests that the jurors considered the crimes relating to each incident separately, as Justice FitzGerald had instructed that they must.

Accordingly, Swinton has failed to show that he was prejudiced by his trial counsel’s failure to move to sever the charges against him. He consequently cannot establish, as he must, that his appellate counsel opted not to raise a “significant and obvious issue[] while pursuing issues that were clearly and significantly weaker.” Mayo, 13 F.3d at 533.

iii. Persistent Violent Felony Offender Claim

Swinton next alleges that Mr. Kaplan should have argued that Swinton's trial counsel was ineffective for failing to challenge his designation as a persistent violent felony offender. (See Am. Pet. at 4-5; Suppl. Reply at 34-36). More specifically, Swinton contends that Mr. Weinstein should have contested the use of the 1975 Conviction as a predicate for the adjudication of him as a persistent violent felony offender. (Id.; see also S. 3). Underlying this claim is Swinton's assertion that the 1975 Conviction was secured in violation of his Sixth Amendment right to counsel. (See Am. Pet. at 4-5; Suppl. Reply at 34-36).

Under New York law, a persistent violent felony offender is someone who "stands convicted of a violent felony offense as defined in [Penal Law Section 70.02(1)] after having previously been subjected to two or more predicate violent felony convictions as defined in [Penal Law Section 70.04(b)]." CPL § 400.16. The CPL provides a procedure by which a defendant may challenge the validity of a prior conviction being used to enhance his sentence. See CPL §§ 400.15, 400.16. Nevertheless, when a New York court has previously determined that an offense qualifies as a predicate violent felony, "such finding shall be binding upon that defendant in any future proceeding in which the issue may arise." Id. § 400.15(8).

During the sentencing, Justice FitzGerald determined that Swinton was a persistent violent felony offender based upon his 1975 Conviction for Rape in the First

Degree and his 1986 conviction on charges of Robbery and Burglary in the First Degrees. (S. 3). All three offenses are unquestionably defined as violent felonies under New York law. See Penal Law §§ 70.02(1), 70.04(b). Moreover, Swinton was sentenced in 1986 as a second violent felony offender on the basis of his 1975 Conviction. (See S. 3); Swinton v. Keane, No. 89 Civ. 0933 (JSM), 1990 WL 134876, at *1 (S.D.N.Y. Sept. 13, 1990).

The 1986 determination that his 1975 Conviction was a predicate violent felony offense consequently was “binding . . . in any future proceeding.” CPL §§ 400.15(8).

Accordingly, there was no basis for Mr. Weinstein to challenge the use of the 1975 Conviction as a predicate offense. It follows that Mr. Kaplan cannot be faulted for failing to raise this meritless claim.¹³

iv. Trial Errors

Swinton finally claims that Mr. Kaplan was ineffective for failing to raise numerous challenges to his trial counsel’s performance during trial. (See Am. Pet. at 4;

¹³ Swinton also is not entitled to mount a direct challenge to his designation as a persistent violent felony offender based on the 1975 Conviction. “[O]nce a state conviction is no longer open to direct or collateral attack” a defendant may “challenge the enhanced sentence through a petition under [Section] 2254 [only] on the ground that the prior conviction” “was obtained where there was a failure to appoint counsel . . . , as set forth in [Gideon v. Wainwright, 372 U.S. 335 (1963)].” See Lackawanna Cty. Dist. Attorney v. Coss, 532 U.S. 394, 403-04 (2001). None of Swinton’s challenges to the 1975 Conviction allege that he was entirely deprived of counsel at a critical stage of the proceedings. (See Am. Pet. at 4-5). Accordingly, there is no basis for Swinton to directly challenge the use of the 1975 Conviction as a predicate offense. See Anderson-Bey v. Zavaras, 641 F.3d 445, 454 n.2 (10th Cir. 2011) (“As we read Lackawanna, the exception to its general rule applies only when the defendant had no counsel in the earlier state proceeding.”) (emphasis added); Ocasio v. Smith, No. 07 Civ. 2754 (BSJ) (AJP), 2008 WL 110938, at *17 n.35 (S.D.N.Y. Jan. 8, 2008) (“This exception for a Gideon-like challenge for failure to appoint counsel does not extend to a claim of ineffective assistance of counsel.”).

Suppl. Reply at 30-34). To name but a few examples, Swinton claims that Mr. Weinstein was deficient for: (a) indicating to the jury pool during voir dire that they might learn Swinton had a criminal history; (b) failing to “secure a forensic expert in ink and digital, latent print sciences,” “forensic imagery analysis,” “auditory identification,” and “molecular genetics”; (c) failing to prepare to cross-examine the People’s expert witnesses; (d) failing to cross-examine the victims effectively about certain issues, such as whether the “crime scene had been altered or tampered with prior to the arrival of [the crime scene investigators]”; and (e) failing to raise a “third party[] guilt defense.” (See Suppl. Reply at 30-34).

Despite his laundry list of complaints, Swinton cannot establish that Mr. Kaplan opted not to raise “significant and obvious issues while pursuing issues that were clearly and significantly weaker.” Mayo, 13 F.3d at 533. As Mr. Kaplan stated when he explained to Swinton his decision not to include these arguments in his appellate brief, Swinton’s “counsel ineffectiveness” claims were not “meritorious” because “effective counsel means ‘meaningful representation,’” not “perfect or near perfect representation.” (SR 74). Moreover, Mr. Kaplan noted that Swinton would need “to show prejudice.” (Id.). As Mr. Kaplan likely understood, even if trial counsel erred, Swinton would not have been able to establish prejudice in light of the overwhelming evidence of his guilt. See Lindstadt v. Keane, 239 F.3d 191, 204 (2d Cir. 2001) (“Even serious errors by counsel do not warrant granting habeas relief where the conviction is supported by overwhelming evidence of guilt.”); United States v. Reiter, 897 F.2d 639, 645 (2d Cir.

1990) (“overwhelming record support” of guilt negated incompetent performance by counsel). Indeed, as Justice FitzGerald explained to Swinton shortly before sentencing him, the proof established “beyond . . . peradventure that [Swinton was] not innocent” and that the jury’s verdict was “correct . . . on every count.” (S. 14).

For these reasons, Swinton’s remaining claims concerning his trial counsel’s errors during trial therefore do not entitle him to any relief.

V. Conclusion

For the foregoing reasons, I recommend that Swinton’s Amended Petition be denied. Furthermore, because Swinton has not made the substantial showing of the denial of a constitutional right required by 28 U.S.C. § 2253(c)(2), a certificate of appealability should not issue.

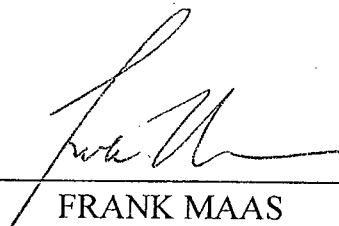
VI. Notice of Procedure for Filing Objections to this Report and Recommendation

The parties shall have fourteen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See also Fed. R. Civ. P. 6(a) and (d). Any such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Vernon S. Broderick, to my chambers at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be directed to

Judge Carter. The failure to file timely objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140 (1985); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b).

SO ORDERED.

Dated: New York, New York
September 19, 2016


FRANK MAAS
United States Magistrate Judge

Copies to:

Reginald Swinton (via U.S. Mail)
07-A-3279
Auburn Correctional Facility
P.O. Box 618
Auburn, New York 13024

Counsel of record (via ECF)

APPENDIX

E

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of April, two thousand eighteen.

Reginald Swinton,

Petitioner - Appellant,

v.

Supt. Steven Racette,

Respondent - Appellee.

ORDER

Docket No: 17-2105

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

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk