710 F.Supp.3d 128
United States District Court, E.D. New York.

Jacques **DORCINVIL**, Petitioner,

v.

Marlyn **KOPP**, [1] Respondent.

No. 20-cv-600 (KAM)
|
Signed January 5, 2024

Synopsis

Background: Following affirmance of conviction for murder, attempted murder, assault, criminal contempt for violating an order of protection, and illegal possession of a weapon, 122 A.D.3d 874, 996 N.Y.S.2d 661, denial of his two motions to vacate the conviction, 2017 WL 3573486, and denial of his application for a writ of error coram nobis, 149 A.D.3d 867, 49 N.Y.S.3d 923, petitioner filed petition for writ of habeas corpus.

Holdings: The District Court, Kiyo A. Matsumoto, J., held that:

[1] testimony from lead police detective did not implicate Confrontation Clause;

[2] none of state's comments in summation were unduly prejudicial;

[3] state court's determination that trial counsel did not render ineffective assistance by failing to strike unidentified prospective juror did not contradict or unreasonably apply clearly established federal law;

[4] state court's determination that trial counsel's failure to contact alleged alibi witness did not constitute ineffective assistance did not contradict or unreasonably apply clearly established federal law;

[5] state court determination that appellate counsel did not render ineffective assistance did not contradict or unreasonably apply clearly established federal law;

[6] state court's finding that minor witness was competent to testify did not contradict or unreasonably apply clearly established federal law; and

[7] state court's decision allowing admission of photo of victim's body after her murder and petitioner's arrest photos did not contradict or unreasonably apply clearly established federal law.

Petition denied.

Post-Conviction Review

West Headnotes (84)

[1] **Criminal Law**
Effectiveness of Counsel

A coram nobis petition is an appropriate vehicle in New York state court to raise a claim of ineffective appellate counsel. U.S. Const. Amend. 6.

[2] **Habeas Corpus**
Demurrer; amended and supplementary pleadings

District court would construe habeas petitioner's second habeas petition as a motion to amend his pending initial habeas petition and treat the second petition as the operative petition. 28 U.S.C.A. § 2254.

[3] **Habeas Corpus**
Counsel, right and necessity

Appointing habeas petitioner counsel in his habeas case was not warranted as it would not serve the interests of justice; court could adequately resolve all of petitioner's claims based on parties' submissions and ample state court record, petitioner's claims were unlikely to be of substance, there were no factual or legal ambiguities material to petitioner's claims that appointed counsel could reasonably be expected to help clarify, petitioner competently articulated factual and legal bases for his claims, and identified no facts that he was unable to investigate without counsel or conflicting evidence that would require cross-examination. 28 U.S.C.A. § 2254.

[4] **Habeas Corpus**
Accrual

A petitioner's state court conviction becomes "final," for purposes of one-year limitation period under Antiterrorism and Effective Death Penalty Act (AEDPA) for seeking habeas relief from

conviction, only after proceedings conclude in the United States Supreme Court or time expires to petition for a writ of certiorari in that court. 28 U.S.C.A. § 2244(d)(1)(A).

[5] **Habeas Corpus**

Counsel, right and necessity

There is no constitutional right to appointed counsel in habeas cases. 28 U.S.C.A. § 2254.

[6] **Habeas Corpus**

Counsel, right and necessity

The Court has discretion whether to appoint counsel in a habeas case, and the threshold question is whether the petitioner's claims are likely to be of substance. 28 U.S.C.A. § 2254.

[7] **Habeas Corpus**

Purpose and Use of Writ

A petition for a writ of habeas corpus under 28 U.S.C. § 2254 is the vehicle by which a state prisoner obtains federal review of his or her state custody. 28 U.S.C.A. § 2254.

[8] **Habeas Corpus**

Default, etc., precluding state court consideration

Respect for judicial federalism requires that a federal habeas court refrain from resurrecting a claim the petitioner procedurally defaulted in state court. 28 U.S.C.A. § 2254.

[9] **Habeas Corpus**

Default, etc., precluding state court consideration

"Procedural default" occurs when the state court clearly and expressly relied on a state procedural rule to dispose of the habeas petitioner's claim, regardless of whether the state court also addressed the merits of the claim. 28 U.S.C.A. § 2254.

[10] **Habeas Corpus**

Availability of Remedy Despite Procedural Default or Want of Exhaustion

Habeas Corpus

Cause and prejudice in general

A petitioner may raise a procedurally defaulted claim in a federal habeas proceeding only by showing either (1) good cause for the default and resulting prejudice or (2) that he or she is actually innocent. 28 U.S.C.A. § 2254.

[11] **Habeas Corpus**

State Determinations in Federal Court

If the state court adjudicated the petitioner's claim on the merits, the Antiterrorism and Effective Death Penalty Act (AEDPA) requires the habeas court to give the state court's decision great deference. 28 U.S.C.A. § 2254(d).

[12] **Habeas Corpus**

Adequacy or effectiveness of state proceeding; full and fair litigation

The state court need not explain its reasoning adjudicating defendant's claims for its decision to be considered "on the merits," for purposes of habeas review under the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2254(d).

[13] **Habeas Corpus**

Adequacy or effectiveness of state proceeding; full and fair litigation

If the habeas petitioner presented the claim to the state court and the state court denied relief, the habeas court may presume the state court adjudicated the claim on the merits absent any contrary indication or state law principle, for purposes of habeas review under the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2254(d).

[14] **Habeas Corpus**

Federal Review of State or Territorial Cases

Habeas Corpus

Federal or constitutional questions

"Clearly established federal law," for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) requirement that a state court decision on the merits of a claim raised on federal habeas review stand unless it was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, means a holding, as opposed to dicta, of a Supreme Court decision that existed at the time of the relevant state court decision. 28 U.S.C.A. § 2254(d).

[15] **Habeas Corpus**

Federal Review of State or Territorial Cases

Habeas Corpus

Federal or constitutional questions

For purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) requirement that a state court decision on the merits of a claim raised on federal habeas review stand unless it was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, a habeas court may not use Second Circuit precedents to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that the Supreme Court has not announced. 28 U.S.C.A. § 2254(d).

[16] **Habeas Corpus**

Federal or constitutional questions

For purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) requirement that a state court decision on the merits of a claim raised on federal habeas review stand unless it was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, a state court decision is "contrary to" clearly established federal law if it contradicts a Supreme Court decision on a legal question or decides a case differently from how the Supreme Court decided a case with materially identical facts. 28 U.S.C.A. § 2254(d).

[17] **Habeas Corpus**

Federal Review of State or Territorial Cases

For purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) requirement that a state court decision on the merits of a claim raised on federal habeas review stand unless it was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, a state court decision involves "an unreasonable application of clearly established federal law" if the state court identifies the correct legal rule from the applicable Supreme Court decision but unreasonably applies it to the facts of the petitioner's case. 28 U.S.C.A. § 2254(d).

[18] **Habeas Corpus**

Pro se or lay petitions

When a habeas petitioner proceeds pro se, the court holds the petition to less rigorous standards than it holds filings by counseled parties. 28 U.S.C.A. § 2254.

1 Cases that cite this headnote

[19] **Habeas Corpus**

Pro se or lay petitions

The court must liberally construe a pro se habeas corpus petition to raise the strongest arguments it suggests. 28 U.S.C.A. § 2254.

1 Cases that cite this headnote

[20] **Habeas Corpus**

Pro se or lay petitions

Pro se habeas petitioners are not exempt from applicable procedural and substantive rules. 28 U.S.C.A. § 2254.

[21] **Criminal Law**

Determination

There is no reason for the court to address both elements of the *Strickland* inquiry if the defendant

fails to establish one; the court may address the two elements in either order. U.S. Const. Amend. 6.

[22] **Habeas Corpus**

Coram nobis, post-conviction motion, or similar collateral proceedings

Habeas petitioner failed to exhaust his claim in New York state court that his trial counsel in his murder trial was ineffective for failing to object to lead police detective's hearsay testimony, which allegedly violated his rights under the Confrontation Clause of the Sixth Amendment, where state court had determined that claim could not be resolved on direct appeal without reference to matter outside the record that petitioner would have to raise in collateral challenge to conviction, which he did not do. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

[23] **Habeas Corpus**

In general; mixed petitions

Habeas Corpus

Dismissal

A habeas court facing a mixed petition containing both exhausted and unexhausted claims may (1) dismiss the entire petition without prejudice, (2) deny the entire petition on the merits, (3) permit the petitioner to delete the unexhausted claims from the petition and return to state court to proceed on the unexhausted claims, or (4) stay the petition until the petitioner exhausts the unexhausted claims. 28 U.S.C.A. § 2254.

2 Cases that cite this headnote

[24] **Habeas Corpus**

In general; mixed petitions

District court would further goals of Antiterrorism and Effective Death Penalty Act (AEDPA) of encouraging finality and reducing delays by exercising its discretion to reach merits of habeas petitioner's unexhausted claims that his trial counsel was ineffective for failing to object to police detective's hearsay testimony, rather than requiring petitioner to exhaust the claim in New York state court; petitioner had not prevailed on single of his many claims raised in various state court appeals or collateral proceedings, court was already considering petitioner's other ineffective trial counsel claims that state courts had addressed and rejected, and court could resolve unexhausted claim based on *Strickland*'s prejudice prong alone. U.S. Const. Amend. 6; 28 U.S.C.A. §§ 2254(b)(2), 2254(d).

1 Cases that cite this headnote

[25] **Habeas Corpus**

Counsel

District court would review de novo, rather than applying "great deference" standard under the Antiterrorism and Effective Death Penalty Act (AEDPA) to, habeas petitioner's claim that his trial counsel in his state murder trial was ineffective for failing to object to police detective's hearsay testimony, where petitioner failed to raise claim in New York state court proceedings so that there was no state court decision on the merits to which to defer. U.S. Const. Amend. 6; 28 U.S.C.A. §§ 2254(b)(2), 2254(d).

[26] **Criminal Law**

Evidence as to information acted on

Testimony in defendant's New York state murder trial from lead police detective that he had determined defendant to be a suspect after he spoke with another police detective, who did not testify at trial, and that he had talked to people who called into tipline set up during investigation was not hearsay under New York law; testimony did not relay to jury any "statement" by other detective or a tipline caller, lead detective had offered testimony to explain his own actions during investigation, not to prove truth of what another person had told him, and state court on direct appeal had rejected defendant's claim that such testimony constituted impermissible hearsay and bolstering.

[27] **Criminal Law**

Hearsay in General

Under New York law, "hearsay" is recognized as an out-of-court statement admitted for the truth of the matter asserted.

[28] **Criminal Law**

Out-of-court statements and hearsay in general

Testimony in defendant's New York state murder trial from lead police detective that he had determined defendant to be a suspect after he spoke with another police detective, who did not testify at trial, and that he had talked to people who called into tipline set up during investigation, which purportedly bolstered testimony from surviving victim identifying defendant as person who stabbed him and killed victim, did not implicate Confrontation Clause of the Sixth Amendment, where defendant had full and fair opportunity to cross-examine lead detective and victim who had survived defendant's attempt to kill him. U.S. Const. Amend. 6.

[29] **Criminal Law**

Right of Accused to Confront Witnesses

Criminal Law

Cross-examination and impeachment

The federal Constitution guarantees criminal defendants the right to confront adverse witnesses and the main and essential purpose of confrontation is to secure the opportunity of cross-examination. U.S. Const. Amend. 6.

[30] **Criminal Law**

Identification

Trial counsel's failure to object to lead police detective's testimony, in defendant's New York state murder trial, identifying defendant on video surveillance footage as person who had walked past victim's dead body was not prejudicial, and thus did not amount to ineffective assistance, where victim's landlord had given testimony at trial identifying defendant as person who was shown on footage as walking past victim's dead body. U.S. Const. Amend. 6.

[31] **Constitutional Law**

Vouching for witnesses; bolstering

"Bolstering," even if forbidden under state law, is insufficiently prejudicial to implicate federal due process for purposes of a habeas corpus petition. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(a).

[32] **Habeas Corpus**

Coram nobis, post-conviction motion, or similar collateral proceedings

Habeas petitioner failed to exhaust his claim in New York state court that his trial counsel was ineffective for failing to object to allegedly unduly prejudicial comments that state had made during its summation in his murder trial, where petitioner never raised claim in a state collateral proceeding after being instructed to do so by state court in rejecting claim on direct appeal. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

[33] **Habeas Corpus**

Counsel

District court would review de novo, rather than applying "great deference" standard under the Antiterrorism and Effective Death Penalty Act (AEDPA) to, habeas petitioner's claim that his trial counsel in his state murder trial was ineffective for failing to object to allegedly unduly prejudicial comments that state had made in its summation in his murder trial, where petitioner failed to raise claim in New York state court proceedings so that there was no state court decision on the merits to which to defer. U.S. Const. Amend. 6; 28 U.S.C.A. §§ 2254(b)(2), 2254(d).

[34] **Habeas Corpus**

Particular issues and problems

Decisions about whether to make objections during the prosecutor's summation are matters of trial strategy virtually unchallengeable on an ineffective assistance of counsel claim in a federal

habeas proceeding. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

[35] **Habeas Corpus**

Particular issues and problems

To support habeas relief on a claim of ineffective assistance of counsel based on a failure to object to prosecutorial argument, the prosecutor must have made improper comments that so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. Amends. 6, 14; 28 U.S.C.A. § 2254.

[36] **Constitutional Law**

Prosecutor

Criminal Law

Personal knowledge, opinion, or belief of counsel

Criminal Law

Expression of opinion as to guilt of accused

Criminal Law

Appeals to Sympathy or Prejudice

Criminal Law

Comments on evidence or witnesses

None of state's comments in summation in defendant's New York state murder trial were unduly prejudicial so as to deprive defendant of his Fourteenth Amendment right to due process; state's references to defendant as a "guilty man" were permissible as argument to jury about how to interpret evidence that they had heard, state's vivid description of victim's murder and trauma it inflicted on her son, who was eyewitness, was permissible because prosecutors were not forbidden from vigorous advocacy or using colorful language in summations, state's use of phrase "I submit to you" was common form of verbal filler used by attorneys when arguing in court rather than conveyance of personal belief of defendant's guilt, and trial court had instructed jury that summations were not evidence. U.S. Const. Amends. 14.

[37] **Habeas Corpus**

Counsel

New York state trial court's decision on petitioner's second motion to vacate his conviction was last reasoned state court decision addressing his claim, that his trial counsel was ineffective by failing to request a suppression hearing regarding property that police received from him during his arrest, that would govern habeas court's review of petitioner's claim, where trial court had rejected claim as factually incorrect and barred by trial court's previous rejection of same claim in petitioner's first motion to vacate as factually incorrect, and Appellate Division and New York Court of Appeals had declined discretionary review. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[38] **Habeas Corpus**

State court decision on procedural grounds, and adequacy of such independent state grounds

Habeas petitioner's claim that trial counsel was ineffective by failing to request a suppression hearing regarding property that police had received from him during his arrest was procedurally barred under independent and adequate state grounds doctrine; New York state court had denied claim raised in petitioner's second motion to vacate conviction pursuant to state procedural rule permitting court to claim in motion to vacate where claim was previously determined on merits in prior proceeding other than appeal from judgment, trial court had denied same claim in petitioner's first motion to vacate, and there was nothing improper about how state court invoked state procedural rule. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254; N.Y. CPL § 440.10(3)(b).

[39] **Habeas Corpus**

Counsel

New York state trial court's decision on petitioner's second motion to vacate his conviction was last reasoned state court decision addressing his claim, that his trial counsel was ineffective for failing to move to strike an unidentified juror who said during jury selection

that she thought she would be "very nervous" without elaborating on what she would be nervous about, that would govern habeas court's review of petitioner's claim, where trial court had rejected claim both on merits and on procedural grounds, and Appellate Division and New York Court of Appeals had declined discretionary review. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[40] **Habeas Corpus**

Particular issues and problems

New York state trial court's determination that trial counsel did not render ineffective assistance by failing to move to strike an unidentified prospective juror who said during jury selection that she thought she would be "very nervous" without elaborating on what she would be nervous about, did not contradict or unreasonably apply clearly established federal law, as required for petitioner to obtain federal habeas relief, where petitioner did not establish that unidentified prospective juror was actually seated on jury, and United States Supreme Court precedent had denied habeas relief even where jurors have "doubted, or disclaimed outright, their own impartiality on voir dire." U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[41] **Criminal Law**

Jury selection and composition

A defendant alleging ineffective counsel with respect to jury selection must show that the juror had "actual bias." U.S. Const. Amend. 6.

[42] **Habeas Corpus**

Counsel

New York state trial court's decision on petitioner's second motion to vacate his murder conviction was last reasoned state court decision addressing his claim, that his trial counsel was ineffective for failing to contact alleged alibi witnesses after petitioner had given him their contact information, that would govern habeas court's review of petitioner's claim, where trial court had rejected claim on merits, and Appellate Division and New York Court of Appeals had declined discretionary review. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[43] **Habeas Corpus**

Evidence; procurement, presentation, and objection

New York state trial court's determination that trial counsel's failure to contact alleged alibi witnesses after petitioner had given him their contact information did not prejudice petitioner because it would not have changed result of murder trial, and thus did not constitute ineffective assistance of counsel, did not contradict or unreasonably apply clearly established federal law, as required for petitioner to obtain federal habeas relief; affidavit from only alibi witness discussed in petitioner's habeas petition had only attested to petitioner's whereabouts day before murder, and witness had no knowledge of petitioner's whereabouts on day of murder. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[44] **Habeas Corpus**

Counsel

New York state trial court's decision on petitioner's second motion to vacate his murder conviction was last reasoned state court decision addressing his claim, that his trial counsel was ineffective for never producing DNA experts or requesting a hearing to determine whether or not the DNA evidence introduced at trial by state's experts was reliable, that would govern habeas court's review of petitioner's claim, where trial court had rejected claim as being "without merit" and because court "decline[d] to revisit" the DNA claims pursuant to state law, and Appellate Division and New York Court of Appeals had declined discretionary review. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[45] **Habeas Corpus**

State court decision on procedural grounds, and adequacy of such independent state grounds

Habeas petitioner's claim that trial counsel was ineffective for never producing DNA experts or requesting a hearing to determine whether or not the DNA evidence introduced at his murder trial by state's experts was reliable was procedurally barred under independent and adequate state grounds doctrine, where trial court had rejected claim in part because court "decline[d] to revisit" the DNA claims pursuant to state procedural law, and there was nothing improper about how state court invoked state procedural rule. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d); N.Y. CPL § 440.10(3)(b).

[46] **Habeas Corpus**

Counsel

New York Appellate Division's decision on petitioner's coram nobis petition was last reasoned state court decision addressing his claim, that his appellate counsel was ineffective for failing to argue on appeal that trial counsel in murder trial was ineffective for failing to preserve Confrontation Clause objection regarding DNA report and autopsy reports introduced at trial, that would govern habeas court's review of petitioner's claim, where Appellate Division had rejected claim on ground that petitioner had failed to establish that he was denied effective assistance of appellate counsel, and New York Court of Appeals had declined discretionary review. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[47] **Habeas Corpus**

Adequacy and Effectiveness of Counsel

Habeas Corpus

Counsel

The Antiterrorism and Effective Death Penalty Act (AEDPA) requires the habeas court reviewing a state court's decision on a *Strickland* claim to apply "double deference," comprising both the deference owed to counsel's strategic decisions under *Strickland* itself and the deference owed to the state court's application of *Strickland* to counsel's performance. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

1 Cases that cite this headnote

[48] **Habeas Corpus**

Adequacy and Effectiveness of Counsel

A state court's summary disposition denying a defendant's ineffective assistance of counsel claim on the merits must stand on habeas review so long as any reasonable judge could have found that counsel complied with the *Strickland* standard. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

[49] **Habeas Corpus**

Post-trial proceedings; sentencing, appeal, etc

New York Appellate Division's determination in summary disposition of petitioner's coram nobis petition that appellate counsel did not render ineffective assistance for failing to argue on direct appeal that trial counsel in murder trial was ineffective for failing to preserve Confrontation Clause objection regarding DNA report and autopsy reports introduced at trial, did not contradict or unreasonably apply clearly established federal law as set forth in *Strickland*, as required for petitioner to obtain federal habeas relief; appellate counsel explained that she declined to raise arguments because she found state's DNA evidence weak and observed that trial counsel had exploited that fact to petitioner's advantage in summation and that any objection to autopsy evidence was foreclosed by state court precedent, and Appellate Division had found other claims of ineffective assistance of trial counsel raised by appellate counsel to be unsuitable for direct appellate review. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[50] **Constitutional Law**

Right to fair trial in general

In a criminal trial, due process means only the fundamental elements of fairness, not the meticulous observance of state procedural prescriptions. U.S. Const. Amend. 14.

[51] **Habeas Corpus**

Particular issues and problems

New York Appellate Division's decision on petitioner's direct appeal was last reasoned state court decision addressing his claim, that trial court denied him due process by finding minor witness competent to testify and denying his request for disclosure of witness's mental health records, that would govern habeas court's review of petitioner's claim; Appellate Division had rejected challenge to competency on merits and found that challenge to trial court's refusal to disclose medical records inappropriate for review on direct appeal because it was based on matter outside the record, New York Court of Appeals declined discretionary review, and petitioner did not raise latter claim in his state court motions to vacate. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[52] **Habeas Corpus**

Witnesses; examination

New York Appellate Division's determination on direct appeal that petitioner was not denied due process by trial court in finding that minor witness was competent to testify in petitioner's murder trial did not contradict or unreasonably apply clearly established federal law, as required for petitioner to obtain federal habeas relief; issue of child witness's competency to testify in New York state court was governed by New York state law, and did not implicate federal law, as required for federal habeas relief. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d); N.Y. CPL § 60.20(2).

[53] **Habeas Corpus**

Questions of local law

Federal habeas relief is available only for errors of federal law and does not lie for errors of state law. 28 U.S.C.A. § 2254.

[54] **Habeas Corpus**

Coram nobis, post-conviction motion, or similar collateral proceedings

Habeas petitioner failed to exhaust claim in New York state trial court, that refusal to disclose psychological evaluation of witness in petitioner's murder trial violated his due process rights, where he did not raise it in his second state court motion to vacate his conviction after the appellate court found claim to be improperly raised on direct review. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

[55] **Witnesses**

Grounds for limiting cross-examination

Trial courts have wide latitude to limit cross-examination to avoid testimony only marginally relevant.

[56] **Witnesses**

Mental condition in general

A trial court may restrict inquiry into a witness's psychiatric history if the proponent of such evidence fails to reasonably link it to the facts at issue.

[57] **Privileged Communications and Confidentiality**

In camera review

The standard procedure when a court faces a request for disclosure of sensitive psychiatric records is to review the materials in camera and determine whether they are appropriate for cross-examination. U.S. Const. Amend. 6.

[58] **Constitutional Law**

Immunity and privilege

Privileged Communications and Confidentiality

Mental health records

New York state trial court's refusal to disclose psychiatric records of minor witness at defendant's murder trial did not violate defendant's due process rights under the Fourteenth Amendment; court had examined witness's records in camera and had found that

defendant's attorney had enough to effectively cross-examine witness as to perception of events as crime occurred, defendant's attorney cross-examined witness regarding his stay in psychiatric hospital and argued in summation that witness was not credible and that he was lying, and defendant had not provided any reason to find that the marginal impeachment value gained from disclosure of more of witness's medical records would have materially improved attorney's ability to cross-examine witness or that there was any defect in trial court's in camera review process. U.S. Const. Amend. 14.

[59] **Habeas Corpus**

Particular issues and problems

New York Appellate Division's decision on petitioner's direct appeal of murder conviction was last reasoned state court decision addressing his claim, that trial court violated his Fourteenth Amendment due process rights by admitting photo of victim after petitioner had assaulted her before her murder, photo of victim's body after her murder, video surveillance footage depicting victim's body, and petitioner's arrest photos, that would govern habeas court's review of petitioner's claim; Appellate Division had rejected claim on merits as to photo of victim after her murder and petitioner's arrest photos and found that claim as to photo of victim after her assault and surveillance footage "unpreserved for appellate review and, in any event, without merit," New York Court of Appeals had declined discretionary review, and petitioner did not raise claims in either of his state court motions to vacate conviction. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[60] **Habeas Corpus**

State court decision on procedural grounds, and adequacy of such independent state grounds

Habeas petitioner's claim that trial court violated his Fourteenth Amendment due process rights by admitting certain evidence including murder trial photo of victim after petitioner had assaulted her before her murder was procedurally barred under independent and adequate state grounds doctrine based on New York Appellate Division's ruling on direct appeal that claims were "unpreserved for appellate review"; although Appellate Division did not cite particular procedural rule in its ruling, Appellate Division likely relied on New York's contemporaneous objection rule, which was a valid procedural bar in New York state court, petitioner did not argue that there was good cause for, or prejudice resulting from, the default, and did not argue that he was actually innocent. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

[61] **Habeas Corpus**

Evidence

State court evidentiary rulings generally present state law questions inappropriate for review in a federal habeas proceeding. 28 U.S.C.A. § 2254.

[62] **Habeas Corpus**

Evidence

A state court evidentiary error cannot support federal habeas relief unless the error amounted to a federal due process violation. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

[63] **Constitutional Law**

Admissibility in general

Evidence erroneously admitted under state law does not violate the Fourteenth Amendment's Due Process Clause if it was at least arguably relevant, but not sufficiently material to provide the basis for conviction or remove a reasonable doubt that otherwise would have existed. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

[64] **Habeas Corpus**

Evidence

To overcome Antiterrorism and Effective Death Penalty Act (AEDPA) deference to a state court decision regarding its evidentiary ruling, a habeas petitioner must identify a Supreme Court decision clearly establishing that erroneously admitting the specific kind of evidence at issue violates

the Fourteenth Amendment's Due Process Clause. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[65] **Habeas Corpus**

Admissibility

New York Appellate Division's decision rejecting on merits petitioner's claim that trial court violated his Fourteenth Amendment due process rights by admitting in murder trial photo of victim's body after her murder and petitioner's arrest photos did not contradict or unreasonably apply clearly established federal law, as required for petitioner to obtain federal habeas relief; no United States Supreme Court precedent had held that admission of photograph of victim's body violated due process, arrest photos were arguably relevant to show that petitioner had changed his appearance after victim's murder, thus evincing consciousness of guilt, and photos were insufficiently material to form basis of petitioner's conviction in light of overwhelming evidence against him. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[66] **Habeas Corpus**

Particular issues and problems

New York Appellate Division's decision on petitioner's direct appeal of murder conviction was last reasoned state court decision addressing his claim, that he was denied a fair trial because trial court denied his motion to sever charges, which stemmed from two separate incidents, that would govern habeas court's review of petitioner's claim; Appellate Division had rejected claim on merits, New York Court of Appeals had denied discretionary review, and petitioner did not raise claim in either of his state court motions to vacate conviction. 28 U.S.C.A. § 2254(d).

[67] **Habeas Corpus**

Joinder or severance of counts or defendants

A state court's decision whether to join or sever charges is a matter of state law that generally cannot support habeas relief. 28 U.S.C.A. § 2254.

[68] **Constitutional Law**

Joinder and consolidation

Prejudicial joinder amounts to a constitutional violation only when it renders a habeas petitioner's trial fundamentally unfair in violation of the Fourteenth Amendment's Due Process Clause. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

[69] **Habeas Corpus**

Joinder or severance of counts or defendants

To prevail on a claim of prejudicial joinder that resulted in Fourteenth Amendment due process violation, a habeas petitioner must show actual prejudice resulting from the joinder, not just the potential for prejudice. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

[70] **Constitutional Law**

Joinder and consolidation

Under the Fourteenth Amendment's Due Process Clause, a state court may consider matters of judicial convenience in deciding to join charges. U.S. Const. Amend. 14.

[71] **Habeas Corpus**

Joinder or severance of counts or defendants

New York Appellate Division's decision on direct appeal of petitioner's murder conviction rejecting on merits petitioner's claim that he was denied a fair trial because trial court denied his motion to sever charges stemming from two separate incidents did not contradict or unreasonably apply clearly established federal law, as required for petitioner to obtain federal habeas relief; charges stemming from victim's murder and stabbing of victim's son were inextricably related to charges stemming from prior assault of victim and her son because petitioner's contact with victim and son on date of victim's murder had violated order of protection that was issued against him in response to petitioner's assault of victim, and thus formed basis for criminal contempt charges that were filed against him on top of murder charges, and

severing charges would have required minor son, who had moved out of state, to return to New York to testify if there were two trials. 28 U.S.C.A. § 2254(d).

[72] **Habeas Corpus**

Admissibility of Evidence; Arrest and Search

New York Appellate Division's decision on petitioner's direct appeal was last reasoned state court decision addressing his claim raised in pro se supplemental brief, that trial court violated his Fourteenth Amendment due process rights by permitting state to elicit suppressed statements on direct examination, that would govern habeas court's review of petitioner's claim; Appellate Division had rejected claim as "unpreserved for appellate review and, in any event, without merit," New York Court of Appeals declined discretionary review, and petitioner did not raise claim in his state court motions to vacate his conviction. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[73] **Habeas Corpus**

State court decision on procedural grounds, and adequacy of such independent state grounds

Habeas petitioner's claim that trial court violated his Fourteenth Amendment due process rights by permitting state to elicit suppressed statements on direct examination was procedurally barred under independent and adequate state grounds doctrine based on New York Appellate Division's ruling on direct appeal of murder conviction that claims were "unpreserved for appellate review and, in any event, without merit"; although Appellate Division did not cite particular procedural rule in its ruling, state had noted that petitioner's claim was unpreserved for appellate review because petitioner had failed to state grounds supporting his objection to testimony at issue and made no further application after trial court overruled objection, petitioner did not argue that there was good cause for, or prejudice resulting from, the default, and did not argue that he was actually innocent. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254; N.Y. CPL § 470.05(2).

[74] **Habeas Corpus**

Particular issues and problems

New York Appellate Division's decision on petitioner's direct appeal of murder conviction was last reasoned state court decision addressing his claim, that state trial court had denied him his rights under the Due Process Clause of the Fourteenth Amendment and violated his rights under the Confrontation Clause by refusing to give missing witness instruction, that would govern habeas court's review of petitioner's claim; Appellate Division had rejected claim by ruling that any errors in trial court's ruling were harmless, "as there was overwhelming evidence of [petitioner's] guilt and no significant probability that the errors contributed to [petitioner's] convictions," New York Court of Appeals declined discretionary review, and petitioner did not raise claim in either of his state motions to vacate conviction. U.S. Const. Amends. 6, 14; 28 U.S.C.A. § 2254(d).

[75] **Habeas Corpus**

Review; Post-Conviction Relief and New Trial

To obtain habeas relief in light of a state court's harmless error ruling, the petitioner must both overcome the deference given to state courts pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA) and satisfy the requirement of establishing that the alleged error had a substantial and injurious effect or influence on the trial's outcome. 28 U.S.C.A. § 2254(d).

[76] **Habeas Corpus**

Review; Post-Conviction Relief and New Trial

If a habeas claim falls because the petitioner cannot show prejudice, there is no need to prolong the matter by also conducting an Antiterrorism and Effective Death Penalty Act (AEDPA) review

of the state court's harmless error analysis. 28 U.S.C.A. § 2254(d).

[77] **Habeas Corpus**

Conduct of trial, in general

Habeas Corpus

Instructions

A trial court's erroneous refusal to give a missing witness instruction is subject to a harmless error analysis on habeas review, as is a Confrontation Clause violation. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

[78] **Habeas Corpus**

Review; Post-Conviction Relief and New Trial

Habeas petitioner failed to show that New York trial court's error of refusing to give missing witness instruction in murder trial regarding police detective who investigated murder and prior incident in which petitioner assaulted victim, which Appellate Division determined to be harmless error, had a substantial and injurious effect or influence on trial's outcome, as required to obtain habeas relief on claim that was deemed harmless error by state court; there was overwhelming evidence of petitioner's guilt, most of testimony that missing police detective could have offered would have been cumulative with other witnesses' testimony, trial court issued other instructions mitigating against absence of missing witness instruction, and trial court permitted petitioner to comment in summation about detective's failure to testify. 28 U.S.C.A. § 2254.

[79] **Habeas Corpus**

Admissibility of Evidence; Arrest and Search

New York Appellate Division's decision on petitioner's direct appeal was last reasoned state court decision addressing his claim, that state trial court had violated his rights under the Confrontation Clause and the Due Process Clause of the Fourteenth Amendment by allowing police detective to testify that he discovered petitioner's past arrest records and complaints after running electronic background check on him, that would govern habeas court's review of petitioner's claim; Appellate Division rejected claim based on harmless error, New York Court of Appeals declined discretionary review, and petitioner did not raise claim in either of his state motions to vacate conviction. U.S. Const. Amends. 6, 14; 28 U.S.C.A. § 2254(d).

[80] **Habeas Corpus**

Review; Post-Conviction Relief and New Trial

Habeas petitioner failed to show that New York trial court's error of allowing police detective to testify in murder trial that he discovered petitioner's past arrest records and complaints after running electronic background check on him, determined to be harmless error by Appellate Division, had a substantial and injurious effect or influence on trial's outcome, as required to obtain habeas relief on claim that was deemed harmless error by state court; allegedly improper testimony consisted of just four lines in a 537-page trial transcript, brief and general suggestion that petitioner had other encounters with law enforcement could not have substantially influenced verdict given mass of specific evidence linking petitioner to crimes at issue, and, by time detective gave testimony, jury had already properly heard that petitioner had prior arrest for assault against victim and had order of protection entered against him. 28 U.S.C.A. § 2254.

[81] **Habeas Corpus**

Particular issues and problems

New York state trial court's decision on petitioner's second motion to vacate conviction was last reasoned state court decision addressing his claim, that state had suppressed *Brady* material in his murder trial, that would govern habeas court's review of petitioner's claim; trial court had rejected claim as "procedurally barred because it relie[d] on a misapprehension of the

facts," and the New York Appellate Division and Court of Appeals had declined discretionary review. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[82] **Habeas Corpus**

State court consideration of merits

New York state court's dismissal of claim raised in motion to vacate conviction, pursuant to a New York statute providing for denial without a hearing of a motion to vacate a judgment if an allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof, is an adjudication on the merits, not an invocation of a procedural bar, for purposes of habeas review of state court decision pursuant to Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2254(d); N.Y. CPL § 440.30(4)(c).

[83] **Habeas Corpus**

Discovery and disclosure

New York trial court's decision rejecting on merits petitioner's claim, that state had suppressed *Brady* material in his murder trial, did not contradict or unreasonably apply clearly established federal law, as required for petitioner to obtain federal habeas relief; alleged *Brady* materials that were recovered from petitioner during his arrest, a Bible, driver's license, state identification cards, debit card, and sunglasses, were not introduced at trial, and petitioner did not explain how materials were material or exculpatory evidence. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d).

[84] **Criminal Law**

Constitutional obligations regarding disclosure

A *Brady* violation occurs when the prosecution suppresses material exculpatory evidence. U.S. Const. Amend. 14.

Attorneys and Law Firms

*141 Jacques **Dorcinvil**, Ossining, NY, Pro Se.

MEMORANDUM & ORDER

KIYO A. MATSUMOTO, United States District Judge:

Petitioner Jacques **Dorcinvil**, proceeding *pro se*, petitions for a writ of habeas corpus in accordance with 28 U.S.C. § 2254, alleging that his state custody violates his federal constitutional rights due to ineffective assistance of counsel, various trial errors, and suppression of exculpatory evidence. (ECF No. 6 pp. 2–28, Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by Person in State Custody ("Pet.").) For the reasons below, the Court respectfully denies the Petition.

BACKGROUND

Dorcinvil's Petition claims fifteen different grounds for relief covering all aspects of his trial, which he previously raised across multiple state court appeals and collateral proceedings that spanned nearly a decade. The Court provides only a broad overview of the facts and procedural history here and discusses more specific details undergirding each of **Dorcinvil's** asserted grounds for habeas relief further below.

I. Factual Background

On January 14, 2007, Claudette Marcellus returned home to her Brooklyn apartment with her twelve-year-old son, B.M.,[2] to find that her boyfriend, Jacques **Dorcinvil**, had locked them out. (ECF No. 20-1 pp. 296–829, Trial Tr., 24:9–19.)[3] **Dorcinvil** *142 opened the door, argued with Claudette, and then began hitting her with a metal chair and broomstick. (*Id.* 25:13–27:9.) When B.M. attempted to flee and call the police, **Dorcinvil** punched and kicked him. (*Id.* 27:10–28:2.) The police arrested **Dorcinvil**, but Claudette signed a waiver of prosecution and declined to press charges. (*Id.* 197:6–21, 202:22–203:10.) After the incident, Claudette obtained a no-contact order of protection against **Dorcinvil**, but **Dorcinvil** continued living at her apartment. (*Id.* 35:5–15.)

On May 4, 2007, while the order of protection was still in effect, **Dorcinvil** attacked Claudette with a knife and then chased B.M. around the apartment, stabbing him in the back and pushing him onto a couch. (*Id.* 37:1–38:9.) Claudette rushed over to shield B.M. with her body, and

Dorcinvil repeatedly stabbed them both. (*Id.* 38:10–22.) After the attack, **Dorcinvil** gathered some clothes and left the apartment, dropping several items, with Claudette staggering after him. (*Id.* 39:15–40:10.) When the police arrived, they found Claudette dead in a pool of blood outside the building and followed a trail of bloody handprints and footprints back into her apartment. (*Id.* 63:6–66:3, 239:10–13.) Paramedics arrived and transported B.M. to the hospital. (*Id.* 241:7–251:3.)

The officers who inspected the apartment afterward found a bloody jacket inside the apartment containing a wallet and other papers, including an expired passport in **Dorcinvil's** name. (*Id.* 451:3–453:1.) Joseph Perry, the lead detective on the case, ran a background check on **Dorcinvil** and responded to tips that came through the department hotline. (*Id.* 457:19–458:12.) Later that month, the police arrested **Dorcinvil** at the Haitian consulate in Miami while he was requesting a passport. (*Id.* 462:14–463:14.) The State charged **Dorcinvil** with murder, attempted murder, assault, contempt (for violating the order of protection), and illegally possessing a weapon. (ECF No. 20 pp. 1–34, Aff. in Opp'n to Pet. for Writ of Habeas Corpus ("Pitts Aff.") ¶ 6.)

II. Procedural Background

A. Trial

Dorcinvil, represented by Stanford Bandelli, Esq., was tried by a jury in the Supreme Court of New York, Kings County. (*Id.* ¶ 7.) The State's witnesses included B.M., several police officers, a DNA expert, a paramedic, a medical expert, and the landlord of the apartment building where Claudette and B.M. had lived. (*See generally* Trial Tr.) Detective John Briano, who had investigated the January and May incidents and accompanied B.M. in the ambulance ride to the hospital, did not testify. (*Id.* 200:17–24, 436:21–23; Pitts Aff. ¶ 7 n.14.) **Dorcinvil** did not testify and called no witnesses. (Trial Tr. 475:4–9.) The jury convicted **Dorcinvil** on all counts. (*Id.* 533:22–535:2.) On December 16, 2009, the court sentenced him to an aggregate term of imprisonment of fifty-seven years to life. (ECF No. 20-1 pp. 830–48, Sentencing Tr., 14:21–22.)

B. Collateral Challenges and Appeals

On November 15, 2011, **Dorcinvil** filed a *pro se* motion in state court to vacate the judgment of conviction under Section 440.10 of the New York Civil Practice Law and Rules, arguing that his trial attorney was constitutionally ineffective. (ECF No. 20-2 pp. 6–23, Mot. to Vacate Judgment Under CPL 440/10 ("1st 440 Mot.").) He also moved for additional DNA testing on two pieces of evidence recovered from the crime scene. (*Id.* 23.) The court denied **Dorcinvil's** motion, (ECF No. 20-4, Decision & Order ("D&O on 1st 440 Mot.")), and denied **Dorcinvil's** motion to renew ***143** and reargue his motion, (*See* ECF No. 20-5 pp. 2–3, Notice of Appeal). On January 29, 2013, the Appellate Division, Second Department, denied leave to appeal. (ECF No. 20-5 p. 8, Decision & Order on Appl.)[4]

On February 5, 2013, **Dorcinvil**, represented by new appointed counsel, Erica Horwitz, Esq., appealed his judgment of conviction, claiming various due process and Confrontation Clause violations. (ECF No. 20-6, Br. for Def.-Appellant ("Appellate Br.").) **Dorcinvil** later filed a *pro se* supplemental brief raising ineffective trial counsel and additional due process claims. (ECF No. 20-8, Def.-Appellant Suppl. *Pro Se* Br. ("Suppl. Appellate Br.").) The Appellate Division, Second Department, affirmed **Dorcinvil's** conviction. *People v. **Dorcinvil***, 122 A.D.3d 874, 996 N.Y.S.2d 661 (2d Dep't 2014). The New York Court of Appeals denied leave to appeal on March 26, 2015, *People v. **Dorcinvil***, 25 N.Y.3d 950, 7 N.Y.S.3d 279, 30 N.E.3d 170 (2015), and on June 15, 2015, denied **Dorcinvil's** *pro se* request for reconsideration, *People v. **Dorcinvil***, 25 N.Y.3d 1162, 15 N.Y.S.3d 294, 36 N.E.3d 97 (2015). **Dorcinvil** did not petition the United States Supreme Court for a writ of certiorari. (Pet. 3.)

On December 9, 2015, **Dorcinvil** filed a second *pro se* motion to vacate the judgment of conviction in state court, seeking additional DNA testing and also claiming ineffective counsel, actual innocence, and failure to disclose exculpatory evidence. (ECF No. 20-16, Def. C.P.L. § 440.10 *Pro Se* Brief ("2d 440 Mot.").) The court denied the motion on October 27, 2016. (ECF No. 20-19, Mem. ("D&O on 2d 440 Mot.").) **Dorcinvil** appealed the portions of the trial court's order unrelated to additional DNA testing, and the Appellate Division, Second Department, denied leave to appeal on August 18, 2017, Decision & Order on Appl., *People v. **Dorcinvil***, No. 2016-13011, 2017 WL 3573486 (2d Dep't Aug. 18, 2017). As to the request for additional DNA testing, however, the court deemed **Dorcinvil's** "motion papers ... a timely notice of appeal from that portion of the [trial court's] order." *Id.* On October 27, 2017, the New York Court of Appeals summarily dismissed **Dorcinvil's** application for leave to appeal the Appellate Division's ruling. *People v. **Dorcinvil***, 30 N.Y.3d 979, 67 N.Y.S.3d 581, 89 N.E.3d 1261 (2017).

[1] While his second motion to vacate was pending, **Dorcinvil** on July 6, 2016, filed a *pro se* petition for a writ of error *coram nobis*, claiming Horwitz was ineffective in litigating his direct appeal.[5] (ECF No. 20-11, Writ or [sic] Error *Coram Nobis*, Def.'s *Pro-Se* Br. ("*Coram Nobis* Pet.").) The Appellate Division, Second Department, denied the application, *People v.* ***Dorcinvil***, 149 A.D.3d 867, 49 N.Y.S.3d 923 (2d Dep't 2017), and the New York Court of Appeals denied leave to appeal on July 20, 2017, *People v.* ***Dorcinvil***, 29 N.Y.3d 1091, 63 N.Y.S.3d 7, 85 N.E.3d 102 (2017).

In January 2019, **Dorcinvil**, represented again by Horwitz, appealed the portion of the trial court's order denying **Dorcinvil's** request for DNA testing raised in his second motion to vacate. (ECF No. 20-21, Br. for Def.-Appellant ("DNA Appellate Br.").) The Appellate Division, Second Department, affirmed, ***144** *People v.* ***Dorcinvil***, 175 A.D.3d 1421, 109 N.Y.S.3d 457 (2d Dep't 2019), and the New York Court of Appeals denied leave to appeal on December 12, 2019, *People v.* ***Dorcinvil***, 34 N.Y.3d 1077, 116 N.Y.S.3d 146, 139 N.E.3d 804 (2019), and denied reconsideration on February 12, 2020, *People v.* ***Dorcinvil***, 34 N.Y.3d 1158, 142 N.E.3d 1169 (N.Y. 2020).

C. Federal Habeas Review

[2] [3] [4] [5] [6] On January 24, 2020, **Dorcinvil** timely[6] filed commenced this action by filing a petition for a writ of habeas corpus. (ECF No. 1.) **Dorcinvil's** petition included a letter requesting that the Court hold the Petition "in abeyance" until the New York Court of Appeals decided his request for reconsideration of its denial of leave to appeal the Appellate Division's decision on **Dorcinvil's** appeal as to his second state court motion to vacate. (ECF No. 1-4 p. 1, Jan. 17, 2020, Ltr. from Jacques **Dorcinvil**.) On February 27, 2020, **Dorcinvil** filed another letter notifying the Court that the New York Court of Appeals denied reconsideration and requesting the Court to adjudicate his Petition.[7] (ECF No. 6 p. 1, Feb. 20, 2020, Ltr. from Jacques **Dorcinvil**.) The letter attaches a second petition for a writ of habeas corpus virtually identical to the first, exhibits, and another memorandum of law. (*See generally* ECF No. ***145** 6.) The Court follows the Second Circuit's directive to construe the second petition as a motion to amend the initial petition and thus treats the second petition as the operative Petition. *See Stewart v. Dep't of Corr.*, No. 20-cv-2136 (JMA), 2020 WL 3415768, at *2 (E.D.N.Y. June 22, 2020) (citing *Ching v. United States*, 298 F.3d 174, 175 (2d Cir. 2002)). It makes no practical difference, however, because the contents of the two are substantively the same. The Court will still reference the memorandum of law **Dorcinvil** submitted in support of his first petition to the extent it helps clarify the bases for some of his claims.

Dorcinvil first claims his trial counsel was constitutionally ineffective for (1) failing to object to parts of Detective Perry's testimony, (2) failing to object to comments in the State's summation, (3) failing to request a hearing to suppress property seized from him during his arrest, (4) failing to move to strike an allegedly biased juror, (5) failing to investigate a potential alibi witness, and (6) failing to retain a DNA expert.

Dorcinvil further claims his appellate counsel was constitutionally ineffective for failing to raise a Confrontation Clause claim regarding the State's DNA and medical evidence.

Dorcinvil also claims his general due process rights were violated at trial due to (1) the trial court's denial of his motion to exclude B.M.'s testimony and denial of his request for disclosure of additional parts of B.M.'s mental health documentation, (2) the admission of allegedly unduly prejudicial exhibits, (3) the trial court's denial of **Dorcinvil's** motions to sever the charges regarding the January 2007 and May 2007 incidents, (4) the admission of a statement on direct examination that the trial court allegedly suppressed and ruled could be used only for impeachment, (5) the trial court's refusal to give a missing witness instruction as to one of the detectives that investigated the January 2007 and May 2007 incidents, and (6) the admission of testimony referencing **Dorcinvil's** "past arrests" and "complaints."

Finally, **Dorcinvil** claims the State suppressed exculpatory evidence.

LEGAL STANDARD

[7] A petition for a writ of habeas corpus under 28 U.S.C. § 2254 is the vehicle by which a state prisoner obtains federal review of his or her state custody. *Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 278 (2d Cir. 2003). The court may issue the writ only if it finds that the petitioner is in custody in violation of federal law. 28 U.S.C. § 2254(a). Any claim for which the petitioner seeks habeas relief must have been fairly presented for review and exhausted in the state court. 28 U.S.C. § 2254(b)(1)(A).

[8] [9] [10] Respect for judicial federalism requires that a federal habeas court refrain from resurrecting a claim the

petitioner "procedurally defaulted" in state court. *Davila v. Davis*, 582 U.S. 521, 527–28, 137 S.Ct. 2058, 198 L.Ed.2d 603 (2017). Procedural default occurs when the state court clearly and expressly relied on a state procedural rule to dispose of the petitioner's claim, regardless of whether the state court also addressed the merits of the claim. *Garner v. Lee*, 908 F.3d 845, 859 (2d Cir. 2018). The petitioner may raise a procedurally defaulted claim in a federal habeas proceeding only by showing either (1) good cause for the default and resulting prejudice or (2) that he or she is actually innocent. *Gomez v. United States*, 87 F.4th 100, 107 (2d Cir. 2023).

[11] **[12]** **[13]** If the state court adjudicated the petitioner's claim on the merits, the Antiterrorism and Effective Death Penalty ***146** Act ("AEDPA") requires the habeas court to give the state court's decision great deference. *McCray v. Capra*, 45 F.4th 634, 640 (2d. Cir. 2022). The state court need not explain its reasoning for its decision to be considered "on the merits." *Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013). If the petitioner presented the claim to the state court and the state court denied relief, the habeas court may presume the state court adjudicated the claim on the merits absent any contrary indication or state law principle. *Id.*

[14] **[15]** Under AEDPA, a state court decision on the merits must stand unless it was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented" in the state court. 28 U.S.C. § 2254(d). "Clearly established federal law" means a holding, as opposed to dicta, of a Supreme Court decision that existed at the time of the relevant state court decision. *McCray*, 45 F.4th at 640. The habeas court may not use Second Circuit precedents to "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule" that the Supreme Court "has not announced." *Jackson v. Conway*, 763 F.3d 115, 134 (2d Cir. 2014) (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64, 133 S.Ct. 1446, 185 L.Ed.2d 540 (2013)).

[16] **[17]** A state court decision is "contrary to" clearly established federal law if it contradicts a Supreme Court decision on a legal question or decides a case differently from how the Supreme Court decided a case with materially identical facts. *McCray*, 45 F.4th at 640. A state court decision "involves an unreasonable application of" clearly established federal law if the state court identifies the correct legal rule from the applicable Supreme Court decision but unreasonably applies it to the facts of the petitioner's case. *See id.*

[18] **[19]** **[20]** When a habeas petitioner proceeds *pro se*, the court holds the petition to less rigorous standards than it holds filings by counseled parties. *Licausi v. Griffin*, 460 F. Supp. 3d 242, 260 (E.D.N.Y. 2020). The court must liberally construe the petition to raise the strongest arguments it suggests. *Id.* Still, *pro se* petitioners are not exempt from the applicable procedural and substantive rules. *Banner v. Royce*, 525 F. Supp. 3d 417, 418 (E.D.N.Y. 2021).

DISCUSSION

Dorcinvil's Petition claims fifteen grounds for relief. (*See* Pet. 6–12(E).) The Court first addresses the ineffective trial counsel claims (Grounds One, Two, Nine, Ten, Eleven, Twelve), followed by the ineffective appellate counsel claim (Ground Fifteen), general due process claims (Grounds Three, Four, Five, Six, Seven, Eight, Fourteen), and suppression of evidence claim (Ground Thirteen).

I. Ineffective Assistance of Trial Counsel

The Sixth Amendment to the federal Constitution guarantees a criminal defendant the right to assistance of counsel. U.S. Const. amend. VI. In *Strickland v. Washington*, the Supreme Court interpreted "assistance" to mean "effective" assistance. 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). An attorney renders ineffective assistance if he or she (1) performs below objectively reasonable professional standards (2) in a way that prejudices the defendant. *Farhane v. United States*, 77 F.4th 123, 126 (2d Cir. 2023). Prejudice occurs only when ***147** there is a substantial likelihood that the result of the proceeding would have been different but for the attorney's deficient performance. *Garner*, 908 F.3d at 866.

[21] There is no reason for the court to address both elements of the *Strickland* inquiry if the defendant fails to establish one. *Id.* at 861. Further, the court may address the two elements in either order. *Id.* The Second Circuit has instructed district courts to dispose of *Strickland* claims solely for lack of sufficient prejudice without "grad[ing] counsel's performance" when it is easier to do so. *See id.* (quoting *Mitchell v. Scully*, 746 F.2d 951, 954 (2d Cir. 1984)).

A. Detective Perry's Testimony

Dorcinvil claims his trial attorney, Bandelli, was ineffective because he failed to object to "damaging hearsay" in the form of Detective Perry's testimony that he "had a suspect" after arriving on the scene and speaking to Detective Briano, who did not testify at **Dorcinvil's** trial. (ECF No. 1-3, Mem. of Law, Pet'r's *Pro-Se* Br. ("Mem.") 43–47; *see* Trial Tr. 455:25–456:9.) **Dorcinvil** further alleges that Perry offered hearsay testimony by mentioning he talked to people who called into the tipline he set up during his investigation. (Pet. 6(A).) **Dorcinvil** also argues that Perry's hearsay testimony violated his rights under the Confrontation Clause. (*Id.*) **Dorcinvil** failed to exhaust this claim in state court before raising it here, but the Court exercises its discretion to reach and reject the claim on the merits.

1. Exhaustion

[22] **Dorcinvil** raised the *Strickland* claim regarding Perry's hearsay testimony in his direct appeal, and the Appellate Division concluded that **Dorcinvil's** entire ineffective counsel claim was a "mixed claim" because it concerned both record and non-record issues. ***Dorcinvil***, 122 A.D.3d at 877–78, 996 N.Y.S.2d 661. Thus, the court concluded that the claim could not be "resolved without reference to matter outside the record" and that **Dorcinvil** would have to raise it in a collateral challenge rather than on direct appeal. *Id.* at 878, 996 N.Y.S.2d 661; *see Pierotti v. Walsh*, 834 F.3d 171, 178 (2d Cir. 2016) (recognizing this practice as standard in New York state court). **Dorcinvil** did not claim Bandelli was ineffective for failing to object to the State's summation in either of his state collateral challenges. (Pet. 8.) Thus, he "deprived the state court of an opportunity to review" this claim and has left it unexhausted. *See Murray v. Cunningham*, No. 19-cv-767 (DC), 2023 WL 4665761, at *7 (E.D.N.Y. July 20, 2023) (finding "mixed" ineffective counsel claim unexhausted where appellate court instructed petitioner to raise claim in collateral proceeding but petitioner had not done so at time he sought federal habeas relief).

[23] Because **Dorcinvil's** Petition contains both exhausted and unexhausted claims, it is a "mixed petition." *See Rhines v. Weber*, 544 U.S. 269, 275, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). A habeas court facing a mixed petition may (1) dismiss the entire petition without prejudice, (2) deny the entire petition on the merits, (3) permit the petitioner to "delete" the unexhausted claims from the petition and return to state court to proceed on the unexhausted claims, or (4) stay the petition until the petitioner exhausts the unexhausted claims. *Wesley-Rosa v. Kaplan*, 274 F. Supp. 3d 126, 129 (E.D.N.Y. 2017). **Dorcinvil** has not moved for a stay, and he would not have been able to because he had no good cause for failing to raise this component of his ineffective trial counsel claim in either of his state collateral challenges. *See id.*

*148 [24] The Court exercises its discretion to reach the merits rather than send **Dorcinvil** back to state court to raise the claim in a third collateral challenge. *See* 28 U.S.C. § 2254(b)(2); *Abuzaid v. Mattox*, 726 F.3d 311, 322 n.8 (2d Cir. 2013). **Dorcinvil** has not prevailed on a single one of the many claims he raised in his various state court appeals or collateral proceedings, which spanned nearly a decade and generated over one thousand pages of briefing and judicial decisions, and the Court declines to create even more work for the state courts by forcing them to adjudicate yet another plainly meritless claim. Further, the Court is already considering other of **Dorcinvil's** ineffective trial counsel claims that the state courts *have* addressed and rejected, which leaves the Court in a position to evaluate the cumulative effect of all allegedly prejudicial *Strickland* errors. Finally, the Court can resolve the claim based on *Strickland*'s prejudice prong alone solely by reference to the existing record, and nothing in the Petition or record suggests the result could possibly change given additional factual development. Thus, the Court finds that addressing this component of **Dorcinvil's** ineffective trial counsel claim now will further "AEDPA's goals of encouraging finality and reducing delays." *See Johnston v. Senkowski*, No. 01-cv-1770 (NAM), 2005 WL 1388880, at *3 (N.D.N.Y. June 9, 2005).

2. Merits

[25] [26] [27] Because there is no state court decision on the merits to defer to, AEDPA deference does not apply and the Court reviews **Dorcinvil's** claim *de novo*.[8] *See Folkes v. Lee*, No. 10-cv-5416 (BMC), 2011 WL 2610496, at *4 (E.D.N.Y. June 30, 2011). Even under *de novo* review, however, **Dorcinvil's** arguments are meritless. Under New York law, hearsay is recognized as an "out-of-court statement admitted for the truth of the matter asserted." *People v. Slade*, 37 N.Y.3d 127, 170 N.E.3d 1189 (N.Y. 2021) (*quoting People v. Buie*, 86 N.Y.2d 501, 634 N.Y.S.2d 415, 658 N.E.2d 192, 194 (N.Y. 1995)). The challenged testimony – that Perry determined *149 **Dorcinvil** to be a suspect after he spoke to Briano – was not hearsay because it did not relay to the jury any "statement" by Briano or a tipline caller. Further, Perry offered this testimony to explain his own actions during his investigation, not to prove the truth of what another person told him. *See People v. Gross*, 26 N.Y.3d 689, 47

N.E.3d 738, 742 (N.Y. 2016) (explaining that testimony is not hearsay when admitted to "complet[e] the narrative of how [the] defendant came to be investigated"). The Appellate Division found as much when it rejected **Dorcinvil's** claim on direct appeal (not raised in the context of ineffective counsel) that Perry's testimony "constituted impermissible hearsay and bolstering." *See* ***Dorcinvil***, 122 A.D.3d at 876, 996 N.Y.S.2d 661.

[28] **[29]** The challenged testimony also did not implicate the Confrontation Clause. The federal Constitution guarantees criminal defendants the right to confront adverse witnesses, *see* U.S. Const. amend. VI, and the "main and essential purpose of confrontation is to secure ... the opportunity of cross-examination," *Fuentes v. Griffin*, 829 F.3d 233, 247 (2d Cir. 2016) (quoting *Davis v. Alaska*, 415 U.S. 308, 315–16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). **Dorcinvil's** argument that Perry's testimony "bolstered" B.M.'s identification of **Dorcinvil**, (*see* Pet. 6(A)), falls short, however, because **Dorcinvil** had a full and fair opportunity to cross-examine Perry and B.M., *see Licausi*, 460 F. Supp. 3d at 266. Thus, because any hearsay or Confrontation Clause objection to Perry's testimony would have been meritless, **Dorcinvil** cannot claim Bandelli was ineffective for failing to make such objections. *See Blackman v. United States*, No. 16-cr-89 (JS), 2019 WL 2106189, at *5 (E.D.N.Y. May 14, 2019).

[30] **[31]** Finally, **Dorcinvil** argues it was error for the trial court to have admitted Perry's "bolstering" testimony identifying **Dorcinvil** on the video surveillance footage when Perry had not seen him before and that Bandelli was ineffective for failing to object to that testimony. (*See* Pet. 6(A)). That argument cannot help **Dorcinvil** in a federal habeas proceeding because "bolstering" alone, even if forbidden under state law, is insufficiently prejudicial to implicate federal due process. *See* 28 U.S.C. § 2254(a); *Mejia v. Sup't, Elmira Corr. Facility*, No. 20-cv-2836 (KAM), 702 F.Supp.3d 83, 101-02 (E.D.N.Y. Nov. 16, 2023). Moreover, any such error could not have caused *Strickland* prejudice here because Claudette's landlord also identified **Dorcinvil** as the person in the video. (*See* Trial Tr. 133:25–134:1, 138:13–17.) There is no reasonable probability that the jury would not have convicted **Dorcinvil** had Perry not identified him too.

B. The State's Summation

[32] **[33]** **Dorcinvil** claims Bandelli was ineffective by failing to object to allegedly unduly prejudicial comments the State made during its summation.[9] (Pet. 7–7(A).) As with **Dorcinvil's** *Strickland* claim regarding Perry's testimony, **Dorcinvil** failed to exhaust this claim because he never raised it in a collateral proceeding after being instructed to do so by the Appellate Division, but the Court again exercises its ***150** discretion to review the claim on the merits *de novo*. (*See supra* pp. 147-48.)

[34] **[35]** **Dorcinvil** contends Bandelli should have objected when the State allegedly appealed to the jurors' sympathy in an inflammatory way, vouched for B.M.'s credibility, and expressed personal beliefs about **Dorcinvil's** guilt. (Mem. 51–55.) Decisions about whether to make objections during the prosecutor's summation are matters of trial strategy "virtually unchallengeable" in a federal habeas proceeding. *Hamilton v. Lee*, 94 F. Supp. 3d 460, 477 (E.D.N.Y. 2015) (quoting *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052). To support habeas relief, the prosecutor must have made improper comments that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Torres v. Racette*, No. 11-cv-1647 (PKC), 2018 WL 4762246, at *6 (E.D.N.Y. Oct. 2, 2018) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).

[36] None of the State's comments come close to any impropriety necessary to justify habeas relief. The State's references to **Dorcinvil** as a "guilty man," (*see* Trial Tr. 506:5–23), were permissible as an argument to the jury about how to interpret the evidence the jury already heard and reach a verdict, *see United States v. Oreckinto*, 774 F. App'x 698, 702 (2d Cir. 2019) (summary order) (finding no error when prosecutor showed jury image of defendant captioned "Guilty"). The State's vivid description of Claudette's murder and the trauma it inflicted on B.M., which **Dorcinvil** deems "inflammatory," (*see* Mem. 52–53), was not improper because prosecutors are not forbidden from "vigorous advocacy" or using "colorful" language in summations, *see Portes v. Capra*, 420 F. Supp. 3d 49, 58 (E.D.N.Y. 2018) (quoting *United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992)). The State also did not convey a "personal belief" in **Dorcinvil's** guilt to the jury by using the phrase "I submit to you." (*See* Mem. 52–53.) The phrase "I submit to you" is a common form of verbal filler that attorneys utter when arguing in court, and it does not prejudice criminal defendants when used in a prosecutor's summation. *See United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir. 1996); *Wright v. Poole*, No. 02-cv-8669 (KMK), 2012 WL 4478393, at *9 (S.D.N.Y. Sept. 28, 2012). Finally, the trial court instructed the jury that summations are not evidence, and this Court must presume the jury followed that instruction absent

any evidence to the contrary. (*See* Trial Tr. 512:24–513:12); *Joseph v. Conway*, No. 07-cv-5523 (DC), 671 F.Supp.3d 248, 258-59 (E.D.N.Y. Apr. 26, 2023) (citing *Gonzalez v. Sullivan*, 934 F.2d 419, 424 (2d Cir. 1991)).

Because none of the comments from State's summation that **Dorcinvil** cites were unduly prejudicial, there would have been no basis for Bandelli to object to them. *See Broxmeyer v. United States*, 661 F. App'x 744, 749 (2d Cir. 2016) (summary order) (explaining that "absent any prejudicial error in the [prosecutor's] summation," the lack of "an otherwise futile objection could not have rendered counsel ineffective") (quoting *United States v. Cohen*, 427 F.3d 164, 170 (2d Cir. 2005)). Thus, **Dorcinvil** cannot claim to have suffered *Strickland* prejudice through the lack of objections and cannot obtain habeas relief on this ground.

C. Suppression Hearing

[37] **Dorcinvil** claims Bandelli was ineffective by failing to request a suppression hearing (or "*Mapp* hearing") regarding property the police recovered from **Dorcinvil** during his arrest in Miami. (Pet. 12(A).) **Dorcinvil** raised this claim in his first motion to vacate, (*see* 1st 440 Mot. 5), and the ***151** trial court rejected it as factually incorrect, (*see* D&O on 1st 440 Mot.). **Dorcinvil** then raised the claim again in his second motion to vacate, and the trial court rejected it as factually incorrect and because the court's "prior decision and order [was] now also a bar to [**Dorcinvil's**] attempt to re-litigate the same issue," (D&O on 2d 440 Mot. 6–7 (citing N.Y. C.P.L.R. § 440.10(3)(b))). This Court reviews the trial court's decision on the second motion to vacate, the last reasoned state court decision addressing this ground for relief after the Appellate Division and New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

[38] **Dorcinvil's** *Strickland* claim based on Bandelli's alleged failure to request a suppression hearing is procedurally defaulted. The trial court rejected **Dorcinvil's** claim based on Section 440.10(3)(b) of the New York Civil Practice Law and Rules. That section generally permits the trial court to deny a motion to vacate where "[t]he ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding" in New York state court "other than an appeal from the judgment." N.Y. C.P.L.R. § 440.10(3)(b). The Second Circuit has not addressed whether a state court's proper invocation of Section 440.10(3)(b) operates as a procedural bar, but the consensus among district courts in the circuit is that it does. *See, e.g., Brown v. Burnett*, No. 19-cv-1295 (TJM), 2021 WL 4990257, at *12 (N.D.N.Y. Oct. 27, 2021); *Jiang v. Larkin*, No. 12-cv-3869 (PGG), 2016 WL 1718260, at *23 (S.D.N.Y. Apr. 28, 2016); *Nowicki v. Cunningham*, No. 09-cv-8476 (KMK), 2014 WL 5462475, at *9 (S.D.N.Y. Oct. 27, 2014). The Court finds those district court decisions well reasoned and joins the consensus. The Court also finds nothing improper about how the trial court invoked Section 440.10(3)(b) here. Moreover, **Dorcinvil** has not argued there was good cause for or prejudice resulting from the default, nor has he established actual innocence. Thus, **Dorcinvil** cannot prevail on this claim.

D. Jury Selection

[39] **Dorcinvil** claims his trial attorney was ineffective for failing to move to strike an unidentified juror who said during jury selection that she thought she would be "very nervous" without elaborating on what she would be nervous about. (Pet. 12(B).) **Dorcinvil** raised this claim in his second state court motion to vacate, and the trial court rejected it both on the merits and on procedural grounds, (D&O on 2d 440 Mot. 7–8 (citing N.Y. C.P.L.R. § 440.30(4)(b))). This Court reviews the trial court's decision on the second motion to vacate, which was the last reasoned state court decision addressing this ground for relief after the Appellate Division and New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

Despite the trial court's invocation of Section 440.30(4)(b) of the New York Civil Practice Law and Rules, which permits a court to deny a motion to vacate where the motion papers lack sworn statements substantiating essential facts, this Court assumes without deciding that the trial court adjudicated this claim on the merits. The Second Circuit has not addressed whether Section 440.30(4)(b) can support a procedural default, but because there is an intra-district split on that question, *see Totesau v. Lee*, No. 19-cv-6992 (PKC), 2022 WL 1666895, at *19 n.30 (E.D.N.Y. May 25, 2022) (collecting cases), and Second Circuit authority finding that a similar state procedural rule *cannot* support a procedural default, *see Giraldo v. Bradt*, No. 11-cv-2001 (JFB), 2012 WL 3835112, at *8 (E.D.N.Y. Sept. 5, 2012) (citing ***152** *Garcia v. Portuondo*, 104 F. App'x 776, 779 (2d Cir. 2004) (summary order)), the Court concludes that this claim is best resolved on the merits. Thus, the Court heeds the Second Circuit's suggestion to "hurdl[e] the procedural questions to reach the merits." *See Dunham v. Travis*, 313 F.3d 724, 729–30 (2d Cir. 2002) (explaining that doing so is justified where the substantive issue easily resolves against the petitioner and the procedural issue concerns a complicated state law

question); *Totesau*, 2022 WL 1666895, at *19 n.30 (doing so with respect to Section 440.30(4)(b)).

[40] Turning to the merits, **Dorcinvil's** *Strickland* claim fails because there was no prejudice. During jury selection, Bandelli asked whether any prospective juror had a "friend or a friend of a friend or a family member that [had] been ... the victim of domestic violence." (ECF No. 20-1 pp. 73–221, Voir Dire Tr. 67:19–22.) One juror apparently signaled that she had a question, and the exchange proceeded as follows:

> MR. BANDELLI: Ma'am?
>
> PROSPECTIVE JUROR: I think I'll be very nervous.
>
> THE COURT: I prefer that you be nervous because, you know, this is a case where it's a hard job. The question is not whether you will be nervous, but can you do the job?
>
> PROSPECTIVE JUROR: I don't know. My stomach is bubbling already.

(*Id.* 68:20–69:3.) The transcript does not indicate which prospective juror had this exchange with Bandelli or whether that juror was seated for trial, but no juror was stricken as a result of the exchange.

[41] There is no prejudice here because **Dorcinvil** has failed to establish that the unidentified prospective juror who thought she would be "very nervous" was actually seated on the jury. Second, even assuming this juror was seated, the trial court did not contradict or unreasonably apply clearly established federal law in finding that the juror's statements did not evince actual bias. A defendant alleging ineffective counsel with respect to jury selection must show that the juror had "[a]ctual bias." *United States v. Kelly*, 609 F. Supp. 3d 85, 152 (E.D.N.Y. 2022). **Dorcinvil** cites no Supreme Court case holding that a juror's statement expressing a vague sense of nervousness, without more, amounts to actual bias. To the contrary, the Supreme Court has denied habeas relief even where jurors have "doubted, or disclaimed outright, their own impartiality on voir dire." *See Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2011) (citing *Patton v. Yount*, 467 U.S. 1025, 1032, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)); *accord Figueroa v. Heath*, No. 10-cv-121 (JFB), 2011 WL 1838781, at *12 (E.D.N.Y. May 13, 2011). Thus, **Dorcinvil** cannot obtain habeas relief on this ground.

E. Alleged Alibi Witness

[42] **Dorcinvil** claims Bandelli was ineffective for failing to contact alleged alibi witnesses after **Dorcinvil** gave Bandelli their contact information. (Pet. 12(C).) **Dorcinvil** raised this claim in his first motion to vacate, (*see* 1st 440 Mot. 5), and the trial court rejected it on the merits, (D&O on 1st 440 Mot.). **Dorcinvil** then raised the claim again in his second motion to vacate, and the trial court rejected it on the merits again without invoking Section 440.10(3)(b), (D&O on 2d 440 Mot.). This Court reviews the trial court's decision on the second motion to vacate, which was the last reasoned state court decision addressing this ground for relief after the Appellate Division and New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

*153 [43] Because the trial court did not invoke the successive motion procedural bar when it denied **Dorcinvil's** second motion to vacate, the Court concludes this claim is not procedurally defaulted and will review it on the merits, applying AEDPA deference. The trial court did not contradict or unreasonably apply clearly established federal law in rejecting this claim. The only "alibi" witness **Dorcinvil** discussed before that court was his fellow inmate, Steven Renaud, who swore an affidavit testifying as to **Dorcinvil's** whereabouts the day *before* the May 2007 incident. (D&O on 2d 440 Mot. 8.) The court thus found this affidavit at most "place[d] [**Dorcinvil**] in mid-town Manhattan on the day before the crime, evidence which would not have precluded [**Dorcinvil's**] commission of murder a day later." (*Id.*) Accordingly, **Dorcinvil** cannot establish *Strickland* prejudice because he cannot establish a substantial likelihood that Renaud's testimony would have changed the result. Renaud "had no knowledge of [**Dorcinvil's**] whereabouts" on May 4, 2007. *See Matthews v. Mazzuca*, No. 01-cv-9369 (HB), 2003 WL 22208358, at *4 (S.D.N.Y. Sept. 23, 2003) (finding counsel not ineffective for not investigating alleged alibi witness who could testify as to petitioner's whereabouts on day of incident but not at time of incident), *aff'd by* 120 F. App'x 856 (2d Cir. 2005). Even if Renaud's testimony were admitted, it "would have still left open the very real possibility that he in fact visited" Claudette's apartment on May 4, 2007. *See id.* Thus, **Dorcinvil** may not obtain habeas relief on this ground.

F. DNA Expert

[44] [45] **Dorcinvil** claims Bandelli was ineffective for "never produc[ing]" DNA experts or "request[ing] ... a hearing to determine whether or not the DNA evidence introduce[d] at trial by the people's experts were reliable." (Pet. 12(C).) **Dorcinvil** raised this claim in his first motion to vacate, (*see* 1st 440 Mot. 8–9), and the trial court rejected it as factually incorrect, (*see* D&O on 1st 440

Mot.). **Dorcinvil** then raised the claim again in his second motion to vacate, and the trial court rejected it as "without merit" and because the court "decline[d] to revisit" the DNA claims "pursuant to CPL § 440.10(3)(b)." (D&O on 2d 440 Mot. 9). This Court reviews the trial court's decision on the second motion to vacate, which was the last reasoned state court decision addressing this ground for relief after the Appellate Division and New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640. The Court concludes that this claim is procedurally defaulted for the same reason that **Dorcinvil's** suppression hearing claim is procedurally defaulted. (*See supra* p. 151.)

Because each deficiency **Dorcinvil** alleges in Bandelli's performance resulted in either no prejudice or negligible prejudice, the Court also finds that there is no reasonable probability that the cumulative effect of all the alleged errors would have changed the result of **Dorcinvil's** trial. *See Ohle v. United States*, No. 13-cv-450 (JSR), 2015 WL 5440640, at *12 (S.D.N.Y. Sept. 8, 2015). Thus, even considering all of **Dorcinvil's** *Strickland* claims collectively, he cannot establish the prejudice necessary to obtain habeas relief.

B. Ineffective Assistance of Appellate Counsel

[46] **Dorcinvil** claims his appellate counsel, Erica Horwitz, was constitutionally ineffective because she failed to argue on appeal that **Dorcinvil's** trial counsel was constitutionally ineffective for failing to preserve a Confrontation Clause objection regarding the DNA report and autopsy reports introduced at trial. (Pet. 12(E).) **Dorcinvil** raised this claim in his *coram* ***154** *nobis* petition, (*Coram Nobis* Pet. 11), and the state appellate court rejected it on the ground that **Dorcinvil** "failed to establish that he was denied effective assistance of appellate counsel," ***Dorcinvil***, 149 A.D.3d at 867. This Court reviews the Appellate Division's decision on the *coram nobis* petition, the last reasoned state court decision addressing this ground for relief after the New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

[47] [48] Here, Horwitz provided the state court an affirmation explaining her appellate strategy. (*See* ECF No. 20-12, Affirmation of Erica Horwitz ("Horwitz Affirmation").) AEDPA thus requires the Court to apply "double deference," comprising both the deference owed to Horwitz's strategic decisions under *Strickland* itself and the deference owed to the state court's application of *Strickland* to Horwitz's performance. *See Simpson v. Bell*, 557 F. Supp. 3d 365, 372 (E.D.N.Y. 2021). Because the decision under review was a summary disposition, it must stand so long as any reasonable judge "could have" found that Horwitz complied with the *Strickland* standard. *See Chrysler v. Guiney*, 806 F.3d 104, 118 (2d Cir. 2015). In conducting that analysis, the Court observes the Supreme Court's admonition that appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *See id.* (quoting *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)).

[49] The Appellate Division did not contradict or unreasonably apply *Strickland* or any other clearly established federal law in denying **Dorcinvil's** *coram nobis* petition. Horwitz filed a 63-page appellate brief on **Dorcinvil's** behalf raising five claims of error. (Horwitz Affirmation ¶ 6.) In response to **Dorcinvil's** *coram nobis* petition, she explained that she declined to argue Bandelli was ineffective for failing to object to the State's DNA evidence because she found the State's DNA evidence weak and observed that Bandelli exploited it to **Dorcinvil's** advantage in his summation. (*Id.* ¶¶ 10–17.) She further explained that she declined to argue Bandelli was ineffective for failing to object to the State's autopsy evidence because such an objection would have been squarely foreclosed by state court precedent. (*Id.* ¶¶ 18–26.) Applying AEDPA's doubly deferential standard, the Court concludes that a reasonable judge could have found that Horwitz's selection of appellate issues fell within the range of discretion afforded by *Strickland*, regardless of whether it was the optimal selection or even a good selection. *See Chrysler*, 806 F.3d at 118. Moreover, even if Horwitz's strategy were deemed professionally unreasonable, there was no prejudice. Horwitz *did* argue ineffective trial counsel in the alternative with respect to two of her arguments, (*see* Appellate Br. 49, 62), and the appellate court found those claims formed part of a "mixed claim" of ineffective assistance unsuitable for direct appellate review, ***Dorcinvil***, 122 A.D.3d at 877–78, 996 N.Y.S.2d 661. There is no reason to find the additional ineffective trial counsel claims that **Dorcinvil** would have preferred Horwitz to raise would have met any other fate. Thus, **Dorcinvil** cannot obtain habeas relief on his ineffective appellate counsel claim.

III. General Due Process

[50] The federal Constitution provides that a state may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. In a criminal trial, "due process" means ***155** only the "fundamental

elements of fairness," not the "meticulous observance of state procedural prescriptions." *Murray v. Noeth*, 32 F.4th 154, 158 (2d Cir. 2022) (quoting *Rivera v. Illinois*, 556 U.S. 148, 158, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009)).

A. B.M.'s Testimony and Medical Records

Dorcinvil claims the trial court denied him due process by finding B.M. competent to testify and denying **Dorcinvil's** request for disclosure of B.M.'s mental health records. (Pet. 9–9(A).) Bandelli had made a pre-trial motion to exclude B.M.'s testimony based on B.M.'s alleged "cognitive issues" that Bandelli argued affected B.M.'s perception. (Voir Dire Tr. 8:8–18.) The court denied the motion, reasoning that B.M.'s medical issues were irrelevant to his competency to testify. (*Id.* 8:19–9:6.) The court also denied Bandelli's request for disclosure of B.M.'s school psychological evaluation after the court reviewed the records *in camera*. (*Id.* 10:1–13:23.)

[51] When **Dorcinvil** raised this claim in his direct appeal, the Appellate Division rejected on the merits **Dorcinvil's** challenge to B.M.'s competency to testify and found **Dorcinvil's** challenge to the trial court's refusal to disclose B.M.'s medical records inappropriate for review on direct appeal because it was based on matter outside the record. *Dorcinvil*, 122 A.D.3d at 877, 996 N.Y.S.2d 661. **Dorcinvil** did not raise this claim in either of his state court motions to vacate. (Pet. 9.) This Court thus reviews the Appellate Division's decision on **Dorcinvil's** direct appeal, the last reasoned state court decision addressing this ground for relief after the New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

[52] [53] The Appellate Division did not contradict or unreasonably apply clearly established federal law in permitting B.M. to testify. Federal habeas relief is available only for errors of federal law and "does not lie for errors of state law." *Jones v. Hendrix*, 599 U.S. 465, 490, 143 S.Ct. 1857, 216 L.Ed.2d 471 (2023) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)). A child witness's competency to testify in New York state court is governed by New York state law, specifically Section 60.20(2) of the Civil Practice Law and Rules. **Dorcinvil's** claim thus does not implicate federal law and cannot support habeas relief. *See Ramos v. Lee*, No. 19-cv-1125 (JS), 2021 WL 3269237, at *9 (E.D.N.Y. July 30, 2021) ("Whether the trial court properly admits sworn testimony from a child complainant in accordance with the requirements of C.P.L. § 60.20(2) is a matter best left to the New York state courts."); *see also DiGuglielmo v. Smith*, 366 F.3d 130, 136 (2d Cir. 2004) (admonishing district courts not to repackage alleged state law errors as federal law errors by simply framing them as due process violations).

[54] **Dorcinvil's** challenge to the trial court's refusal to disclose B.M.'s psychological evaluation is unexhausted because he did not raise it in his second state court motion to vacate after the appellate court found it improperly raised on direct review; however, the Court again exercises its discretion under 28 U.S.C. § 2254(b)(2) to address and reject this claim on the merits under *de novo* review. (*See supra* p. 147-48.)

[55] [56] [57] **Dorcinvil's** claim fails on the merits. Trial courts have "wide latitude" to limit cross-examination to avoid testimony only "marginally relevant." *Corby v. Artus*, 699 F.3d 159, 166 (2d Cir. 2012) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). Specifically, a trial court may constitutionally ***156** restrict inquiry into a witness's psychiatric history if the proponent of such evidence fails to reasonably link it to the facts at issue. *Drake v. Woods*, 547 F. Supp. 2d 253, 267 (S.D.N.Y. 2008). The standard procedure when a court faces a request for disclosure of sensitive materials is to review the materials *in camera* and determine whether they are appropriate for cross-examination. *Viera v. Sheahan*, No. 16-cv-4048 (KAM), 2020 WL 3577390, at *6 (E.D.N.Y. June 30, 2020).

[58] Under these standards, the trial court committed no error in refusing to disclose B.M.'s psychiatric records. Before trial, the court examined B.M.'s records *in camera* found Bandelli already had "enough" to effectively cross-examine B.M. as to his perception of the events as the crime occurred. (Voir Dire Tr. 13:15–21.) At trial, Bandelli cross-examined B.M. regarding his stay in a psychiatric hospital. (*See* Trial Tr. 48:6–55:5.) In summation, Bandelli argued B.M. was not credible and that he was lying. (*Id.* 496:14–499:7.) **Dorcinvil** has provided no reason to find the marginal impeachment value gained from disclosure of *more* of B.M.'s medical records would have materially improved Bandelli's ability to cross-examine B.M. or that there was any defect in the trial court's *in camera* review process. *See McGeachy v. Perez*, No. 11-cv-3906 (DC), 2023 WL 1830802, at *9 (E.D.N.Y. Feb. 7, 2023) (denying habeas relief where "substantial cross-examination of [witness's] mental health history was permitted" and "there was no evidence that [additional records] would not have been cumulative" of witness's other testimony). Thus, **Dorcinvil** may not obtain habeas relief on this ground.

B. Trial Exhibits

[59] **Dorcinvil** claims the trial court violated his due process rights by admitting a photo of Claudette after the January 2007 assault, a photo of Claudette after the May 2007 murder, video surveillance of the May 2007 incident, and **Dorcinvil's** arrest photos. (Pet. 7; 10–10(A).) **Dorcinvil** raised this claim in his direct appeal. (Appellate Br. 50–54.) The Appellate Division rejected the claim on the merits as to the May 2007 photo of Claudette and **Dorcinvil's** arrest photos. *Dorcinvil*, 122 A.D.3d at 876–77, 996 N.Y.S.2d 661. It found **Dorcinvil's** claim as to the January 2007 photo of Claudette and the video footage "unpreserved for appellate review and, in any event, without merit." *Id.* at 877, 996 N.Y.S.2d 661. **Dorcinvil** did not raise his evidentiary claims regarding the trial exhibits in either of his state court motions to vacate. (Pet. 8.) This Court thus reviews the Appellate Division's decision on **Dorcinvil's** direct appeal, the last reasoned state court decision addressing this ground for relief after the New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

[60] **Dorcinvil's** evidentiary claims regarding the January 2007 photo and the arrest photos are procedurally defaulted. Though the Appellate Division concluded they were "unpreserved for appellate review" without citing a particular procedural rule, ***Dorcinvil***, 122 A.D.3d at 877, 996 N.Y.S.2d 661, the Court finds that the Appellate Division likely relied on New York's contemporaneous objection rule, which is a valid procedural bar in New York state court, *see Carey v. Connell*, No. 10-cv-3873 (DLC), 2012 WL 37084, at *4 n.1 (S.D.N.Y. Jan. 6, 2012) (concluding habeas claims were procedurally defaulted based on contemporaneous objection rule where Appellate Division wrote that claims were "unpreserved for appellate review and, in any event, without merit"); ***157** *Whaley v. Graham*, No. 06-cv-3843 (JFB), 2008 WL 4693318, at *7 (E.D.N.Y. Oct. 15, 2008) (same). Because **Dorcinvil** has not argued there was good cause for or prejudice resulting from the default, nor has he established that he is actually innocent, those claims cannot support habeas relief.

[61] **[62]** **[63]** **[64]** The Appellate Division did not rely on a procedural bar to reject **Dorcinvil's** claims regarding the May 2007 photo of Claudette and arrest photos but rather addressed those claims on the merits, so this Court reviews the Appellate Division's decision on those evidentiary rulings with AEDPA deference. State court evidentiary rulings generally present state law questions inappropriate for review in a federal habeas proceeding. *See Vega v. Walsh*, 669 F.3d 123, 126 (2d Cir. 2012). A state court evidentiary error cannot support habeas relief unless the error amounted to a federal due process violation. *Enoksen v. Squires*, 532 F. Supp. 3d 75, 93 n.13 (E.D.N.Y. 2021). Evidence erroneously admitted under state law does not violate due process if it was "at least arguably relevant," *Vega*, 669 F.3d at 126, but not "sufficiently material to provide the basis for conviction" or "remove a reasonable doubt" that otherwise would have existed, *Heidgen v. Graham*, 420 F. Supp. 3d 1, 11 (E.D.N.Y. 2019). Moreover, to overcome AEDPA deference, the petitioner must identify a Supreme Court decision clearly establishing that erroneously admitting the specific *kind* of evidence at issue violates due process. *Evans v. Fischer*, 712 F.3d 125, 133-35 (2d Cir. 2013) (reversing district court for granting habeas relief without citing a sufficiently similar Supreme Court case).

[65] Here, the Court may not grant habeas relief on **Dorcinvil's** claim as to the photograph of Claudette's body because no Supreme Court precedent holds that the admission of a photograph of a victim's body violates due process. *See Fernandez v. Ercole*, No. 14-cv-2974 (HBP), 2017 WL 2364371, at *5 (S.D.N.Y. May 31, 2017). As to **Dorcinvil's** arrest photographs, the state court ruling was not erroneous because New York law permits the admission of a defendant's arrest photograph. *See King v. Coveny*, No. 18-cv-2851 (KPF), 2022 WL 4952537, at *9 (S.D.N.Y. Oct. 3, 2022). Moreover, there was no due process violation because the photographs were at least arguably relevant to show that **Dorcinvil** changed his appearance after Claudette's murder, thus evincing consciousness of guilt; however, the photographs were also insufficiently material to form the basis of **Dorcinvil's** conviction in light of the overwhelming evidence against him. Thus, **Dorcinvil's** claims as to the trial exhibits cannot support habeas relief.

C. Joinder

Dorcinvil claims he was denied a fair trial because the trial court denied his motion to sever the charges and instead conducted a single trial regarding the January 2007 and May 2007 incidents. (Pet. 11(A); *see* Voir Dire Tr. 2:22–6:6.) The court explained that the May 2007 incident related to the January 2007 incident because it involved **Dorcinvil's** violation of the orders of protection that resulted from the January 2007 incident. (Voir Dire Tr. 6:21–7:12.) The court further explained that two trials would require B.M., a minor who had moved out of state, to return to New York twice to

testify, and that the court would not permit that result. (*Id.* 7:13–15.)

[66] **Dorcinvil** raised this claim in his direct appeal, and the Appellate Division rejected it on the merits. *See* ***Dorcinvil***, 122 A.D.3d at 877, 996 N.Y.S.2d 661. **Dorcinvil** did not raise the claim in either of his state court motions to vacate. (Pet. 11(A).) This Court thus reviews the Appellate Division's decision on **Dorcinvil's** direct appeal, the last reasoned state court ***158** decision addressing this ground for relief after the New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

[67] [68] [69] [70] The state court did not contradict or unreasonably apply federal law in rejecting **Dorcinvil's** prejudicial joinder claim. A state court's decision whether to join or sever charges is a matter of state law that generally cannot support habeas relief. Prejudicial joinder amounts to a constitutional violation only when it renders the petitioner's trial fundamentally unfair in violation of federal due process. *Herring v. Meachum*, 11 F.3d 374, 377 (2d Cir. 1993); *accord Fields v. N.Y.S.D.O.C.C.S.*, No. 20-cv-9 (PKC), 2023 WL 6292479, at *9 (E.D.N.Y. Sept. 27, 2023). To prevail, the petitioner must show *actual* prejudice resulting from the joinder, not just the potential for prejudice. *Fields*, 2023 WL 6292479, at *9. Moreover, a state court may constitutionally consider matters of judicial convenience in deciding to join charges. *Conroy v. Racette*, No. 14-cv-5832 (JMA), 2017 WL 2881137, at *13 (E.D.N.Y. July 6, 2017).

[71] Here, **Dorcinvil** fails to establish that he suffered actual prejudice from the joinder. The charges stemming from the May 2007 murder of Claudette and stabbing of B.M. "inextricably related" to the charges stemming from the January 2007 assault of Claudette and B.M. because **Dorcinvil's** contact with the victims in May 2007 violated the order of protection that was issued in response to the January 2007 incident and thus formed the basis for the criminal contempt charges. (*See* Trial Tr. 524:12–19); *Fields*, 2023 WL 6292479, at *10. Further, it was appropriate for the state trial court to have considered the fact that B.M., a minor witness who had moved out of state, would have had to return to New York to testify if there were two trials. *See Conroy*, 2017 WL 2881137, at *13. Thus, the trial court's denial of **Dorcinvil's** motion to sever did not violate due process and **Dorcinvil** may not obtain habeas relief on this ground.

D. Suppression Ruling

Dorcinvil claims the state trial court unconstitutionally permitted the State to elicit suppressed statements on direct examination. (Pet. 11(A)–(B).) Before trial, the State conceded that two of **Dorcinvil's** post-arrest statements were obtained illegally and agreed only to introduce those statements to impeach **Dorcinvil** if he chose to testify. (*See* ECF No. 20-1 pp. 1–72, Hr'g Tr., 4:2–13, 68:6–70:14.) The statements concerned the route **Dorcinvil** took to travel from New York City to Miami and **Dorcinvil's** theory that another man stabbed Claudette and B.M. (*Id.* 46:13–47:20.) The trial court appears to have acknowledged the State's concessions without explicitly ruling that **Dorcinvil's** statements were obtained unconstitutionally. (*See id.* 4:14, 68:6.) The State sought a ruling that the statements were not coerced and thus usable for impeachment, and the state trial court agreed to make that ruling. (*Id.* 70:15–71:1.)

At trial, the State elicited the following testimony from Detective Perry on direct examination, which **Dorcinvil** alleges violated the trial court's "suppression" ruling:

> Q. What did you do in Miami, Florida?
>
> A. I transported Jacques [**Dorcinvil**] back to New York.
>
> Q. Did you learn how he came to be in Florida or – did you learn how he came to be in custody in Florida[?]
>
> MR. BANDELLI: Objection.
>
> A. Yes.
>
> THE COURT: Overruled.
>
> Q. How is that?
>
> A. He walked into the consulate looking for a passport.
>
> ***159** Q. Did you eventually place Jacques [**Dorcinvil**] under arrest?
>
> A. Yes, I did.

(*Id.* 462:25–463:14; *see* Pet. 11(B).) This testimony does not reveal the route **Dorcinvil** took to travel from New York to Florida.

[72] **Dorcinvil** raised this claim in his *pro se* supplemental brief in support of his direct appeal, (*see* Suppl. Appellate Br. 34–42), and the Appellate Division rejected it as "unpreserved for appellate review and, in any event, without merit," ***Dorcinvil***, 122 A.D.3d at 877, 996 N.Y.S.2d 661. **Dorcinvil** did not raise this claim in his state court motions to vacate. (Pet. 11(B).) This Court thus reviews the Appellate Division's decision on **Dorcinvil's** direct appeal, which was the "last

reasoned state-court decision to address" this ground for relief after the New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

[73] This claim is procedurally defaulted. The Appellate Court's conclusion that the claim was "unpreserved for appellate review" invoked a procedural bar even if the court also addressed the merits. *See Carey*, 2012 WL 37084, at *4 n.1 (explaining that a state court's rejection of a claim on both procedural and substantive grounds invokes a procedural bar if phrased in the conjunctive rather than in the disjunctive). Though the Appellate Division did not cite a precise procedural ground, it need not do so, *Simms v. Lilly*, No. 21-cv-702 (PKC), 2022 WL 4451003, at *6 (E.D.N.Y. Sept. 23, 2022), and the Court declines to conclude that the Appellate Division misapplied its own procedural law when that court both explicitly invoked it and had a valid justification. In its response to **Dorcinvil's** *pro se* supplemental appellate brief, the State noted that this claim was "unpreserved for appellate review" because Bandelli failed to state the grounds supporting his objection to the testimony at issue and made no further application after the trial court overruled the objection. (ECF No. 20-9, Resp't's Br. in Reply to Def.'s *Pro Se* Suppl. Br. ("State's Appellate Br.") 40.)[10] The Court finds that the Appellate Division likely relied on New York's specific objection rule to find **Dorcinvil's** claim unpreserved. *See* N.Y. C.P.L.R. § 470.05(2); *People v. Britt*, 34 N.Y.3d 607, 145 N.E.3d 207, 213 (N.Y. 2019) (finding "one-word objections, without any elaboration" insufficient to preserve objection to trial testimony for appellate review); *see also, e.g., Anderson v. Martuscello*, No. 17-cv-9638 (KMK), 2021 WL 4429333, at *12 (S.D.N.Y. Sept. 27, 2021) (relying on New York's specific objection rule to apply procedural default where Appellate Division deemed petitioner's claim "unpreserved for appellate review" without specifying a procedural ground). **Dorcinvil** has not argued there was good cause for or prejudice resulting from the default here, nor has he established actual innocence. Thus, **Dorcinvil** cannot prevail on this claim.

E. Missing Witness Instruction

Dorcinvil claims the state trial court denied him due process and violated his rights under the Confrontation Clause by refusing to give a missing witness instruction as to Detective Briano, who investigated the January 2007 and May 2007 incidents but did not testify at the trial. (Pet. ***160** 11(B).) By the time of **Dorcinvil's** trial, Briano had retired from the police force and moved out of state. (Trial Tr. 444:20–445:10.)

[74] **Dorcinvil** raised this claim in his direct appeal, and the Appellate Division rejected it, concluding that "[a]ny errors in this regard were harmless, as there was overwhelming evidence of [**Dorcinvil's**] guilt and no significant probability that the errors contributed to [**Dorcinvil's**] convictions," without opining one way or the other whether the trial court *did* err, ***Dorcinvil***, 122 A.D.3d at 876–77, 996 N.Y.S.2d 661. **Dorcinvil** did not raise this claim in either of his motions to vacate. (Pet. 11(B).) This Court thus reviews the Appellate Division's decision on **Dorcinvil's** direct appeal, the last reasoned state court decision addressing this ground for relief after the New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

[75] [76] The Appellate Division's harmless error determination was a merits adjudication. *See Brown v. Davenport*, 596 U.S. 118, 127, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022). To obtain habeas relief in light of a state court's harmless error ruling, the petitioner must both overcome AEDPA deference and satisfy the requirement the Supreme Court set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), of establishing that the alleged error had a "substantial and injurious effect or influence" on the trial's outcome, *Brown*, 596 U.S. at 126–27, 142 S.Ct. 1510. If a habeas claim falls because the petitioner cannot show *Brecht* prejudice, "there is no need to prolong the matter" by also conducting an AEDPA review of the state court's harmless error analysis. *Id.* at 138–39, 142 S.Ct. 1510.

[77] **Dorcinvil** cannot obtain habeas relief based on his missing witness instruction claim because even assuming the trial court erred in refusing to give such an instruction, **Dorcinvil** cannot show that *Brecht* prejudice resulted from the alleged error. A trial court's erroneous refusal to give a missing witness instruction is subject to a harmless error analysis, *Johnson v. Griffin*, No. 13-cv-4337 (MKB), 2022 WL 3347771, at *13 (E.D.N.Y. Aug. 12, 2022), as is a Confrontation Clause violation, *United States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004); *accord Sims v. Artus*, No. 07-cv-6187 (JFB), 2019 WL 3718024, at *8 (E.D.N.Y. Aug. 7, 2019). Thus, the Appellate Division's decision must stand unless the Court finds that the lack of a missing witness instruction substantially influenced the verdict.

[78] The lack of a missing witness instruction here had at most a negligible effect on the verdict. First, there was overwhelming evidence of **Dorcinvil's** guilt. *See Johnson*, 2022 WL 3347771, at *14 (finding "any error in the refusal to give a missing witness charge" harmless in light of

overwhelming evidence of guilt). As **Dorcinvil** argued on appeal, the *only* disputed factual issue at trial was whether the State proved his identity as the attacker beyond a reasonable doubt. (Appellate Br. 50.) B.M. – with whom **Dorcinvil** lived for months before the attacks – made an in-person identification of **Dorcinvil** and testified in detail about **Dorcinvil's** January 2007 and May 2007 attacks. (Trial Tr. 22:6–47:20.) B.M.'s testimony regarding the May 2007 incident was corroborated by surveillance footage showing a man, identified by Claudette's landlord as **Dorcinvil**, walking past Claudette's dead body. (*Id.* 123:6–138:17.) B.M.'s testimony was further corroborated by the admission of the jacket **Dorcinvil** left at the scene, which had both victims' blood on it, **Dorcinvil's** ***161** DNA on the collar, and **Dorcinvil's** driver's license and passport in its pockets. (*Id.* 296:2–8, 451:5–453:3.)

Additionally, though Briano was involved in the investigation, most if not all of the testimony he might have offered had he testified would have been cumulative with other witnesses' testimony, given that B.M. and other officers involved in the investigation were called as witnesses. *See Page v. Conway*, No. 10-cv-5264 (DAB) (KNF), 2013 WL 2896798, at *9 (S.D.N.Y. May 3, 2013) (finding any possible error in "the trial court's refusal to give a missing witness jury instruction" harmless "because the record did not provide any basis for the jury to find that" the witness "possessed material, non-cumulative information"), *R&R adopted by* 2014 WL 1877677 (S.D.N.Y. May 8, 2014). Moreover, the trial court issued other instructions "mitigat[ing] against the absence of the missing witness instruction," including that the jurors were required to "decide the case on the evidence alone without speculating concerning matters not presented," which "specifically precluded" the jury from "speculating about what [Briano] would have said had he testified." *See Johnson*, 2022 WL 3347771, at *13; (Trial Tr. 512:14–23). Finally, the trial court permitted Bandelli "to comment in summation about [Briano's] failure to testify," which further "mitigate[d] the impact of a failure to give a missing witness charge." *See Johnson*, 2022 WL 3347771, at *13; (Trial Tr. 481:11–21 ("Where is Detective Briano? I have no idea. He's not here.... Why isn't he here? Why isn't he here?"), 482:16–18 ("There is a reason you didn't hear from Detective Briano. I don't know what it is, but he should have been here and that's on them."), 488:19–20 ("Where is Detective Briano? Where is he? He's not here."), 496:12–13 ("[W]here is the Detective Briano? Where is he?"), 497:20 ("Where is Detective Briano? Where is he?")). Because **Dorcinvil** cannot show that the lack of a missing witness instruction substantially influenced the verdict in light of these circumstances, he cannot show *Brecht* prejudice and thus cannot obtain habeas relief on this ground.

F. "Prior Arrests" and "Complaints"

[79] **Dorcinvil** claims he suffered due process and Confrontation Clause violations when the trial court allowed Detective Perry to testify that he discovered **Dorcinvil** had "past arrests" and "complaints" after running an electronic background check on him. (Pet. 11(B), 12(E).)[11] **Dorcinvil** first raised this claim in his direct appeal, and the Appellate Division rejected it based on harmless error without opining whether the trial court actually erred in admitting this testimony. *See* ***Dorcinvil***, 122 A.D.3d at 876–77, 996 N.Y.S.2d 661. **Dorcinvil** did not raise this claim in either of his state court motions to vacate. (Pet. 11(B), 12(E).) This Court thus reviews the Appellate Division's decision on **Dorcinvil's** direct appeal, the last reasoned state court decision addressing this ground for relief after the New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640. As with **Dorcinvil's** missing witness instruction claim, (*see supra* pp. 159-60), the Appellate Division's harmless error ruling was a merits adjudication that cannot be disturbed unless **Dorcinvil** can both show *Brecht* prejudice and overcome AEDPA deference, *see Brown*, 596 U.S. at 126–27, 142 S.Ct. 1510.

[80] This claim fails because **Dorcinvil** cannot show *Brecht* prejudice. As described ***162** above, (*see supra* pp. 160-61), the evidence of **Dorcinvil's** guilt was overwhelming. The allegedly improper testimony, by contrast, consisted of just four lines in a 537-page trial transcript. (Trial Tr. 457:21–24.) Given the mass of specific evidence linking **Dorcinvil** to the crimes at issue, Perry's brief and general suggestion that **Dorcinvil** had other encounters with law enforcement could not have substantially influenced the verdict. Moreover, by the time Perry offered this testimony, the jury had already properly heard that **Dorcinvil** was arrested for the January 2007 incident and had an order of protection entered against him, (*see id.* 471:16–22), which mitigated against the possibility the jury might have speculated about other crimes **Dorcinvil** may have committed. Thus, because **Dorcinvil** cannot show *Brecht* prejudice, he cannot obtain habeas relief on this ground.

IV. Suppression of Exculpatory Evidence

[81] **Dorcinvil** claims the State suppressed exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). (Pet. 12(D); *see* Reply 49–

55.) **Dorcinvil** first raised this claim in his second state court motion to vacate, (*see* 2d 440 Mot. 22–31), and the state trial court rejected it as "procedurally barred because it relie[d] on a misapprehension of the facts," (D&O on 2d 440 Mot. 10). The court explained that the evidence seized from **Dorcinvil's** person during his arrest in Miami was not introduced at trial. (*Id.*) Rather, the State showed evidence recovered from the May 2007 crime scene itself weeks earlier. (*Id.*) This Court reviews the trial court's decision on the second motion to vacate, the last reasoned state court decision addressing this ground for relief after the Appellate Division and New York Court of Appeals declined discretionary review. *See McCray*, 45 F.4th at 640.

[82] This claim is not procedurally defaulted. The state trial court rejected the claim based on N.Y. C.P.L.R. § 440.30(4)(c), which permits the court to reject a claim if "[a]n allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof." (*See* D&O on 2d 440 Mot. 11.) A state court's rejection of a claim based on Section 440.30(4)(c) is an adjudication on the merits, not an invocation of a procedural bar. *Giraldo*, 2012 WL 3835112, at *8 (citing *Garcia*, 104 F. App'x 776 at 779). Thus, the Court reviews the claim on the merits, applying AEDPA deference.

[83] **[84]** The state trial court did not contradict or unreasonably apply *Brady*. A *Brady* violation occurs when the prosecution suppresses material exculpatory evidence. *McCray*, 45 F.4th at 641. **Dorcinvil** utterly fails to articulate how any of the items seized from him during his arrest in Miami weeks after the May 2007 incident (a Bible, driver's license, state identification cards, debit card, business card, and sunglasses) and that were never introduced at trial, (*see* D&O on 2d 440 Mot. 10), constitute material *or* exculpatory evidence. Thus, **Dorcinvil** cannot obtain habeas relief on this ground.

CONCLUSION

The Court respectfully denies **Dorcinvil's** Petition and dismisses this action with prejudice.

In accordance with 28 U.S.C. § 1915(a)(3), the Court certifies that any appeal from this order would not be taken in good faith and thus denies *in forma pauperis* status for the purposes of an appeal. *See* ***163** *Coppedge v. United States*, 369 U.S. 438, 444–45, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

SO ORDERED.

All Citations

710 F.Supp.3d 128

Footnotes

The proper respondent in a federal habeas action is the warden or superintendent of the facility where the petitioner is held. *Green v. Lee*, 964 F. Supp. 2d 237, 253 (E.D.N.Y. 2013). The original respondent in this action was Christopher Miller, the Superintendent of Great Meadow Correctional Facility when the action was filed. (*See* Pet. 2.) The Court, on its own initiative, deems the Petition amended to change the respondent to the Superintendent of Sing Sing Correctional Facility, where **Dorcinvil** is currently held. (*See* ECF No. 31, Notice of Change of Address); *Pellis v. Wright*, No. 19-cv-149 (EAW), 2022 WL 3587755, at *4 n.4 (W.D.N.Y. Aug. 22, 2022). The Court retains subject-matter jurisdiction because **Dorcinvil** was convicted and sentenced in the Eastern District of New York. *See* 28 U.S.C. § 2241(d).

2 The Court refers to the surviving victim, who was a minor at the time, only by his initials.

3 The Court cites all docket entries according to their internal pagination, not the page numbers assigned by the Court's electronic docketing system.

4 The Appellate Division has discretion whether to hear an appeal of the denial of a motion to vacate. N.Y. C.P.L.R. § 450.15.

5 A *coram nobis* petition is an appropriate vehicle in New York state court to raise a claim of ineffective appellate counsel. *Wade v. Melecio*, No. 21-cv-9138 (GHW) (JLC), 2023 WL 2152489, at *18 (S.D.N.Y. Feb. 22, 2023), *R&R adopted by* 2023 WL 2500676 (S.D.N.Y. Mar. 14, 2023).

6 A habeas petitioner has one year from the date his or her state court conviction becomes final to seek relief in federal court. 28 U.S.C. § 2244(d)(1)(A). A petitioner's state court conviction becomes "final" for habeas purposes, however, only after proceedings conclude in the United States Supreme Court or time expires to petition for a writ of certiorari in that court. *Davis v. Racette*, 99 F. Supp. 3d 379, 384 (E.D.N.Y. 2015). A petition for a writ of certiorari seeking review of a judgment of a lower state court that was subject to discretionary review by the state court of last resort must be filed within ninety days after entry of the order denying discretionary review. U.S. Sup. Ct. R. 13(1). Here, because **Dorcinvil**

did not seek relief in the United States Supreme Court, his state court conviction became final on September 14, 2015, the date ninety-one days (an additional day added because the ninetieth day fell on a Sunday) after the New York Court of Appeals denied discretionary review of the Appellate Division's decision. **Dorcinvil** thus had one year after that date to file his Petition in this Court. The December 9, 2015, filing of **Dorcinvil's** second motion to vacate tolled the one-year limitation period, however. *See* 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."). That motion remained pending until December 12, 2019, when further state appellate review finally became unavailable. *See Clemente v. Lee*, 72 F.4th 466, 476 (2d Cir. 2023). Because the periods after **Dorcinvil's** conviction became final when his second motion to vacate was not pending amounted to less than one year on the date on which he sought federal habeas review, his Petition is timely.

7 **Dorcinvil's** letter includes a request for appointment of counsel. There is no constitutional right to appointed counsel in habeas cases. *Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004); *accord Rucano v. LaManna*, No. 18-cv-4586, 2020 WL 978825 (KAM), at *4 (E.D.N.Y. Feb. 28, 2020). The Court has discretion whether to appoint counsel, and the threshold question is whether the petitioner's claims are "likely to be of substance." *Rucano*, 2020 WL 978825, at *4 (quoting *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986)). As set forth below, the Court can adequately resolve all **Dorcinvil's** claims based on the parties' submissions and the ample state court record, and it finds that **Dorcinvil's** claims are unlikely to be of substance. Further, based on its review of the parties' submissions and the state court record, the Court finds no factual or legal ambiguities material to **Dorcinvil's** claims that appointed counsel might reasonably be expected to help clarify. **Dorcinvil** competently articulated the factual and legal bases for his claims, and he identified no facts he was unable to investigate without counsel nor conflicting evidence that would require cross-examination. Thus, the Court finds that appointing counsel would not serve "the interest of justice." *Id.* at *3.

8 The inapplicability of AEDPA deference complicates the Court's review because the record lacks an affidavit from Bandelli explaining his actions. The Second Circuit held in *Sparman v. Edwards* that "a district court facing the question of constitutional ineffectiveness of counsel should, except in highly unusual circumstances, offer the assertedly ineffective attorney an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs." 154 F.3d 51 (2d Cir. 1998). The absence of Bandelli's affidavit poses no problem as to **Dorcinvil's** other ineffective counsel claims because the Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), held that the record in cases subject to 28 U.S.C. § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits, thus abrogating *Sparman* with respect to such cases. *Licausi*, 460 F. Supp. 3d at 259 n.8; *see Ridgeway v. Zon*, 424 F. App'x 58, 60 (2d Cir. 2011). Because no state court adjudicated **Dorcinvil's** ineffective counsel claim on the merits, at least as it pertains to the State's summation, the *Sparman* presumption arguably still applies. *See, e.g., United States v. Macaluso*, No. 16-cr-609, 2020 WL 2097837, at *2 (E.D.N.Y. May 1, 2020) (noting court had solicited affidavit from defendant's trial attorney in resolving ineffective counsel claim raised in post-*Cullen* motion under 28 U.S.C. § 2255 to vacate federal conviction). Nonetheless, the Court can resolve **Dorcinvil's** claim based on *Strickland*'s prejudice prong alone by simply assuming without deciding – and without casting any aspersions on Bandelli – that Bandelli's performance was deficient, thus rendering it unnecessary for the Court to solicit an affidavit from Bandelli explaining his trial strategy. *See Broxmeyer v. United States*, 661 F. App'x 744, 750 (2d Cir. 2016) (summary order) ("Although it might have been helpful if the district court had sought affidavits from [defendant's] counsel, none of his claims requires further evidence to determine their validity.") (citation omitted).

9 This claim is found in Ground Two of **Dorcinvil's** Petition, which also asserts that **Dorcinvil** was "denied a fair trial by ... the admission of an unnecessary and gruesome photograph of the bloody, half naked decedent." (Pet. 7.) Because most of Ground Two concerns **Dorcinvil's** allegations of ineffective counsel, (*see id.* 7–7(A); Mem. 51–55 (elaborating on Ground Two)), the Court addresses that portion of the claim here and addresses the victim's photograph below, (*see infra* pp. 156-57).

10 The State also suggested the claim was unpreserved for appellate review because Bandelli did not seek to reopen the suppression hearing. (*See* State's Appellate Br. 39–40.) The Court declines to address that ground as additional support for the Appellate Division's conclusion due to the relative dearth of federal habeas case law addressing it as a basis for procedural default.

11 **Dorcinvil** raises this claim twice in his Petition, citing it as both his Eighth and Fourteenth ground for relief.

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E.D.N.Y. – Bklyn
20-cv-600
Matsumoto, 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 23rd day of October, two thousand twenty-four.

Present:

Richard C. Wesley,
Gerard E. Lynch,
Maria Araújo Kahn,
Circuit Judges.

Jacques Dorcinvil,

Petitioner-Appellant,

v. 24-462

Marlyn Kopp,

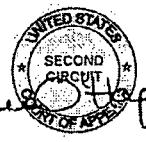
Respondent-Appellee,

Cristopher Miller,

Respondent.

Appellant, pro se, moves for leave to proceed in forma pauperis, a certificate of appealability, and permission to file an oversized motion. However, this Court has determined sua sponte that the notice of appeal was untimely filed. Upon due consideration, it is hereby ORDERED that the appeal is DISMISSED for lack of jurisdiction. *See* 28 U.S.C. § 2107; *Bowles v. Russell*, 551 U.S. 205, 214 (2007). It is further ORDERED that Appellant's motions are DENIED as moot.

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



C P-2

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 17th day of December, two thousand twenty-four.

Jacques Dorcinvil,

Petitioner - Appellant,

v.

Marlyn Kopp,

Respondent - Appellee,

Cristopher Miller,

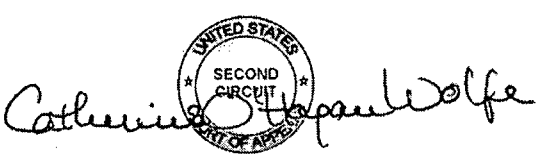
Respondent.

ORDER
Docket No. 24-462

A mandate issued as an administrative error on December 12, 2024, in the above-referenced case.

IT IS HEREBY ORDERED that the mandate in this case is recalled.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



P-3

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 8th day of January, two thousand twenty-five,

Present: Richard C. Wesley,
Gerard E. Lynch,
Maria Araújo Kahn,

Circuit Judges,

Jacques Dorcinvil,

Petitioner - Appellant,

v.

Marlyn Kopp,

Respondent - Appellee,

Cristopher Miller,

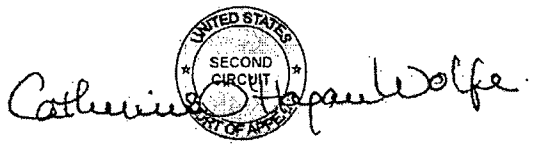
Respondent.

ORDER
Docket No. 24-462

Appellant Jacques Dorcinvil having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



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